OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 82-5920

TITLE KEVIN MICHAEL SHEA, Petitioner v. LOUISIANA

PLACE Washington, D. C.

DATE November 7, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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KEVIN MICHAEL SHEA :

Petitioner : No. 82-5920

v. :

STATE OF LOUISIANA :

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Washington, D.C.

Wednesday, November 7, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

FRANCES BAKER JACK, ESQ., Shreveport, Louisiana (appointed by this Court); on behalf of the Petitioner.

PAUL JOSEPH CARMOUCHE, ESQ., District attorney, First Judicial District, Caddo Parish, Shreveport, Louisiana; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: This Court will hear arguments first this morning in Shea v. Louisiana.

Ms. Jack, you may proceed whenever you're ready.

ORAL ARGUMENT OF FRANCES BAKER JACK, ESQ.

ON BEHALF OF THE PETITIONER

MS. JACK: Mr. Chief Justice, and may it please the Court, 17 months after this Court announced its decision in Edwards v. Arizona, the Louisiana Supreme Court refused to apply the principles of that decision in reviewing Petitioner Shea's conviction which was before that court on direct review.

Like the Petitioner in Edwards v. Arizona, Mr. Shea had requested an attorney while he was undergoing custodial interrogation. Like Mr. Edwards, his request initially was honored. However, later, the police came back and reinitiated communication, though, like Mr. Edwards, Mr. Shea had not yet consulted with the attorney he had requested.

Mr. Edwards' conviction was overturned on that basis. Mr. Shea asked the Louisiana Supreme Court on direct appeal to overturn is on the same basis.

The Louisiana Supreme Court recognized that Mr. Shea's rights had been violated under the principles

anncunced by this Court in Edwards. However, it did not feel bound by that decision because the Louisiana Supreme Court felt that Edwards was not entitled to retroactive application.

That view is contrary to the principles anncunced by this Court concerning retroactivity. As I pointed out, Mr. Shea's case was on direct appeal tc the Louisiana Supreme Court. It was the first chance that court had tc review his conviction.

Edwards had come out in May of 1981. The Louisiana Supreme Court decisicn, on original hearing, was issued in January cf 1982; the rehearing in May of 1982.

The general rule concerning retroactivity cf intervening decisions is that when you're reviewing a case on direct appeal, you apply the law as it is at that time.

The pattern in following -- the law has not truly changed in that area, if you review the cases that this Court had addressed. It's important to realize the principles underlying the theory of applying the law as it is at the time of review. They were outlined very clearly by Justice Harlan in a dissent in Desist v. United States, and that approach was adcpted by the Court two years in United States v. Johnson.

The concerns that Justice Harlan expressed dealt with what he termed the ambulatory nature of decision making when you're dealing with the question of retroactivity. There should be some consistency in the decision making process of the court. If you apply the rule that Petitioner Shea advocates, that is, the rule that has been applied for many, many years, that you look at the law as it is as the time of direct review, you don't end up with a welter of inconsistent decisions and a sense of unclearness as to exactly what law could apply.

Furthermore, if the Court decides a new constitutional issue, which this Court had stated that it did in Edwards, if that constitutional issue is truly right and that's the correct interpretation of the Constitution, then the lower courts are bound to follow it. And you cannot affirm a lower court that rejects it, which is exactly what the Louisiana Supreme Court did.

Edwards was on the books. They were aware of it. But they chose not to follow it.

Another concern that comes to mind if you do not apply the law as it is on the time of direct review is that each litigant is entitled to fair justice on the merits of his own case.

When Mr. Edwards' case came before the Court, his conviction was overturned for the same violation that occurred with Mr. Shea. Six other cases -- excuse me -- seven other cases were pending before this Court at the time on petitions for writ of certiorari. Those petitions were granted, and cases were remanded to the state courts for reconsideration in light of Edwards.

On one of these cases that was remanded, the conviction was then overturned after the Court did apply Edwards. Had Mr. Shea's case moved just a little bit faster -- and I submit it's moved rather quickly because he has not even entered the round of collateral review yet -- but had he been before this Court in May of 1981 when Edwards was pending, his case would have been remanded and, based upon the Louisiana Supreme Court finding that his rights were violated under Edwards, he would have been entitled to a new trial.

QUESTION: Ms. Jack, what did the court hold with respect to the retroactivity of Miranda itself?

