Retroactivity of Constitutional Decisions - Criminal Procedure

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Retroactivity of Constitutional Decisions—Criminal Procedure—The United States Supreme Court has held that retroactive effect will not be given to a constitutional decision where the newly established doctrine was neither judicially foreshadowed nor enhances the accuracy of criminal trials.


On September 27, 1973, Norman Stumes was arrested in Green Bay, Wisconsin, on pending perjury and felony check charges. At the time of his arrest, Stumes was a suspect in the death of Joyce Hoff in Sioux Falls, South Dakota. Stumes spoke with his Sioux Falls attorney the next day by phone, and was advised not to make any statements before returning to South Dakota. Three Sioux Falls police officers, who went to Green Bay to bring him back, spoke with him on the morning of October 1. After they read him his Miranda rights, Stumes indicated he understood them and would not object to speaking to the officers without his attorney being present. Questioning ceased when he refused to say whether he would take a lie detector test without talking to his attorney first. Stumes was questioned again in the afternoon without renewal of his Miranda warnings. He admitted Hoff's death had been accidental, but then refused to talk any further until he had spoken with his attorney. The next day, when the 500 mile trip to Sioux Falls began, Stumes, after receiving a second Miranda warning, indicated that he would be willing to talk. Stumes recounted striking and strangling Hoff after she stated that she would tell

2. Id. at 1339. On September 17, 1973, the victim was discovered in the bedroom of her apartment. Death was attributed to lack of oxygen, either by anoxia or asphyxiation. Brief for Petitioner at 3-4, Solem v. Stumes, 104 S. Ct. 1338 (1984).
3. 104 S. Ct. at 1339.
6. 104 S. Ct. at 1340.
7. Id.
8. Id.
9. Id. Stumes admitted he had been in Hoff's apartment the night of the killing and that they had had intercourse, but he denied having anything to do with her death. Id.
10. Id.
someone that she and Stumes had slept together. He also agreed to give a statement to the police when they reached Sioux Falls, saying he did not care what his attorney said, he would talk to anybody he wanted to.

The trial court refused to suppress any of Stumes' statements to the police and a jury subsequently convicted Stumes of first-degree manslaughter and sentenced him to life imprisonment. On direct appeal, the South Dakota Supreme Court automatically affirmed the conviction after the trial court, on remand, determined that the statements were made voluntarily. A write of habeas corpus was denied by the federal district court after an evidentiary hearing. While Stumes' appeal was pending, the United States Supreme Court held, in Edwards v. Arizona, that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him. The Court of Appeals for the Eighth Circuit applied Edwards and found that the police acted unconstitutionally by twice renewing interrogation after Stumes had invoked the right to counsel. The Supreme Court granted certiorari to consider whether Edwards v. Arizona should be applied

11. Id. Stumes confessed to killing Hoff after being urged by one of the police officers to "get it off his chest." Id.
12. Id. After Stumes had been placed in his cell in Sioux Falls, he asked for one of the officers who had accompanied him from Green Bay, and then told him that Joyce Hoff's death had been accidental and that he was not a vicious killer. Brief for Petitioner at 29-30.
13. 104 S. Ct. at 1340.
15. 104 S. Ct. at 1340.
16. Id. See 28 U.S.C. § 2254 (1976). The statute provides for writ of habeas corpus by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States. Id.
17. 104 S. Ct. at 1340. The district court concluded that Stumes had knowingly, intelligently and voluntarily waived his right to counsel. Id. The court found that the afternoon session of questioning was unconstitutional because the officers had failed to reinform Stumes of his rights. It decided, however, that the admission of that evidence was harmless beyond a reasonable doubt. Id. at 1340 n.1. See Stumes v. Solem, 511 F. Supp. 1312 (1981).
20. 104 S. Ct. at 1340-41. The court found that Stumes' agreement to speak when the police resumed questioning was not a valid waiver. It also found that his comment that the taking of a human life was useless did not constitute an initiation of a new conversation about the homicide because he had been interrogated on and off during the whole trip, with the incriminating statement being prompted by the officer's invitation to get it off his chest. The court did not consider whether Edwards should be applied retroactively. Id. at 1341 n.2.
The opinion of the Court was delivered by Justice White. He noted that as a rule judicial opinions apply "retroactively," but nevertheless held that the Court of Appeals had erred in applying *Edwards* to Stumes' case. Relying on the basic principles of retroactivity for criminal cases established in cases such as *Linkletter v. Walker*, *Tehan v. United States ex rel. Shott*, *Johnson v. New Jersey*, and *Stovall v. Denno*, the majority indicated there were three criteria to consider in determining if new constitutional rules should be applied retroactively. First, courts must look at the purpose to be served by the new standard. Second, they must determine the extent of the reliance by law enforcement authorities on the old standard. Finally, they must examine the effect of the new rule would have on the administration of justice.

