IN THE SUPREME COURT OF FLORIDA
CASE NO: SC10 -602

NICHOLAS AGATHEAS,

Appellant,

vs.

STATE OF FLORIDA

Appellee.
_____/

INITIAL BRIEF OF APPELLANT NICHOLAS AGATHEAS

On Appeal From The Judgments, Convictions And Terms of Imprisonment By The Circuit Court In And For Palm Beach County, Florida
Case No.: 50-1002-CF 006013A
Honorable Krista Marx, Circuit Judge

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CERTIFICATE OF INTERESTED PARTIES

Undersigned counsel for Appellant, Nicholas Agatheas, certifies that the following is a complete list of persons who have an interest in the outcome of this case. This is a criminal case and there are no identifiable corporate entities.

1. Nicholas Agatheas, Defendant/Appellant;
2. Arnstein & Lehr, LLP, Attorneys for Appellant;
3. James J. Carney, Sr. Asst. Attorney General;
4. Mary Ann Diggan, Assistant State Attorney;
5. Daniel Galo, Assistant State Attorney.
6. John A. Garcia, Esquire, Defense Counsel;
7. Barry E. Krischer, Esquire, Assistant State Attorney;
8. Honorable Jorge LaGarga, Circuit Judge;
9. Honorable Krista Marx, Circuit Judge;
10. Bill McCollum, Attorney General;
11. Aleathea McRoberts, Assistant State Attorney;
12. Richard L. Rosenbaum, Esq., Counsel for Appellant;
13. Joseph A. Tringali, Asst. Attorney General;

CERTIFICATE OF INTERESTED PARTIES (cont'd)

14. Thomas Villano, Victim

Respectfully submitted,
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PRELIMINARY STATEMENT

The following symbols, abbreviations, and references will be utilized throughout this Initial Brief of Appellant, Nicholas Agatheas. "Appellant" shall refer to the Defendant in the Circuit Court below, Nicholas Agatheas.

The term "Appellee" shall refer to the Plaintiff in the Circuit Court below, the State of Florida.

The Record on appeal in this case includes all pleadings, documents, and orders filed at the trial court and appellate court levels, contained in Volumes 1 through 11, with the trial transcript contained in volumes 5 – 11, pages 1 through 1134. Citations to the documents contained in the Record on appeal shall be indicated by an "R" followed by the appropriate page number (R). Citations to the transcript of the hearings, trial, and sentencing proceedings shall be indicated by a "T" followed by the appropriate page number (T).

An Appendix is attached to this Initial containing public records surrounding the prosecution of Nicholas Agatheas' defense counsel in *United States v. John A. Garcia*, 06-80128-CR-DTKH and disbarment proceedings by The Florida Bar and the Florida Supreme Court. Citations to the Appendix shall be indicated by "Appendix" followed by the appropriate page number. (Appendix

___).

All emphasis indicated herein have been supplied by the Appellant unless otherwise specified.

STATEMENT OF THE CASE

This Court accepted jurisdiction on September 24, 2010 to review Nicholas Agatheas' conviction for first degree murder. The Appellant, whose date of birth is September 24, 1976, was indicted by a Grand Jury in Palm Beach County on May 10, 2005, for the July 2000 murder of Thomas Villano. The State did not seek the death penalty. (R 153). [Emphasis added]

Trial commenced on November 13, 2006 before the Honorable Krista Marx. The State filed a Motion to Disqualify defense attorney John A. Garcia (hereinafter referred to as "Garcia") on the eve of trial because the lawyer had been charged with money structuring and obstruction of justice in Federal District Court and was expected to plead guilty. *USA v. Garcia*, *supra*; (Appendix 1-20).

Specifically, Garcia and his defense counsel negotiated that Garcia be charged in an Information rather than Indictment. The Information was filed on August 22, 2006, charging John A. Garcia with three (3) counts of illegal money structuring contrary to Title 31, U.S.C. Section 5324(a)(3) and Section 5324(d)(2) and in Count Four with making false statements to the Government contrary to Title 18 U.S.C. Section 1001. (Appendix at p. 6-9). A criminal forfeiture count was also filed against Garcia seeking forfeiture of his "ill gotten gains." (Appendix at p. 8).

Pursuant to conversations and agreements by Garcia, his counsel and the Government, Garcia voluntarily surrendered on September 20, 2006 and his Initial Appearance in Federal Court was coordinated to be conducted on the same day (Appendix, Dkt 4). Garcia was released on $100,000 personal surety bond with several non-monetary conditions (*Id.*). A not guilty plea was entered the same date (Appendix, Dkt 7).

Garcia intended to enter a guilty plea to the federal charges as soon as *State v. Agatheas* concluded. Because Nicholas Agatheas' trial took longer than expected, Garcia's counsel asked that the change of plea proceeding be reset for approximately two weeks later (Appendix, Dkt 19; 20; 21).

