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## U.S. SUPREME COURT PREVIEW

During this present court session, the United States Supreme Court will hear argument in several cases whose outcome will be of interest to law enforcement agencies and prosecutors. This issue of the *Legal Eagle* will preview these cases and the effects they could have on your agency.

***Carr v. United States*, No. 08-1301 (Scheduled for Oral Argument on 2/24/2010)**

On February 6, 2003, Thomas Carr was arrested and charged with First Degree Sexual Abuse in Alabama State Court for inappropriately touching a fourteen-year-old girl over her clothes. He pled guilty on May 17, 2004, and received a fifteen year sentence with all but two years suspended. He received a credit for time served pending trial, and was released from prison on July 3, 2004. He then registered with Alabama authorities as a sex offender as required by law.

On July 27, 2006, the President of the United States signed the Sex Offender Registration and Notification Act (SORNA) into law. SORNA requires persons who are convicted of certain sex offenses in state court to register as a sex offender. More importantly in Carr's case, it also made it a crime for someone required to register under SORNA to travel in interstate or foreign commerce if they had knowingly failed to register as required. Such crime is a felony punishable by up to ten years in prison pursuant to 18 U.S.C. §2250(a).

Before SORNA had been enacted (sometime in 2004 or 2005), Carr moved from Alabama to Ft. Wayne, Indiana. On July 19, 2007 (after the enactment of SORNA), he was arrested for involvement in a fight. At that time, the authorities determined that he was required to register under SORNA and had not complied with those since enacted requirements.

On August 22, 2007, a federal grand jury indicted him for failing to register as required under 18 U.S.C. §2250(a). Carr moved to dismiss on the grounds that his interstate travel predated SORNA's enactment in 2006 and its application to him in 2007. The District Court denied his motion, and he pled conditionally guilty thereby preserving his right to appeal the denial of his Motion to Dismiss. He was sentenced to thirty months.

In his appeal before the Seventh Circuit Court of Appeals and before the Supreme Court, Carr has argued that the plain language of SORNA indicates that it applies only to travel taking place after enactment of the statute. He further argued that if it does punish travel prior to its enactment and failure to register, it violates the ex post facto doctrine of the U.S. Constitution, Article I, Sec. 9. The U.S. Constitution prohibits retroactive laws that criminalize actions that were legal when committed or increasing the punishment retroactively. The United States General Solicitor has argued that applying SORNA to travel that predated its enactment is not an ex post facto application because at least one of the acts committed by Carr

occurred after the criminal statute punishing him took effect. The United States is arguing that although the travel predated the enactment of SORNA, Carr had an obligation to register under SORNA upon its enactment. Because he did not do so, they argue, there is no ex post facto application of the law.

The Court's decision in this case could affect not only prosecutions under SORNA, but also could conceivably affect the prosecutions under state sex offender registrations; particularly with regards to changes made in those statutes that may have served to increase registration requirements, responsibilities, or lengths of time that individuals must remain registered on such lists.



***Berghuis v. Thompkins*, No. 08-1470  
(Scheduled for Oral Argument on 3/10/2010)**

What happens when an officer non-coercively tries to persuade a suspect to cooperate with questioning when the officer has informed the suspect of his *Miranda* rights, and the suspect acknowledges that he understands those rights, but does not specifically invoke those rights or specifically waive them prior to making incriminating statements? The U.S. Supreme Court will have an opportunity to resolve that issue during this session.

Van Chester Thompkins was a suspect in a murder occurring in Michigan. He was taken into custody in Ohio a little over a year after that crime, and Michigan investigators drove to Ohio to interview him. Thompkins was read his *Miranda* rights from a standard form, and he indicated verbally he understood those rights by saying "yes". He refused,

however, to sign or initial the form. During the entirety of his interview, he never indicated explicitly that he was unwilling to talk to anyone or that he was invoking any of his rights under *Miranda*.

After indicating that he understood his rights, the investigators attempted to persuade Thompkins to make a statement and give his version of what happened during the shooting. They didn't ask him questions, but were primarily making statements and waiting for a response from him. During the nearly three hour interview, Thompkins shared only limited verbal responses, wasn't verbally communicative or cooperative, and remained silent "much of the time." This type of interviewing during which Thompkins remained largely silent, but never specifically invoked his *Miranda* rights, lasted for approximately two hours and fifteen minutes.

According to the investigating officer's testimony, he then proceeded with a different interview tactic:

"I finally looked at him, and I asked him, tried to take a different tact, I guess what I call a spiritual tact, whether or not he believed in God. He made eye-contact with me for one of the few times that he did for the interview. I saw his eyes well up with tears. He answered me orally and said, 'yes.'

I asked if he prayed to God? And he said, 'Yes.'

And I asked him if he had asked God to forgive him for-I believe the words were, and I quoted them in my report verbatim 'shooting that boy down.' And he answered, 'Yes.'"

