IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,497

ANTONIO MARTINEZ

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution in the trial court and the appellee in the district court. Petitioner was the defendant in the trial court and the appellant before the district court below.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

The following symbols will be used herein:

"R"	Record on Appeal.
"AB"	Petitioner's Initial Brief
"A"	Appendix of the District Court's opinion below

All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts as substantially true and correct except as modified by the facts herein, and with the following additions and/or clarifications:

1. Petitioner was read his Miranda rights at least three times prior to the alleged improper reading after which a taped statement was taken (R 12, 37, 111, 126, 129-131). After the third reading of his rights, Petitioner orally confessed to the crime which was subsequently taped by police (R14, 41-42, 125). This oral confession comprised the substance of the taped confession.

2. Petitioner signed a written waiver of rights form (R 12, 37, 41, 56, 129).

3. In an effort to confirm whether or not Petitioner understood his rights, the police twice asked Petitioner if he knew what a lawyer was, to which Petitioner responded, someone who "could help him stay out of jail" (R12, 29, 33-36, 37-39, 42, 42-43, 73). Detective Murphy testified that they tried very hard to make sure this Spanish speaking defendant understood his rights, as did Captain Gumbinner (R 13, 73-74).

4. The terms of Petitioner's plea agreement were as follows: Petitioner would be entering a plea of nolo contendere to the lesser included offense of second degree murder, specifically reserving his right to appeal the trial court's denial of the motion to suppress Petitioner's confession,

pursuant to the prosecutor's stipulation that the motion was dispositive of the case (R144, 149). When the trial court asked the prosecutor if "This is the entire plea agreement then?" the prosecutor responded, "It is, Judge, and that's correct."(T 144, 149).

SUMMARY OF THE ARGUMENT

After the third time Petitioner was read his constitutional rights, Petitioner orally confessed to the offense at bar; Petitioner's oral confession comprised the substance of the taped confession which is now under review before this Court. Thus, since Petitioner's first uncontested confession could be utilized should be Petitioner be tried, the instant issue on appeal is not dispositive of the case at bench. The State accepts responsibility for failing to recognize, until now, the nondispositive nature of the issue on appeal; however, since the confession now being challenged cannot be legally resolved in a vacuum, apart from Petitioner's first uncontested confession, this Court cannot ignore the nondispositive nature of the instant issue on appeal.

Notwithstanding, when viewed within the context in which it was made, Petitioner's statement, "But what if I don't have any money [for a lawyer]?" was not intended as an invocation of Petitioner's Miranda rights. Furthermore, assuming arguendo, that the statement was, at best, an equivocal request for counsel, the officer's follow-up questions were limited to clarifying Petitioner's response, and were not intended to evoke an incriminating response. Finally, assuming that Petitioner's statement was a request for counsel, the error in denying the motion to suppress Petitioner's confession was harmless in light of Petitioner's previous oral uncontested confession.

ARGUMENT ON APPEAL

THE DISTRICT COURT OF APPEAL PROPERLY UPHELD THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS PETITIONER'S CONFESSION.

The Petitioner was read his Miranda[1] rights on at least four occasions (R 129). The third time Petitioner was advised of his constitutional rights, Petitioner orally confessed to the murder sub judice. Petitioner admitted that he and another individual (Martin), perpetrated a robbery against the victim, and in so doing, they stabbed the victim five times and slit his throat (R14, 41-42, 125). Petitioner's third confession comprised the substance of the taped confession which Petitioner is now challenging before this Court. Petitioner has never contested the admissibility of the third confession. Based on the trial court's denial of Petitioner's motion to suppress his confession, Petitioner pleaded nolo contendere to the instant offense, specifically reserving his right to appeal.

Based on the foregoing, the instant issue is not dispositive of the case at bench. Turner v State, 429 So.2d 318 (Fla. 1st DCA 1982). While the State accepts responsibility for failing to recognize, until now, the impropriety of Respondent's nolo contendere plea, the nondispositiveness of Respondent's second confession is inherent to a proper resolution of the issue now on appeal. However, notwithstanding the State's failure to

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[1] Miranda v Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 378 (1966).

raise the nondispositiveness of Petitioner's confession before the district court below, the outcome of the Fourth District Court's opinion sub judice is nonetheless correct. See Stone v State, 481 So.2d 478 (Fla. 1985).