MS. JACK: Miranda was found not to be retroactive to cases that were then pending on direct appeal.

QUESTION: Why shouldn't the same rule apply in Edwards if it's a new rule?

MS. JACK: Your Honor, I believe that Miranda

was such a complete break with prior law, it set forth safeguards that no one knew about before, that the police had no way of knowing that they would be required to say these certain things to someone when they had them in custody, as opposed to the rule of Edwards which is nothing more than a clarification and possibly creating an exception to the rule of Miranda.

QUESTION: Well, didn't we say in Solem that it was, you know, at least largely new?

MS. JACK: You stated it was not a clear break with the past, but that it was a new rule. I believe that interpretation is subject to discussion.

For example -- and I believe this was pointed out in the dissent to Solem -- and that is that the rule of Edwards actually created an exception to the rule of Miranda. In that respect, it did create a new rule.

Prior to Edwards, it was unclear what, if any, statements made after the person in custody invoked his right to counsel would be admissible.

Edwards came forth and said there's an exception to that. There are statements that will be admissible. Those are the statements that are made if the person in custody initiates the conversation.

At that point, those kind of statements became an exception to the broad exclusionary rule of Miranda.

I don't believe it imposed new restrictions. It believed it loosened the prior restrictions set forth in Miranda.

QUESTION: Do you think that's a fair reading of the Court's opinion in Solem v. Stumes, that it really withdrew Miranda or retracted a little bit?

I would have thought otherwise.

MS. JACK: I believe that's one of the interpretations available.

The third concern that the Court must consider in deciding the rule of retroactivity is similar to the one of treating litigants, doing justice to each on the merits of his own pace, and that is treating similarly situated Defendants alike.

Otherwise, you have the situation where the one chance Defendant whose case is picked for review gets the benefit, but all the others who suffered the same constitutional violation do not get the benefit.

There are reasons for distinguishing between cases that are on direct review and those that are on collateral. And I'll note that also in Solem, the case did come before the Court on collateral review, as opposed to Mr. Shea.

There's a need for finality in judgments. And once the time for petitioning for cert has passed, the

judgment is final. That's not the situation when cases come before this Court on habeas, and the considerations that you look to in deciding whether to overturn a conviction when it comes before you on habeas are different, because you've got to have some point where you can say it's over. But until you reach that point, the only guidance you have is the law at that time.

Mr. Shea's conviction is still not final. You've got to look at the law as it is now and as it was when Louisiana reviewed it. And the law at that time was Edwards v. Arizona which came out in May of '81.

There are other factors which have been listed as considerations in determining the retroactivity question. Those are the purpose of the rule to be served, the reliance factor, and the impact on justice.

I submit that those factors truly come into play only when the case is before the Court on collateral review. If you review the cases in which those factors were applied, each of those cases did come before the Court on collateral review.

Those matters need to be considered because the cost incurred by the states in sending multitudes of cases back, and telling them you have to retry something that was tried 30 years ago is enormous. And the Court must consider whether it's necessary to impose that upon

the states.

So, in making that decision, you have to look at these factors. Even if those factors were to apply on direct review, which I submit they do not, they would likewise mandate retroactive application of Edwards v. Arizona to Mr. Shea's case.

The purpose of the rule, though in Solem the Court noted that it was primarily a prophylactic rule and that prophylatic rules generally are not applied retroactively, the rule of Peyton v. New York was prophylactic. It was intended to deter police conduct. Yet, that rule was applied retroactively to cases pending on direct review in U.S. v. Johnson.

Again, I note U.S. v. Johnson is the case in which the Court adopted the Harlan approach. Furthermore, in Solem, the Court stated that the integrity of the system and the truth finding process is a critical consideration. Well, they stated that the Fifth Amendment's involvement with that is not so entirely unrelated as it is in Fourth Amendment context.

The Fifth Amendment right to be free from self-incrimination and the right to be free from continued interrogation has more to do with truth finding process than the Fourth Amendment exclusionary

rule against unreasonable searches and seizures.

And yet, in Johnson, retroactivity, Peyton was applied retroactively, even though it was a Fourth Amendment case. So I submit the purpose behind the rule of Edwards, originally the rule of Miranda, dictates that the case should apply to Mr. Edwards -- Mr. Shea's conviction.