With regard to the first factor, Justice White noted that complete retroactive effect would be most appropriate where the new rule enhanced the accuracy of the criminal trial. He found, however, that the *Edwards* rule did not meet this test, because it had only a tangential relation to truthfinding at trial. According to Justice White, there was nothing to suggest that the suppression of statements taken after a suspect has requested counsel will automatically improve the factfinding process. In his opinion, the *Ed-
wards rule was merely a protective measure designed to safeguard pre-existing rights.36

In considering the reliance factor, Justice White noted that even though Edwards did not overrule any prior decision or transform standard practice, it did establish a new bright-line rule that had not been clearly foreshadowed by earlier cases.37 He explained that police officers could not have anticipated the Edwards rule because prior to Edwards the law was unsettled with regard to when police officers could resume questioning of a suspect who had requested counsel.38 Because of this, Justice White concluded that law enforcement officials were justified in relying on the law as it existed prior to the Edwards decision.39

In addressing the third and final factor, Justice White determined that retroactive application of the Edwards rule would disrupt the administration of justice, it would require new investigations and possible retrials, which would be hampered by problems of lost evidence, faulty memory, and missing witnesses.40

By thus weighing the factors listed in the Linkletter, Tehan, Johnson, and Stovall cases, Justice White was able to conclude that the Edwards rule should not be applied retroactively.41

In a concurring opinion, Justice Powell maintained that a new

36. Id. at 1343. Justice White noted that although Edwards is not entirely unrelated to the accuracy of criminal trials, it is not the sort of decision that should be applied retroactively because it does not go to the heart of the truthfinding function. Id.

37. Id. at 1343-45. Justice White explained that prior to Edwards, the issue of whether a waiver of the right to counsel was knowing, voluntary and intelligent was decided on a case by case basis, which resulted in disagreement among the lower courts as to the state of the law. Edwards, however, established a per se approach: the suspect had to initiate subsequent conversation. In effect, Edwards had laid down a new guideline for the implementation of Miranda v. Arizona, which had not been fully anticipated by that decision. Id. at 1343-45.

38. Id. at 1344. See, e.g., United States v. Hernandez, 574 F.2d 1362, 1370 n.16 (5th Cir. 1978); United States v. Herman, 544 F.2d 791, 796 n.8 (5th Cir. 1977). Some courts prohibited resumption of questioning unless initiated by the suspect. See e.g., United States v. Womack, 542 F.2d 1047, 1050-51 (9th Cir. 1976); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969). On the other hand, a number of courts allowed renewed interrogation after a request for counsel. See, e.g., White v. Finkbeiner, 611 F.2d 186, 191 (7th Cir. 1979), vacated, 451 U.S. 1013 (1981); Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979); United States v. Rodriguez-Gastelum, 569 F.2d 482, 488 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978); Hill v. Whealen, 490 F.2d 629 (6th Cir. 1974).

39. 104 S. Ct. at 1343-45.

40. Id. at 1345.

41. Id. Justice White limited the holding in Stumes to mean nonretroactivity in collateral review of a final conviction, leaving open the question of where the line should be drawn in other circumstances. Id.
rule of constitutional law should be applied only when the court is reviewing convictions that were not yet final when the new rule was announced. He indicated that this approach was consistent with the purpose of habeas review, which requires the court to determine if the conviction rested upon the correct application of the law in effect at the time of the conviction. With this in mind, he determined that the retroactive application of new constitutional rules did little to advance the purposes of collateral review on habeas. Justice Powell added that the costs imposed upon the state by retroactive application of new rules of constitutional law far outweighed the benefit of their application; therefore, he found it unnecessary to consider the Linkletter/Stovall factors.