In Brown v State, 376 So.2d 382 (Fla. 1979), this Court held that, as a matter of law, a confession may not be considered dispositive of the case. See also Carr v State, 438 So.2d 826 (Fla. 1983). In so holding, the Brown court recognized that:

> Quite apart from the questions of legal consistency discussed above, we are also troubled by certain legal assumptions which have been made by the parties to this procedure. They appear to assume that a reviewing court can properly look at one legal issue, even one of constitutional dimensions, in isolation from the other facets of a case. This, of course, was a characteristic of the genius of the early common law but is not true of our modern system of jurisprudence. Under classical common law notions, the trial court always presented a single, finite issue, either factual or legal, to the reviewing court; that single issue, many times of artificial significance, because of the peculiarities of common law pleading, would be dispositive of the entire. case...
>
> In what is a throwback to common law practices, resembling in some ways the situation created by a demurrer, we are presented in the case at bar with a naked question of law which could very well be of artificial and inflated importance. Since there was no trial, the only record before us is the hearing on the motion to suppress. We are left to conjecture whether the prosecution had additional evidence to present against the defendant. There

> is at least an inference that can be drawn from the limited record before us that since the arresting officers received a description of the defendants over the police radio, there were some eyewitnesses to the crime itself. We are left to speculate that perhaps the prosecutor had sufficient additional evidence that he would not have introduced the evidence seized during the search of defendant's automobile and which the district judge ruled could be admitted into evidence...

(Emphasis added). 376 So.2d at 384 citing United States v Cox, 464 F.2d 937 (6th Cir. 1972).

Thus, assuming arquendo that the taped confession which Petitioner challenges is infirm, the State could nonetheless utilize Petitioner's first oral confession should Petitioner be tried. Indeed, even Petitioner obliquely recognizes that, but for the prosecutor's agreement to the terms of Petitioner's nolo plea, the instant issue was not dispositive of the issue now before this Court (AB 5).

While some courts have been reluctant to go behind stipulations of dispositiveness, Zieqler v State, 471 So.2d 172, 175-176 (Fla. 1st DCA 1985), such stipulations have not precluded the appellate courts from finding that an issue before it is dispositive of the case. Turner v State, 429 So.2d 318 (Fla. 1st DCA 1982; Morqan, III v State, 486 So.2d 1356 (Fla. 1st DCA 1986); See also Garcia v State, 15 F.L.W. 127 (Fla. 3d DCA, January 5, 1990). In Morgan, the First District noted:

> ...the phenomenon of the "stipulation" as to dispositiveness first found

> official sanction in opinions of the district courts of appeal. E.g. Jackson v State, 382 So.2d 749 (Fla. 1st DCA 1980). The Florida Supreme Court has not yet embraced--or for that matter even discussed--the principle that such a stipulation will be binding upon the appellate courts. In fact, when the Supreme Court has spoken on the dispositiveness requirement, the Court has followed a rather conservative path...

486 So.2d at 1358, n.1. Where nondispositive issues have been appealed based on a nolo plea, the appellate courts have sometimes found themselves in an untenable position: "This is a phenomenon that is happening all too frequently and creates a variety of sticky problems. See Morgan, III v State, 486 So.2d 1356. The instant case presents still another mutation." Howard v State, 515 So.2d 346, 348 n.2 (Fla. 1st DCA 1987).

Appellate review of a dispositive issue pursuant to a nolo contendere plea is based on the assumption that there will be no trial on the case, regardless of whether the case is affirmed or reversed on appeal. Morgan, III v State 486 So.2d at 1357, Brown v State, 376 So.2d 382 (Fla. 1979). Thus, despite the State's negligence in failing to recognize the nondispositiveness of Petitioner's confession sooner, and assuming that Petitioner's second taped confession is infirm, to disregard the nondispositiveness of the second confession would result in a windfall to Petitioner inasmuch as the admissibility of Petitioner's first confession is uncontested. Consequently, as the confession now being challenged cannot legally be resolved

in a vacuum, apart from Petitioner's first uncontested confession, this Court cannot ignore the nondispositive nature of the instant issue on appeal.

