
ARTICLES

POST-PLEA APPEAL OF "DISPOSITIVE" ISSUES: "THERE'S GLORY FOR YOU!"¹

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I. INTRODUCTION

In its 1974 decision in *Cooksey v. State*,² the Alaska Supreme Court rejected the commonly held view that a plea of *nolo contendere* necessarily constitutes a waiver of all "nonjurisdictional defects." Acting primarily to prevent needless waste of legal resources by avoiding the necessity of putting defendant through "the costly and futile ordeal of a complete trial" in order to preserve the right to appeal issues resolved prior to trial, the court created a new rule allowing the appeal of a limited range of issues following entry of a *nolo plea*.³ Pursuant to that rule, the right to appellate review could be preserved

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1. Alice's conversation with Humpty Dumpty continues as follows:

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean a nice knock-down argument," Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

L. CARROLL, *Through the Looking-Glass*, in *THE WORKS OF LEWIS CARROLL*, 111, 174 (Spring Books ed. 1965). Many of us have had reason to sympathize with Alice in our attempts to understand what "dispositive" means. My principal goal in preparing this article is to suggest a resolution of that problem.

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2. 524 P.2d 1251 (Alaska 1974).

3. *Id.* at 1255. The court's insistence upon a plea of *nolo contendere* in this context, rather than a guilty plea, is presumably based on the conceptual difference between those pleas. Because a guilty plea technically constitutes an admission of guilt, it would make little sense to use it as the starting point in a process through

when the plea had been specifically conditioned upon retention of that right and the issue preserved for appellate review had been "fully litigated" prior to entry of the plea.⁴

The *Cooksey* procedure was employed in two cases involving suppression of evidence issues over the next three years⁵ and then significantly modified in a footnote to *Oveson v. Municipality of Anchorage*.⁶ The *Oveson* court restated the second prong of the *Cooksey* rule to require that the issue preserved for appeal be such that a successful appeal "would have resulted in the dismissal of the charge and would have barred further prosecution"; the court then held that:

[h]enceforth, appeals under the *Cooksey* doctrine will not be approved unless it is clearly shown, and the parties have stipulated with trial court approval, that our resolution of the issue reserved for appeal will be dispositive of the entire case.⁷

The *Oveson* procedure adds two requirements to the original formulation: the parties must stipulate that the issue preserved is dispositive, and that issue must be "clearly shown" to be actually dispositive. Coupled with the first prong of the *Cooksey* rule, the revised procedure has become an institution in Alaska's appellate case law.

The evolution of the "*Cooksey-Oveson*" procedure has not, however, been an entirely smooth one. That fact is due, at least in part, to problems that are apparent on the face of the procedure's formulation. The requirement that it be "clearly shown" that "resolution of the issue reserved for appeal will be dispositive of the entire case"⁸ is an elusive one. On the one hand, it appears that the prosecutor's willingness to enter into a stipulation to that effect ought to be dispositive. After all, if the prosecutor agrees to dismiss a case in the event of an adverse ruling on a given issue, that issue is dispositive in a very real sense. On the other hand, it seems evident from the language of *Oveson* that the court had two separate requirements in mind: not only must the parties formally stipulate, with trial court approval, that the issue is dispositive, but also that fact must be "clearly shown." This language suggests the need for an independent assessment of the

which a defendant seeks exoneration on legal grounds. The nolo plea, on the other hand, carries no such connotation and is perfectly consistent with the attempt to avoid criminal liability on appeal. See generally *Miller v. State*, 617 P.2d 516, 518-19 (Alaska 1980) (trial court erred in rejecting previously accepted nolo pleas simply because defendant continued to assert his innocence).

4. *Id.* at 1255-57.

5. *Richardson v. State*, 563 P.2d 266, 267 n.1 (Alaska 1977), *modified*, *Oveson v. Municipality of Anchorage*, 574 P.2d 801 (Alaska 1978); *Trunnel v. State*, 535 P.2d 1041, 1042 n.2 (Alaska 1975), *modified*, *Oveson v. Municipality of Anchorage*, 574 P.2d 801 (Alaska 1978).

6. 574 P.2d 801, 803 n.4 (Alaska 1978).

7. *Id.*

8. *Id.*

truth of the parties' stipulation—some showing that the parties are correct in their prediction that a jury would either acquit if the given pretrial issue had been decided in defendant's favor or convict if that decision had gone the other way.

The tension between these competing interpretations of the *Oveson* formulation reflects a tension between two underlying policies. The first policy is the *Cooksey-Oveson* rule's stated purpose: avoidance of the waste of legal resources. This policy is plainly served by the first interpretation, in that leaving the decision to stipulate that an issue is dispositive solely to the parties' discretion would minimize needless litigation. The second policy is unstated but nevertheless inherent: allowing the parties unchecked discretion also raises the possibility that the procedure will be abused. Only by imposing some check on that discretion can the appellate courts prevent manipulation of the rule and avoid issuing advisory opinions on issues that might not otherwise be subject to appellate review.

