

FILED

IN THE SUPREME COURT OF FLORIDA SID J. WHITE

APR 12 1985

CLERK SUPREME COURT

By [Signature]
Chief Deputy Clerk

BRYAN JENNINGS,)
)
 Appellant,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 62,600

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

Edwards v. Arizona, 451 U.S. 477 (1981) is applicable to the instant case based upon the recent holding that Edwards is to be given retroactive effect. Shea v. Louisiana, 470 U.S. ____ (1985). An examination of Smith v. Illinois, 469 U.S. ____ (1984) reveals that the facts contained therein are practically indistinguishable from the facts of the instant case. Jennings' initial request for counsel was unequivocal and unambiguous thus requiring immediate termination of the interview. Since this was not done, the confession by Jennings should have been excluded. Smith v. Illinois, supra, holds that an accused's post-request responses to further interrogation cannot be used to cast doubt on the clarity of the initial request for counsel.

IN THE SUPREME COURT OF FLORIDA

BRYAN JENNINGS,)
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 Appellant,)
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Case No. 62,600

SUPPLEMENTAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

Appellant, BRYAN JENNINGS, was originally convicted following a jury trial in February, 1980, in Brevard County, Florida, of first-degree murder, kidnapping, three counts of sexual battery, burglary and aggravated battery and sentenced to death for the murder conviction. (R 1042-1044) Appellant's convictions and sentences were subsequently vacated by the this Honorable Court and the case remanded for a new trial. The reversal was based upon a conflict of interest by the trial attorney. The opinion is reported as Jennings v. State, 413 So.2d 24 (Fla. 1982). In considering the issues raised in that initial appeal, this Honorable Court addressed the trial court's denial of Appellant's motion to suppress his statement to law enforcement officials based upon the continuation of the questioning following his request for counsel. This Court concluded that the denial of the motion was proper. Id., at 26.

Prior to his retrial, Appellant filed a motion to suppress his statement as well as certain physical evidence obtained as the fruits thereof essentially asserting similar grounds as those raised in the first trial. These motions were considered at a hearing before the trial court on July 6, 1982, and denied. (R 854-986) The statement and physical evidence was introduced over Appellant's timely objection at his retrial wherein he was again convicted of first-degree murder, kidnapping, sexual battery, burglary, and aggravated battery, and sentenced to death for the murder conviction. Appellant once again raised this point in his direct appeal to this Court which reiterated the propriety of its previous ruling on the admissibility of Appellant's statement and the evidence obtained as a result. Accordingly, this Court affirmed the convictions, the death sentence and the life sentences imposed for the other convictions. Jennings v. State, 453 So.2d 1109 (Fla. 1984).

Appellant subsequently petitioned the Supreme Court of the United States to grant a Writ of Certiorari to the Supreme Court of Florida asserting a deprivation of his constitutional rights to assistance of counsel and due process of law guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. On February 25, 1985, the Supreme Court of the United States issued an order granting the petition for writ of certiorari, vacating the judgment and remanding the case to this Court for further consideration in light of Shea v. Louisiana, 470 U.S. ____ (1985) and Smith v. Illinois, 469 U.S. ____ (1984). (See attached appendix) Pursuant to Appellant's

request, this Court granted the motion to file supplemental
briefs in the above-styled cause. This brief follows.

STATEMENT OF THE FACTS

On the morning of May 11, 1979, the body of six year old Rebecca Kunash was found floating in a canal near the family's Brevard County home. The autopsy revealed that she had been sexually assaulted, that her skull had been fractured, and that the cause of her death was asphyxiation by drowning. Latent fingerprints on the window sill of the victim's bedroom and a footprint in the sand outside the window were revealed through subsequent police investigation. (R 235-243, 320-345)

On the same day as the murder, the petitioner, a twenty year old Marine home on leave, was arrested on a traffic warrant and taken to the Brevard County Jail. At 1:00 a.m. on May 12, he was awakened in his cell and taken by police to an interview room for questioning with regard to the girl's death. (R 460-490, 867)

Following an explanation of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), the police asked Jennings if he was willing to proceed without an attorney being present to represent him. Jennings hesitated in answering and the police reiterated their question. Initially, Jennings agreed to talk but asked to "...wake up a little bit first, ...". Following a long pause, Jennings stated, "No, I don't think so, I definitely have to have a lawyer for this. This is too heavy for me to do." The police failed to halt the interview. They questioned if Jennings was fully awake and understood what they were saying. He responded that he was still half asleep but that he was awake enough to realize that the charge was a serious

one that he did not wish to talk about by himself. The police agreed that the charge was a serious one, to which Jennings admitted to doing certain things in the past but denied ever killing anyone. The police then continued their discussion with Jennings stating their willingness to hear his side of the story, but explaining that he first had to intelligently waive his constitutional rights. They expressed a willingness to terminate the interview if Jennings so wished. This continuation of the discussion by the law enforcement officers was met with a long pause by Jennings. The agent then repeated his desire that Jennings make a decision concerning this opportunity to discuss the charge. This also was met with a long silence from the Jennings, following which Jennings finally relented and agreed to discuss the charge once he was given some time and an opportunity to get some water and to clear his head. The officers then conducted an interrogation which eventually led to the incriminating statement which resulted in the recovery of certain physical evidence as well. (R 1184-1205) The agents also admitted that, following the interrogation, they obtained photographs of Jennings following yet another request for an attorney. (R 926-927)