Justice Stevens, writing in dissent, stated that there was no basis for the majority's finding that Edwards established a new rule of law. He believed it was well settled, prior to Edwards, that the police may not interrogate a prisoner after he had asked for the assistance of counsel. In Justice Stevens' opinion, the Edwards decision simply restated a rule that had been part of the law since Miranda v. Arizona was decided. Justice Stevens also noted that Edwards itself made it clear that the rule reconfirmed in that case had been part of the law ever since Miranda was decided.

Justice Stevens also took issue with the majority's analysis of retroactivity, criticizing the majority's test because it denied retroactive application to cases that allegedly settled previously unsettled questions of law. According to Justice Stevens, such a test was, in reality, no test at all because if the law had to be com-

42. Id. at 1347 (Powell, J., concurring) (citing Hankerson v. North Carolina, 432 U.S. 233, 246-48 (1977) (Harlan, J., concurring in the judgment)).
44. 104 S. Ct. at 1347 (Powell, J., concurring).
45. Id.
46. Id. at 1348 (Stevens, J., dissenting). Justices Brennan and Marshall joined Justice Stevens in dissent. Id.
47. See id. at 1348-51 (Stevens, J., dissenting).
48. Id. at 1348.
50. 104 S. Ct. at 1351 (Stevens, J., dissenting). According to Justice Stevens, the Edwards rule was at most a modest extension of existing doctrine. Id. at 1353.
51. Id. at 1350. (Stevens, J., dissenting). The Edwards opinion expressly stated that it was inconsistent with Miranda and its progeny for the authorities to reinterrogate an accused in custody, if he has clearly asserted his right to counsel. Id. See Edwards v. Arizona, 451 U.S. at 484-85.
52. 104 S. Ct. at 1351-54. (Stevens, J., dissenting).
53. See id. at 1354 (Stevens, J., dissenting).
pletely settled before a new case could be applied retroactively, then no question of retroactivity could ever arise.  

The decision by the Court not to apply the Edwards rule retroactively was predictable in light of a series of cases decided since 1965. Prior to that time, both the common-law and the constitutional decisions of the Supreme Court recognized a general rule of retroactivity. But in 1965, the Court decided the landmark case of Linkletter v. Walker, and declined to apply retroactively the rule established in Mapp v. Ohio. In reaching this conclusion, the Court discussed the traditional, common-law, Blackstonian view, in which all overruling decisions were applied retroactively, and the somewhat newer Austinian view, which allowed for a prospective application only. After analyzing these competing conceptual and jurisprudential theories, the Linkletter Court determined that the Constitution neither requires nor prohibits retroactive application of a judicial decision. According to the Court, such a decision is a matter of judicial policy, requiring the court to weigh the bene-

54. Id. at 1354 (Stevens, J., dissenting).
57. 381 U.S. 618, 639 (1965). In Linkletter, the Court denied relief on collateral attack, but upheld the application of Mapp to all cases pending when Mapp was decided. It was also applied to the litigants at bar. Id. at 626.
58. 367 U.S. 643 (1961). In Mapp, evidence obtained through an unreasonable search and seizure was excluded from state criminal proceedings. Id. at 660. See Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650 (1962), for a pre-Linkletter look at the retroactivity of Mapp.
59. 381 U.S. at 622-23. The Blackstonian theory made all overruling decisions retroactive as well as prospective. This view resulted from the notion that the court is merely a discoverer of the law and not the maker, so in overruling the decision, the court discovers what the law really was and considers it as if it always had been. Id. See J. Gray, Nature and Sources of the Law 222 (1st ed. 1909); Shulman, Retroactive Legislation, in 13 Encyclopaedia of the Social Sciences 355, 356 (1934).
60. 381 U.S. at 624. Austin maintained that cases could be applied prospectively only. This was based on the theory that judges do more than discover the law, but also "fill in" the law. He believed that although an overruled case had been wrongly decided, the overruling decision did not erase cases decided under it. Id. See Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940).
61. 381 U.S. at 629.
fits against the detriments in each case.\textsuperscript{62} It identified as relevant to the determination of retroactivity the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard the rule.\textsuperscript{63} Applying these criteria, the \textit{Linkletter} Court found that the deterrent purpose of \textit{Mapp} would not be served by a retroactive application.\textsuperscript{64}

