IN THE SUPREME COURT OF FLORIDA



DANIEL PETERKA,

Appellant,

v.

CASE NO. 75,995

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

**SUPPLEMENTAL ANSWER BRIEF OF APPELLEE**

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 300179

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

## TABLE OF CONTENTS


| | PAGE(S) |
|---|---|
| TABLE OF AUTHORITIES | ii |
| SUMMARY OF ARGUMENT | 1 |
| ARGUMENT | |
| POINT XII | |
| REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE RENEWED CLAIM INVOLVING THE DENIAL OF PETERKA'S MOTION TO SUPPRESS HIS STATEMENTS, ASSUMING, IN FACT, THAT ANY CLAIM OF ERROR IS PROPERLY BEFORE THIS COURT | 2-11 |
| CONCLUSION | 11 |
| CERTIFICATE OF SERVICE | 12 |

## TABLE OF AUTHORITIES


| CASES | PAGE(S) |
|---|---|
| **Arizona v. Roberson,** 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) | 8 |
| **Bertolotti v. Dugger,** 565 So.2d 1343 (Fla. 1990) | 4,5 |
| **Edwards v. Arizona,** 451 U.S. 427, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) | 2,5,7 |
| **Henderson v. Dugger,** 925 F.2d 1309 (11th Cir. 1991) | 9 |
| **Henderson v. State,** 463 So.2d 196 (Fla. 1985) | 8 |
| **McNamara v. State,** 357 So.2d 410 (Fla. 1978) | 6 |
| **Minnick v. Mississippi,** ____ U.S. ____, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) | 8 |
| **Routly v. State,** 440 So.2d 1260 (Fla. 1983) | 5 |
| **Steinhorst v. State,** 412 So.2d 332 (Fla. 1982) | 4 |
| **Stewart v. State,** 420 So.2d 862 (Fla. 1982) | 5 |
| **Tillman v. State,** 471 So.2d 32 (Fla. 1985) | 4 |

## SUMMARY OF ARGUMENT

The argument presented in Appellant's Supplemental Brief does not cast into question the correctness of the trial court's denial of Peterka's motion to suppress his statements, a matter already extensively briefed in the Initial and Answer Briefs in this cause. The arguments now raised - an alleged violation of the Sixth Amendment and an alleged violation of the Fifth Amendment in regard to Peterka's right to counsel - were never raised in the circuit court, and are procedurally barred. Additionally, the circuit court below made an express finding that, prior to making the statements utilized against him at trial, Peterka himself had reinitiated contact with the police. Accordingly, reversible error has not been demonstrated, and the instant conviction of first degree murder and sentence of death should be affirmed in all respects.

## ARGUMENT

*POINT XII*

*REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE RENEWED CLAIM INVOLVING THE DENIAL OF PETERKA'S MOTION TO SUPPRESS HIS STATEMENTS, ASSUMING, IN FACT, THAT ANY CLAIM OF ERROR IS PROPERLY BEFORE THIS COURT*

In the Initial Brief in this cause, filed on December 5, 1990, Appellant set forth a lengthy argument concerning the admissibility of his statements at trial, contending that such had been error because, in violation of the Fifth Amendment, Peterka's statements had been induced by improper promises; Appellant also seemingly contended that the statements of July 18, 1989, had been "tainted" by promises made at other times (Initial Brief at 19-24). In its Answer Brief, filed February 22, 1991, the State set forth a lengthy response to these arguments, and also observed:

> It is important to note that no Sixth Amendment violation has been alleged, nor has Appellant ever argued that these statements were admitted in violation of such precedents as *Edwards v. Arizona*, 451 U.S. 427, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

(Answer Brief at 22).

Apparently, the above observation struck a nerve with opposing counsel, because, in the Supplemental Brief of Appellant, accepted for filing by this Court on April 19, 1991, Appellant now argues that admission of his statements violated the Sixth Amendment and **Edwards v. Arizona**, 451 U.S. 427, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (Supplemental Brief at 1-6). Appellee respectfully submits that opposing counsel's initial judgment was correct, and that omission of this claim was the proper course.

