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'Miranda' dealt one-two punch by high court

Tony Mauro
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It has not been a good week for the famed *Miranda* warning at the hands of the Supreme Court.

In decisions issued on Tuesday and Wednesday, the Court ruled that confessions should be admitted at trial even when police interviewed suspects in circumstances that lower courts viewed as *Miranda* violations.

The Court on Wednesday issued *Maryland v. Shatzer*, establishing new, more permissive rules for police who want to question a suspect for a second time after the suspect invokes *Miranda*'s right to remain silent.

The Maryland case came down a day after the justices decided *Florida v. Powell*, in which a 7-2 majority Court said that Florida's alternative wording of the *Miranda* warning is acceptable, even though it does not explicitly state that a suspect has a right to have a lawyer present during questioning.

Stanford Law School professor Jeffrey Fisher said the rulings continue the Court's trend of "extreme hostility toward constitutional rules that require the exclusion of evidence — especially confessions and the product of illegal searches — from criminal trials." Fisher, who heads a National Association of Criminal Defense Lawyers (NACDL) committee that files amicus briefs at the high court, said, "In short, this Court sees the costs and benefits of rules designed to curb police overreaching entirely differently than the Court did a generation ago. "

Sidley Austin partner Jeffrey Green, who also assists NACDL and other defense lawyers in high court arguments, added, "At this rate, what's left [of *Miranda*] will be only what we see on TV."

But Lauren Altdoerffer of the Criminal Justice Legal Foundation, which supports law enforcement officials in *Miranda* cases, said the rulings don't weaken constitutional protection against compelled self-incrimination. "The Court is allowing states and police to draft rules that fit their needs but still fit the requirements of *Miranda*." She added that the crucial question is whether the interview of the suspect is compelled or voluntary.

In the Maryland case, which was argued on the first day of the Court's term last October, the ruling weakens the so-called *Edwards v. Arizona* rule, which states that, once a suspect invokes *Miranda*, any subsequent waiver of the right triggered by a police request is deemed involuntary — making further police questioning improper.

Justice Antonin Scalia, writing for the majority, carved out an exception to that rule when there is a "break in custody" between the first and subsequent police efforts to question the suspect. In the case before the Court, defendant Michael Shatzer Sr., who was in prison on other charges at the time, asserted his *Miranda* rights in 2003 when police tried to question him about sexually abusing his son. The investigation was closed, but more than two years later was reopened and he was questioned again in 2006, while still in prison. Investigators read him his rights again, he signed a waiver, and made incriminating comments about the episode with his son. Indicted on abuse charges, Shatzer sought to have his interview suppressed because of the 1981 *Edwards* rule. The Maryland Court of Appeals, the state's high court, sided with Shatzer, citing the *Edwards* rule.

Scalia said the *Edwards* rule should not act as an "eternal" bar against further police questioning. "In a country that harbors a large number of repeat offenders, this consequence is disastrous." In the interest of producing a clear rule on the issue, Scalia said the Court agreed that, after a 14-day "break of custody," police may try to question a suspect again without fear that a subsequent confession would be suppressed. "That provides plenty of time for the suspect to get re-acclimated to his normal life…and to shake off any residual coercive effect of his prior custody," Scalia wrote. In Shatzer's case, Scalia said the fact that he was actually in prison during the "break in custody" did not alter the calculus. Justices Clarence Thomas and John Paul Stevens joined Scalia's decision except for the 14-day duration of the new rule.

In Tuesday's *Florida v. Powell* ruling, Justice Ruth Bader Ginsburg wrote that Tampa, Fla., police had satisfied the requirements of *Miranda* even though its warning did not explicitly tell the suspect that he had the right to have a lawyer present during questioning. Interviewed in connection with a 2004 robbery, Kevin Powell was told he had "the right to talk to a lawyer" before answering police questions, and that he could use "any of these rights at any time you want" during the interview. The Florida Supreme Court said this wording was inadequate and misleading and the confession should be suppressed.

But Ginsburg said that, in combination, the Tampa police warnings "reasonably conveyed Powell's right to have an attorney present at all times." She noted that the FBI, like many other jurisdictions, explicitly state the right to have a lawyer present, "but we decline to declare its precise formulation necessary to meet Miranda's requirements."

A third *Miranda* case is still pending this term. *Berghius v. Tompkins*, which will be argued on March 1, asks whether police can try to noncoercively persuade a suspect to answer questions after the *Miranda* warning has been given, but before the suspect has invoked or waived the right.

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