The following year, in \textit{Tehan v. United States ex rel. Shott},\textsuperscript{65} the Court declined to give retroactive effect to \textit{Griffin v. California},\textsuperscript{66} where the Court prohibited prosecutors and judges from commenting adversely on a defendant's failure to testify.\textsuperscript{67} Using the determinative factors announced in \textit{Linkletter}, the \textit{Tehan} Court emphasized the reliance of judges and prosecutors, downplayed the rather limited effect a retroactive application would have on the administration of justice and concluded that the fifth amendment privilege against self-incrimination did not go to the heart of the truthfinding process.\textsuperscript{68}

After \textit{Linkletter} and \textit{Tehan}, it appeared the Court would apply the principle that newly declared constitutional rules of criminal procedure would at least be applied retroactively to cases still on direct review.\textsuperscript{69} However, in \textit{Johnson v. New Jersey},\textsuperscript{70} decided the same year as \textit{Tehan}, and in \textit{Stovall v. Denno},\textsuperscript{71} decided the next year, the Court abandoned that principle and conceded that application of its pertinent criteria did not produce a clear result.\textsuperscript{72} The Court found it necessary to balance the determinative factors and admitted that it was dealing with a question of probabilities in terms of whether the truthfinding process was affected.\textsuperscript{73} The \textit{Johnson} Court, facing the question of whether to apply \textit{Escobedo v. Illinois}\textsuperscript{74} and \textit{Miranda v. Arizona}\textsuperscript{75} retroactively, emphasized

\begin{footnotes}
62. \textit{Id.}
63. \textit{Id.}
64. \textit{Id.} at 637.
66. 308 U.S. 609 (1965). \textit{Griffin}, like \textit{Mapp}, had already been applied to cases on direct review without discussion of retroactivity. 382 U.S. at 409 n.3.
67. 382 U.S. at 413-14.
68. \textit{Id.} at 413-18.
71. 388 U.S. 293 (1967).
72. 384 U.S. at 728-29.
73. \textit{Id.}
74. 378 U.S. 478 (1964). \textit{Escobedo} held that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into custody, the police carry out a process of interroga-
the disruptive effect retroactive application would have on the administration of criminal laws and found this, plus the reliance law enforcement officials had placed on existing interrogation practices, controlling over the purpose of the new rule. The Court in Johnson abandoned any distinction between cases on direct review and those on collateral review, finding the reliance and effect factors sufficiently strong to warrant application of Escobedo and Miranda only to trials begun after those decisions were announced.

The next case considered by the Court was Stovall v. Denno, where for the first time, the Court recited the following considerations as being pertinent to the retroactivity/prospectivity question: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. The Court also reiterated that each constitutional rule of criminal procedure has its own distinct functions, its own background as precedent, and its own impact on the administration of justice, the combination of which vary with the dictate involved. Because of the balancing process involved, different degrees of retroactivity might be called for in different cases. So, although the exclusionary rules fashioned by United States v. Wade and Gilbert v. California were aimed at minimizing a miscarriage of justice at trial by preventing unfairness at the pretrial hearing, the Stovall Court found the reliance and effect factors more important and denied retroactive applica-

75. 384 U.S. 436 (1966). Miranda laid down the governing principle that, as a constitutional prerequisite to the admissibility of such statements, the suspect must, in the absence of a clear, intelligent waiver of the constitutional rights involved, be warned before being questioned, that he has a right to remain silent, that he has the right to the presence of an attorney, either retained or appointed, and that any statement he does make may be used as evidence against him. Id. at 467-73.


77. Id. at 732.

78. 388 U.S. at 297.


82. 388 U.S. 263 (1967).
tion. In doing so, it modified Johnson by focusing on the time of the violation, rather than the commencement of the trial, in determining the cases to which the Wade/Gilbert requirement of counsel at a pre-trial hearing would apply.

The Stovall Court also recognized the apparent inequities involved in applying the new rule to the parties involved, but not to those similarly situated. It considered the fact that the parties involved were by chance beneficiaries of the new rule as insignificant compared to its efforts to adhere to sound decisionmaking. Such selective awards of retroactivity have served as a main point of contention between members of the Court since the days of Linkletter. Uniformly, the dissenter have asserted that, at the least, all defendants whose cases were still on direct appeal when the law-changing decision was made, should be entitled to retroactive application. But the balancing involved in the application of the Stovall factors has, instead, led to inconsistent results. At one end of the spectrum, the Court has rather consistently given complete retroactive effect to a new constitutional rule where it is designed to enhance the accuracy of criminal trials. Conversely, the Court

83. Stovall, 388 U.S. at 298-301. The Stovall case was argued and announced at the same time as Wade and Gilbert.

84. 388 U.S. at 296.


has applied some standards only to future cases, with the benefit of the new rule not even going to the parties before the Court. Finally, there is the intermediate approach seen in Stovall, under which the Court applies the change in the law to all future litigants, along with the parties at bar.