John A. Garcia pled guilty to all of the Federal charges. He was sentenced to be imprisoned by the Bureau of Prisons for eighteen months followed by two years supervised release, with other general and specific conditions. (Appendix at p.13-20). John Garcia was admitted to practice law in the State of Florida in April 1988 and was formally disbarred effective, *nunc pro tunc*, January 13, 2007 on March 4, 2008. He has been released.

After a hearing, the State's Motion to Disqualify Garcia was denied, jury selection began.

No substantive pre-trial motions were filed, except regarding costs (R 64, Volumes 1 and 2, generally.) Attorney Garcia stipulated to introduction of each and every one of the State's exhibits at trial (R 376-377). The State called sixteen witnesses; the Defense called none (R 951).

Key pieces of evidence were seized from Nicholas Agatheas years after the incident at the time of his arrest. These items included a backpack in Nicholas Agatheas' possession which contained among other things, an unrelated 45 caliber revolver and latex gloves nestled inside another pair of gloves. *Agatheas* at 206. No pretrial Motion to Suppress was filed and no objections were lodged by the defense to the introduction of the evidence.

On November 16, 2006, the jury found Appellant guilty of first degree murder with a firearm. Sentencing commenced on November 17, 2006, the same day defense attorney Garcia was originally scheduled to plead guilty to the Federal charges against him.

Appellant was sentenced to life without the possibility of parole.

Appellant appealed his conviction to the Fourth District Court of Appeal, and his sentence and conviction were affirmed on February 24, 2010. *Agatheas v. State*, 28 So. 3d 204 (Fla. 4th DCA 2010) [on Motion for Rehearing and Rehearing En Banc]. This appeal to the Florida Supreme Court ensues. Nicholas Agatheas

remains incarcerated, presently housed at Taylor Correctional Institution in Perry, Florida.

STATEMENT OF THE FACTS

On November 16, 2006, the Appellant was convicted of one count of first degree murder with a firearm for the July 2000 murder of Thomas Villano (R.154). Mr. Villano had been murdered in his Lake Worth home.

The bulk of the evidence utilized to convict Nicholas Agatheas came from his estranged former girlfriend's testimony and irrelevant, highly prejudicial items (including a gun – not the one used to commit this offense) seized from the Appellant years after the victim's death. These items were not the subject of any pretrial suppression motions or motion in Limine. Similarly, the evidence was admitted without objection at trial.

The State moved to Disqualify defense attorney Garcia on the eve of trial because Garcia had been charged with money structuring and obstruction in Federal District Court two months prior and was expected to plead guilty (R.46-48). The following exchange took place moments before jury selection began:

MR. GARCIA: Nick, we've had serious discussions in regards to my representation of you in this particular case, right?

MR. AGATHEAS: Yes.

MR. GARCIA: And, you are obviously aware that I have been charged with three charges in federal court?

MR. AGATHEAS: Yes.

MR. GARCIA: And, I have gone over those charges with you, and you know the status of them as, you know, basically that we're waiting to -- or I am waiting to resolve those?

MR. AGATHEAS: Yes.

MR. GARCIA: And, obviously I've been representing you for 18 months now?

MR. AGATHEAS: Correct.

MR. GARCIA: Have I -- up to this particular point in time, have I done anything or not done anything that you want me to do?

MR. AGATHEAS: No, sir.

MR. GARCIA: Okay. I've completed all of the work and talked to all of the people and prepared the case in the manner that you would like me to prepare?

MR. AGATHEAS: Yes.

MR. GARCIA: And, you do understand the state's concern that if we were to go to trial and lose, that you obviously would get sentenced to a mandatory life sentence, right?

MR. AGATHEAS: Yes, correct.

MR. GARCIA: And, that you couldn't, after we go through this colloquy here, you could not go back and say, "My lawyer was under indictment in the federal system, and therefore I don't think he worked for me." You understand that? That's the state's concern.

MR. AGATHEAS: Yes, I do.

MR. GARCIA: Okay, and now you do wish that I go forward in the -

- in your representation; you want me to be your lawyer?

MR. AGATHEAS: Yes, I would like that.

(R 50).

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THE COURT: You've discussed with Mr. Garcia all of the defense witnesses that you might possibly want to have called in this case; is that right?

MR. AGATHEAS: Yes, ma'am.

THE COURT: And, all possible defenses you've discussed with him; is that right?

MR. AGATHEAS: Yes, ma'am.

****

MR. LUBIN: I represent John Garcia. John's case was scheduled for a plea on Friday in front of Judge Hurley under the belief at that time that this case would be over by then. . . .

