

REINTERROGATION AFTER INVOCATION OF THE *MIRANDA* RIGHT TO COUNSEL

THIS IS VERSION 2 OF THIS OUTLINE

A. INTRODUCTION

1. This outline was created to be used in conjunction with my lecture on the effect of the Court's decision in *Shatzer* on reinterrogation of a person after that person has effectively invoked the *Miranda* right to counsel. However, I believe that this outline has value as a stand alone outline.
2. In *Maryland v. Shatzer*, 559 U.S. ____, 130 S.Ct. 1213 (2010) the Court addressed two *Miranda* issues—*Miranda* custody and reinterrogation of a person after that person has effectively invoked the *Miranda* right to counsel. The Court explicitly recognized/created a break in custody exception to the *Edwards* rule.
3. Outline abbreviations
 - a. MRTC: *Miranda* right to counsel.
 - b. LEO: Law enforcement officer.

B. *SHATZER* INFORMATION/FACTS/HOLDINGS/IMPACT

1. The Court's opinion in *Maryland v. Shatzer*, 559 U.S. ____, 130 S.Ct. 1213 (2010) consisted of three opinions: (1) the majority opinion authored by Justice Scalia; (2) a concurring opinion-concurring in part and concurring in the judgment, authored by Justice Thomas; (3) a concurring opinion-concurring in the judgment, authored by Justice Stevens. All nine members of the Court agreed, for different reasons, that the defendant's reinterrogation statement was admissible into evidence in the state's case-in-chief---there was no *Miranda* related violation.
2. The facts: (1) the defendant was serving a sentence in prison in Maryland; (2) the defendant was questioned concerning a prior sexual assault (which had occurred prior to the defendant's present incarceration) on August 7, 2003 by Detective Blankenship; (3) the defendant was advised of the *Miranda* warnings and he waived his rights thinking that the detective was an attorney; (4) realizing his mistake the defendant invoked his *Miranda* right to counsel; (5) approximately

two years and six months later, during which time the defendant remained in prison in the general population, another detective from the same police department as Blankenship interviewed the defendant in a different prison on March 2, 2006 concerning the same sexual assault offense; (6) the defendant, after being advised of and waiving the *Miranda* rights, gave a statement on March 2; (7) on March 7, 2006 the same detective returned to the prison along with another officer, the defendant was advised of and waived the *Miranda* rights, the defendant made an incriminating statement, and the defendant then requested an attorney.

3. In *Shatzer* the Court addressed the issue of can the police, after a break in custody, reinitiate questioning/interrogation of a person after he/she has effectively invoked the *Miranda* right to counsel-how does a break in custody affect the *Edwards* presumption of involuntariness. All nine members of the Court agreed that a defendant can be reinterrogated after a break in custody. Their disagreement centered on the required length of the break in custody and the test that should be used to determine if the break in custody was sufficient-the majority established a 14 day rule, Justice Thomas favored a shorter time, and Justice Stevens favored a longer time. The Court (the majority opinion) held/established a bright-line rule that if a person (who has effectively invoked the *Miranda* right to counsel) is released from custody for a period of fourteen days, the person can be reinterrogated by the police concerning the same crime as the original interrogation. I will refer to this as the 14 day break in custody rule. In so holding the Court held that after 14 days the *Edwards* presumption of involuntariness is not applicable. 559 U.S. at ____, 130 S.Ct. at 1223. Some of the reasons behind the Court's decision were:

When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is far fetched to think that a police officer's asking the suspect whether he would like to waive his *Miranda* rights will any more "wear down the accused," [Smith v. Illinois, 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 \(1984\)](#) (*per curiam*), than did the first such request at the original attempted interrogation-which is of course not deemed coercive. His change of heart is less likely attributable to "badgering" than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest. Uncritical extension of [Edwards](#) to this situation would not significantly increase the number of genuinely coerced confessions excluded. The "justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." [Coleman v. Thompson, 501 U.S. 722, 737, 111 S.Ct. 2546, 115 L.Ed.2d 640 \(1991\)](#).

