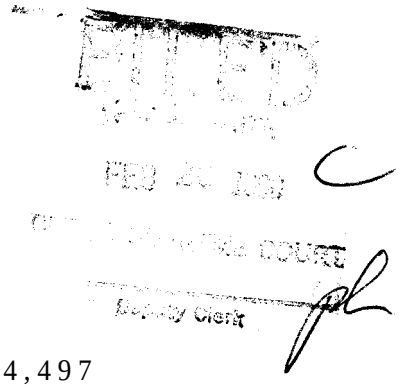
IN THE SUPREME COURT OF FLORIDA



ANTONIO MARTINEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 74,497

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue, 9th Floor
West Palm Beach, FL 33401
(407) 355-2150

JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407

Counsel for Petitioner

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AUTHORITIES CITED

OTHER AUTHORITIES

United States Constitution

STATEMENT OF THE CASE AND FACTS

At 4:00 a.m. on February 15, 1987, Petitioner, Antonio Martinez, was arrested for the homicide of Jimenez Miguel (R7). Petitioner was read his Miranda rights twice at the Indiantown substation (R29,34). Petitioner indicated that he understood his rights and did not ask for an attorney (R33). Petitioner was transported from the substation to the Stuart police station so he could be interviewed (R10). At the Stuart station, Petitioner was taken to a room and read his Miranda rights from a printed Spanish rights form (R37). All the warnings were given by Deputy Darwin Perez of the Martin County Sheriff's Office.

Later at Stuart, a taped statement was taken from Petitioner. Before the statement was taken Perez read Appellant his Miranda rights (R42). Deputy Perez testified that he read the warnings in the same manner as previously and that Appellant's answers were the same (R42-43).

The tape shows that Perez informed Petitioner that if he did not have money for a lawyer the county would pay for a lawyer that could represent him in court (R109). Petitioner was asked if he understood and replied, "Okay" (R109). Petitioner was then told he had the right to have a lawyer present (R109). Petitioner replied, "But what about if I don't have any money" (R109). Perez did not answer Petitioner's question but instead asked Petitioner if he wanted to talk (R109-110). Petitioner said, "*Yes*" (R109), and then gave the taped statement admitting to his participation in the killing.

On March 9, 1987, the grand jury indicted Petitioner for murder in the first degree (R163). Petitioner moved to suppress his taped confession. A hearing was held on the motion (R6-131). The trial court found that there had been an omission from the Miranda warning given prior to the taped confession but concluded from the totality of the circumstances that Petitioner's confession was voluntary and not coerced (R130-131). Petitioner's motion to suppress was denied (R131).

On March 25, 1987, Petitioner changed his plea of not guilty to a plea of nolo contendere to the lesser offense of second degree murder reserving the right to appeal the denial of the motion to suppress (R144,239-241). Petitioner and the prosecutor stipulated that the motion was dispositive of the case (R144, 240). Petitioner was adjudicated guilty of murder in the second degree (R260-261). On May 18, 1988, Petitioner was sentenced to twenty-two (22) years in prison (R262-263). On May 18, 1988, Petitioner timely filed his notice of appeal (R245). The district court affirmed Petitioner's conviction and sentence (A1-5). Petitioner filed for rehearing which was denied on June 28, 1989 (A9). On July 26, 1989, Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction. This review follows.

SUMMARY OF THE ARGUMENT

Prior to Petitioner's giving his taped statement he was read his Miranda warnings. However, despite the fact that Petitioner asked -- "But what about if I don't have any money" -- in response to being informed that he had the right to have an attorney present, Petitioner was not informed that an attorney would be available at the interrogation even if he could not afford one. Due to the omission in the Miranda warnings, even though the confession might be otherwise voluntary, the motion to suppress the taped confession should have been granted.

In addition, Petitioner's statement could be considered an equivocal indication that he would want an attorney present if he could afford one. After such an equivocal indication is given the police must limit the inquiry to clarify whether the defendant wants counsel. Because the police did not limit their inquiry to such a determination, Petitioner's confession should have been suppressed.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS PETITIONER'S CONFESSION.

