The Burger Court Opinion Writing Database

Shea v. Louisiana

470 U.S. 51 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1985

Re: No. 82-5920 - Kevin Michael Shea v. Louisiana

Dear Byron:

I join your dissent.

Regards,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 9, 1984

No. 82-5920

Shea v. Louisiana

Dear Chief,

Harry has agreed to try his hand at the opinion for the Court in the above.

Sincerely,

Bill

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 18, 1984

No. 82-5920

Shea v. Louisiana

Dear Harry,

I agree.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

84 DEC 18 P1:19

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 19, 1984

Re: Shea v. Louisiana, No. 82-5920

Dear Harry:

Although my join in this opinion is unconditional, I am not sure that I fully understand the import of the second to last paragraph of the opinion. I don't think it would be overruling Stovall -- am I not right? You'll remember that I had a statement at the foot of your Johnson opinion that it was my "understanding that the decision leaves undisturbed our retroactivity precedents as applied to convictions final at the time of decision." Am I right that there is nothing in your second to last paragraph that is inconsistent with this? In other words, complete prospectivity is not foreclosed in every case, is it?

Sincerely,

W.J.B., Jr.

Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 20, 1984

Re: Shea v. Louisiana, No. 82-5920

Dear Harry:

Thanks so much for taking care of my questions. So long as it is all right with you, I would prefer just to omit the first full paragraph on page 10.

Sincerely,

W.J.B.,Jr.

Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 13, 1984

Re: 82-5920 - Shea v. Louisiana

Dear Harry,

In due course, I shall circulate a dissent.

Sincerely yours,

Justice Blackmun

Copies to the Conference

.84 DEC 13 b5:35

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: DEC 2 0 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[December ——, 1984]

JUSTICE WHITE, dissenting.

Last Term, in *Solem* v. *Stumes*, —— U. S. —— (1984), we held that the rule announced by the Court in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), should not be applied retroactively in collateral attacks on criminal convictions. We concluded that the prophylactic purpose of the *Edwards* rule, the justifiable failure of police and prosecutors to foresee the Court's decision in *Edwards*, and the substantial disruption of the criminal justice system that retroactive application of *Edwards* would entail all indicated the wisdom of holding *Edwards* nonretroactive. Today, however, the majority concludes that notwithstanding the substantial reasons for restricting the application of *Edwards* to cases involving interrogations that postdate the Court's opinion in *Edwards*, the *Edwards* rule must be applied retroactively to all cases in which the process of direct appeal had not yet been completed when *Edwards* was decided. In so holding, the majority apparently adopts a rule long advocated by a shifting minority of Justices and endorsed in limited circumstances by the majority in *United States* v. *Johnson*, 457 U. S. 537 (1982): namely, the rule that any new constitutional decision—except, perhaps, one that constitutes a "clear break with the past"—must be applied to all cases pending on direct appeal at the time it is handed down.

Two concerns purportedly underlie the majority's decision. The first is that retroactivity is somehow an essential

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JAN 2 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 5

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[January ——, 1985]

JUSTICE WHITE, dissenting.

Last Term, in *Solem* v. *Stumes*, —— U. S. —— (1984), we held that the rule announced by the Court in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), should not be applied retroactively in collateral attacks on criminal convictions. We concluded that the prophylactic purpose of the *Edwards* rule, the justifiable failure of police and prosecutors to foresee the Court's decision in *Edwards*, and the substantial disruption of the criminal justice system that retroactive application of *Edwards* would entail all indicated the wisdom of holding *Edwards* nonretroactive. Today, however, the majority concludes that notwithstanding the substantial reasons for restricting the application of *Edwards* to cases involving interrogations that postdate the Court's opinion in *Edwards*, the *Edwards* rule must be applied retroactively to all cases in which the process of direct appeal had not yet been completed when *Edwards* was decided. In so holding, the majority apparently adopts a rule long advocated by a shifting minority of Justices and endorsed in limited circumstances by the majority in *United States* v. *Johnson*, 457 U. S. 537 (1982): namely, the rule that any new constitutional decision—except, perhaps, one that constitutes a "clear break with the past"—must be applied to all cases pending on direct appeal at the time it is handed down.

Two concerns purportedly underlie the majority's decision. The first is that retroactivity is somehow an essential at-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 14, 1984

Re: No. 82-5920-Shea v. Louisiana

Dear Harry:

Please join me.