Initially, the State would question whether these newly asserted arguments are properly before this Court, inasmuch as the record would seem to indicate that they were **never** raised to the court below. In the suppression motion itself, filed February 6, 1990, Peterka's counsel asserted only that his statements on July 14, 1989, had been made without advisement of his right to counsel, and that his subsequent statements had been made following improper promises or coercion (R 2019); there is absolutely no allegation that Appellant's right to counsel was ever invoked, or violated. Following testimony on the motion, the arguments of counsel were presented below; at this time, defense counsel made it clear beyond any doubt that his only argument against the admission of the statements related to their alleged lack of voluntariness (R 348-349). The following exchange took place:

> MR. LOVELESS (Defense Counsel): The court should consider where that person is in order to judge his state of mind. The court should also consider any express desires to remain silent and the request for an attorney, and that has been shown on more than one occasion. Both have been shown on more than one occasion.
>
> The fact that he asked for an attorney, although that was disputed, was not scrupulously honored. Your Honor, that is not the issue completely. **I'm not arguing that that is the issue. The issue is not that my client was -- that he gave the statement because he was denied access to an attorney,** although that contributed to it. I'm not saying that he gave the statement because they expressly --
>
> THE COURT: Are you contending there's been a Sixth Amendment violation?

> MR. LOVELESS: Your Honor, that is part of it, **but that is not the basis of the motion, Your Honor.**
>
> THE COURT: I didn't note it in your motion.
>
> MR. LOVELESS: My client, throughout this, has indicated that he understood what his rights were, that he had the right to an attorney, and he could have stopped at any time. I'm just pointing that out as one of the circumstances that the court should consider in arriving at some decision as to the voluntariness of the statement.
>
> THE COURT: Well, counsel, once you pass from the investigatory to the accusatory stage, there's a Sixth Amendment right that comes into play which is separate and apart from the Fifth Amendment right.
>
> MR. LOVELESS: Yes, sir.
>
> THE COURT: All right. **You're not contending there was a violation of the Sixth Amendment right to counsel, then?**
>
> MR. LOVELESS: **No, sir.**

(R 325-326) (emphasis supplied).

Appellee respectfully submits that the above exchange demonstrates, at the minimum, that any allegation of a Sixth Amendment violation has been waived **sub judice**. Such being the case, no claim of this nature can be asserted on appeal. **See, e.g., Bertolotti v. Dugger**, 565 So.2d 1343, 1345 (Fla. 1990) (specific legal ground upon which a claim is based must be presented to the trial court in order to preserve an issue for appeal); **Tillman v. State**, 471 So.2d 32 (Fla. 1985); **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982). Appellee also submits that, while counsel below did indeed invoke the Fifth Amendment in part, he would seem to have done so only for the proposition that an involuntary confession was inadmissible, and, as with any

Sixth Amendment claim, seems to have affirmatively disavowed any reliance on the Fifth Amendment, in regard to a claim that the State violated Peterka's right to counsel. Indeed, to hold otherwise, would allow a defendant, such as Peterka, to raise one constitutional claim at trial, and another on appeal. This is, of course, expressly forbidden. **See, e.g., Stewart v. State**, 420 So.2d 862, 865 (Fla. 1982) (defendant could not argue at trial that court's order precluding reopening of the case caused prejudice in one respect, and then assert another alleged harm on appeal); **Bertolotti, supra** (defendant's objection at trial that testimony constituted improper "habit" evidence did not preserve claim that testimony constituted improper "victim impact" evidence). Certainly, at the time that the statements were actually introduced into evidence at the trial, defense counsel said nothing of any alleged violation of the Sixth Amendment or of **Edwards v. Arizona**, stating only that he was relying upon the grounds set forth in his motion (R 1316-1317). Pursuant to this Court's decision, **Routly v. State**, 440 So.2d 1260-1261 (Fla. 1983), all of the matters set forth in the supplemental brief are procedurally barred.

To the extent that this Court disagrees as to the presence of any claim based upon **Edwards v. Arizona**, Appellee would suggest that any claim of this nature would be without merit. Although, as opposing counsel points out, the judge below did in fact state that he was granting the motion to suppress in some respects, as to some of the statements, and in so doing made no express findings, Appellee suggests that neither of these facts

is to the benefit of Appellant. Certainly, as maintained above, it cannot be said that Judge Fleet granted any portion of the motion to suppress based upon arguments which were **never** presented to him. Further, Appellee disagrees with opposing counsel's view that **McNamara v. State**, 357 So.2d 410 (Fla. 1978), must somehow be read as a basis to overturn the circuit court's ultimate denial of relief; indeed, the undersigned counsel reads **McNamara** for exactly the opposite conclusion.