THE COURT: I think so, too. I mean, Judge Hurley is a reasonable person, and this is the way I feel about it: this case is quite old; Mr. Garcia has been on it for 18 months. The defendant is anxious to go to trial; it certainly appears that he's anxious to have Mr. Garcia represent him. For another attorney to come on now, we're talking about, you know, probably a year delay in getting this case tried, as so I certainly understand the state's concerns, and I'm willing to work a very tight schedule to do our very best to get it done by Friday, and if that doesn't happen, I am confident that Judge Hurley would put off the plea for a few

days.(R 58).

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THE COURT: . . . which that's what's been going on in the circuit court for the last several months with regard to Mr. Garcia, and by committee we decided that the proper way to address it is to have each client state on the record that they are aware of the facts and whether or not they wish to have Mr. Garcia continue to represent him. You know, I think we've done a sufficient colloquy here. And, Mr. Agatheas, I want you to understand if you are convicted, sir, you know, and you go off to prison and you get a life sentence, there's a lot at stake here; you're not going to be able to write letters and say, you know, "I changed my mind, and Mr. Garcia was in the midst -- under indictment for federal charges." Do you understand that?

MR. AGATHEAS: Yes, ma'am, I understand that.

THE COURT: And, have you -- Mr. Garcia, what are the charges that you've been indicted for?

MR. GARCIA: There are two counts of, for lack of a better term, money laundering.

MR. LUBIN: Structuring.

MR. GARCIA: Structuring, money structuring, and then the third count is -- I don't know what they actually call it. What is it, Richard?

MR. LUBIN: Obstruction.

THE COURT: Obstruction? All right, so -- and have you discussed the details of what those charges are with Mr.

Agatheas?

MR. GARCIA: Oh, yes.

THE COURT: Mr. Agatheas, you're aware of what the charges are that Mr. Garcia has been indicted for?

MR. AGATHEAS: Yes, ma'am.

THE COURT: And, do you understand that those could be construed as crimes of dishonesty; I mean, do you have any questions or concern about that?

MR. AGATHEAS: No, ma'am, I'm fully informed of the situation.

THE COURT: Okay, and do you understand that at this moment in time, I am more than willing, if you so wish, to continue this case and to appoint you a new lawyer, and they would take whatever time they felt was necessary to get ready to try this case; do you understand that?

MR. AGATHEAS: I understand and appreciate that, ma'am, but I would like to stay with John.

THE COURT: And, you're -- so, you're waiving any right to contest this later; is that right?

MR. AGATHEAS: Yes, ma'am.

THE COURT: And, you understand that you're in a perfect position right now to complain, and I will happily appoint you someone else?

MR. AGATHEAS: I understand that, ma'am.

THE COURT: And, knowing all of that, you wish to go forward with Mr. Garcia; is that right?

MR. AGATHEAS: Yes, ma'am.

THE COURT: Okay. I'll note the state's objection for the record, and the motion to disqualify is denied.

(R 62).

Thereafter, the trial began. During opening statements, the State alleged that Appellant was a former employee of the victim, who "hated" the victim, shot him eight times in the head and neck, then tried to make the crime look like a burglary (R 354 - 367). The State further alleged that the Appellant bragged to his girlfriend, Jessica Krauth, about the murder (R 354-367).

The Defense in opening statements and closing arguments explained that Appellant had a fight with his girlfriend on the night of the murder and made arrangements to stay with his friend that night (R 372-376). However, he first went to the beach to meet a female acquaintance, and that angered his girlfriend. The Defense claimed that the former girlfriend (Jessica Krauth) came forward years after the murder, only after a private investigator for the victim's family leaked out information about the case so that her story could be more consistent with the evidence. The defense argued that Nicholas Agatheas is innocent of this crime, and completely cooperated with authorities, giving consistent statements every step of the way over the years which elapsed after the shooting (R 372 -376, 931, 979). There was no evidence linking Appellant to the inside of the house

where the murder took place (R 980). However, there was DNA evidence in the home of at least two other suspects on the comforter used to cover the victim. (T 995).

The State called Jessica Krauth, Mr. Agatheas' former girlfriend, to testify against him. In July of 2000, Appellant was living with his girlfriend at her parents' in their home in Boynton Beach, Florida (R 556 - 572). On the night of the murder, Ms. Krauth testified that she and Appellant had an argument and he went to sleep at his friend Larry Tubor's house (R 564). Appellant called her in the "middle of the night" and asked her to call Larry and give him directions to a certain place to pick him up (R 566). However, she gave Larry the wrong directions because she was so tired (R 568). A few nights later, Appellant and his girlfriend saw the news about Villano's death on television (R 569). She testified that Appellant admitted to her that he had gone to the victim's home, shot him several times, and left his shirt in the house (R 570). She testified that Appellant said Villano got what he deserved because he had raped Appellant's friend, who later committed suicide (R 569).