That statement was put into evidence at trial. At the trial level and before the Michigan Court of Appeals, Thompkins argued that his statement was inadmissible because he had implicitly invoked his right to remain silent by failing to meaningfully

respond to officers for a period of over two hours. The State of Michigan argued that a waiver of *Miranda* rights need not be expressly given, but may be implied or indicated by the suspect's behavior. It cited many state and federal court decisions that have held when a suspect acknowledges his rights and does not invoke them, is not subject to coercion, and then answers questions voluntarily has waived his rights. The trial court admitted the statements, and the Michigan Appellate Courts upheld his conviction.

The Sixth Circuit Court of Appeals overturned the admissibility of his statement and vacated his guilty judgment thereby requiring a retrial. The Sixth Circuit found a distinction between all the cases cited by the State of Michigan and Thompkins' situation. It held those cases all involved individual that nearly immediately cooperated and communicated with investigators shortly after acknowledging their *Miranda* rights. The Sixth Circuit held that Thompkins' persistent silence in the face of questioning for two hours unequivocally indicated that he did not wish to waive his right to remain silent.

This case, *Maryland v. Shatzer*, and *Florida v. Powell* (both which will be highlighted next) could significantly change the content of *Miranda* warnings and the procedures for giving and documenting them.

### ***Florida v. Powell*, 08-1175 (Argued December 7, 2009)**

In *Florida v. Powell*, the U.S. Supreme Court is being asked to decide whether a suspect must be expressly advised to his right to counsel throughout and during questioning, and if so, does that failure to give such an express notice violate *Miranda v. Arizona*. The Court will address an issue that has divided lower courts: Is it sufficient for police to tell suspects that they have a right to speak with a lawyer before questioning, and that they may "use" that right during questioning or must officers expressly inform suspects that they have the right to counsel present during the interrogation itself.

The case in question arises from the State of Florida's prosecution of Kevin DeWayne Powell for being a felon in possession of a firearm. He was interrogated after being read *Miranda* warnings and signing a waiver to be questioned. During that interrogation, he made several incriminating statements. The verbatim text of the *Miranda* warning given was as follows:

You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have a right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

At trial, Powell's counsel argued that the *Miranda* warnings given were insufficient because they did not explicitly state that Powell had a right to consult with counsel during the questioning rather than simply before it. He was ultimately convicted. On appeal, the Florida Court of Appeals reversed that conviction. In doing so, it held that the *Miranda* warnings were constitutionally deficient because they did not clearly warn him of his right to have an attorney present during the actual questioning. The Florida Supreme Court affirmed that decision, and the State petitioned the U.S. Supreme Court to hear the matter. In asking the U.S. Supreme Court to hear the case, the State of Florida noted that four federal courts of appeals had held that suspects must be expressly informed of the right to have an attorney present during questioning (meaning the warning in this case would have been insufficient), but that four other federal courts of appeals had found *Miranda* warnings sufficient even when those warnings lacked explicit statements about the right to counsel during interrogation.

During oral arguments before the Supreme Court, at least three of the Justices (Sotomayor, Kennedy, and Bryer) asked questions that seemed to indicate they

believed the warnings used in this particular case were insufficient under *Miranda*. Three other Justices (Scalia, Chief Justice Roberts, and Alito) all made comments seemingly indicating that they found the warning in question acceptable under the law. The Supreme Court could use this case to clarify and resolve the difference in the lower courts on this issue. There was, however, also discussion about whether Florida reached its decision on separate, independent state grounds based exclusively on its State Constitution. If the Court held that was the case, it could dismiss the case without deciding the Federal *Miranda* issues that have been raised. It seems more likely that the Court will reach the merits and provide some added direction to law enforcement regarding the precise wording that *Miranda* requires.

#### ***Maryland v. Shatzer*, No. 08-680 (Argued October 5, 2009)**

The final *Miranda* related case before the U.S. Supreme Court to be discussed was actually the first case argued during this 2009 term. The Fifth Amendment to the Constitution states that "[no] person... shall be compelled in any criminal case to be a witness against himself." *Miranda* attempts to protect this right in the context of a custodial interrogation by requiring the police to inform suspects of their right (among others) to counsel. If the right to counsel is asserted, *Edwards v. Arizona* mandates that the police cease all questioning until counsel is present or the suspect voluntarily initiates further conversation. The Court will be asked to determine whether there are any exceptions to that barring of reinterrogation, and under what circumstances a suspect might be allowed to be approached again by law enforcement without violating *Edwards*.

In August 2003, the police interviewed Michael Shatzer, Sr. regarding allegations that he had sexually abused his three-year-old son. Shatzer was serving a sentence in prison for an unrelated offense. When questioned, Shatzer invoked his Fifth Amendment right to counsel. The interrogation was ended, and the investigation was closed. In March 2006, when

Shatzer's son was older and able to provide more information, a different police officer informed Shatzer, still incarcerated, that a new investigation had been initiated. This time Shatzer waived his *Miranda* rights and ended up making several incriminating statements before again requesting counsel and ending the interview.