On the merits, the trial court found that Petitioner was adequately advised of his rights on at least three occasions; that prior to the recorded interview, Petitioner was fully advised about his right to an attorney, and that an attorney would be provided if Petitioner was unable to retain one because of lack of funds (R 130-131). The trial court further found that Petitioner understood his rights, and waived them. In its opinion below, the Fourth District Court deferred to the trial court's findings in holding that Petitioner's statement, "But what about if I don't have any money?'' did not constitute a request for counsel (A 3-6). See McNamara v State, 357 So.2d 410, 412 (Fla. 1978).

It is well settled that when an accused asks to see counsel, all interrogation must cease. Edwards v Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); however, when an accused's statements can be construed as an equivocal request for counsel, interrogating officers are permitted to initiate further communications for the purpose of clarifying the accused's wishes. Long v State, 517 So.2d 664 (Fla. 1988); Valle v State, 474 So.2d 796 (Fla. 1985) vacated on other grounds 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986); Cannady v State, 427 So.2d 723 (Fla. 1983).

Sub judice, the record reveals that during Petitioner's taped statement, the following transpired:

> [Deputy]: You have the right to a lawyer while we are questioning you if you want to...You have the right to have a lawyer present while we are interviewing you, if you want to.
>
> (Thereafter, translation was concluded until the following day.)
>
> [Deputy]: If you don't have money for a lawyer, the county will pay for a lawyer that can represent you at that time in court, do you understand?
>
> [Petitioner]: Okay.
>
> [Deputy]: (Indiscernible) and to have a lawyer present, you can do that, do you understand that?
>
> [Petitioner]: But what if I don't have any money?
>
> [Deputy]: But do you understand the rights that I am reading to you, do you understand? Do you want to talk to us?
>
> [Petitioner]: Yes.

(R104-109).

Prior to the foregoing taped statement, Petitioner had been advised of his constitutional rights on at least three occasions (R 12, 37, 111, 126, 129-131). Additionally, Petitioner had signed a written waiver of rights form prior to his oral confession of the murder (R 12, 37, 41, 56, 129). Finally, after the Petitioner had been advised of his rights for the fourth time in his taped statement, Petitioner reiterated his participation in the offense at bar. Thus, when viewed in the

context in which Petitioner made the statement, "But what if I don't have any money?", Cannady v State, 427 So.2d at 728, there is sufficient evidence to conclude that Petitioner was not invoking his Miranda rights when he made the statement, thereby waiving his right to counsel. Id.

Moreover, assuming that Petitioner's statement was, at best, an equivocal request for counsel, the officer's follow-up statements were limited to determining whether or not Petitioner understood his rights, and whether or not Petitioner wished to talk; it is evident that the officer's response to Petitioner's statement was not intended to evoke an incriminating response. Cannady v State, 427 So.2d at 728; Valle v State, 474 So.2d at 799; Cf. Long v State, 517 So.2d 664. After the officer asked Petitioner if he understood his rights and wished to make a statement, the Petitioner unequivocally responded "Yes" thereby indicating that he voluntarily waived his rights, and that his earlier statement was not a request for counsel. Id.

Finally, assuming that the taped statement was taken in violation of Petitioner's constitutional rights, any error is merely harmless where the taped confession now being challenged was merely cumulative of Petitioner's previous oral uncontested confession. Turner v State, 429 So.2d at 321.

CONCLUSION

Based on the foregoing arguments and authorities cited herein, Respondent respectfully requests that the Fourth District Court's opinion below be AFFIRMED.

Respectfully submitted,

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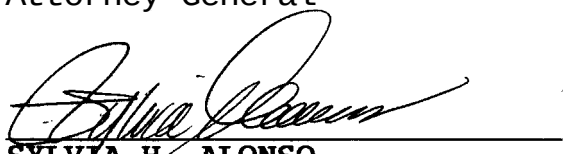

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by courier to JEFFREY L. ANDERSON, Assistant Public Defender, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 16th day of March, 1990.

Of Counsel