Desist v. United States, decided in 1969, focused on another problem arising out of the retroactivity doctrine. There the Court addressed the question of whether Katz v. United States, which had eliminated the need to show a physical trespass in order to establish a fourth amendment search-and-seizure violation, should be retroactively applied. The Court concluded that even though Katz may have been foreshadowed in prior decisions, it was nonetheless a clear break with the past, and, therefore, a retroactivity analysis was in order. The Desist Court also enunciated a hierarchy among the Stovall factors, claiming the most important factor to be the purpose to be served by the new constitutional rule. The Court reasoned that prospectivity is supported in decisions that amplify the evidentiary exclusionary rule, since exclusionary rules generally are procedural weapons with no bearing on guilt and the fairness of the trial. Thus, Desist brought into focus the threshold question of whether there was a sufficient change in the law to present a retroactivity problem and also gave some indication as to how the Court was moving in cases dealing with the fourth and fifth amendment exclusionary rules.

The exclusionary rule distinction was further refined in United States v. Peltier, where two propositions were established. First, Peltier reiterated that retroactive application of a new constitutional rule is appropriate where its major purpose goes to the truth-finding function at trial, and so raises serious questions

92. 394 U.S. at 248.
94. 394 U.S. at 249-50.
95. 422 U.S. 531 (1975).
about the accuracy of a guilty verdict. Second, the *Peltier* Court found that new extensions of the exclusionary rule do not serve that purpose and concluded, therefore, that they should not be applied retroactively.

An examination of the Court's past decisions involving the retroactivity question reveals discontent with the treatment of this issue. Commentators, along with dissenting members of the Supreme Court, have repeatedly taken issue with the Court's inconsistent application of the *Stovall* factors. Professor Beytagh has maintained that the inconsistency in application results from the Court's erratic treatment of retroactivity/prospectivity questions. Beytagh notes that, at times the Court gives plenary consideration of the question to a case coming some time after the law-making decision, while at other times the Court has decided the matter in a summary fashion, writing only a "cryptic per curiam opinion," while at still other times, the Court has announced its resolution of the retroactivity question in the very

96. *Id.* at 535 (citing Williams v. United States, 401 U.S. 646, 653 (1971)).

97. 422 U.S. at 535. The Court noted that "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule ... the Court has concluded that any such new constitutional principle would be awarded only prospective application." (footnote omitted). *Id.* Furthermore, the Court reasoned that the exclusionary rule serves two purposes: to protect judicial integrity and to deter unconstitutional police conduct; if the police acted in good faith in obtaining the evidence, those arguments lose their force. *Id.* at 537-42. See, e.g., Hill v. California, 401 U.S. 797 (1971); Williams v. United States, 401 U.S. 646 (1971); Jenkins v. Delaware, 395 U.S. 213 (1969); Desist v. United States, 394 U.S. 244 (1969); Fuller v. Alaska, 393 U.S. 80 (1968); Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966).

Before *Peltier*, courts generally assumed that if evidence was ruled to have been unconstitutionally obtained, it would be excluded as a matter of course. See Recent Development, *Retroactivity and the Exclusionary Rule: When Do the Policies Underlying the Exclusionary Rule Warrant Its Retroactive Application?—United States v. Peltier*, 13 AM. CRIM. LAW REV. 317, 323 (1975).

98. See supra notes 86-89 and accompanying text.

99. See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1604-05 (1975), where the author states:

The Court has also been criticized for inconsistent application of its stated criteria . . . . This criticism appears to be justified. The Court has never provided the lower courts or practitioners with a thoughtful evaluation of the relative significance of the criteria that compose the oft-invoked three-pronged test.