Sincerely,

TM

T.M.

Justice Blackmun

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: DEC 1 3 1984

Recirculated: _____

HAB
Please join me

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[December ——, 1984]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present--after he requested an attorney. This case presents the issue whether that ruling is applicable to a case pending on direct appeal in a state court at the time *Edwards* was decided.

I

There is no dispute as to the facts. Petitioner Kevin Michael Shea was charged in Louisiana with two counts of armed robbery. He was arrested on July 2, 1979, and was taken to the police station at Shreveport. There he was turned over to Detectives Smith and Snell for questioning. His so-called *Miranda* rights, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), were read to him, and he signed a standard *Miranda* card. He said, however, that he did not wish to make any statement until he saw a lawyer. The interview thereupon was terminated.

The following afternoon, July 3, before petitioner had been in communication with any lawyer, Detective Snell returned. He informed petitioner that he was to be transferred from the city jail to the parish jail. Without inquiring of peti-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 19, 1984

Re: No. 82-5920, Shea v. Louisiana

Dear Bill:

Many thanks for your note of December 19.

I certainly do not wish to impinge in anyway upon the point you made in your statement in Johnson. I offer two alternatives. The first is to omit the first full paragraph on page 10 of the opinion. The second is (a) to replace the words "one of the several positions taken by" in the sixth line of the paragraph with the words "an observation of," and (b) to add the following sentence at the end of the paragraph: "The present decision, as did Johnson, of course, leaves undisturbed our retroactivity precedents as applied to convictions final at the time of decision." The last, of course, is your langauge in Johnson.

I would be willing to do either of these. Do you have a preference?

Sincerely,

Harry

Justice Brennan

STYLISTIC CHANGES
pp. 1, 2, 7, 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[January ——, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney. This case presents the issue whether that ruling is applicable to a case pending on direct appeal in a state court at the time *Edwards* was decided.

I

There is no dispute as to the facts. Petitioner Kevin Michael Shea was charged in Louisiana with two counts of armed robbery. He was arrested on July 2, 1979, and was taken to the police station at Shreveport. There he was turned over to Detectives Smith and Snell for questioning. His so-called *Miranda* rights, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), were read to him, and he signed a standard *Miranda* card. He said, however, that he did not wish to make any statement until he saw a lawyer. The interview thereupon was terminated.

The following afternoon, July 3, before petitioner had been in communication with any lawyer, Detective Snell returned. He informed petitioner that he was to be transferred from the city jail to the parish jail. Without inquiring of petitioner whether he had spoken with an attorney or whether

Pp. 7 4 9

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: DEC 2 6 198-

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[January ——, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney. This case presents the issue whether that ruling is applicable to a case pending on direct appeal in a state court at the time *Edwards* was decided.

I

There is no dispute as to the facts. Petitioner Kevin Michael Shea was charged in Louisiana with two counts of armed robbery. He was arrested on July 2, 1979, and was taken to the police station at Shreveport. There he was turned over to Detectives Smith and Snell for questioning. His so-called *Miranda* rights, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), were read to him, and he signed a standard *Miranda* card. He said, however, that he did not wish to make any statement until he saw a lawyer. The interview thereupon was terminated.

The following afternoon, July 3, before petitioner had been in communication with any lawyer, Detective Snell returned. He informed petitioner that he was to be transferred from the city jail to the parish jail. Without inquiring of petitioner whether he had spoken with an attorney or whether

File

See my reply

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 28, 1984

Re: No. 82-5920, Shea v. Louisiana

Dear Lewis:

I, of course, am concerned by the fact that you are bothered by the sentence added to footnote 4 on page 7 of the third draft of the proposed opinion in this case. Because the vote is so close and because we always like to have a Court opinion, rather than a plurality one, you are, in a sense, "dealing from strength."

I added the final sentence to the footnote because of footnote 1 of Byron's dissent. It was not intended to "slip somethin in," but was proposed in order to clarify that, under the rationale in this case, the ruling in Edwards is to be applied to all convictions that were not final at the time Edwards was decided, regardless of whether the conviction is challenged on direct appeal or in a collateral proceeding. If an Edwards violation occurred before Edwards was decided and the defendant raised the Edwards issue on direct appeal after Edwards was decided, the appellate court would be bound to apply the ruling in Edwards. This is our narrow holding in Shea. However, if the state appellate court then erroneously rejects the Edwards claim, the defendant ought to be able subsequently to raise his claim on federal habeas.