Petitioner filed a motion to suppress his taped confession. A hearing was held on the motion. The motion was denied and Petitioner pleaded nolo contendere reserving his right to appeal.[1]

Petitioner's confession should have been suppressed for two reasons. First, the confession was made during a custodial interrogation and prior to the confession the police failed to adequately give a complete Miranda warning. Second, during the reading of the warning Petitioner made an equivocal indication that he would want counsel if he could afford one.

Petitioner was read his Miranda rights by Officer Perez prior to giving the taped confession. The reading of the warnings was taped. The tape showed that Perez informed Petitioner that if Petitioner did not have money for a lawyer the county would pay for a lawyer that could represent him in court (R109). Petitioner was asked if he understood and replied, "Okay" (R109). Petitioner was then told he had the right to have a lawyer present (R109). Petitioner replied, "But what about if I don't have any money" (R109). Perez did not answer Petitioner's question

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[1] The state stipulated that the denial of the motion to suppress the confession was dispositive of the case (R144). Consequently, this issue is properly preserved for appellate review. Jackson v. State, 382 So.2d 749 (Fla. 1st DCA 1980), aff'd 392 So.2d 1324 (Fla. 1981): Weber v. State, 492 So.2d 1166 (Fla. 4th DCA 1986); Freeman v. State, 450 So.2d 301 (Fla. 5th DCA 1984).

but instead asked Petitioner whether he wanted to talk (R109-110). Petitioner said, "Yes" (R109). Thereafter Petitioner gave the taped statement admitting to participation in the killing.

It is clear from the tape that there was an omission from the Miranda warning by failing to inform Petitioner that he could have an attorney present at the interrogation despite the fact that he didn't have any money. The trial court recognized this omission but found that based on the totality of the circumstances, Petitioner's confession was not coerced and was voluntary (R130-131).[2] However, as noted by this Court in Caso v.

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[2] The majority decision of the district court basically rubber stamped the trial court's ruling without evaluating the legal conclusions which had been drawn. The majority opinion specifically recognized that the "facts are not in dispute" (A1), and that "the statement of law expressed in the dissenting opinion is correct" (A5). In deciding this case, the district court mistakenly treated the trial court's ruling on voluntariness as a mere factual finding. However, the voluntariness of a confession, and the claim of a Miranda violation, is a mixed question of fact and law. Moffett v. State, 179 So.2d 408, 413 (Fla. 2d DCA 1965); United States v. Barfield, 507 F.2d 53, 57 (5th Cir. 1975). Thus, voluntariness involves not only findings as to what occurred factually, but also legal conclusions as to the meaning of those facts. Where a trial court has made explicit findings of "historical" and "phenomenological" facts surrounding a confession, those findings must indeed be accepted by the appellate court unless wholly lacking support in evidence. Culombe v. Connecticut, 367 U.S. 568, 603, 81 S.Ct. 1850, 1879, 6 L.Ed.2d 1037 (1961). But the legal effect of established facts is a question of law which is not entitled to such deference. Brannen v. State, 94 Fla. 656, 114 So. 429, 431 (1927). Determinations which attach legal significance to historical facts are conclusions of law. Bratton v. City of Detroit, 704 F.2d 878, 899 (6th Cir. 1983). Conclusions of law concerning the legal effect of historical facts are obviously the province of appellate courts, for otherwise appellate courts would ever be powerless to reverse any ruling of a trial court.

As the district court noted, in the instant case the historical facts in the record are not in dispute. Rather, the issues of this appeal concern only the conclusions of law to

State, 524 So.2d 422 (Fla. 1988), the confession must be suppressed where there is an omission in the Miranda warnings even though the statements are otherwise voluntary:

> "[f]ailure to administer Miranda warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the fifth amendment must nevertheless be excluded from the evidence under Miranda. Thus, in the individual case, Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." 470 U.S. at 307, 105 S.Ct. at 1292.

524 So.2d at 425 (emphasis added). In Caso the Miranda warnings were inadequate because it did not convey that "he would be furnished counsel free of charge if he could not pay for such services himself." 524 So.2d at 425. This Court held:

> We hold that the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in-chief and Caso's statement in the present case was improperly admitted.