Ms. Krauth also stated that Appellant admitted to her that he stole the victim's Ford Expedition to make it appear the victim had been robbed, then drove around listening to music really loud. (T 571-572). The victim's vehicle was

found abandoned in Boca Raton, within one and a half miles of three pay telephones that were used to call Jessica Krauth's number on the night of the murder. (T 790, 793-796). Appellant also told her that he took off his shirt and left it in the house of the victim. (T 570). A black tee shirt was also recovered in the front yard of the victim's residence. (T 464, 573, 692, 693). The shirt that was recovered when first tested did not indicate a match with the Appellant. (T 993). However, when taking different portions of that shirt and combining them, there was an arguable "match" with Nicholas Agatheas as a contributor (other DNA was also on the shirt but no one was identified as a contributor because samples must be submitted to find a match). (T 644, 994). The Appellant's DNA was not found on the comforter covering the victim's body, but at least two other individuals supplied DNA to the comforter, Larry Tabor and Anthony Rice. (T 995).

Ms. Krauth testified that she told no one about Mr. Agatheas confession except her brother because she feared Agatheas (R 576-578). However, her brother passed away shortly after she told him as a result of a car accident. (R 576).

Detective McCann called Ms. Krauth to offer her sympathies on the passing of her brother, and at that time, Krauth told the detective her story (R 577). On

cross-examination, Ms. Krauth admitted that the Appellant called her on the night of the murder from a pay phone, and admitted to her that he had been with an ex-girlfriend (R 579-599).

Detective McCann testified that she obtained Appellant's statement (R 803 -809). Mr. Agatheas told her that he had worked for the victim for two to three years cleaning restaurant hoods and had left the victim's employ to work with Larry Tabor installing hoods instead of cleaning them. He sometimes used shirts provided by the victim, and if a shirt got dirty up on the roof, he would throw it off. (T 880). He stated that at time of the homicide he worked for Ron Coarsler at Lawson Industries. He knew that the victim kept money in his home and said the victim wore a thick gold bracelet. He had been in the victim's home, particularly the bathroom and garage office. He stated that on the day in question, he had argued with his girlfriend Jessica Krauth. He had gotten off work and his friend Larry Tabor had driven him to Lake Worth Beach and dropped him off. Thereafter he saw his friend Vanessa and rode around with her, but he declined her offer to go clubbing because he had no money, and she dropped him off in the area of Linton and Congress. He then called Ms. Krauth to come pick him up around 2:00 or 3:00 a.m., but she refused. He asked her to call Larry Tabor who

picked him up and took him to his home where he slept and left the next morning (T 805 - T 809).

Few objections from the defense were lodged before or during trial. No pre-trial motions were filed (R 64, Volumes 1 and 2, generally.) Inexplicably, Attorney Garcia stipulated to the admission of all of the State's exhibits (R 376-377). The State called sixteen witnesses; the Defense called none (R 951).

On November 16, 2006, after five years of investigation and two days of testimony, the jury found Mr. Agatheas guilty on one count of first degree murder with a firearm (R 154). He was sentenced the following morning in a ten minute hearing so that defense counsel, Mr. Garcia could attend to his own Federal proceedings (R 60).

SUMMARY OF ARGUMENT

Fundamental error occurred when the State introduced in evidence Appellant's .45 caliber weapon (not related to this crime), and other prejudicial items seized from his backpack in his home at the time of his arrest, five years after the alleged murder. Florida law is clear that weapons uncovered in a search of premises controlled by a defendant can only be admissible in evidence at trial if it is linked to the crime charged. The State conceded that the murder weapon utilized was a .38 (or possibly a .357), and not a .45 revolver (R 615, 1013) [Emphasis added]. The introduction of the .45 and other items was therefore irrelevant and highly prejudicial. Not only did the seized gun tend to show that Appellant was engaged in crimes, but it caused confusion for the jury. The jury was lead to believe that the murder weapon was in evidence, yet the only weapon seized was the .45 revolver which bore no connection to the charged offense (R 625, 628, 988-990, 1013).

The appellate court determined that the revolver and contents of the backpack were relevant to corroborate the former girlfriend's testimony years earlier. However, the backpack containing a gun and other items were not relevant to this case and therefore did not bolster her credibility regarding her testimony about the Appellant's involvement in the murder. Further, her

credibility was already corroborated by the fact that she claimed Appellant left his black tee shirt at the scene of the crime, and indeed one was found there containing his DNA, and phone calls she claimed to have received from Appellant on the night of the murder were indeed made to her from payphones in the area where the victim's car was found on the night of the murder. This highly prejudicial gun and other seized items were not linked to the crime or her testimony about the crime, and therefore fundamental error occurred.

The second argument claims that ineffective assistance of counsel is apparent from the Record and therefore, reversal and a new trial are required. An appellant can raise ineffective assistance of counsel on direct appeal if the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable. Here, there was no conceivable tactical explanation for allowing the introduction of the irrelevant .45 revolver and other backpack contents (screwdriver, flashlight, batteries, gloves and bandana). The prejudice to Nicholas Agatheas was indisputable. A new trial with effective counsel is warranted under both the Florida and United States Constitutions.