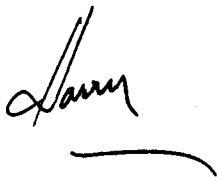
Indeed, I read your concurring opinion in Hankerson v. North Carolina as being entirely consistent with this view. In Hankerson, you describe John Harlan's view as contemplating "that courts apply a new rule retroactively in cases still pending on direct review, whereas cases on collateral review ordinarily would be considered in light of the rule as it stood when the conviction became final." 432 U.S., at 248. My point is simply that the ruling in Edwards should be applicable on collateral review of convictions that became final after Edwards was decided. In such cases, "the rule as it stood when the conviction became final" is the rule in Edwards.

I therefore think it desirable to include the additional sentence in note 4 and thereby to avoid the possible need for still a third decision by this Court clarifying the retroactive applicability of the ruling in Edwards. Would you be satisfied if I amended the addition to note 4 to read as follows:

> "Of course, under the rationale of our decision today, the question is whether the conviction became final before Edwards was decided; if it did not, the ruling in Edwards is applicable, even on collateral review. This is consistent with Justice Harlan's view that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final. See Mackey v. United States, 401 U.S. 667, 689 (1971) (Harlan, J., concurring). See also Hankerson v. North Carolina, 432 U.S. 233, 248 (1977) (POWELL, J., concurring)."

I prefer my original form, but if this change would satisfy you, I would be glad to consider it.

Sincerely,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 2, 1985

Re: No. 82-5920, Shea v. Louisiana

Dear Lewis:

Thank you for your letter of December 31. While, as I said before, I prefer my original form, I am willing to adopt your suggested version of footnote four in substance. This is going to the printer today and should be around shortly.

Sincerely,

Harry

Justice Powell

pp. 7+8

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JAN 0 2 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[January ——, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney. This case presents the issue whether that ruling is applicable to a case pending on direct appeal in a state court at the time *Edwards* was decided.

I

There is no dispute as to the facts. Petitioner Kevin Michael Shea was charged in Louisiana with two counts of armed robbery. He was arrested on July 2, 1979, and was taken to the police station at Shreveport. There he was turned over to Detectives Smith and Snell for questioning. His so-called *Miranda* rights, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), were read to him, and he signed a standard *Miranda* card. He said, however, that he did not wish to make any statement until he saw a lawyer. The interview thereupon was terminated.

The following afternoon, July 3, before petitioner had been in communication with any lawyer, Detective Snell returned. He informed petitioner that he was to be transferred from the city jail to the parish jail. Without inquiring of petitioner whether he had spoken with an attorney or whether

P. 8

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JAN 29 1985

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[January ——, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney. This case presents the issue whether that ruling is applicable to a case pending on direct appeal in a state court at the time *Edwards* was decided.

I

There is no dispute as to the facts. Petitioner Kevin Michael Shea was charged in Louisiana with two counts of armed robbery. He was arrested on July 2, 1979, and was taken to the police station at Shreveport. There he was turned over to Detectives Smith and Snell for questioning. His so-called *Miranda* rights, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), were read to him, and he signed a standard *Miranda* card. He said, however, that he did not wish to make any statement until he saw a lawyer. The interview thereupon was terminated.

The following afternoon, July 3, before petitioner had been in communication with any lawyer, Detective Snell returned. He informed petitioner that he was to be transferred from the city jail to the parish jail. Without inquiring of petitioner whether he had spoken with an attorney or whether

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 1, 1985

Memorandum to the Conference

Re: No. 82-5920, Shea v. Louisiana

In view of the footnote added by Bill Rehnquist to his dissent, I am now omitting the words "contrary to the implication of Justice Rehnquist's dissent" that appeared in my footnote 4 on page 8 of the opinion.

HAB.