Consideration of Alaska's large body of *Cooksey-Oveson* case law indicates that the problem with the procedure is the tension that is inherent in the procedure itself. That possibility, in turn, suggests that the problem is not amenable to any satisfactory compromise solution. If the policy of avoiding needless litigation is regarded as paramount, the appellate courts must resign themselves to the risk that the *Cooksey-Oveson* procedure will be abused. If the policy of preventing such abuse is preferred, the court system must be prepared to spend time and money on needless litigation. The only alternative to these extremes is the existing uneasy compromise promulgated by appellate courts which refuse to clarify the original formulation.

II. ALASKA'S CASE LAW

There are only two published opinions⁹ in which a *Cooksey-Oveson* appeal has been rejected,¹⁰ and only two others in which the parties' use of the procedure has been called into serious question.¹¹ Comparison of these cases to others in which the procedure has not been questioned is revealing.¹²

9. The Alaska Court of Appeals frequently declines to review issues raised pursuant to this procedure in unpublished opinions. These opinions are "without precedential effect and may not be cited in the courts of this state," ALASKA R. APP. P. 214(d), and have therefore provided little guidance to trial courts and attorneys.

10. *Heuga v. State*, 609 P.2d 547, 548 (Alaska 1980); *Cronin v. Municipality of Anchorage*, 635 P.2d 840, 841-42 (Alaska Ct. App. 1981).

11. *Uptegraft v. State*, 621 P.2d 5, 7 n.3 (Alaska 1980); *Begley v. Municipality of Anchorage*, 711 P.2d 540, 543 (Alaska Ct. App. 1985).

12. *See, e.g., Deal v. State*, 626 P.2d 1073, 1076-77 n.3 (Alaska 1980); *Gonzales v. State*, 586 P.2d 178, 179-80 n.5 (Alaska 1978) (appeal based on *Oveson* alone); *Cruise v. State*, 584 P.2d 1141, 1144 n.3 (Alaska 1978) (*Oveson* does not apply, but appeal

*Heuga v. State*¹³ came before the Alaska Supreme Court on a *Cooksey-Oveson* plea purporting to preserve the right to appeal the trial court's admission of defendant's confession into evidence. The court ruled, however, that "a determination that Heuga's confession [was] invalid would not be dispositive of the case, as there was eyewitness identification of Heuga as the perpetrator."¹⁴ The court rejected the claim that, because the state had "lost track of the eyewitness," the confession issue was dispositive on the ground that "the test of appealability [was] the situation as it existed at the time the plea was entered, not how it [was] altered by later events."¹⁵ The court did not explain why the state's agreement that the confession issue was dispositive did not implicitly include a decision not to present the eyewitness evidence at trial or, more to the point, why the parties could not simply rely upon the state's tactical decision to withhold that evidence. The court did, however, state its concern quite clearly:

If we accepted Heuga's argument it would mean that the requirements of *Oveson* could be circumvented if the court and counsel merely wished not to observe the holding of that case. We will not trench on *Oveson* in this manner.

Where it appears that the dictates of *Oveson* have been ignored, we will not hesitate to dismiss the appeal sua sponte, as we have done here. To do otherwise would mean that we could have thrust upon us the determination of hypothetical and abstract questions which are not dispositive of the case as to which appeal is sought. This we refuse to do.¹⁶

The Court of Appeals confronted a similar situation in *Cronin v. Municipality of Anchorage*.¹⁷ That case involved a stipulation that the trial court's adverse ruling on defendant's motion to dismiss the complaint was dispositive. On appeal, however, the municipality conceded that it possessed evidence sufficient to allow it to "attempt to prove" guilt on an alternative theory.¹⁸ "It is therefore clear," the court held, "that the city has agreed to dismiss the driving while intoxicated charge against Cronin in the event he prevails on appeal, not because it would be unable to proceed against Cronin in the event of an adverse

would have been valid if it did); *Romo v. Municipality of Anchorage*, 697 P.2d 1065, 1067 (Alaska Ct. App. 1985); *McCracken v. State*, 685 P.2d 1275, 1276 (Alaska Ct. App. 1984); *Jensen v. State*, 667 P.2d 188, 189 (Alaska Ct. App. 1983) (jurisdiction based on *Oveson*); *Van Brunt v. State*, 646 P.2d 872, 873 (Alaska Ct. App. 1982).

13. 609 P.2d 547 (Alaska 1980).

14. *Id.* at 548.

15. *Id.*

16. *Id.*

17. 635 P.2d 840 (Alaska Ct. App. 1981).