At the same time that extending the *Edwards* rule yields diminished benefits, extending the rule also increases its costs: the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain. Voluntary confessions are not merely “a proper element in law enforcement,” *Miranda, supra*, at 478, 86 S.Ct. 1602, they are an “unmitigated good,” *McNeil*, 501 U.S., at 181, 111 S.Ct. 2204, “essential to society’s compelling interest in finding, convicting, and punishing those who violate the law,” *ibid.* (quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

559 U.S. at ____, 130 S.Ct. at 1221-22. Justice Thomas, in his concurring opinion, argued: (1) that a break in custody allows a police initiated reinterrogation of a defendant after that defendant has invoked the MRTC and (2) that in this case the break in custody was of sufficient length to allow reinterrogation of the defendant. He disagreed with the 14 day rule because he believed that a shorter time would allow a reinterrogation of the defendant or other persons who invoke the MRTC. Justice Stevens, in his concurring opinion, agreed: (1) that a break in custody, under some circumstances, allows a police initiated reinterrogation of a defendant after that defendant has invoked the MRTC and (2) that in this case the break in custody was of sufficient length to render *Edwards* inapplicable. He disagreed, however, with the rule that *Edwards* always ceases to be applicable when there is a 14 day break in custody and the reasons used by the majority to support the creation of this rule.

4. The practical effect of the Court’s opinion in *Shatzer* on police initiated reinterrogation of certain persons after they have invoked the MRTC.
 - a. Reinterrogation, either on the same crime or a different crime, will be legally allowed within a certain amount of time in almost all cases because: (1) the defendant has been released from custody during the pendency of the case; (2) the defendant at the conclusion of the case will either be released from custody or will not be in *Miranda* custody because he or she is serving a sentence in jail or prison.

C. REINTERROGATION AFTER A PERSON HAS EFFECTIVELY INVOKED THE *MIRANDA* RIGHT TO COUNSEL

1. Introduction/General Law
 - a. The discussion that follows addresses reinterrogation after an effective invocation of the *Miranda* right to counsel.
 - b. These situations must be distinguished from reinterrogation situations after a person has effectively invoked the *Miranda* right to remain silent (a *Michigan v. Mosley* situation). See *State v. Bean*, 2011 WI App 129, ¶ 33, 337 Wis.2d.406, 423, 804 N.W.2d 696.
 - c. I usually use the term “reinterrogation” rather than interrogation or renewed interrogation. However, in some situations the reinterrogation could be an original interrogation if the invocation occurred prior to any interrogation.

- d. The *Edwards* presumption of involuntariness/the *Edwards* protective umbrella after a person invokes the *Miranda* right to counsel. *Shatzer*, 559 U.S. at ____, 130 S.Ct. at 1220, 1222, 1226. There is a *presumption* that a suspect's waiver of the *Miranda* rights is involuntary after the suspect has invoked the *Miranda* right to counsel. *Shatzer*, 559 U.S. at ____, 130 S.Ct. at 1223.
 - e. The Fifth Amendment *Miranda* right to counsel, unlike the Sixth Amendment right to counsel, is not offense specific. *State v. Cole*, 2008 WI App 178, ¶ 26, 315 Wis.2d 75, 91, 762 N.W.2d 711.
 - f. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981); *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093 (1988).
 - g. The invocation of the MRTC must be timely to be effective.
2. When is reinterrogation allowed after an assertion of the MRTC-the law prior to *Shatzer*.
 - a. The defendant initiates it. *State v. Hampton*, 2010 WI App 169, ¶¶ 37-44, 330 Wis.2d 531, 550-53, 793 N.W.2d 901.
 - b. The defendant is provided with a lawyer during the reinterrogation/a lawyer is present during the subsequent interrogation. *State v. Cole*, 2008 WI App 178, ¶ 25, 315 Wis.2d 75, 90, 762 N.W.2d 711. This does not occur very often for a very good reason.
 - c. Reinterrogation is not allowed on any offense by any officers while the defendant remains in continuous custody-the *Edwards* and *Roberson* rules. *See* 12 below.
 - d. A break in custody situation. The United States Supreme Court had not directly addressed this issue prior to *Shatzer*. *Shatzer*, 559 U.S. at ____, 130 S.Ct. at 1220. Some jurisdictions had adopted a break in custody exception to the continuous custody rule. Those courts took different positions as to the required length of the break in custody. An excellent summary of the break in custody law prior to *Shatzer* and the positions taken by the various jurisdictions on this issue can be found in *State v. Wessells*, 209 N. J. 395, 37 A.3d 1122, 1127-28 (2012). There was no direct Wisconsin law on the break in custody exception. *See State v. Cole*, 2008 WI App 178, ¶ 38, 315 Wis.2d 75, 97, 762 N.W.2d 711.
 - e. In Wisconsin a person who was serving a sentence in prison was in custody for *Miranda* purposes.
 3. When is reinterrogation allowed after an assertion of the MRTC-the law after *Shatzer*.
 - a. The defendant initiates it-2a above.
 - b. The defendant is provided with a lawyer during the reinterrogation-2b above.
 - c. The "continuous custody" no reinterrogation rule-2c above-is still the law.
 - d. Reinterrogation is now allowed after a 14-day break in custody. *State v. Bean*, 2011 WI App 129, ¶ 33, 337 Wis.2d 406, 423, 804 N.W.2d 696; *State v. Wessells*, 209 N.J. 395, 37 A.3d 1122, 1129-30 (2012) (the Court