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING OVER DEFENSE COUNSEL'S OBJECTIONS, APPELLANT'S CONFESSION WHICH WAS OBTAINED FOLLOWING HIS UNEQUIVOCAL REQUEST FOR COUNSEL AND WHERE THE STATEMENT WAS NOT FREELY AND VOLUNTARILY MADE, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

In light of this Court's prior consideration of this issue on two previous occasions [Jennings v. State, 453 So.2d 1109 (Fla. 1984) and Jennings v. State, 413 So.2d 24 (Fla. 1982)], Appellant will confine his argument in this supplemental brief to the narrow issue presented by the February 25, 1985, order of the Supreme Court of the United States which issued the writ of certiorari, vacated the judgment and remanded this cause to this Court for further consideration in light of Shea v. Louisiana, 470 U.S. ____ (1985) and Smith v. Illinois, 469 U.S. ____ (1984). However, Appellant unequivocally states that the purpose of this limitation of argument is clarity and brevity and should not be construed as any type of waiver of any previous arguments or assertions.

Shea v. Louisiana, 470 U.S. ____ (1985) can be addressed quickly and easily in the instant case. Shea, supra, involved a clear violation of an accused's rights under Edwards v. Arizona, 451 U.S. 477 (1981). The only issue in dispute was the retroactive effect of Edwards. This issue was never in dispute in the instant case. Indeed, this Court distinguished Edwards from the instant facts, while expressing concern with some of the language in the majority opinion. Jennings v. State,

413 So.2d 24, 26 (Fla. 1982). See also Jennings v. State, 453 So.2d 1109, 1113 (Fla. 1984). However, Shea v. Louisiana, supra, settles once and for all any doubt that may have arisen as to the retroactivity and applicability of Edwards v. Arizona to the instant case. Clearly, Edwards applies to the appellant's case.

An examination of Smith v. Illinois, 469 U.S. _____ (1984) (see attached appendix) reveals that this Court should have ruled that Jennings' confession was inadmissible. In Smith v. Illinois the police advised Smith of some of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) following which Smith stated that a friend had advised him to obtain the services of a lawyer. upon further advisement of his rights, Smith indicated that he would like to consult a lawyer. Rather than terminating the questioning, the interrogating officers finished reading Smith his Miranda rights and then pressed him again to answer their questions regarding his willingness to talk without counsel. Smith then responded ambiguously thus indicating indecision. Following one final question, Smith agreed to proceed with the interview. Smith then confessed following which the interview was terminated after another request for counsel. Smith's motion to suppress his incriminating statements was denied at trial. In affirming Smith's convictions, the Appellate Court of Illinois for the Fourth District acknowledged that Smith's first request for counsel "appears clear and unequivocal." Smith v. Illinois, 113 Ill.App.3d 305, 310, 447 N.E.2d 556, 559 (1983). However, the court went on to conclude that an examination of the entire

colloquy clearly revealed that Smith was undecided about exercising his right to counsel and had not made an effective request for such. The court described it as an indecisive inquiry into the right to counsel. Id., at 310, 447 N.E.2d, at 559. The Illinois Supreme Court also agreed with the lower tribunal concluding that Smith's statements were ambiguous when considered in their totality. Smith v. Illinois, 102 Ill.2d, at 373, 466 N.E.2d, at 240. The majority concluded that, in light of his subsequent remarks, Smith did not clearly assert his right to counsel.

The United States Supreme Court granted certiorari and reversed holding that Smith's initial request for counsel was not ambiguous. The interrogating officers should have terminated their questioning when Smith stated that he would like to consult with a lawyer. Smith's post-request responses to further interrogation could not be used to cast doubt on the clarity of his initial request for counsel. Smith v. Illinois, supra. In so holding, the high court pointed out that the rigid prophylactic rule first espoused in Edwards v. Arizona, 451 U.S. 477 (1981) embodies two distinct inquiries. First, it must be determined whether the accused actually invoked his right to counsel. If this was done, an accused's responses to further questioning may be admitted only upon a finding that he initiated further discussions with the police, and knowingly and intelligently waived the right he had invoked. The Court concluded that Smith's case concerned the threshold inquiry as to whether or not he had invoked his right to counsel. The Court concluded that,

using any of the conflicting standards for determining the consequences of an ambiguous or equivocal request for counsel, Smith's request was clear and unequivocal. With the possible exception of the word "uh", Smith's statement was neither indecisive nor ambiguous. "Uh, yeah, I'd like to do that." This reasoning originated in Justice Simon's dissent below. 102 Ill.2d, at 377, 466 N.E.2d, at 242.