At the trial for abusing his son, Shatzer moved to suppress his March 2006 statements on the ground that under *Edwards*, his 2003 invocation of his right to counsel barred police from interrogating him in 2006 without an attorney present. The trial court held that his continuous incarceration on an unrelated offense for nearly three years constituted a break in custody that terminated the *Edwards* prohibition on reinterrogation. Shatzer was found guilty of sexual abuse.

The Maryland Court of Appeals reversed. It held that the mere passage of time alone will not end *Edwards* protections. It further held that any "break in custody" exception that might be possible to apply to *Edwards* would not be applicable to an inmate who had continuously been incarcerated between those two interrogations. The State of Maryland appealed that decision to the U.S. Supreme Court and the Court agreed to hear the matter.

The State of Maryland's position was supported in its appeal by *amicus* briefs filed by the United States government along with a group of thirty-seven states (including Oklahoma). On appeal, Maryland argued that when there has been a break in custody or a substantial lapse of time between interrogations, the *Edwards* rule should not apply and reinterrogation should be permitted when it is accompanied by a voluntary *Miranda* waiver. It argued that a break in police custody for questioning served to avoid continuously subjecting the suspect to the coercive pressures of custodial interrogation that *Edwards* served to prohibit. They further argued that the substantial lapse in time between the two interrogations further eliminated any coercive pressure created by the custodial interrogations. Finally it argued that allowing the prohibitions of *Edwards* to continue indefinitely would provide

suspects with permanent protection from interrogation which would not serve the goals of *Edwards*, and would needlessly impede legitimate police investigations. Shatzer's appellate counsel argued that any encroachment on or exception to a bright-line rule would undermine *Edwards*'s goal of ensuring that custodial statements are not obtained through coercion. Counsel further argued that even if the Court were to recognize a "break in custody" exception to *Edwards*, such an exception would not apply to him because he was continuously in custody as a result of his incarceration on an unrelated matter.

The Court's decision will undoubtedly clarify the nature and extent of the *Edwards* prohibition on reinterrogation after invocation of a right to counsel, along with any exceptions or limitations on that prohibition.



***Sullivan v. Florida, No. 08-7621 and Graham v. Florida, No. 08-7412 (Argued November 9, 2009)***

On March 1, 2005, a deeply divided U.S. Supreme Court ruled 5-4 in *Roper v. Simmons*, No. 03-633, that executing those who committed murder as juveniles violated the Eighth Amendment's bar against cruel and unusual punishment. Now that same court (with several new Justices) is being asked to determine whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for LWOP as punishment for the juvenile's commission of a non-homicide crime.

In two separate cases, defendants Joe Harris Sullivan and Terrance Jamar Graham were sentenced to LWOP at ages 13 and 17 respectively.

Sullivan was convicted of committing sexual battery on an elderly victim whom he and other co-defendants had also burglarized. Graham initially pled guilty to burglary and armed robbery charges in 2003 when he was 16. He received three years probation with one year in county jail. The next year he was arrested for a home invasion robbery. He was ultimately sentenced to life in prison.

The appeals made by these former juveniles both ask that the court treat juveniles differently by explicitly barring LWOP sentences in all cases for juveniles committing non-homicide crimes. The arguments in those appeals largely mirror those made in *Roper*.

These two cases have drawn much attention in the legal community. No less that twenty-one *amicus* briefs have been filed supporting both sides of the matter. One of the more interesting ones was from a group of former juvenile offenders who later achieved success, including actor Charles S. Dutton and former U.S. Senator Alan K. Simpson. Dutton stabbed a person to death in a street fight at age 17. Simpson committed arson on federal property and once assaulted and battered a police officer. Some experts wonder why the Supreme Court decided to take two cases instead of one. Some speculate that the justices could create a dividing line between younger and older juveniles.

During oral arguments, the justices clearly struggled with fashioning a constitutional justification for a bright-line rule based upon a particular age. The justices all seemed to recognize the arbitrary nature of a rule that banned all LWOP sentences for a person of a particular age while freely allowing the same sentence for someone just on the other side of whatever line was drawn. Chief Justice Roberts strongly and repeatedly argued for a rule that allowed juveniles more of a chance to use their age to challenge LWOP sentences as opposed to a absolute constitutional ban against ever imposing that sentence on juveniles. Experts viewing the oral argument and gauging the different justices statements have largely agreed that there does not appear to be a majority of the Court in favor of

completely taking away the LWOP option with regards to juveniles even in situations where the victim was not killed. A rule where judges must take the offender's youth into account in setting any sentence and where the sentence must be fair and proportional both for an offender of that age and for the particular crime committed is likely to be fashioned by the Court as a result of these appeals.



## FUTURE ISSUES OF THE *LEGAL EAGLE*

Future issues of the *Legal Eagle* will include:

- State Law Enforcement jurisdiction in Indian Country
- The Oklahoma Computer Crimes Act
- Legal Updates
- U.S. Supreme Court Review and Legislative Updates

If you have any suggestions for legal topics of interest to law enforcement officers and their agencies that you would like to see covered by the *Legal Eagle*, be sure to drop the OSBI Legal Unit an e-mail at:

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