



**2010 Annual Conference of the
International Association of Chiefs of Police
Legal Officers' Section Meeting**

**Selected Rulings of the
Supreme Court of the United States
2009-2010**

Presented and prepared by
Karen J. Kruger, Esq.

Member, Funk & Bolton, P.A.
36 S. Charles St., 12th Fl.
Baltimore, Maryland 21201
Tel. (410) 659-8322
www.fblaw.com

Fourth Amendment

Michigan v. Fisher, 130 S. Ct. 546, No. 09-91 (December 7, 2009)

Responding to a disturbance complaint, officers were directed by neighbors to a home where a man was reportedly “going crazy.” At the residence, the officers discovered a smashed pickup truck in the driveway, broken fencing, three broken house windows, blood on the hood of the truck, and blood on clothing inside the truck. As they approached the house, they noticed Fisher inside the house, screaming and throwing things; the back door was locked and the front door was blocked by a couch. The officers could see that Fisher was injured and they asked if he needed medical attention; Fisher told them to get a warrant, and refused the officers’ request to enter. One of the officers pushed the front door open and looked inside, at which point Fisher pointed a long rifle at the officer. The officers withdrew and Fisher was prosecuted for the armed assault on the officer.

Relying on *Brigham City v. Stuart*, 547 U.S. 398 (2006), the Court reversed the suppression of the evidence, and reiterated its earlier holding that officers “may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” The exigent circumstances exception to the warrant requirement requires probable cause and exigent circumstances; officers are not required to meet that standard when they make warrantless entry under the emergency aid doctrine.

City of Ontario v. Quon, 130 S. Ct. 2619, No. 08-1332 (June 17, 2010)

As a member of the Ontario California Police SWAT team, Sgt. Quon was issued a two-way alphanumeric pager. City policy restricted pager use to official purposes, and texts in excess of the plan schedule resulted in overage charges.

Supervisors were concerned about recurring overage charges for the pagers. A lieutenant was asked to look into the usage and collect reimbursement from staff members who incurred overages due to personal use. Quon’s lieutenant said he didn’t want to be in the bill-collecting business, but Quon regularly reimbursed the city for overage charges incurred for his pager.

Eventually, city officials decided to do an audit of pager use to determine if official business needs required a restructuring of the service plan or if the overages were due to personal messaging in violation of policy. The city obtained transcripts of the text messages from Arch Wireless. They learned that Quon was using his two-way pager to exchange sexually explicit messages

with his estranged wife and a police dispatcher (Florio) with whom he was having an affair. Quon and another SWAT sergeant (Trujillo) had also exchanged numerous personal messages. Quon was disciplined for violating city policy regarding pager use.

Sgt. Quon, joined by his wife, Florio, and Sgt. Trujillo, filed suit against the city and Arch Wireless, alleging violations of their Fourth Amendment right to privacy as well as violations of the Stored Communications Act.

The district court found no Fourth Amendment violation, ruling that the city sought only to determine whether the pagers were being used in conformity with stated policy. The Ninth Circuit disagreed, finding the audit violated Fourth Amendment rights because Quon had been told by his lieutenant that his messages would not be subject to audit if he paid the overage charges. The Circuit also ruled against Arch Wireless, finding a violation of the Stored Communications Act (a *certiorari* petition on the SCA issue was denied).

The question before the Court was: whether, despite the city's no-privacy policy, but by virtue of his supervising lieutenant's informal policy of permitting some personal use of the pagers, Quon had a reasonable expectation of privacy in text messages transmitted on his city-issued pager. Also before the Court was the question of whether individuals who exchanged texts with him had a reasonable expectation that their messages would be free from review by the recipient's government employer.

In Justice Kennedy's opinion, the Supreme Court issued a resounding and unanimous "no" to both questions, reminding us anew that the Fourth Amendment's "reasonable" expectation of privacy is not based on personal and subjective expectations, but on that which is deemed objectively reasonable within our society.