The State also maintains its position, as asserted in the Answer Brief (Answer Brief at 33, n.3 & 38, n.4), that **McNamara** does not dictate that it must be presumed, at this juncture, that Judge Fleet credited all the testimony of Peterka himself over that of the police officers (Supplemental Brief of Appellant at 1-2). Even assuming, however, that one were to take such view, Peterka cannot prevail. It must be remembered that Peterka made a number of statements - (1) a statement to Deputies Harkins and Ashmore in the early hours of July 14, 1989; (2) a statement to Deputy Vinson on the afternoon of July 14, 1989; (3) another statement to Deputy Vinson on the afternoon of July 18, 1989; (4) a statement to his former employer, Shorty Purvis, on the evening of July 18, 1989, and (5) two further statements to law enforcement officers on the evening of July 18, 1989. At trial, only a short portion of the first statement, and the entirety of the fourth and fifth statements were introduced. Daniel Peterka has **never** testified in **any** fashion that he **ever** invoked his right to counsel at **any** time **after** July 14, 1989; similarly, there has been **no** testimony that Peterka **ever** invoked such right at any

time on July 18, 1989. The only testimony presented below was to the effect that Peterka stated at the conclusion of the first interview on the morning of July 14, 1989, that "if the officers were going to continue questioning him, he wanted a lawyer present" (R 2094); Peterka himself conceded, however, that his rights were respected, testifying below, "They quit questioning me when I talked about an attorney." (R 2094, 2103, 2122). Peterka also stated that, later that morning, he had told "someone in the tower" of the jail that he wanted an attorney (R 2107); according to Appellant, however, the request was made because he wished to talk to an attorney concerning the process of "going to back to Nebraska" (R 2099, 2128). Peterka likewise seemed to say that his initial interview with Deputy Vinson had ended when he [the defendant] indicated that he did not wish to talk anymore (R 2132); there has never been any testimony that Peterka invoked his right to counsel at this, or any subsequent, interview.

On the basis of the above, it is difficult to see the basis for opposing counsel's current claim of an alleged violation of **Edwards v. Arizona**; Appellee can likewise not agree with opposing counsel that **Edwards** means that, due to Peterka's alleged invocation of his rights, "the police could not question [him] until he had seen a lawyer." (Supplemental Brief of Appellant at 2). Rather, **Edwards** specifically provides that once an attorney has expressed a desire to deal with the police through counsel, he is not subject to further **police-initiated** interrogation until counsel has been made available to him, unless the accused

himself has initiated any further communication with the police. **Edwards**, 451 U.S. at 485-486. The United States Supreme Court likewise expressly observed that nothing in its holding was meant to imply that a defendant, such as Edwards, was powerless to countermand his prior election or that comments made prior to any invocation of right or subsequent to any initiation of discussion by the defendant were inadmissible. **Id.** The fact that **Edwards** and its progeny are limited to police-initiated interrogation is beyond dispute. **See, e.g., Arizona v. Roberson**, 486 U.S. 675, 688, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988); **Minnick v. Mississippi**, ____ U.S. ____, 111 S.Ct. 486, 112 L.Ed.2d 489, 499 (1990).

The statements which were introduced against Peterka were not the result of police-initiated interrogation. In denying Peterka's motion to suppress, Judge Fleet expressly found that Peterka's conversation with Shorty Purvis on July 18, 1989, with the express intention that whatever he said to Purvis would be relayed in turn to the police officers, was "the formal equivalent of the defendant's resumption of dialogue with the law enforcement officers." (R 357). Obviously, this is a finding that Peterka himself initiated any further contact with the police, such that **Edwards** and **Roberson** are not applicable. There can be no question that Peterka himself was in fact aware that what he said to Purvis would be related to the police or that such was his express intention; indeed, he so testified below (R 2108). Appellee would suggest that this case is analogous to **Henderson v. State**, 463 So.2d 196, 199 (Fla. 1985), in which this