18. *Id.* at 841.

legal decision, but in order to obtain a ruling from this court.”¹⁹ The court echoed *Heuga* in elaborating its position:

We have concluded that under *Oveson*, we do not have authority to hear this matter as an appeal. In *Oveson* the court said, “appeals under the *Cooksey* doctrine will not be approved unless it is clearly shown, and the parties have stipulated with trial court approval, that our resolution of the issue reserved for appeal will be dispositive of the entire case.” We believe it is clear that in Cronin’s case the issue raised on appeal would not be dispositive. We do not believe that the City of Anchorage, by entering into an agreement that an appellate issue is dispositive of the case when it clearly is not, can avoid the requirements of *Oveson* and *Cooksey*. For this court to hear a *Cooksey* appeal, the record must clearly reflect that the issue before the court is dispositive of the case.²⁰

Again, the court did not explain why the municipality’s decision not to proceed on the alternative theory failed to render the issue preserved for appeal dispositive. Clearly the *Cronin* court, like the *Heuga* court, was reacting primarily against a perceived attempt to manipulate the legal process. Moreover, nothing prevented the parties from proceeding to trial only on the first theory and obtaining appellate review after completion of that “costly and futile ordeal”²¹—achieving their desired purpose at the expense of *Cooksey*’s policy of avoiding the waste of legal resources.

It is unlikely that the state’s trial case was entirely dependent on the issues preserved for review in every *Cooksey-Oveson* appeal that has been accepted and decided: most prosecution cases either contain enough inculpatory evidence to allow the state to “attempt to prove” guilt even without the questioned evidence or on an alternative theory. In fact, it is unlikely that the appellate courts could know whether such is the case in the vast majority of the *Cooksey-Oveson* appeals they review. Indeed, additional case law reveals the inconsistency with which the Alaska courts have approached the problem of prosecutor discretion.

In *Uptegraft v. State*,²² for example, the Alaska Supreme Court recognized that there was “some doubt” as to whether the suppression issue before it on a *Cooksey-Oveson* appeal was dispositive “because there was other evidence against Uptegraft that might have been used to obtain a conviction.”²³ The *Uptegraft* court stated that the determinative question was whether the prosecutor “would . . . have proceeded with the case without the evidence.”²⁴ Other Alaska Supreme

19. *Id.*

20. *Id.* at 841-42 (citation and footnote omitted).

21. *See Cooksey*, 524 P.2d at 1255.

22. 621 P.2d 5 (Alaska 1980).

23. *Id.* at 7 n.3.

24. *Id.*

Court cases are to the same effect.²⁵ Nothing in the opinions themselves indicates any persuasive way to reconcile *Heuga* with the *Uptegraft* line of cases. Sometimes, as in *Uptegraft*, a prosecutor's decision is accepted without question; but the possibility always exists that, as in *Heuga*, the court will second-guess that decision and override the prosecutor's evaluation of his own case.

Court of appeals cases reveal a similar inconsistency. In *Van Brunt v. State*²⁶ the appellant had entered a *Cooksey* plea to the charge of driving with a blood alcohol level in excess of the 0.10 standard in exchange for a dismissal of the second count which charged DWI on an alternative theory.²⁷ Although *Cronin* and *Van Brunt* present the same situation with regard to the *Cooksey-Oveson* issue,²⁸ they are decided in exactly opposite ways.²⁹

Two cases in which the court of appeals expressed concern about the *Cooksey-Oveson* problem before addressing the merits of the issue sought to be preserved suggest an alternative approach. The appellant in *Begley v. Municipality of Anchorage*³⁰ had sought a continuance to allow presentation of expert testimony regarding her Intoximeter result.³¹ Apparently conceding that she would certainly be convicted without that evidence, she sought to include the trial court's denial of the request for a continuance in the *Cooksey* stipulation.³² The court of appeals was "somewhat puzzled" by the prosecutor's entry into that

25. See, e.g., *Deal v. State*, 626 P.2d 1073, 1076-77 n.3 (Alaska 1980) (*Oveson* requirement satisfied by stipulation of parties without independent determination that issue was dispositive); *Gonzales v. State*, 586 P.2d 178, 179-80 n.5 (Alaska 1978) (*Oveson* requirement is that "parties must stipulate, with the trial court's approval, that [the appellate] court's resolution of the issue reserved for appeal will be dispositive of the entire case"); *Cruse v. State*, 584 P.2d 1141, 1144 n.3 (Alaska 1978) (review appropriate because "[t]he district attorney indicated that he would not have proceeded with the case without the evidence at issue").

26. 646 P.2d 872 (Alaska Ct. App. 1982).

27. *Id.* at 873. See also *McCracken v. State*, 685 P.2d 1275, 1276 (Alaska Ct. App. 1984) (using *Cooksey* plea on a refusal to take a breathalyzer test charge); *Jensen v. State*, 667 P.2d 188, 188-89 (Alaska Ct. App. 1983) (using *Cooksey* plea on an amended charge that defendant refused to take a breathalyzer test).

28. The fact that the state had sufficient evidence to charge under both alternative theories would have compelled it to make the same concessions as the municipality did in *Cronin*—that it had "sufficient evidence . . . to attempt to prove" its case on the alternative theory. See *Cronin v. Municipality of Anchorage*, 635 P.2d at 841. The only distinction between *Cronin* and *Van Brunt* is the court's failure to extract that concession in the latter case.