- in *Shatzer* explicitly recognized a break in custody exception after a person invokes the *Miranda* right to counsel).
- e. In *Shatzer* the Court held that a person who is serving a sentence in prison and who is in the general prison population is not in custody for *Miranda* purposes.
4. The 14 day break in custody rule-general law.
 - a. Terminology:14-day break in custody rule or the 2-week break in custody rule.
 - b. A 14 day break in custody ends the *Edwards* presumption of involuntariness/the defendant is no longer covered by the *Edwards* protective umbrella-the *Edwards* rule against reinterrogation of a person after the person invoked the MRTC is not applicable when there is a 14 day break in custody between the person’s invocation of the MRTC and the initiation of subsequent questioning by the police. *Howes v. Fields*, 565 U.S. ____, ____, 132 S.Ct. 1181, 1190 (2012).
 - c. It ends the *Edwards* presumption of involuntariness-the defendant is no longer covered by the *Edwards* protective umbrella.
 - d. The durational requirement of 14 days. The Court stated that the break in custody must be of sufficient duration to dissipate the coercive effects of being in custody. 559 U.S. at ____, 130 S.Ct. at 1222-23. The Court referred to this as the break in custody “durational requirement.” 559 U.S. at ____, 130 S.Ct. at 1222. The Court stated that 14 days satisfies this durational requirement. 559 U.S. at ____, 130 S.Ct. at 1223. Why did the Court choose to set a specific durational requirement length and why 14 days? 559 U.S. at ____, 130 S.Ct. at 1222-23, 26 and *State v. Wessells*, 209 N.J. 395, 37 A.3d 1122, 1129-30 (2012).
 - e. 14 days is a fixed time period/bright line rule and not a flexible rule that in some cases would allow reinterrogation during a lesser period of time when a person is not in custody. *Wessells*, 37 A.3d at 1130-31.
 - f. There are numerous unanswered questions after the *Shatzer* opinion.
 - g. What method of counting is to be used to determine the 14 days? Some of the possible answers include a counting system like that set forth at sec. 990.001(4) or a minute-to-minute counting system.
 - h. Must the 14 days be continuous? It is my opinion that the 14 days must be continuous.
 - i. When the prosecution must show a valid waiver of the *Miranda* rights, what is the burden of proof-a *Thompkins* waiver or a higher burden of proof?
 - j. The definition of custody/when is a person not in custody for this rule.
 - k. It is applicable to any interrogation on any crime by any officers. *Shatzer*, 559 U.S. at ____, 130 S. Ct. at 1224-25.
 - l. The 14 day break in custody rule was applied in *United States v. Guzman*, 603 F.3d 99, 102-06 (1st Cir. 2010).
 - m. The issue of the retroactivity of the *Shatzer* decision was discussed in *State v. Wessells*, 209 N.J. 395, 37 A.3d 1122 (2012).