Fifth Amendment

Florida v. Powell, 130 S. Ct. 1195, No. 08-1175 (February 23, 2010)

In this case, Tampa police administered its standard *Miranda* warning, "You have the right to talk to a lawyer before answering any of our questions . . . you have the right to use any of these rights at any time you want during the interview." Powell confessed to ownership of a handgun found during an earlier search; he was convicted of possession of a firearm by a convicted felon.

On appeal, the Florida appellate courts determined that the confession should have been suppressed because the *Miranda* admonition was misleading; it suggested that Powell could only consult with a lawyer *before* the interrogation process began, but not *during* it. The Florida Supreme court based its ruling on state and federal constitutional principles.

Scholars correctly predicted a full review of this question, because the issue had been raised several times in years past, and there was a split among the federal circuit courts of appeal

The Supreme Court dispensed with the argument that it lacked jurisdiction in light of the lower courts' reliance on state constitutional principles, by relying on *Michigan v. Long*, 463 US 1032. *Long* held that, when state court decisions rest primarily on, or are so intertwined with, federal constitutional principles, and in which there has been no clear announcement of separate state law, the Supreme Court may assert jurisdiction. This jurisdictional determination should assist state practitioners in applying the ruling of the Court, and in reconciling future state cases that have both state and federal constitutional issues in play.

Justice Ginsburg wrote the opinion for the court, saying that the Court has never dictated the words that must be used to convey the warnings announced in *Miranda*. The court announced a preference for clear admonition of rights along the lines of those used by the FBI, but warnings that reasonably convey the rights to a custodial suspect are sufficient. The warning that the Tampa police gave to Powell satisfied this standard.

Maryland v. Shatzer, 130 S. Ct. 1213, No. 08-680 (February 24, 2010)

Shatzer was arrested and taken to the local jail for a child sexual abuse offense; at the time, he was also suspected of sexual offenses against his minor son. The sex crimes investigator went to the local jail to interview Shatzer about the uncharged allegations concerning his son. After receiving his *Miranda* warnings, Shatzer invoked his right to counsel and the interview ended.

Shatzer was thereafter convicted on the other sex crimes charges and sentenced to state prison time. Two and a half years later, additional evidence was developed in the form of more detailed verbal disclosures from the then-8-year-old son. A detective visited Shatzer in prison to interview him again. Again, after receiving *Miranda* warnings, Shatzer made some qualified inculpatory statements regarding the crimes against his son and he agreed to

submit to a polygraph examination. After the polygraph examination, Shatzer made additional inculpatory statements and prosecution ensued.

The question on appeal was whether, under the authority of *Edwards v. Arizona*, the defendant's initial invocation of counsel under the Fifth Amendment barred any further interrogation as long as the defendant remained in continuous custody.

Under *Edwards*, a suspect who has invoked his Fifth Amendment right to counsel during custodial interrogation is not subject to further interrogation until counsel has been made available, the suspect initiates contact with law enforcement authorities, or there has been a break in custody. The Maryland appellate courts determined that the passage of time was insufficient to qualify as a break in custody under *Edwards*.

The Supreme Court (Scalia, writing for the majority) ruled that once an incarcerated suspect is returned to general population for a period of time, he or she has been "released from custody" for purposes of the Fifth Amendment. "The Court concludes that the appropriate period is 14 days, which provides ample time for the suspect to get reacclimated to his normal life, consult with friends and counsel, and shake off any residual coercive effects of prior custody."

This bright-line 14-day break-in-custody rule for incarcerated suspects should invigorate law enforcement agencies in their efforts to interview incarcerated suspects in otherwise cold cases. Note, however, that renewed *Miranda* warnings must be administered and this rule is subordinate to any Sixth Amendment rights.

Berghuis v. Thompkins, 130 S. Ct. 2250, No. 08-1470 (June 1, 2010)

This *habeas* action raised the question of whether a defendant's prolonged silence during a post-*Miranda* interview constituted an invocation of his right to silence under the Fifth Amendment.