29. This failure to apply the strict *Cronin* approach is not unique to *Van Brunt*. See, e.g., *Romo v. Municipality of Anchorage*, 697 P.2d 1065, 1066 (Alaska Ct. App. 1985) (consent of prosecutor and court sufficient to allow defendant to preserve right to appeal).

30. 711 P.2d 540 (Alaska Ct. App. 1985).

31. *Id.* at 542.

32. *Id.*

stipulation and the trial court's subsequent approval of it because "[t]he issue of whether a continuance should [have been] granted [was] in no way dispositive of this case."³³ Unfortunately, the court proceeded to address the merits of the issue without clarifying the basis for its hesitation.³⁴ There is, however, a need for clarification. Did the court mean that, on the facts of *Begley*, it had not been "clearly shown" that the denial of appellant's request for a continuance was "dispositive of the entire case"? Or did the court mean that a request for a continuance could never be dispositive in the way required by *Oveson*? The second possibility suggests an interpretation of the *Cooksey-Oveson* procedure which the courts had not previously considered: that the applicability of the *Cooksey-Oveson* doctrine depends upon the kind of issue involved rather than its dispositive or non-dispositive character.

*Brown v. State*³⁵ suggests a similar interpretation. In accepting the *Cooksey* appeal of the denial of a motion to dismiss the prosecution, the court noted that Alaska's criminal rules contain no specific provision authorizing such a motion and stated that its "willingness to entertain *Brown's* *Cooksey* appeal . . . should not be interpreted as a recognition of pretrial motions for summary judgment in criminal cases."³⁶ Insofar as the court's statement constitutes a warning that future appeals based on such motions will not be received favorably, it again suggests the possibility of a distinction based on the kind of issue presented rather than on the question of whether the issue is dispositive.³⁷

The most obvious conclusion to be drawn from *Heuga* and *Cronin* is that the *Oveson* limitation on *Cooksey* is not capable of meaningful application. Both cases bring the unresolvable tension discussed above into sharp focus: given prosecutorial decisions as to how the cases would be presented, the policy of preventing manipulation was served at the expense of requiring needless litigation. Both cases

33. *Id.* at 543.

34. *Id.*

35. 739 P.2d 182 (Alaska Ct. App. 1987).

36. *Id.* at 184 n.2.

37. The posture of *Brown* on appeal put the court in a difficult position: it could hardly decide whether motions for summary judgment are appropriate in criminal cases because that issue had not been briefed. Also, it could not order briefing of that issue because neither party had an interest in asserting a negative answer to that question. The impression that the appellate process was being manipulated in this respect may have been at least partly responsible for the court's apparent reluctance to decide the issue. Compare *Hemphill v. State*, 673 P.2d 888, 889 n.1 (Alaska Ct. App. 1983) (similar issue accepted without comment) with *Burnett v. Municipality of Anchorage*, 678 P.2d 1364 (Alaska Ct. App.), cert. denied, 469 U.S. 859 (1984) (reservation of constitutional challenge accepted without indication of procedure employed at trial level).

are irreconcilable with other opinions published by the same courts within a period of a few months. Both make the most sense if interpreted as expressions of cumulative frustration in the face of a perceived abuse of the *Cooksey-Oveson* procedure.

Neither does the shift in focus suggested by *Begley* and *Brown* promise to solve the problem. Although a ruling that certain kinds of issues will be per se eligible for *Cooksey-Oveson* treatment while others will not would certainly provide a welcome predictability, it would do so only at the expense of both policies underlying the original rule. It is easy to construct hypotheticals under which virtually any kind of pretrial issue can be made either dispositive or non-dispositive.³⁸ A bright-line rule including certain kinds of issues and excluding others would result in waste to the extent that excluded issues are in fact dispositive, and abuse of the process to the extent that included issues are not. And, as has been noted, the nagging fact remains that by committing himself to the position that any given issue is dispositive, a prosecutor necessarily makes that issue dispositive in fact. Furthermore, a strict application of *Oveson* to the defense side of the problem—which has so far not been attempted—would reveal that no issue is ever really “dispositive”: defendant always has the option of simply denying the truth of the state’s evidence and relying on reasonable doubt. On the one hand, a prosecutor can make any issue dispositive merely by saying it is; on the other hand, defendant can always hope for jury nullification and, for that reason, cannot regard any issue as dispositive. For these reasons, it seems clear that a distinction based not on the *Oveson* holding but on the nature of the issue involved cannot be workable.

The *Cooksey-Oveson* procedure does not, and cannot, withstand close scrutiny. Yet, that procedure has undeniably resulted in the avoidance of a great deal of pointless litigation and the saving of very substantial amounts of time and money.³⁹ Alaska’s experience suggests, paradoxically, that the procedure is both indispensable and incapable of coherent application.