100. Beytagh, supra note 99, at 1605.
same case in which the new constitutional rule is announced.\(^{101}\) This off-hand method of approaching retroactivity, as well as the manner in which the Court applies the three-pronged \textit{Stovall} test to the facts of each case, has led to a result-oriented approach.\(^{102}\) This, in turn, provides little guidance for lower courts, which must struggle along as best they can, without workable guidelines necessary for consistent decisionmaking.

The present method of analyzing a retroactivity question is further confused by consideration of the threshold issue of what constitutes a "law-changing decision," one that properly presents a retroactivity/prospectivity question.\(^{103}\) When confronted with landmark decisions that overrule established precedents, these cases clearly qualify for the retroactivity analysis. Conversely, there are cases that simply apply existing precedents to particular and somewhat different facts. It is between these two extremes that problems have arisen, in spite of the suggestion by the Court in \textit{Desist} that retroactivity analysis is appropriate wherever the new rule involved a "clear break with the past."\(^{104}\)

The disagreement among the Justices in \textit{Peltier} and, more recently, in \textit{United States v. Johnson}, \(^{105}\) as well as the present case indicates that this problem has yet to be resolved. Justice Stevens, for example, in his \textit{Stumes} dissent, pointed out that perhaps the retroactivity question should not have been addressed at all.\(^{106}\) In \textit{Stumes}, the Court gave great weight to the fact that the \textit{Edwards} decision established a "new rule."\(^{107}\) Whether a new rule has been declared or not is, of course, the threshold question, with this being a matter of weighing the advantages and disadvantages.\(^{108}\) Though the \textit{Stumes} Court treated \textit{Edwards} as creating a new rule, the court engaged in no explanation of the rule, but merely assumed \textit{Edwards} to have such an effect because prior case law was

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101. \textit{Id.} Professor Beytagh advocates a new procedural mechanism for dealing with the retroactivity question. \textit{Id.} at 1619-25. \textit{See also} Hasler, \textit{Retroactivity Rethought: The Hidden Costs}, 24 Me. L. Rev. 1, 20-23 (1972) ("The methods by which the retroactivity decisions are selected for review [and announced] foster further uncertainties [sic].").

102. As early as \textit{Johnson v. New Jersey}, 384 U.S. at 728-29, the Court admitted that while the determinative criteria seemed clear, how they were applied was a question of probabilities, a matter of degrees.


104. 394 U.S. at 248.


106. 104 S. Ct. at 1348 (Stevens, J., dissenting).

107. \textit{Id.} at 1343-44.

108. \textit{See supra} note 92 and accompanying text.
unsettled in some of the lower courts.\textsuperscript{109} As pointed out by Justice Stevens, this method of defining a new rule was unprecedented.\textsuperscript{110} In *Hanover Shoe, Inc., v. United Shoe Machinery Corp.*,\textsuperscript{111} for example, the Court held that its endorsement of a rule of antitrust law that was previously followed by only the Second Circuit did not constitute a new rule for retroactivity purposes. There the Court looked for an abrupt and fundamental shift in doctrine, but found only an extension of doctrines which had been growing and developing over the years.\textsuperscript{112} Recently, in *United States v. Johnson*, the Court considered whether a holding that the fourth amendment prohibits warrantless arrests of persons in their homes was a new rule of law.\textsuperscript{113} In holding that it was not, the Court looked for a sharp break and noted that a new rule would be recognized only when a decision explicitly overrules a past precedent of the Court, disapproves a practice that the Court arguably has sanctioned in past cases, or overturns a longstanding and widespread practice to which this Court has not spoken but which a nearly unanimous body of lower court authority has expressly approved.\textsuperscript{114} As discussed above, the *Stumes* Court has downplayed the fact that *Edwards* was not a clear break and instead concentrated on the fact that the law in the lower courts was unsettled prior to *Edwards*.\textsuperscript{115}

The wisdom of the Court's most recent vacillation in approach is open to question. As the Court noted only two years earlier in *Johnson*, not applying a rule retroactively because the law was unsettled prior to the ruling would be absurd, since cases involving clear, pre-existing guidelines raise no real problems of retroactivity.\textsuperscript{116} Again, the Court's application of the rule tends to illustrate a result-oriented approach.