Second, the reliance factor. I don't believe a fair reading of the Court's cases can support a theory that the police officers had no idea Edwards was coming. Miranda had set forth exactly what was to be done. It said when a person says they want a lawyer, interrogation must cease, and it shall not resume until the person has been afforded a lawyer.

On numerous occasions after that, the Court reiterated the rigid, per se rule of Miranda; that you do not reinterrogate a person after they've said they want a lawyer, and that's exactly what they did to Mr. Shea.

QUESTION: I suppose one of the exceptions to that was if the accused himself initiates the discussion.

MS. JACK: Correct, Your Honor. And that's --

QUESTION: That was expressed, was it not, in Edwards?

MS. JACK: That is the exception that was created in Edwards; correct. In that case, that was exactly what the situation posed.

QUESTION: You think that sharpens the point you're making.

MS. JACK: I believe it does. I believe that it shows that they knew what to do, but there was this one grey area where, if the person initiated it, could his statement be used?

And so in Edwards, they said yes, it can. But prior to Edwards, it was clear that they could initiate the conversation. Exactly what the result was if the person in custody initiated it was unclear. But as far as the police officers' conduct and what they could do, that was unquestioned both before and after Edwards. They could not reinitiate interrogation.

The third factor is of critical importance in this case, and that is the impact on the administration of justice. I submit that there will be very little effect on the criminal justice system if this Court finds that Edwards v. Arizona is to apply to convictions not yet final at that time.

So far, I have found only two states which held that it was not retroactive, and that is Louisiana and New Jersey. To the contrary, many states held that

it was. Several states never discussed the issue. They simply applied Edwards to factual situations arising prior to them, without discussion, because they didn't see Edwards as posing a true retroactivity question.

The majority of the federal circuits have done likewise. So over the past few years, most of the convictions have been treated in terms of Edwards, and you'll see very few that will be affected by this decision.

Also, the six cases that were sent back by this Court when Edwards was decided, those were cases that obviously arose prior to Edwards, and yet they applied the rule of Edwards.

Mr. Shea is entitled to the same benefits that Mr. Edwards and the petitioners in the other cases before the Court on that day received. He did not get the benefit of that from the Louisiana Supreme Court.

And if there are no further questions, I'd like to reserve some time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Carmouche.

ORAL ARGUMENT OF PAUL JOSEPH CARMOUCHE, ESQ.

ON BEHALF OF THE RESPONDENT

MR. CARMOUCHE: Mr. Chief Justice and may it please the Court, the State of Louisiana submits that

the per se rule announced in Edwards should only be applied prospectively.

We submit that the modern-day retroactivity analysis that, on the effect of new constitutional directives, does not support retroactivity on direct appeal in the Shea case, or at least on those cases involving the Edwards rule.

At the outset, I'd like to state that we agree with Petitioner on the fact that retroactivity of judicial decisions is neither compelled nor controlled by the Federal Constitution. We also agree that this Court has handed down innumerable decisions addressing the issue of retroactivity. And those decisions have resulted in varying degrees of retroactivity with respect to where to draw the line of retroactivity.

We agree with Petitioner in brief when she cites the criteria that the Court should use with respect to retroactivity, the three criteria that the Court has used in the past. When we look at retroactivity of a new constitutional rule, of course, the Court had cited those three criteria. The primary factors are the purpose to be served by the new rule, the extent of reliance by law enforcement on the former constitutional directive, and the effect on administration of criminal justice if retroactivity is

granted to the new constitutional principle.

We strongly disagree with Petitioner with applying te Edwards rule to the Shea case -- to the Shea case and the Shea facts. First, we would like to look at those three criteria and the first criteria, of course, the purpose to be served by the rule.

We submit, the State of Louisiana submits that Stumes is correct when it states that the Edwards rule has only a tangential relation to the truth finding function of the trial. That tangential relation is clearly pointed out in the Shea facts when we look at the Shea facts.

In Shea, there were two armed robberies.

QUESTION: Counsel, do you think that -- well, do you agree with your opposition that, had this case been a little farther along and pending here at the time Edwards was decided, that this Court would have sent it back for reconsideration in the light of Edwards?

MR. CARMOUCHE: I'm not sure, Your Honor. I think that -- is the Court asking me, had this case been heard at the same time as Edwards, prior to Edwards, whether or not there had ever been an Edwards rule?

QUESTION: I'm assuming that Edwards came here first, cert was granted, and before it was decided, this case came up in your Supreme Court, and then Edwards was

decided as it was. Do you think that this Court would have denied cert or would have sent it back to your Supreme Court for reconsideration in light of Edwards?

