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 INITIAL BRIEF OF APPELLANT

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SECOND JUDICIAL CIRCUIT

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SUPPLEMENTAL INITIAL BRIEF

ISSUE XII

THE COURT ERRED IN PARTIALLY DENYING PETERKA'S MOTION TO SUPPRESS STATEMENTS BECAUSE HE HAD REPEATEDLY ASKED FOR THE ASSISTANCE OF COUNSEL, WHICH THE POLICE IGNORED, A VIOLATION OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO THE ASSISTANCE OF COUNSEL.

As with the second issue raised in this case, the key "fact" in this issue is the trial court's partial granting of the defendant's Motion to Suppress Statements. The court granted the motion as to what Peterka said from the time he was arrested until he talked with Shorty Purvis (T 356-57). It denied the motion regarding what he told Purvis because it believed he had initiated that conversation (T 357).

The "fact" that the court partially granted the Motion to Suppress means that this court in reviewing the trial court's order must resolve all the conflicts in the evidence so as to support the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). This means that this court must assume the trial court believed Peterka when he said that he

repeatedly requested that the police stop their interrogation, and most significantly, this court must believe that he also asked for the assistance of a lawyer (T 2101, 2106-2107). This latter request meant that the police could not question Peterka until he had seen a lawyer. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

In Edwards, the court said the police could not question the defendant because he had invoked his right to counsel under the Fifth Amendment but had not talked with his lawyer when they wanted to question him. The court made this holding despite the claim that Edwards had said he no longer wanted counsel. Id. at 484. Once a defendant has said he wants a lawyer, he must at least talk with him before he can decide he no longer wants his help.

In Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), Roberson was arrested and jailed for committing a burglary. The police tried to question him, but before they could do so, the defendant said he wanted counsel before he answered any questions. Three days later, another policeman (ignorant of Roberson's earlier assertion of his right to counsel) questioned him about another burglary. Although the officer advised him of his Miranda rights, the defendant did not want counsel, and he made some incriminating statements. The United States Supreme Court said the Arizona appellate court had properly affirmed the suppression of what Roberson had said. When a suspect invokes his right to counsel, any further questioning must stop.

> Roberson's unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney.

Id. at 684.

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 voluntarily quit fighting. They stopped only after the Coalition forces had reduced Hussein's army to scrap, and Peterka asked to call Purvis only after Vinson had promised him he would be charged only with manslaughter. Neither act was voluntary, and Peterka's was especially not so because the call to Purvis was not the result of some internal realization of his plight.

Instead, it was the relentless and persistent temptations of an officer who admitted he had been told not to "come back until he had a confession." (T 287) Where Peterka's waiver was done "at the suspect's own instigation," such a waiver is purely voluntary." Trody v. State, 559 So.2d 641 (Fla. 3rd DCA 1990) (Quoting Roberson). In Trody, the Third District held the defendant's confession violated Edwards and Roberson because Trody had "neither telephoned the detectives nor in any way contacted them. Rather, the detectives initiated each contact with appellant while appellant was being held in jail."

Id. at 642. Similarly here, Peterka never asked Vinson to question him, and once the defendant asked to talk with a lawyer, the police officer should not have interrogated him until he had talked with counsel. Once a defendant has asserted his right to counsel, all questioning must cease until an attorney has been provided. Long v. State, 517 So.2d 664, 666 (Fla. 1987).

In Kyser v. State, 533 So.2d 285 (Fla. 1988), Kyser was arrested in Columbus, Georgia for a shooting in Panama City. On the way to the jail, Kyser was read his Miranda rights, and when asked for his name, he gave an alias. When he arrived at the station a Bay County officer reread Kyser his rights while a Georgia policeman checked his identity. Kyser, in effect, said that he wanted a lawyer before he talked about the Florida shooting. That officer left, but a Georgia policeman entered and questioned him for several hours about the shooting. The Florida officer returned shortly after the interrogation began, but he never told the other officer Kyser had invoked his right to counsel.

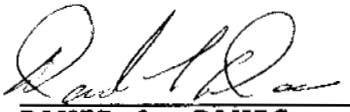
Kyser eventually said there was another man present and he wanted to talk with his wife before he talked with the police further. He told his wife (over the telephone) the name of the other man, and Kyser's spouse told the police what her husband had relayed to her. Kyser then implicated himself in the shooting, although he said someone else had been the triggerman. Kyser also repeated that statement to another law enforcement officer when he was returned to Florida and reread

his Miranda rights. Kyser was eventually charged with and convicted of first degree murder and sentenced to death. This court reversed that conviction because Kyser had requested counsel, and he had never initiated contact with the police after he had invoked that right.

Similarly, in this case, Peterka had not only invoked his right to remain silent, he had told Officer Vinson that he wanted a lawyer (T 2106-2107). The police never honored that request, and Peterka never initiated any contact with the police. This court should reverse the trial court's judgment and sentence and remand for a new trial.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Richard B. Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, DANIEL PETERKA, #119773, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 27th day of March, 1991.

DAVID A. DAVIS