Court, while noting the holding of **Edwards**, found that the defendant therein had, after asserting any right to counsel, "changed his mind" and "volunteered further information"; the Eleventh Circuit, reviewing the same case, agreed with this Court, and expressly found that Henderson had initiated his subsequent contacts with the police. **See Henderson v. Dugger**, 925 F.2d 1309 (11th Cir. 1991) (distinguishing **Minnick**). Appellee would note that opposing counsel's only response to such contention is not grounded in the current case, but rather in current events,

> While a suspect can initiate further interrogation, there is nothing in this case to indicate that Peterka, whose right to have a lawyer had been repeatedly violated and who had been given a promise of leniency, voluntarily asked to talk with Shorty Purvis. To say otherwise would induce one to believe the Iragis [sic] voluntarily quit fighting. They stopped only after the Coalition forces had reduced Hussein's army to scrap . . .

(Supplemental Brief of Appellant at 3).

While this highly imaginative analogoy is not without interest, it is insufficient to cast doubt upon the correctness of the express findings below by the circuit court, to the effect that Peterka initiated the exchange which led to the statements which were introduced against him at trial.

Thus, Appellee would contend that, Appellant's present contentions notwithstanding, the record is clear that, even assuming that Peterka's own testimony must be credited, the defendant's rights were respected, and not violated. Whenever Peterka indicated that he wished to stop talking, his request was honored. Peterka made only two references to counsel. His first

was conditional, when he stated that if the officers wanted to continue questioning him, he wanted counsel; the officers did not in fact wish to continue questioning him, and any interrogation ceased at that point. Assuming that Peterka's second communication to the unknown person in the jail tower constituted any form of invocation of his Fifth Amendment right to counsel, the State would contend that a subsequent waiver has been shown through Peterka's initiation of communication with the authorities through Shorty Purvis on July 18, 1989.[1] Indeed, this latter contention is not as hard to believe as opposing counsel would suggest. It bears repeating that the statements which Peterka made on the night of July 18, 1989, were, from his point of view, exculpatory, in that he related that the homicide had occurred during a fight. Also, as noted, it was Peterka's desire that these statements in fact be conveyed to the police.

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[1] Appellee would also contend that this communication of Peterka to the unknown person in the jail tower did not in fact constitute an invocation of counsel, under **Edwards** or **Roberson**. **Roberson** specifically holds that a person who has "expressed his desire to deal with the police only through counsel" cannot be subjected to further police-initiated interrogation, unless he, himself, has initiated such. Peterka is not that person. His alleged request for counsel was made, through his own admissions, simply so that he could consult an attorney about the mechanics of returning to Nebraska, a matter totally unrelated to the instant prosecution (R 2099, 2128). In **Roberson**, the defendant had stated flatly that he wanted counsel present during **any** questioning. **Roberson**, 486 U.S. at 684. Peterka, also by his own admission, was no stranger to the legal system, having been arrested and advised of his rights previously (R 2119). Accordingly, the State can see no reason why any court should invoke Peterka's rights more broadly than he himself chose to do. **Cf. Connecticutt v. Barrett**, 479 U.S. 523, 107 S.Ct. 828, 93 L.E.2d 920 (1987) (defendant's refusal to sign written statement, but willingness to provide oral statement, limited request for counsel, which was honored by police). In light of the above, it is clear that error has not been demonstrated.

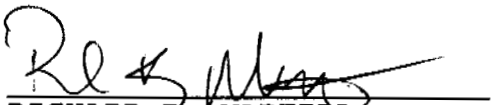
Appellee can see no reason why Peterka should now be afforded relief, simply because subsequent events have proven that such decision did not turn out to be the wisest course. Appellee, also, as argued above, can see no reason why Peterka should be allowed, at this juncture, to seek relief on the basis of arguments never presented below. Accordingly, no relief is warranted as to this procedurally barred claim, and Appellant's conviction of first degree and sentence of death should be affirmed in all respects.

**CONCLUSION**

WHEREFORE, for the aforementioned reasons, Appellant's conviction of first degree murder and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. 300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of May, 1991.

RICHARD B. MARTELL
Assistant Attorney General