5. The 14 day break in custody rule—the situation where the defendant is not in custody when the reinterrogation occurs.
 - a. Situation: a person: (1) effectively invokes the MRTC while being interrogated on crime A; (2) is then released from *Miranda* custody for 14 days; (3) is not in *Miranda* custody during the reinterrogation.
 - b. A person in this situation can be reinterrogated on crime A or any other crime.
 - c. Is there a requirement of an advisal of the *Miranda* warnings and a valid waiver even when the defendant is not in custody for *Miranda* purposes? There is language in *Shatzer* that would support an argument that the answer is yes. *Shatzer*, 559 U.S. at ____, 130 S.Ct. at 1221, 1223, 1225-26.

6. The 14 day break in custody rule—the reinterrogation occurs when the defendant is in *Miranda* custody.
 - a. Situation: a person: (1) effectively invokes the MRTC while being interrogated on crime A; (2) is then released from *Miranda* custody for 14 days; (3) is then taken into *Miranda* custody on either crime A or some other crime and reinterrogated.
 - b. A person in this situation can be reinterrogated on crime A or some other crime.
 - c. The defendant in *Shatzer* was in *Miranda* custody when he was reinterrogated. *See also Shatzer*, 559 U.S.at ____, 130 S.Ct. at 1226.
 - d. There must be an advisal of the *Miranda* warnings and a valid waiver. What is the waiver burden of proof?

7. The 14 day break in custody rule—a new crime.
 - a. Situation: a person: (1) effectively invokes the MRTC while being interrogated; (2) is then released from custody for less than 14 days; (3) is interrogated on a new crime that occurred after the defendant was released from custody; (4) is either not in custody or is in custody on the new crime when the interrogation occurs.
 - b. My gut reaction answer to this situation is that the interrogation is valid. However, there is language in *Shatzer* that would support the argument that a person cannot be interrogated on a new crime during the 14 day time period.

8. The 14 day break in custody rule-a prior crime.
 - a. Situation: a person: (1) effectively invokes the MRTC while being interrogated; (2) is then released from custody for less than 14 days; (3) is interrogated on a new crime that occurred prior to the defendant's release from custody; (4) is either not in custody or is in custody when the interrogation occurs.

- b. The interrogation is lawful under *Shatzer*.
9. The 14 day break in custody rule-a violation of the “cease questioning” requirement.
- a. Is the 14 day break in custody rule applicable to the situation where: (1) a person effectively invokes the MRTC; (2) the police do not cease questioning; (3) the person is released from custody; (4) the person is reinterrogated (either in custody or not in custody) after being out of custody for 14 days?
 - b. There is language in *Shatzer* that would support an argument that the 14 day break in custody rule is not applicable in this situation. *Shatzer*, 559 U.S. at ____, 130 S.Ct. at 1221, 1225-26.
 - c. In *United States v. Guzman*, 603 F.3d 99 (1st Cir. 2010), the police did not cease questioning of the defendant after he invoked his MRTC. The Court, in rejecting the defendant’s argument that the 14 day break in custody rule should not be applicable because of the failure of the police to honor his invocation of the MRTC, stated “He cites no authority in support of such a contention and we conclude that, after having been released for four months, Guzman cannot contend that his prior invocation of his *Miranda* rights applied.” 603 F.3d at 106.
10. The 14 day break in custody rule-the defendant is serving a sentence in prison or jail.
- a. In *Shatzer*, 559 U.S. at ____, 130 S.Ct. at 1224-25, the Court, in the context of determining what constitutes a sufficient break in custody that allows the police to reinterrogate a person after that person has effectively invoked his *Miranda* right to counsel, clarified that an incarcerated person is not *per se* in custody for *Miranda* purposes-the mere fact of a prison setting alone is insufficient to trigger *Miranda* custody. The Court held that a person: (1) who is serving a sentence/incarcerated pursuant to a conviction in a prison and (2) is in the general prison population, is not in custody for *Miranda* purposes. *See also Fields*, 565 U.S.at ____, 132 S.Ct. at 1190.
 - b. Is the holding of the Court in *Shatzer*, that a person is not in *Miranda* custody when the person is serving a sentence in prison and is in the general prison population, applicable to a person who is in jail in the general jail population serving a sentence? In *Shatzer*, the Court did not address this question. It is my opinion that a strong argument can be made that a person in this situation, especially in a house of correction type of situation or where sentenced inmates are kept separate from pretrial detainees, is not in *Miranda* custody. *See Howes v. Fields*, 565 U.S. ____, ____, 132 S.Ct. 1181 (2012).
 - c. Therefore, a break in custody for reinterrogation purposes can occur while a person is serving a sentence in jail or prison in the general population. *Fields*, 565 U.S.at ____, 132 S.Ct. at 1190.