The United States Supreme Court concluded that the lower courts were able to construe Smith's request for counsel as ambiguous only by looking at the subsequent responses to continued police questioning. In this manner, the courts were considering the questioning and responses in their totality and examining the so-called "flavor" of an accused's request for counsel. The United States Supreme Court called this line of analysis "unprecedented and untenable", emphasizing that a statement is either an assertion of the right to counsel or it is not.

Smith v. Illinois emphasized the "bright-line rule" set forth under Edwards that all questioning must cease after an accused requests counsel. Without such a prohibition, the police might otherwise wear down an accused through badgering or overreaching be it explicit or subtle, deliberate or unintentional.

An examination of the facts of the case at bar reveal that Smith v. Illinois is clearly applicable to the instant case. After Jennings was advised of his rights, Agent Hudepohl asked if he were willing to proceed without an attorney being present to represent him. Jennings hesitated and Hudepohl repeated the

question. Jennings then stated, "Yeah, but let me wake up a little bit first, this is not good when I just woke up (long pause). No, I don't think so, I definitely have to have a lawyer for this. This is too heavy for me to do." (R 1185) Hudepohl asked if Jennings was awake and understood his rights. Jennings admitted to still being "half asleep" but was awake enough to know that he did not wish to continue without counsel. Not once, but twice did Jennings make his wishes known. When the agents refused to break off the interrogation, Jennings concluded his portion of the exchange with a simple denial of the crime. The agents again persisted in their "explanation" of his rights, apparently wanting him to invoke his request for counsel for a third time. Jennings failed to do so, probably thinking that the agents understood his desire to break off the interview and receive legal advice. The agents' request to hear Jennings' invocation of his constitutional rights met with another "long pause" in lieu of a response. (R 1185) The agent persisted once more before, after yet another "long pause", Jennings relented and agreed to talk without counsel. (R 1185-1186) Jennings undoubtedly realized that the police had no intention of honoring his request for counsel. At the suppression hearing, Agent Hudepohl admitted that he continued the interrogation despite Jennings' requests. (R 906) [Hudepohl even confessed that "everything that I done in that interrogation room... [was] for the purpose of..." getting Jennings to talk. (R 904)] No one ever offered to secure counsel for Jennings, in spite of the fact that the agents knew that attorneys with the Office of the Public

Defender were available even at that late hour. (R 900, 926)
Even at the conclusion of the interrogation and statement, the police obtained further evidence from Jennings after yet another request for counsel. (R 892, 926-927)

Clearly, Jennings' statement, "No, I don't think so, I definitely have to have a lawyer for this. This is too heavy for me to do" (emphasis added, R 1185) is unambiguous and unequivocal as the request in Smith v. Illinois, "Uh, yeah, I'd like to do that." In fact, Appellant submits that his own request is clearly more unequivocal and unambiguous. Jennings states that he definitely must have a lawyer. (R 1185) At that point, questioning should have immediately ceased and no further comments or questions could lawfully occur. Smith v. Illinois, (see attached appendix).

In previously holding that Jennings' statement was admissible, this Court used the precise analysis which the United States Supreme Court condemned in Smith. This Court stated that, "Although we are concerned with some of the language in the majority opinion of Edward v. Arizona, [citation omitted], considering the totality of the circumstances, including the questions and statements of the interrogating officers and the responses thereto, we find that the court properly found the statement to be admissible". Jennings v. State, 413 So.2d 24, 26 (Fla. 1982). In so doing, this Court admitted that the continued dialogue between the detectives and Jennings might have been a subtle attempt to obtain a waiver of counsel. This Court could not discern any improper persuasion or acts on the part of the

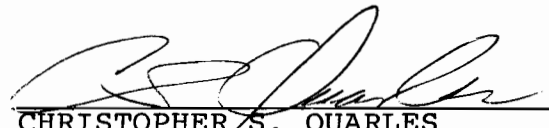
police. This Court concluded by holding, "that a suspect can waive the presence of counsel even though he has indicated a prior desire to have counsel if the waiver is not coerced, is freely given, and is a continuation of the original dialogue." Id. at 27. This holding flies directly in the face of the holding of Smith v. Illinois, (see attached appendix), which this Court admittedly did not have benefit of during its consideration of either appeal by Jennings. Now is the time to recognize the applicability of Smith v. Illinois to the instant set of facts. This Court must reverse Appellant's convictions, vacate the sentences and remand for a new trial at which Jennings' confession and the fruits of it are excluded.

CONCLUSION

Based upon the foregoing cases, authorities and policies as well as those contained in the previously filed briefs in this cause, Appellant respectfully requests that this Honorable Court reverse his convictions, vacate his sentences and remand for a new trial at which the confession and the fruits of it are excluded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, and to Mr. Bryan Jennings, Inmate No. 073045, R-1-S-12, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 10th day of April, 1985.



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