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 21, 1985

C O R R E C T E D C O P Y (one change on p. 2)

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 82-5920, Shea v. Louisiana

There are five cases held for Shea. They are:

1. No. 83-654, Texas v. Wilkerson. After being taken into custody in 1979, respondent was given Miranda warnings and expressed his desire not to talk to the police. Respondent was represented by counsel at that point, and counsel indicated to the police that respondent was not to be questioned in his absence. Later, in the absence of respondent's counsel, the police initiated further interrogation. Respondent confessed, but asked to use the restroom before his confession was reduced to writing and signed. Accompanied by a detective, respondent met his attorney in the hall, apparently by accident. The attorney told respondent not to confess, but respondent told the attorney that he had to. The trial court refused to suppress the written confession, and respondent was convicted of murder and sentenced to death. The Texas Court of Criminal Appeals reversed. It noted that, after invoking his right to counsel, respondent was subjected to further interrogation in the absence of his lawyer, and there was no evidence that respondent initiated the further interrogation. Petitioner Texas contends (1) that Edwards should not have been applied retroactively on direct appeal; (2) that respondent waived his Miranda rights before confessing; and (3) that Miranda and Edwards should be overruled or modified. Shea v. Louisiana forecloses petitioner's first contention and petitioner's second contention is fact-bound. I shall vote to deny.

2. No. 83-1747, Tate v. Rose. Petitioner is the Superintendent of the Chillicothe Correctional Institute in Ohio. Respondent, a prisoner in petitioner's custody, was convicted of murder and received a sentence of 15 years to life. At the trial, the prosecutor introduced statements that respondent made in response to a police officer's renewed questioning undertaken after respondent had invoked his right to silence and to the presence of an attorney. Petitioner concedes that these statements were elicited in violation of Edwards, decided subsequently. The Ohio Court of Appeals affirmed the conviction. The Ohio Supreme Court rendered the customary Ohio dismissal of respondent's direct appeal on March 18, 1981.

December 14, 1984

PERSONAL

83-5920 Shea v. Louisiana

Dear Chief, Bill and Sandra:

I have joined Harry's opinion as it comes close to adopting John Harlan's view of retroactivity.

Each of you voted to affirm the Louisiana Supreme Court even though this case was pending on direct appeal in state court at the time Edwards was decided. I understand your preference for a rule that probably would not apply any decision retroactively - possibly with a Gideon type exception.

My purpose in writing, however, is to suggest that I doubt there will be a better opportunity than this case to achieve 50% of what I understand you would like. The Harlan view would extend retroactivity normally to cases pending on direct review in state court, but only in the most exceptional case would a decision be applied retroactively to a case on habeas review of a state court decision that had become final.

A high percentage of the cases (I would guess) that present cases of retroactivity are habeas corpus petitions. These, particularly the repetitive ones, present one of the more serious problems of our dual system of courts. I therefore feel rather strongly that adoption of the Harlan view would represent significant progress.

As a footnote, I would be surprised if Harry wins a Court without support from one or more of you.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 14, 1984

82-5920 Shea v. Louisiana

Dear Harry:

Please join me.

Sincerely,

Lewis

Justice Blackmun

lfp/ss

cc: The Conference

December 26, 1984

82-5920 Shea v. Louisiana

Dear Harry:

In the third draft of your opinion, circulated today, you added the following sentence to note 4, p. 7:

> "Of course, under our decision today, the ruling in Edwards is to be applied in collateral review of convictions that were not final at the time Edwards was decided".

I could not have joined your opinion with that sentence in it, as it is not in accord with John Harlan's view that I have accepted consistently since my concurring opinion in Hankerson v. North Carolina. Your opinion in Johnson adopted Harlan's view with respect to cases pending on direct review, and I was happy to join you. It expressed no view as to cases on collateral review. Nor does this case involve review of a federal habeas corpus decision. I therefore hope you will be disposed simply to restore note 4 to the language of your first and second drafts.

The sentence you have added is, of course, consistent with a number of prior decisions. But it is unnecessary in this case to reaffirm them as the only issue before the Court involves direct appeal.

Sincerely,

Justice Blackmun

lfp/ss

P.S. I hope you and Dottie had a pleasant Christmas with Sally and her family in Atlanta. We returned from Richmond late Christmas Day.

December 31, 1984

82-5920, Shea v. Louisiana

Dear Harry:

Having reread Justice Harlan's opinion in Mackey v. United States and my concurrences in Hankerson v. North Carolina and Solem v. Stumes, I think you are right that the substance of your change of footnote 4 is consistent with John Harlan's views that I have accepted.