524 So.2d at 425. Likewise, in the instant case after Petitioner had said, "But what about if I don't have any money," after being told that he had the right to have an attorney present, the police failed to inform Petitioner that an attorney should be

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be drawn as to the legal effect of these historical facts. For example, there is absolutely no dispute that Petitioner stated "But what about if I don't have any money", after the police informed him of his right to counsel: this historical fact was recorded on tape. The issue, rather, is whether Petitioner's response could be construed as showing he did not understand that he had the right to appointed counsel at no cost, or whether he equivocally indicated the desire for counsel, which would require the police to cease questioning until the response was clarified. The issue is one of law, which the district court erred in simply deferring to the trial court to decide.

appointed free of charge. Petitioner's statement should have been suppressed. Fifth, Sixth Amendments, United States Constitution.

In addition, Petitioner's statement, "But what about if I don't have any money," in response to the statement that Appellant had the right to have an attorney present, is an equivocal indication that he would want an attorney present if he could afford one. See United States v. Gonzalez, 833 F.2d 1464, 1466 (11th Cir. 1987) (Gonzalez's statement that she had tried to obtain counsel "but could not do so because of costs allows the inference that Gonzalez was requesting counsel").[3]

For example, in Thompson v. State, 548 So.2d 198 (Fla. 1989), this Court held that statements regarding not being able to afford an attorney constituted an equivocal request for counsel:

> Also during these interrogations, the following relevant exchange between police and Thompson occurred:
>
> DETECTIVE CHILDERS: Did you understand your rights:
>
> THE DEFENDANT: Yeah.
>
> DETECTIVE CHILDERS: Did you at any time request an attorney?
>
> THE DEFENDANT: Yeah, but I don't have the money to pay an attorney.
>
> DETECTIVE CHILDERS: You never told us that you wanted an attorney, did you?
>
> THE DEFENDANT: No.

[3] Unlike here, Gonzalez was then informed that counsel could be appointed.

> DETECTIVE CHILDERS: Okay. What you're saying right now is because Charlie Thompson wants to say it, isn't that correct?
>
> THE DEFENDANT: Yes.
>
> (Emphasis added).
>
> * * *
>
> In the present case we believe the Long error is clear on the face of the record. At the time Thompson made his equivocal request, police should have ceased all questioning until they had clarified the meaning of Thompson's statement.

548 So.2d at 203. Likewise, in Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981), despite the fact that the defendant had previously been repeatedly advised of and indicated that he understood his Miranda rights, the court held that the defendant's response "I can't afford to get one," when informed of the right to an attorney, was an equivocal request for counsel:

> Appellant was, in formal terms, repeatedly advised of and said that he understood his Miranda rights, but upon being asked if he wanted a lawyer his response was that "I can't afford to get one." Appellant's interrogators did not then or at anytime thereafter make any further statements or clarification regarding his right to counsel.

402 So.2d at 47. Likewise, Petitioner's statement constituted an equivocal request for counsel.

As noted by this Court in Thompson v. State, supra, where there is an equivocal indication regarding counsel, further inquiry is limited to the sole purpose of clarifying the request:

> ... an accused who has invoked his right to counsel does not waive that right merely by responding to further police-initiated interrogation. Based on these principles, we concluded that an equivocal request for counsel by

> the accused permits police "to continue questioning for the sole purpose of clarifying the equivocal request," but nothing more. 517 So.2d at 667.

548 So.2d at 203; ~~see also~~ Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); United States v. ~~Porter~~, 776 F.2d 370 (1st Cir. 1985) (if actions as to whether defendant wants an attorney are ambiguous, inquiry must cease until more specific determination made).

In the present case the police did not make any attempt to clarify to Petitioner that counsel could be made available even though Petitioner could not afford counsel.[4] As a result, Petitioner's confession should have been suppressed.

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[4] Instead, the following transpired:

> [Deputy Perez]: (Indiscernible) and to have a lawyer present, you can do that, do you understand that?
>
> [Petitioner]: But what about if I don't have any money?
>
> [Deputy Perez]: But do you understand the rights that I am reading to you, do you understand?
>
> [Petitioner]: Yes.

(R109).