Finally, reversible error occurred when, after 18 months in custody without bond, as trial was starting, Appellant was forced to decide whether to waive the

conflict of interest as a result of defense counsel, John A. Garcia's Federal charges and arrest. Based upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and applicable provisions of the Florida Constitutions a new trial is warranted based upon the court's failure to conduct an adequate colloquy concerning Agatheas' attorney's conflict of interest and Appellant's failure to knowingly or intelligently waive the conflict. Reversal and remand for a new trial with Nicholas Agatheas being represented by a conflict free counsel is required.

ARGUMENTS

I. FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE IRRELEVANT, CONFUSING, UNDULY EVIDENCE SEIZED NEARLY FIVE YEARS AFTER THE VICTIM'S DEATH

Fundamental error occurred when the State introduced in evidence Appellant's .45 caliber weapon (not related to the crime), seized from his backpack in his home at the time of his arrest, *five years* after the alleged murder (R 903, V4, Exhibit 122A - H). Also from the back pack and admitted into evidence were latex gloves nestled inside a pair of Mizuno gloves, a flashlight, batteries, a lighter, a screwdriver, and a bandana. There was no evidence that any of these items had any connection whatsoever to the murder of Mr. Villano five years prior, yet these highly prejudicial items were introduced (without objection from defense counsel) in violation of State and Federal law.

The court below found that the revolver and contents of the backpack was admissible because it was relevant to corroborate the former girlfriend's testimony. *Agatheas v. State*, 28 So. 3d 204, 207 (Fla. 4th DCA 2010). The Fourth District's opinion reasoned that the defense had attacked the former girlfriend's credibility, claiming she was tipped off by a private investigator about the evidence collected. One of her statements to police included that the Appellant owned a gun at the time of the murder that he kept in a book bag, and

the introduction of the revolver and contents of the backpack was therefore relevant to corroborate this testimony. *Id*. This reasoning is flawed because 1) there were already other aspects of her testimony which were corroborated by physical evidence (i.e. phone records indicated that Appellant indeed called her the night of the murder from a payphone near where the victim's car was found), and 2) the revolver and other highly prejudicial evidence did not disprove the defense position that information about the crime scene was leaked to Ms. Krauth. Many other aspects of Krauth's story were already "corroborated" (i.e. the black tee shirt she claimed he left at the scene that was recovered outside the victim's home; the loud music he was playing in the victim's car). *Id*. at 206 (The Court describes in detail Ms. Krauth's testimony followed by the corroborated evidence found by investigators). Clearly, this highly prejudicial evidence was cumulative and not necessary to establish corroboration.

Evidence must be relevant in order to be admissible. *See* Fla. Stat. § 90.403 (2006); Rule 403, F.R.E. Relevant evidence is defined as evidence "tending to prove or disprove a material fact." Fla. Stat. § 90.401 (2006). While all admissible evidence must be relevant, not all relevant evidence is admissible; Section 90.403 mandates that "relevant evidence is inadmissible if its probative

value is substantially outweighed by the danger of unfair prejudice." Fla. Stat. § 90.403 (2006).

Florida law is clear that weapons uncovered in a search of premises controlled by a defendant can only be admissible in evidence at trial if linked to the crime charged. The ruling in *Agatheas* directly conflicts with decisions from sister jurisdictions as well as decisions from the Fourth District Court of Appeal. For example, the decision at bar conflicts with *Thornton v. State*, 767 So.2d 1286, 1288 (Fla. 5th DCA 2002), in which a gun located in a co-defendant's office shortly after the crime was deemed admissible to help identify the defendant as a participant in a robbery and the witness' description of the gun "matched the appearance" of the gun admitted into evidence. The decision likewise conflicts with *Sosa v. State*, 639 So.2d 173, 174 (Fla. 3rd DCA 1994), which held that the trial court erred in admitting bullets found in the defendant's vehicle where the defendant was charged with firing a handgun into the victim's car, since there was no link established between the bullets and the defendant's case.

Further, *Agatheas*, directly conflicts with the Third DCA's ruling in *Robertson v. State*, 780 So.2d 94, 96 (Fla. 3rd DCA 2000) in which the former wife's testimony concerned an incident which occurred six years earlier involving a firearm. The testimony was initially ruled inadmissible as neither the crimes,

the victim nor weapon were the same. On *en banc* review, the Third DCA, in a plurality opinion affirmed *Robertson v. State*, 780 So.2d 106 (Fla. 3rd DCA 2001) (*en banc)*. The Florida Supreme Court quashed the decision of the Third DCA and remanded for a new trial. *Robertson v. State*, 829 So.2d 901 (Fla. 2002). Thus *Agatheas* conflicts with this Florida Supreme Court decision. Finally, *Agatheas* directly conflicts with the Fifth DCA's opinion in *Moore v. State*, 1 So.3d 1177 (Fla. 5th DCA 2009). In *Moore*, the court determined that firearms and photos thereof were irrelevant and should have been excluded from trial upon proper objection. The appellate tribunal found the defendant was denied ineffective assistance of counsel based upon the defence's failure to object.