38. As *Begley v. Municipality of Anchorage*, 711 P.2d 540, 542 (Alaska Ct. App. 1985) teaches, even a motion for continuance can be dispositive if the testimony of a critical witness depends upon the outcome. At the other extreme, motions to suppress evidence—the traditional subject of *Cooksey* appeals—are only dispositive in the relatively rare cases where the evidence in issue is the only evidence of guilt. The point is that motions to continue can sometimes be dispositive, while motions to suppress often are not—and a rule qualifying the latter and disqualifying the former for *Cooksey* treatment would make little sense.

39. The appropriate volumes of *Shepard’s Citations* contain close to 100 entries under *Cooksey* and *Oveson*. Since only two of those cases—*Heuga* and *Cronin*—were remanded for trial, the published opinions alone reflect avoidance of nearly 100 unnecessary trials and, consequently, the saving of the substantial resources that would have

III. ALTERNATIVE APPROACHES

Problems notwithstanding, the *Cooksey-Oveson* procedure, or something like it, is supported by the American Bar Association ("ABA"), the American Law Institute, and numerous other commentators.⁴⁰ Many state and federal jurisdictions have adopted such a procedure and have faced problems similar to those encountered in Alaska.

The ABA's recommendation is general:

Where the only contested issues in a prosecution can be raised and determined by decisions on pretrial motions, such as motions to suppress evidence, motions to exclude confessions, and motions challenging the sufficiency of the charging papers to state an offense, a procedure should be established to permit entry of a final judgment of conviction, on the basis of a guilty plea or a stipulation of the facts necessary for conviction, without foreclosing subsequent appeals on the contested issues.⁴¹

To that general statement, it adds only the following:

The trial court should have discretion to reject rather than to accept a proposed guilty plea conditioned on reservation of appellate review of preplea assignments of nonjurisdictional error. This salutary principle should be incorporated into any procedure, whether established by statute or rule or by judicial recognition of a conditional guilty plea.⁴²

This very general formulation provides a starting point, but no guidance as to the details which have proven to be problematic in Alaska.

The *Uniform Rules of Criminal Procedure* contain a different, but equally vague provision:

The plea bars an appeal based upon any nonjurisdictional defect in the proceedings, but an order denying (1) a pretrial motion to suppress evidence, or (2) any pretrial motion which, if granted, would be dispositive of the case, may be reviewed on appeal from an ensuing judgment of conviction.⁴³

Again, the "would be dispositive" requirement offers little in the way of a solution to the problems Alaska appellate courts have encountered. Without clarification, that phrase promises to give rise to the

been expended during those trials. Since *Cooksey-Oveson* appeals are frequently decided in unpublished opinions, *see supra* note 9, this estimate drastically underestimates the economic impact the procedure has had.

40. *See, e.g.*, 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 175, at 630 (1982); Comment, *Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty*, 9 HOUS. L. REV. 305 (1971); J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 7.22 (1982). *See generally* Annotation, *Plea of Nolo Contendere or non vult contendere*, 89 A.L.R. 2D 540 § 36.3 (Supp. 1979 & 1987).

41. STANDARDS FOR CRIMINAL JUSTICE § 21-1.3(c) (2d ed. 1980 & Supp. 1986).

42. *Id.* commentary at 21.15.

43. UNIF. R. CRIM. P. 444(d).

same kind of second-guessing that the *Oveson* requirement has already produced.⁴⁴

A review of the law applied in other jurisdictions likewise provides little guidance. At least three states, for example, have enacted statutory provisions authorizing appellate review of pretrial rulings on motions to suppress evidence.⁴⁵ These provisions necessarily suffer from being both too broad and too narrow. They are too broad to the extent that they contain no requirement that the issue preserved be dispositive: cases will inevitably arise in which reversal of the trial court's ruling will be followed by trial on the merits and a second appeal. In such cases, the procedure will have added a superfluous and time-consuming appeal to the traditional procedure. At the same time, by restricting the scope of its operation to suppression issues only, the procedure requires a pointless trial in any case where defendant wishes to preserve any dispositive pretrial issue other than one involving suppression of evidence. This procedure is doubly wasteful: with respect to the first problem, it simply fails to achieve the desired end of avoiding waste, and with respect to the second, it disallows use of the procedure in many cases where it would be productively employed.

The Louisiana Supreme Court has provided what appears to be the most thorough judicial analysis of the problem. In *State v. Crosby*,⁴⁶ after reviewing the substantial body of conflicting law,⁴⁷ that court conducted a thoughtful analysis of the supporting authorities available as of 1976. The principles the court ultimately found to be applicable to this procedure include requirements of a stipulation preserving a given issue for appeal, trial court approval, and a finding that the ruling complained of will "substantially contribute to a conviction" if allowed to stand.⁴⁸ These principles do not include any requirement that the issue preserved be dispositive. Indeed, the court seems to assume that a trial might follow reversal of a conviction entered in accordance with this procedure.⁴⁹ The Louisiana rule thus

44. See *supra* notes 7-8 and accompanying text.

45. See CAL. PENAL CODE § 1538.5(m) (West 1982 & Supp. 1988); N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 1971 & Supp. 1984); WIS. STAT. ANN. § 971.31(10) (West 1985).