MR. CARMOUCHE: I'm not sure, Your Honor. I don't have that answer. We would disagree that that would be applied.

QUESTION: Your opposition says it would.

MR. CARMOUCHE: The tangential relation of the Edwards rule with respect to the Shea facts is clear. In Shea, there were two armed robberies, the first on June 29th and the second on July 3rd -- on July 2, 1979.

In the armed robbery that was actually tried, that is, the July 2nd armed robbery, in that case a man named Mr. Tuminello was robbed of cash and checks by Shea and an accomplice. During the robbery, a pistol shot was fired into the floor of the business. After the robbery, the police were immediately called and a detailed description was given of Shea and his accomplice.

That description was put out over radio and Shrevport police officers who were only three blocks from the site of the robbery spotted Shea and his accomplice, and identified them by the detailed description that had been given over the radio. They

effected an arrest, and on Shea at the time of the arrest, they found a wad of money and the checks made out to Mr. Tuminello's business.

They also found on Shea's accomplice a pistol with one spent cartridge and five live rounds in it. Shea and his accomplice were placed in a six-man lineup shortly after the arrest, and both were identified by Mr. Tuminello and by the victim of the previous armed robbery.

During the investigation, Shea was advised of his rights per Miranda and, in fact, signed a Miranda standard form. Shea at that point asked for an attorney, and the interrogation was immediately stopped by the police department at that time.

The next day, prior to the time Shea was going to be transferred from the city jail to the parish jail for district court, one of the same detectives asked Shea at that second meeting whether or not he had changed his mind about talking about the case. And Shea indicated he did. He was given his rights. Those rights were given to him, and he gave a confession concerning the robber.

There is no doubt under these facts that Shea was guilty, even without the confession. There is no doubt as to the reliability of the jury verdict in

Shea. Thus, we can clearly see the tangential relation to the truth finding process in the Shea case of applying the Edwards rule.

In Stumes, the Court said that the Edwards rule is a far cry from the sort of decision that goes to the heart of the truth finding function that this Court has consistently held to be retroactive. Rather, it is a prophylactice rule, designed to implement preexisting rights, and this Court has not decided such cases retroactively or applied such cases retroactively.

With respect to the second of the criteria, the Court in Stumes stated that Edwards established a new bright line rule, a safeguard of existing rights, not a new substantive rule, but a new rule nonetheless; that before and after Edwards, an accused had the right to counsel. And Edwards did establish a new test as to when a waiver would be acceptable, and of course the test is that the accused has to initiate any further communication, exchanges, or conversations.

When we look at the Shea case as it's ruled upon by the Louisiana Supreme Court with respect to the second of the criteria, in Louisiana, the Court when it reviewed the Shea case, applied Michigan v. Mosely with respect to the right to counsel and the waiver to the right to counsel and, in fact, found that under Michigan

Shea's rights had been scrupulously honored by the police, that he did have the right to cut off questioning at any point, and held in Shea that his confession was admissible.

They also later recognized that under Edwards, there would have been an Edwards violation. But Louisiana said with respect to the issue of retroactivity that there was a clear break of prior law, and that Edwards should not be applied retroactively to Shea.

I cite that decision only for this reason, and that is, in Louisiana if the Supreme Court was not anticipating Edwards, then law enforcement certainly was not anticipating Edwards. Law enforcement could clearly not have foreshadowed and anticipated the Edwards rule.

Third, the effect on the administration of criminal justice, we can only guess as to the number of cases that may come before this Court if Edwards is applied to cases on direct appeal. Shea was on direct appeal, but yet Shea today is over five years old. Shea proceeded through normal channels in the regular process. It took about a year to get it to trial and about a year on appeal, and then there was a motion expressing a second armed robbery case, and prior to the time that it was all decided, it was still on direct

appeal when Edwards was decided. But it's now five years old.

Of course, the Court in Stumes indicated the difficulties and pointed out the difficulties in trying old cases, the lost evidence, the dim memory of witnesses, and missing witnesses.

The State submits that in applying the retroactivity criteria to the Shea case, that the proper treatment of this Court would be prospectie application only.

With respect to the argument that Petitioner makes treating similar Defendants similarly under their facts, we would cite the Court's reasoning in Stovall where they said it made no difference.