After advising Thompkins of his rights, in full compliance with *Miranda*, officers interrogated him about a shooting in which one victim died. At no point did Thompkins say that he wanted to remain silent, that he did not want to talk to the police, or that he wanted an attorney. He was largely silent during the 3-hour interrogation, but near the end, he answered "yes" when asked if he prayed to God to forgive him for the shooting. He moved to suppress his statements, claiming that he had invoked his Fifth Amendment right to remain

silent, that he had not waived that right, and that his inculpatory statements were involuntary.

The Supreme Court ruled that (1) fact that defendant was silent during first two hours and 45 minutes of three hour interrogation was insufficient to invoke his right to remain silent under *Miranda*; (2) defendant waived his right to remain silent under *Miranda* by responding to question by interrogating officer; and (3) police are not required to obtain a waiver of defendant's right to remain silent under *Miranda* before commencing interrogation.

The Court (5-4) held that an invocation of the right to silence, just like an invocation of right to counsel, must be unambiguous. *See Davis v. United States*, 512 U.S. 452 (1994). Even in a long session, sitting silently or being uncooperative is not enough to clearly communicate an invocation of silence, or any other right.

The Court also held that a defendant is not required to provide an affirmative, express waiver for such a waiver to exist; the defendant's one-word confessional response to a suggestive question is understood as an implied waiver. Waiver may be implied by conduct or words or a combination of both; it need not be expressed.

Commentaries on this decision suggest that this case may mark a significant opportunity to shift established police practices; law enforcement routinely trains its personnel to obtain an explicit waiver from a suspect, but the Court's opinion indicates that an express waiver may not be constitutionally required.

Eighth Amendment

Wilkins v. Gaddy, 130 S. Ct. 1175, No. 08-10914 (February 22, 2010)

Excessive force claims are based on the *nature* of force used, and not the *extent* of any resulting injury. Evidence of "significant injury" is not a threshold requirement for stating a use of force claim; injury and force are imperfectly correlated. Extent of injury may be evidence of degree of force used, but is not determinative.

Statutory Civil Rights

Lewis v. City of Chicago, 130 S. Ct. 2191, No. 08-974 (May 24, 2010)

African-American firefighters sued alleging that a promotional process had a disparate discriminatory impact on them. The City claimed that the suit was untimely because the flawed process had been adopted too remotely in time for the plaintiffs to have made a timely claim. The Supreme Court held that a Title VII claimant who does not file a charge of discrimination with the EEOC in a timely manner regarding the *adoption* of a practice may still assert a timely disparate-impact claim based on the later *application* of that practice, provided that the claimant alleges all elements required for a disparate-impact claim.

Cases to Watch 2010 Term

Michigan v. Bryant, 09-150 (argued 10.5.2010): Is a wounded crime victim's statement to police officers identifying the perpetrator "testimonial evidence" subject to the restrictions of the Confrontation Clause of the Sixth Amendment, or may police testify as to what the victim said?

NASA v. Nelson, 09-530 (argued 10.5.2010): Is a federal contract employee's constitutional right to privacy violated when she is asked if she has received counseling or treatment for recent illegal drug use within the past year?

Los Angeles Co. v. Humphries, 09-350 (argued 10.5.2010): Can plaintiffs prevail on a *Monnell* claim unless they show that a constitutional violation actually resulted from public entity's policy, custom or practice?

Snyder v. Phelps, 09-751 (argued 10.6.2010): Does the First Amendment protect anti-war protestors from liability for a claim of intentional infliction of emotional distress the protest caused the decedent's family?

Connick v. Thompson, 09-571 (argued 10.6.2010): Does theory of inadequate training render prosecutor's office liable for illegal conduct of its prosecutors if there has been only one violation resulting from allegedly deficient training?

Bullcoming v. New Mexico, 09-10876 (argument not yet scheduled): Confrontation clause challenge to admission of testimony of crime lab supervisor about test that he did not conduct.

Kentucky v. King, 09-1272 (argument not yet scheduled): Does the Fourth Amendment's exigent circumstances exception to the warrant requirement apply when the exigency is the result of a lawful police action?

The Legal Officers' Section appreciates the contributions of members Eric Daigle, LeAnn Freeman and Michael Ramage, the American for Effective Law Enforcement and the International Municipal Lawyers Association in the preparation of these materials.