46. 338 So. 2d 584 (La. 1976).

47. *Id.* at 588.

48. *Id.* at 590-92.

49. *Id.* at 591.

reduces wasted trial time at the expense of adding to the appellate court's burden.⁵⁰

The Florida Supreme Court has emphasized the opposite goal, seeking to avoid multiple appeals, even if it is at the expense of additional trials.⁵¹ This emphasis leads to a requirement that the procedure be used only with regard to "dispositive" issues.⁵² Unlike the Alaska courts, however, it ventures a definition of "dispositive" for purposes of the rule. "In most cases," the court said, "the determination will be a simple one":

Motions testing the sufficiency of the charging document, the constitutionality of a controlling statute, or the suppression of contraband for which a defendant is charged with possession are illustrative. This case, however, presents us with one of the truly inscrutable areas—confessions. In order to determine accurately whether a confession is dispositive of a case, the prosecution would have to present to the trial judge all of the evidence it intended to introduce at trial. The judge would then have to decide, on the basis of hearsay and summarized information, whether there was sufficient evidence apart from the confession to support a conviction. Such a procedure would be unwieldy and time-consuming. Therefore, in order to avoid a mini-trial on the sufficiency of the evidence in each case involving a confession, we hold that as a matter of law a confession may not be considered dispositive of the case for purposes of an *Ashby nolo* plea.⁵³

The court's catalogue of pretrial issues is far from complete. More importantly, it is completely arbitrary: the court offers no explanation for the view that suppression of contraband must be dispositive while suppression of a defendant's statement cannot. For reasons that have already been stated,⁵⁴ such a rule promises little in the way of improvement.

The federal authority upon which the *Cooksey* court relied⁵⁵ has been seriously undercut in subsequent cases. Shortly after issuing that opinion, the Fifth Circuit, en banc, ruled that:

50. In other words, the Louisiana Supreme Court is willing routinely to decide pretrial appeals in the hope of reducing the number of retrials caused by the traditional procedure. This new rule will often have the effect of trading two appeals and one trial for what would otherwise be two trials and one appeal.

51. See *Brown v. State*, 376 So. 2d 382, 384-85 (Fla. 1979) (nolo contendere plea conditioned on defendant being allowed to file an appeal permissible only when issue dispositive).

52. *Id.* at 384.

53. *Id.* at 385 (footnotes omitted). See *State v. Ashby*, 245 So. 2d 225, 228 (Fla. 1971) (conditional plea of nolo contendere to preserve questions of law allowed).

54. See *supra* note 45 and accompanying text.

55. *United States v. Caraway*, 474 F.2d 25, 28-29 (5th Cir.), *vacated per curiam*, 483 F.2d 215 (5th Cir. 1973); see *Cooksey*, 524 P.2d at 1255-56.

[a]s a matter of policy this Court disapproves the practice of accepting pleas of guilty or *nolo contendere* if they are coupled with agreements that the defendant may nevertheless appeal on non-jurisdictional grounds.⁵⁶

Five years later, the court expressed some impatience at having had to "reiterate this expression of disapproval on several recent occasions":⁵⁷

We repeat our earlier admonition: prosecutors and district courts are once again reminded of our statement in *Sepe*; the district courts are directed to cease receiving guilty or *nolo contendere* pleas coupled with agreements that the defendant may nevertheless appeal on nonjurisdictional grounds.⁵⁸

At the same time, however, a different Fifth Circuit panel acknowledged that "[a]ble scholars" have recommended adoption of a procedure "whereby a defendant could have review of his constitutional claims without going to trial."⁵⁹ That panel also identified a "trend in other circuits . . . toward considering the merits of conditional confessional pleas" but speculated that this trend was based on the fact the other circuits "are still proceeding on a case by case basis":⁶⁰

These courts do not appear truly to have grappled with the issue of how a plea can be voluntary, intelligent, and in compliance with

56. *United States v. Sepe*, 486 F.2d 1044, 1045 (5th Cir. 1973) (en banc). This rule does not bar appeal following a guilty plea on the ground that "the indictment . . . failed to state an offense, or that the statute providing the basis for the charge is unconstitutional or that the indictment showed on its face that it was barred by the statute of limitations." *Id.* (footnote omitted).

57. *United States v. Lopez*, 571 F.2d 1345, 1346 (5th Cir. 1978).

58. *Id.*

59. *United States v. Swann*, 574 F.2d 1316, 1317 (5th Cir. 1978) (citing 1 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 175 (1982)).