- d. Generally, an inmate who is serving a sentence in either prison or jail is not in *Miranda* custody when he is questioned by law enforcement officers in the jail or prison. *Fields*.
11. The 14 day break in custody rule-how many interrogations.
 - a. Assuming that all of the 14 day break in custody rule requirements are met, how many times (and under what conditions) can the police reinterrogate the same person concerning the same crime?
 - b. The role of the “badgering/anti-badgering” rule in the answer.
 12. The present status of the *Edwards-Roberson* limitations on police initiated interrogation after a defendant has effectively invoked the MRTC-the continuous custody, forever, anyone, anywhere rule.
 - a. Did the Court in *Shatzer* change the rule that a defendant, who has effectively invoked the MRTC and who remains in continuous custody, cannot be interrogated by any law enforcement officer concerning any crime even if the officer does not know of the prior invocation of the MRTC and even if the defendant has met with an attorney after the first interrogation-the *Edwards* continuous custody rule, the *Roberson* “there is no separate investigation exception to the *Edwards* rule, and the *Roberson* “imputation” rule (the fact that the officer who conducted the reinterrogation did not know of the defendant’s assertion of the MRTC is irrelevant)?
 - b. It is my opinion that the *Shatzer* decision did not change this rule. *Shatzer*, 559 U.S. at ____, 130 S.Ct. at 1222-24.
 - c. The Court in *Shatzer* did not address the state’s argument that the substantial lapse in time between the 2003 and 2006 attempts at interrogation of the defendant independently ended the *Edwards* presumption of involuntariness. *Shatzer*, 559 U.S. at ____n 4. 130 S.Ct. at 1222 n. 4.
 - d. It is my opinion that the prior “eternal” nature of this rule will be drastically reduced because of the combined effect of the new 14 day break in custody rule and the rule that a defendant in prison or jail in the general population serving a sentence is not in custody for *Miranda* purposes.
 - e. Is this rule applicable to a crime committed by the defendant while he/she is in continuous custody, especially one committed in the jail or prison setting?
 13. The burden of proof when there is an allegation that the defendant effectively invoked his *Miranda* right to counsel. In *State v. Cole*, 2008 WI App 178, ¶¶ 23-45, 315 Wis.2d 75, 89-101, 762 N.W.2d 711, the Court addressed the proper allocation of the burden of proof when the defendant alleges that his statement is inadmissible in the state’s case-in-chief because of the defendant’s previous invocation of the *Miranda* right to counsel. The state’s position was that once it establishes its prima facie case, the burden is on the defendant to produce credible

evidence that the defendant had previously invoked his *Miranda* right to counsel. The Court did not adopt the state's position. It held that when a defendant gives the State timely notice that he or she is claiming that he or she did not waive the *Miranda* right to counsel (in relation to the statement that is being litigated) because of a previous invocation of the *Miranda* right to counsel by the defendant (and therefore the statement being litigated is inadmissible in the state's case-in-chief because of an invalid waiver), the State has the burden of proof /proving at the suppression hearing (both the burden of going forward with a prima facie case and the burden of persuasion) that the defendant previously waived his/her *Miranda* right to counsel/that the defendant waived his/her *Miranda* right to counsel on the prior occasion that is the subject of the defendant's allegation. This would include showing that the defendant did not effectively invoke the *Miranda* right to counsel during a prior *Miranda* custody interrogation, that the prior interrogation/incident did not occur, etc