Finally, the decision below directly conflicts with *O'Connor v. State*, 835 So.2d 1226, 1230 (Fla. 4th DCA 2003); see also, *Jones v. State*, 32 So.3d 706 (Fla. 4th DCA 2010); *McIntosh v. State*, 858 So.2d 1098 (Fla. 4th DCA 2003). If the evidence at trial does not link a weapon seized to the crime charged, the weapon is inadmissible. *O'Connor* at 1230; *Rigdon v. State*, 621 So. 2d 475 (Fla. 4th DCA 1993). In *Rigdon*, the defendant was charged with attempted murder. A semi-automatic weapon was found under the defendant's bed at the time of his arrest. The "exhibit did not tend to prove or disprove a material fact and had no connection whatsoever to the charged offense" and the conviction was reversed.

Id. at 478. Further, in *Hunn v. State*, 511 So. 2d 583 (Fla. 4th DCA 1987), the Court concluded that a gun recovered in the Defendant's car five months after the alleged armed kidnapping was inadmissible because no connection was established to the crime. The gun "served the purpose only of conveying to the jury that [the defendant's] having guns tended to support the testimony that he had a gun when engaged in the charged crimes" and was therefore error. *Id*. at 589.

Similarly, there was no connection established between the Appellant's .45 revolver and other items in his possession some five years after the July 2000 murder. The State's expert testified that the gun used to kill the victim was a .38, a .38 special, or possibly as .357 (R 615). She testified that all shots were fired from the same gun. There is absolutely no link between a .45 revolver and this murder charge. The .45 revolver and other items did not tend to prove or disprove any material fact in issue. Further, any marginal relevance would be outweighed by the danger of unfair prejudice. *See* Fla. Stat. § 90.403.

The admission of the gun and backpack contents was fundamental error. Fundamental error reaches down into the validity of the trial itself to the extent that a guilty verdict could not have been obtained without the assistance of the alleged error. *Cochran v. State*, 711 So. 2d 1159 (Fla 4th DCA 1998). Not only was it highly prejudicial as tending to support that the Appellant was engaged in

crimes, but the seized weapon could be confused by the jury with the murder weapon (R 628, 988, 989-990). The state's projectile expert (Jennifer Grey) referred to the "gun in evidence" as the possible murder weapon (R 625). She testified that she was "given a .357" to test, *and it could not be excluded as the murder weapon* (R 625, 628). She then testified as to the test-fires from the ".357 gun that was submitted into evidence." (R 623). However, the .45 found in Appellant's backpack was submitted into evidence, and this could easily have confused the jury.

The State contributed to the confusion about the .357, stating during closing arguments that "it can't be included or excluded" (R 1019). This was a confusing remark considering there was no .357 in evidence linked to this crime (R 1019). The State continued to draw inferences that Appellant's seized gun was used in criminal activity, stating that "we know" he had a gun "just like" the one used in this crime in his backpack when he was arrested (R 1019). The gun was a central theme to the State's case, and "permeated the trial."

Further, the gun and backpack contents were highly prejudicial; there was no evidence linking Appellant to the inside of the house where the murder took place, or to the stolen car (R 980). However, there was DNA evidence in the house of other individuals. The State's case depended upon the testimony of

Jessica Krauth – who changed her story after being questioned seven times over the course of five years (R 931 - 932). In this case a strong probability exists that confidential information about the case was leaked from the police department or from the private investigators hired by the victim's family (R 979). The admission of the .45 revolver and other contents of the back pack were erroneous and the verdict could not be obtained without these alleged errors. A new trial is warranted.

II. THE DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO OBJECT TO THE ADMISSION OF THE REVOLVER AND CONTENTS OF THE BACKPACK SEIZED FIVE YEARS AFTER THE CRIME

The Appellant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16(a) of the Florida Constitution when the representation of his trial counsel fell far below the recognized standard of competent counsel as required by the laws of the United States and the State of Florida. Defense counsel allowed highly prejudicial evidence and testimony to be introduced, without objection, which was clearly inadmissible under Florida law. Trial counsel failed to object to the introduction of the .45 caliber revolver and the other contents of his back pack which were not connected to the crime charged, and the facts giving rise to this claim are apparent on the face of the record.

An ineffective assistance of counsel claim is a mixed question of law and fact, and is subject to de novo review. *Bowman v. State*, 748 So. 2d 1082, 1083-84 (Fla. 4th DCA 2000). Jurisdiction was not based upon this issue, but the Supreme Court may in its discretion consider other issues properly raised on appeal. *Price v. State*, 995 So. 2d 401, 406 (Fla. 2008).