60. *Id.* See *United States v. Burke*, 517 F.2d 377, 378-79 (2d Cir. 1975) (court follows *Doyle* exception and allows appeal of reserved issue without express prosecutorial consent); *United States v. Kondos*, 509 F.2d 1147, 1148-49 (7th Cir. 1975) (court refuses to hear appeal for nonjurisdictional defects from unconditional *nolo contendere* plea; court declines to comment on acceptability of conditional pleas); *United States v. Brown*, 499 F.2d 829, 832 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974) (court reiterates finality of guilty pleas for nonjurisdictional issues but considers merits here because district court gave defendants some reason to believe that their plea was conditional); *United States v. Warwar*, 478 F.2d 1183, 1184-85 n.1 (1st Cir. 1973) (court generally has responsibility to inform defendants of rights they might waive with pleas; no opinion expressed as to claims which are waived with a guilty plea or procedure of pleading guilty and preserving issues by stipulation); *Coleman v. Burnett*, 477 F.2d 1187, 1195 (D.C. Cir. 1973) (court discusses possibility of conditional pleas but does not find that one existed in present case); *United States v. Cox*, 464 F.2d 937, 946 (6th Cir. 1972); *United States v. Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965) (recognizing plea reserving issue with government consent as exception to principle that unqualified guilty plea bars all but most fundamental appeals).

F.R. Cr. P. 11, if it is made with leave to appeal. A defendant cannot know the real consequences of his plea, and cannot make an intelligent and voluntary plea, in legal terms, when he is still relying on an appeal to escape the consequences of his plea. At any rate, it appears inappropriate for courts, absent statute or further rulemaking, to establish a practice of accepting conditional pleas by decisional fiat.⁶¹

The panel did not explain why "decisional fiat" is a less appropriate method of adopting the procedure than "statute or further rulemaking." But it did make clear that it was bound by *Sepe*⁶² and that "the argument to undo [the *Sepe* doctrine] must be addressed to the court *en banc*."⁶³

Numerous other courts have joined the Fifth Circuit in opting for the traditional rule.⁶⁴ Few, however, have supplied argument in support of that rule other than *stare decisis*. The Michigan Court of Appeals is an exception:

[I]t is contrary to sound policy to allow the litigants to force the courts to consider constitutional issues and to foreclose courts from finding that in a given case any erroneous denial of a suppression motion is harmless error. The benefit gained by preventing trials necessitated solely by a desire to preserve nonjurisdictional issues is outweighed by these adverse effects on the administration of justice.

Even if we were to find the reasons for enforcing qualified pleas more compelling than those for not enforcing such pleas, we would hesitate to enforce qualified pleas absent an authorizing court rule or statute

Dealing with qualified pleas by rule or statute rather than judicially is desirable from the standpoint of uniformity. Plea-taking procedures are already regulated in great detail by court rule. Any addition to established procedures should also be so regulated. Finally, until there is a definitive rule or statute, trial courts must

61. *Swann*, 574 F.2d at 1317 (citing 1 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 175 (1982)).

62. See *supra* note 55 and accompanying text.

63. *Swann*, 574 F.2d at 1318.

64. See, e.g., *State v. Valenzuela*, 590 P.2d 464, 466 (Ariz. App. 1978); *State v. Satti*, 2 Conn. App. 219, —, 477 A.2d 144, 146, 148 (1984) (denial of application for accelerated rehabilitation not appealable after plea of *nolo contendere*); *Walker v. United States*, 481 A.2d 1308, 1309 (D.C. 1984); *People v. Green*, 21 Ill. App. 3d 1072, 1074, 316 N.E.2d 530, 532 (1974) (court finds that counsel could not reserve right to appeal motion to suppress because guilty plea waives all nonjurisdictional errors in defendant's conviction); *Lill v. State*, 40 Kan. App. 2d 40, 41, 602 P.2d 129, 130 (1979); *State v. Turcotte*, 164 Mont. 426, 428-29, 524 P.2d 787, 788-89 (1974) (appeal denied despite defendant's attempt to reserve right to appeal ruling denying motion to suppress when making guilty plea); *Zappas v. State*, 650 S.W.2d 131, 132 (Tex. Ct. App. 1983).

guess whether a conditional plea will be enforced in that particular case before deciding whether to accept the plea.⁶⁵

Ironically, however, after four years passed without the enactment of a rule or a statute, the same court accepted an appeal which had arisen in the same context with little comment.⁶⁶

Finally, United States Supreme Court dictum has made that Court's views fairly clear:

Many defendants recognize that they cannot prevail at trial unless they succeed in suppressing either evidence seized by the police or an allegedly involuntary confession. Such defendants in States with the generally prevailing rule of finality of guilty pleas will often insist on proceeding to trial for the sole purpose of preserving their claims of illegal seizures or involuntary confessions for potential vindication on direct appellate review or in collateral proceedings. Recognizing the completely unnecessary waste of time and energy consumed in such trials, New York has chosen to discourage them by creating a procedure which permits a defendant to obtain appellate review of certain pretrial constitutional claims without imposing on the State the burden of going to trial.⁶⁷

The Court concluded the discussion with a reference to "New York's commendable efforts to relieve the problem of congested criminal trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution."⁶⁸

It appears that, tradition aside, the only argument that has been advanced against procedures like *Cooksey-Oveson* is based on "the hoary doctrine of avoiding constitutional questions if possible."⁶⁹ Allowance of contingent pleas undercuts that doctrine in two ways: first, it requires appellate review in cases where jury nullification would have produced an acquittal and, second, it deprives appellate courts of the "harmless error" rationale.⁷⁰ In comparison with the substantial savings of time, money, and judicial resources the procedure offers,

65. *People v. Smith*, 85 Mich. App. 32, 44-45, 270 N.W.2d 697, 701-02 (1978) (citations omitted). See also *United States v. Cox*, 464 F.2d 937, 945 (6th Cir. 1972).