I am concerned, however, that your note, both in its original form and in the suggested modification in your letter of December 28, 1984, does not make clear the reason why Edwards is to be applied retroactively to a narrow class of habeas cases, i. e., those in which the original conviction occurred prior to Edwards, but direct review of which was not complete until after this decision. See Mackey v. United States, 401 U.S. 667, 686 (Harlan, J., concurring). It ensures in particular that if appellate courts on direct review erroneously fail to follow our holding in Shea, courts on collateral review will rectify the error.

I suggest the following language for footnote 4:

> "Of course, under the rationale of our decision today, the question is whether the conviction became final before Edwards was decided. As we hold, if a case was pending on direct review at the time Edwards was decided, the appellate court must give retroactive effect to Edwards, subject, of course, to established principles of waiver and harmless error. If it does not, then a court conducting collateral review of such a conviction should rectify the error and apply Edwards retroactively. This is consistent with Justice Harlan's view that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final. See Mackey v. United States, 401 U.S. 667,689 (1971) (Harlan, J., concurring). See also Hankerson v. North

Carolina, 432 U.S. 233, 248 (1977) (Powell, J., concurring)."

I agree that it is desirable to avoid the possibility of this Court having to decide yet another case on the retroactive application of Edwards. Perhaps something along the lines of the above suggestion would be clarifying. I will thus stay with my join.

Sincerely,

Justice Blackmun

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: 1/9/85

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[January ——, 1985]

JUSTICE REHNQUIST, dissenting.

I would be willing to join the result reached by the Court in this case if the majority were willing to adopt both aspects of the approach to retroactivity propounded by Justice Harlan in his concurrence in *Mackey* v. *United States*, 401 U. S. 667 (1971). Under his approach, new constitutional rules prescribed by this Court for the conduct of criminal prosecutions would apply retroactively to all cases on direct appeal at the time the new rule was announced and, with narrow exceptions, would not apply in collateral proceedings challenging convictions that had become final before the new rule was announced. I will not attempt to summarize the justifications for this approach so thoughtfully articulated by Justice Harlan.

Because the Court apparently is not willing to adopt in entirety Justice Harlan's bright-line distinction between direct appeals and collateral attacks, I join JUSTICE WHITE's dissent, agreeing with him that there is little logic to the Court's analysis and its rejection of the sound reasons given in *Solem* v. *Stumes*, —— U. S. —— (1984), for making *Edwards* v. *Arizona*, 451 U. S. 477 (1981), nonretroactive.

Footnote Added

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: 2/4/85

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-5920

KEVIN MICHAEL SHEA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[February ——, 1985]

JUSTICE REHNQUIST, dissenting.

I would be willing to join the result reached by the Court in this case if the majority were willing to adopt both aspects of the approach to retroactivity propounded by Justice Harlan in his concurrence in *Mackey* v. *United States*, 401 U. S. 667, 675 (1971). Under his approach, new constitutional rules prescribed by this Court for the conduct of criminal prosecutions would apply retroactively to all cases on direct appeal at the time the new rule was announced and, with narrow exceptions, would not apply in collateral proceedings challenging convictions that had become final before the new rule was announced. I will not attempt to summarize the justifications for this approach so thoughtfully articulated by Justice Harlan.

Because the Court apparently is not willing to adopt in entirety Justice Harlan's bright-line distinction between direct appeals and collateral attacks, I join JUSTICE WHITE's dissent, agreeing with him that there is little logic to the Court's analysis and its rejection of the sound reasons given in *Solem* v. *Stumes*, 465 U. S. —— (1984), for making *Edwards* v. *Arizona*, 451 U. S. 477 (1981), nonretroactive.*

*While the results reached by the Court in this case and in *Solem* happen to be the same as they would have been under Justice Harlan's approach, the Court's analysis in *Solem* is not the same as his approach. Only JUSTICE POWELL, concurring in the judgment in *Solem*, followed the *Mackey* concurrence. The rationale of Justice Harlan's approach requires

(2)

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Supreme Court of the United States
Washington, D. C. 20543

December 14, 1984

Re: 82-5920 - Shea v. Louisiana

Dear Harry:

Please join me.

Respectfully,

Justice Blackmun

Copies to the Conference

'84 DEC 14 P1:09

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 13, 1984

No. 82-5920 Shea v. Louisiana

Dear Harry,

I will await the dissent in this case.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 20, 1984

No. 82-5920 Shea v. Louisiana

Dear Byron,

Please join me in your dissent.

Sincerely,

Sandra

Justice White

Copies to the Conference