Under the dictates of *Strickland v Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant is entitled to effective assistance of counsel which conforms with community standards. In *Strickland*, the United States Supreme Court promulgated a two-prong test outlining the standard for judging ineffective assistance of counsel claims. Specifically, counsel is ineffective when: 1) his or her representation falls below an objective standard of reasonableness, and 2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 687. The Appellant asserts that his trial counsel's preparation and performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Based upon the facts of this case, Appellant's claims meet the "probability sufficient to undermine confidence in the outcome" standard.

Briefs that raise ineffective assistance of counsel on direct appeal are uncommon, and as a general rule, ineffectiveness should typically be raised in a post conviction motion. *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2nd DCA 2002). However, appellate courts make an exception to this rule when the ineffectiveness

is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable. *Id*., citing *Steward v. State*, 420 So. 2d 862 (Fla. 1982). See also, *United States v. Bender*, 290 F.2d 1279, 1285 (11th Cir. 2002).

The federal courts too will not generally consider claims of ineffective assistance of counsel raised on direct appeal where the district court did not entertain the claim nor develop a factual record. *United States v. Khoury*, 901 F.2d 948, 969 (11th Cir. 1990), modified on other grounds, 910 F.2d 713 (11th Cir. 1990). If the record is sufficiently developed, however, an appellate court will consider an ineffective assistance of counsel claim on direct appeal. *United States v. Camacho*, 40 F.3d 349, 355 (11th Cir 1994). Here, there is no conceivable tactical explanation for allowing the introduction of the .45 revolver and other backpack contents (see Argument I, above).

The State introduced into evidence the of Appellant's .45 caliber revolver, seized from his backpack in his home at the time of his arrest, five years after the alleged murder (R 903, V4, Exhibit 122A - H). Also seized from the back pack were latex gloves nestled inside a pair of Mizuno gloves, a flashlight, batteries, a lighter, a screwdriver, and a bandana. There was no evidence that any of these items were linked to the murder of Mr. Villano, yet these highly prejudicial items

were introduced without objection from Defense Counsel. This fell far below an objective standard of reasonableness.

In *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the United States Supreme Court held that even a single error may constitute ineffective assistance of counsel if that error is egregious enough. This is such an error. Florida law is clear that weapons uncovered in a search of premises controlled by a defendant can only be admissible in evidence at trial if it is linked to the crime charged. *O'Connor v. State*, 835 So. 2d 1226, 1230 (Fla. 4th DCA 2003).

The prejudice caused by this error is indisputable. The State referred again and again to the seized weapon during closing argument, stating that "we know" he had a gun "just like" the one used in this crime (R 1019). Again, no objection was made and no clarification was given to the jury. Given the lack of physical evidence linking Appellant to the murder scene, and the inconsistency of Krauth's statements, the admission of the seized weapon was egregious enough to meet the *Strickland* standard. A new trial is warranted.

III. REVERSIBLE ERROR OCCURRED BECAUSE APPELLANT DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF CONFLICT FREE COUNSEL: COUNSEL WAS CHARGED WITH FEDERAL CRIMES

Reversible error occurred below and Nicholas Agatheas suffered specific prejudice when, after 18 months in custody without bond, as trial was starting, he was forced to decide whether to waive the conflict of interest as a result of defense counsel, John A. Garcia's Federal charges and arrest. Defense attorney Garcia's distraction by the pending charges provide a context for the ineffectiveness claim above. Again, jurisdiction was not granted based upon this issue, but the claim may be considered because it was properly raised on appeal. See *Price v. State*, 995 So. 2d 401, 402 (Fla. 2008).

Procedurally, Nicholas Agatheas was indicted in May 2005 for the July 2000 murder of Thomas Villano. Agatheas' lawyer, John A. Garcia was arrested on Federal charges on September 20, 2006. Agatheas' trial commenced shortly after Garcia's arrest, on November 13, 2006. Garcia had been released pretrial after posting a bond and agreeing to comply with general and specific terms and conditions.

As trial started, the State moved to disqualify Garcia. (R.47). Although Nicholas Agatheas could not have anticipated the prejudice he would suffer as a

result of his conflicted counsel whose loyalties and vigilance were surpassed only by counsel's ineffectiveness of this case. (See Argument II, above.)

Based upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and applicable provisions of the Florida Constitutions a new trial is warranted herein based upon the court's failure to conduct an adequate colloquy concerning Agatheas' attorneys' conflict of interest and Appellant's failure to knowingly or intelligently waive the conflict. Reversal and remand for a new trial with Nicholas Agatheas being represented by conflict free counsel is warranted.