66. *People v. Hubbard*, 115 Mich. App. 73, 76-77, 320 N.W.2d 294, 296 (1982). Only one jurisdiction addresses the procedure by court rule. Ohio Criminal Rule 12(H) provides that "[t]he plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion." *State v. Luna*, 2 Ohio St. 3d 57, 58, 442 N.E.2d 1284, 1285-86 (1982), *per curiam* (quoting OHIO CRIM. R. 12(H)).

67. *Lefkowitz v. Newsome*, 420 U.S. 283, 292-93 (1975).

68. *Id.* at 293.

69. *United States v. Cox*, 464 F.2d 937, 945 (6th Cir. 1972).

70. It should be noted that the jury nullification phenomenon can hardly be a serious consideration here: no meaningful policy could be founded on the fairly remote prospect that a jury might intentionally refuse to honor its commitment to act in accordance with the law. The harmless error doctrine, on the other hand, actually would allow appellate courts to avoid decision on certain issues following trial that contingent pleas would force them to decide. This cost, although real, would appear

these drawbacks seem relatively minor. Apparently, the procedure requires that appellate courts pay a relatively small price in terms of increased caseloads in exchange for a very large benefit to the trial courts. On balance, as most of the authorities cited indicate, the benefits appear to be well worth the cost.

As to the details of the procedure, it does not appear that any other jurisdiction has done much better than Alaska. But that is not to say that Alaska's procedure cannot be improved upon. As is the case in other jurisdictions, Alaska's rule needs clarification, in light of the basic policy interests it serves, so as to be amenable to uniform and predictable application.

IV. CONCLUSION

Several general principles emerge from the authorities that have been discussed. Most important, some sort of provision of conditioning a plea upon preservation of the right to appeal seems necessary in the interest of avoiding the time and expense of pointless trials. If left unchecked, however, such a procedure will most certainly result in problems at the appellate level. Those problems include the possibility that manipulation will allow the parties to obtain improper advisory opinions and that review of non-dispositive issues will increase the appellate case load. A check is therefore necessary.

One approach has been to restrict the scope of such a procedure to certain kinds of issues. Without more, however, this tactic has been ineffective: the same problematic question as to when an issue is "dispositive" persists in the narrower context, and pointless litigation continues outside of that context. Another approach is to vest complete supervisory discretion in the trial court. Given the choice between accepting a conditional plea and presiding over a lengthy and probably pointless trial, however, trial judges are inevitably tempted to save resources by adopting the former course. Even where approval of the plea agreement includes a finding that the issue preserved is "dispositive," experience has proven that standards for making that determination are very difficult to formulate and apply—and that appellate courts fairly frequently disagree with trial court decisions on that issue. It appears, in fact, that there is not and cannot be any meaningful way to make such a determination apart from the substance of the parties' agreement. It is clear, in any event, that neither the trial court nor the appellate court can anticipate or control the parties' tactical decisions at trial and, therefore, cannot prevent a disputed issue from being "dispositive" if the parties wish it to be so. The mere fact that

to be minimal in that it would be fairly rare for an erroneous trial court decision on a "dispositive" issue to be "harmless."

an eyewitness exists, for example, does not mean that a party must use that witness's testimony or that it would be poor trial tactics not to do so.

It appears that the *Oveson* requirement that the issue preserved be "clearly shown . . . [to] be dispositive of the entire case" has created several problems and solved none. It allows appellate courts to react against perceived manipulative use of the procedure, but provides no way of testing the accuracy of such perceptions. And it has not been, and perhaps cannot be, used in a consistent way to serve that purpose.

If that requirement were eliminated, appellate courts would be left with the parties' representation that a given issue is dispositive. But, as has been pointed out, that representation has the effect of actually making the issue dispositive in a very real sense: it carries a commitment by the state to abandon the prosecution in the event of a reversal, and defendant's conviction becomes final if the trial court is affirmed. So long as good faith is assumed, the procedure is perfectly coherent. The only danger lies in the possibility that parties will take advantage of the procedure to "thrust upon [appellate courts] the determination of hypothetical and abstract questions." This is not a danger that has been realized to any serious extent. Given the alternatives, it appears to be one that the appellate courts should be prepared to bear. Abandonment of the requirement that the issue preserved actually be "dispositive of the entire case" would offer much in the way of clarity and consistency and is strongly recommended. Few of us would mourn the loss of the many nice but pointless "knock-down" appellate arguments that this aspect of *Oveson* has engendered.