The State of Louisiana, in conclusion, would respectfully request that this Court uphold the judgment of the Louisiana Supreme Court that Petitioner is not entitled to the relief, any relief under the Edwards decision.

If there are not further questions, thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Jack?

ORAL ARGUMENT OF FRANCES BAKER JACK, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MS. JACK: I'd like to point out that the distinction between habeas and direct review is alive and well and was not killed in the Stovall v. Denno decision. There is language in that decision which states that the distinction is not warranted anymore.

However, you have to look at the whole sentence and also the whole decision. First of all, Stovall v. Denno came before the Court on collateral review. Second, that case involved the retroactivity of the decision of this Court concerning the presence of counsel at a lineup. There had been absolutely no way anyone could anticipate the Court's decision on that point. And the reliance factor was found to be overwhelming in Stovall: the impact, the number of cases that would have to be retried in all 50 states.

Those two factors were so overwhelming that the Court could not rule that Wade and Gilbert were to be retroactive. And if you read the language specifically from that case, it states "for the purposes," no distinction between cases on direct appeal and cases on habeas. That language is very limited to the facts before the Court in Stovall.

To the contrary, the Harlan approach, that is, the across-the-board rule that you apply the law as it is on the time of direct appeal, was recently adopted by

this Court in United States v. Johnson. Again, that case involved a prophylactic rule, a Fourth Amendment rule, and yet Peyton was applied.

In Solem and in earlier case of Williams v. the United States, this Court on two occasions have stated that the Fifth Amendment is not as entirely unrelated, or may have more ramifications concerning the truth finding and the integrity of the criminal justice system than the Fourth Amendment. Yet, the Court has applied Fourth Amendment prophylactic cases to decisions that were pending on direct review.

The decision adopted by the Court in U.S. v. Johnson was adopted after a long discussion of the Linkletter factors and whether those should apply in the case on collateral versus direct. And The Harlan approach of applying the law as it is was adopted because it was the only just and equitable result. It was the only way to ensure consistency and fairness to litigants. And I submit that that's the only approach that would be appropriate in this case.

QUESTION: May I ask just one question?

MS. JACK: Yes.

QUESTION: Would you agree with your opposing counsel that if there was error, it was harmless beyond all doubt?

MS. JACK: I would not, Your Honor. I believe that the introduction of a confession can never be harmless error.

QUESTION: I think he said that, regardless of the confession, that the other evidence was overwhelming of guilt.

MS. JACK: I would disagree with that. I don't believe you have a harmless error question. Furthermore, the -- I don't think you can overlook that the Louisiana Supreme Court did find that his rights were violated under Edwards and would have reversed, had they not felt Edwards was not retroactive.

QUESTION: Well, maybe it was because they didn't have to reach the harmless error question.

MS. JACK: I don't believe that you can find that it was harmless error. The Court has recognized in so many cases the influence on a jury that a confession has, and when a confession is given in the sort of circumstances that this was was, where he had asked for his lawyer, he didn't have his lawyer, and the next morning the same officers came back to him while he's still in jail and said, "Don't you want to talk to us now?"

That's exactly the kind of environment --

QUESTION: What do you consider the most

damaging evidence against him, other than the confession? Is there some evidence about possession of stolen property?

MS. JACK: I believe he did have some checks on him. That's correct.

QUESTION: Pretty persuasive evidence to a jury, isn't it?

MS. JACK: It is, Your Honor; but whether you can say harmless beyond a reasonable doubt, I don't believe. I believe when you've got a confession in front of a jury, that that's what the jury looks to the most. That's what they're looking to hear when they go into the trial, and once they've heard it there's nothing that can take them away from them.

And the possibility of a coerced confession is something that has been of great concern to this Court.

QUESTION: Ms. Jack, just to refresh my recollection -- I've just been glancing at the red brief again -- did your opponent argue that the error was harmless beyond a reasonable doubt?

MS. JACK: That issue was not raised --

QUESTION: I didn't think it was.

MS. JACK: -- in the writ application.

QUESTION: We frequently decide it here for the first time.

CHIEF JUSTICE BURGER: Very well. Thank you, counsel. The case is submitted.

We'll hear arguments next in United States v. Abel.

(Whereupon, at 10:32 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#82-5920 - KEVIN MICHAEL SHEA, Petitioner v. LOUISIANA

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BY Paul A. Richardson

(REPORTER)