Perhaps the most important issue raised by the Court's current approach to retroactivity is that it produces inequality of treat-

\begin{itemize}
  \item 109. See supra note 38 and accompanying text.
  \item 110. 104 S. Ct. at 1352 (Stevens, J., dissenting).
  \item 111. 392 U.S. 481 (1968).
  \item 112. Id. at 497-99.
  \item 113. United States v. Johnson, 457 U.S. 537. The *Stumes* majority distinguished this recent case from the *Stumes* case, as *Johnson* involved the fourth amendment, was not controlled by prior precedent and did not arise on collateral review. 104 S. Ct. at 1341 n.3. See generally Note, Retroactivity and the Exclusionary Rule: A Unifying Approach, 97 Harv. L. Rev. 961 (1984); Note, United States v. Johnson: Reformulating the Retroactivity Doctrine, 69 Cornell L. Rev. 166 (1983).
  \item 114. 457 U.S. at 542-48, 551.
  \item 115. 104 S. Ct. at 1343-44.
  \item 116. 457 U.S. at 559-60.
\end{itemize}
ment for individuals similarly situated.\(^\text{117}\) It was the Stovall Court that stated that defendants in law-changing decisions were "chance beneficiaries," with the new rules applying to them because of the Article III case-or-controversy requirement and because sound decisionmaking forbade allowing a new rule to stand as mere dictum.\(^\text{118}\) Despite criticism by other Justices in various cases, and despite Justice Douglas' repeated disagreement with the Stovall language, the Court has consistently adhered to the "chance beneficiary approach."\(^\text{119}\) At least one commentator has found this approach to be lacking, asserting that the only way for the Court to avoid unequal treatment would be to adopt either full retroactivity or pure prospectivity.\(^\text{120}\) The same writer endorses pure prospectivity, which would provide the consistency the lower courts have been looking for as well as provide for the equality of treatment that is lacking under the current approach.\(^\text{121}\)

When considered as a whole, the entire retroactivity issue, from the threshold issue of whether a law-changing decision has been presented to the dilemma of whether similarly situated defendants should be treated differently, is fraught with uncertainty. Justice Harlan perhaps offered the best articulation of the problem when he labeled the Court's retroactivity doctrine as "ambulatory."\(^\text{122}\) One of the reasons proffered for such a description was that initially some members of the Court grasped the retroactivity doctrine as a way of limiting the reach of decisions which they thought were fundamentally unsound, while others used it as a technique to implement long overdue reforms.\(^\text{123}\) This brought about a case-by-case realignment of the Justices and resulted in incompatible


The Stumes Court sidestepped this issue by ruling that its decision would be applicable only to cases on collateral review, allowing for a different result if the question had arisen on direct review. 103 S. Ct. at 1346-46.

118. 388 U.S. at 301.


120. Id. Professor Beytagh dismisses the Stovall interpretation of Article III as preventing the Court from adopting pure prospectivity. Id.

121. Id. at 1603-05.

122. 457 U.S. at 546 (citing Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part)).

123. 401 U.S. at 676 (Harlan, J., concurring in part and dissenting in part).
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and inconsistent principles. 124

This seems to be the case even today. Indeed, when the language
of Edwards itself said that it was inconsistent with Miranda and
its progeny for the authorities to reinterrogate an accused in cus-

tody if he has clearly asserted his right to counsel, 125 it is not sur-

prising that the lower court did not perceive Edwards as creating a
new rule and automatically applied it to the Stumes appeal with-

out addressing retroactivity. What is surprising, however, is that
the Stumes Court rejected this application and its United States
v. Johnson rationale of two years earlier, and found that Edwards
created a new rule of constitutional law. Justice Harlan called for
the Court to rethink its doctrine. 126 Now is the time.

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124. Id. Justice Harlan also asserted that when similarly situated defendants come
before the Court, basic judicial tradition would demand granting the same relief for all. To
do this he advocated retroactive application to all cases still on direct review. 457 U.S. at
546-47 (citing Desist v. United States, 394 U.S. at 258-59 (Harlan, J., dissenting)).

125. 451 U.S. at 484-85. Justice Stevens noted that “[t]he fact that some police de-
partments may have failed to heed the plain language of the Miranda opinion certainly is
not a justification for reaching the conclusion that the reconfirmation of what was said in
Miranda should be regarded as a new constitutional rule.” 104 S. Ct. at 1351 (Stevens, J.,
dissenting).

126. 394 U.S. at 258 (Harlan, J., dissenting).