A. Appellant's Trial Counsel Choreographed the Trial and Sentencing in this Case With Counsel's Guilty Plea To Federal Criminal Charges and Ultimately, Counsel's Incarceration in Federal Prison

The proverbial "600 pound Gorilla" in Judge Marx's courtroom during *State v. Agatheas*, was Nicholas Agatheas' counsel, John A. Garcia's impending guilty plea to Federal felony offenses, disbarment, and imprisonment in Federal prison. It is clear from the Record that Garcia's guilty plea was affecting the scheduling of Agatheas' trial – its conclusion – and sentencing conducted the day Garcia believed he was to enter a guilty plea to an Information, waiving his right to insist on an Indictment, thus easing the path for the Government to prosecute him.

B. The Waiver Colloquy Was Insufficient, And Thus The Waiver Was Invalid

Appellant challenges his conviction because the trial court did not ensure that he made a knowing and voluntary waiver of conflict-free counsel. Appellant's counsel had a significant conflict of interest because he was scheduled to plead guilty to federal money laundering charges and other federal criminal offenses the same day the trial was scheduled to end. While Appellant was made aware that there was a potential conflict, Nicholas Agatheas did not understand how this conflict could affect his defense. Nicholas Agatheas was in his twenties, and inexperienced with the law. Further, the Court dissuaded Appellant from asking for new counsel by advising him that new counsel would delay the proceedings and keep him in jail for another year before he received his "day in court." (R 58).

A criminal defendant's Sixth Amendment right to the effective assistance of counsel encompasses the right to counsel, free of ethical conflicts. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). However, a Defendant's fundamental right to conflict free counsel can be waived. *United States v. Rodriguez*, 982 F.2d 474 (11th Cir.) *cert. denied* 510 U.S. 901, 114 S.Ct. 275 (1993).

In *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996), the Florida Supreme Court discussed the requirements for a valid waiver of the right to conflict-free

counsel. *Larzelere*, 676 So. 2d at 403 (waiver of conflict free counsel was valid because defendant was "extensively questioned.") A valid waiver colloquy must show: 1) that the defendant was aware of the conflict of interest; 2) that the defendant realized the conflict could affect the defense; and 3) that the defendant knew of the right to obtain other counsel. *Id*. at 403; *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975); *A.P. v. State*, 958 So. 2d 519 (Fla. 2d DCA 2007); *Lee v. State*, 690 So. 2d 664, 667 (Fla. 1st DCA 1997). It is the trial court's duty to ensure that a defendant fully understands the adverse consequences a conflict can impose. *Larzelere*, 676 So. 2d 394, 403, *citing Winokur v. State*, 605 So. 2d 100 (Fla. 4th DCA 1992). Each of the above requirements is independent of the others, and each is essential to a finding that defendant's waiver of his right to conflict-free counsel was voluntary. *Lee*, 690 So. 2d at 667.

Unfortunately, cases wherein defense counsel are under investigation or charged by government cases are no longer "few and far between." In the Eleventh Circuit Court of Appeals, such hearings surrounding waiver of counsel who may be conflicted are termed "*McLain* hearings" following the ruling in *United States v. McLain*, 823 F.2d 1457 (1987); see also *United States v. Lewis*, ___ F.3d ___ (11th Cir. 4-20-10)[11th Circuit Case No: 09-12996]; and *United States v. Lopez*, 590 F.3d 1238 (11th Cir. 2009).

In this case, the court failed to ensure that the Appellant fully understood the adverse consequences of the conflict presented in open court. The court must conduct a "penetrating and comprehensive examination" to determine the validity of a defendant's attempted waiver of the Sixth Amendment right to conflict free counsel. *In re Paradyne Corp*., 803 F. 2d 604 (11th Cir. 1986), *quoting, Van Moltke v. Gillies*, 332 U.S. 708, 723, 68 S.Ct. 316, 323 (1948). Here, the defense attorney was pleading guilty to serious Federal felonies the same day that the first degree murder trial was scheduled to end (and possibly begin a jail term thereafter). (R 47 – 62). The trial court did not inform the Appellant that the pending criminal charges against his attorney could lead to a less than zealous defense as the attorney may seek to curry favor with the government. The court did not inquire as to whether the attorney would be likely beginning a jail term himself upon conclusion of the trial, and what impact that may have on the attorney's memory or concentration. It is unlikely that a layperson on trial for first degree murder could fathom without explicit warnings the impact of this conflict to his defense. Thus, as *Larzelere* requires, the trial court failed in its duty to ensure that the Appellant fully understood the adverse consequences this conflict imposed.

Further, during the waiver colloquy, the defense attorney did not know the exact charges pending against him, and had to wait for his own attorney to arrive to explain to the court what the third charge was (obstruction) (R 60-61).[1] The Appellant was faced with the decision concerning counsel at a point in time which was a crucial stage in Nicholas Agatheas' life and trial. Nicholas Agatheas had already been imprisoned for 18 months waiting for trial. He was first faced with issues concerning his lawyer's own criminal charges at the beginning of his own trial. He therefore did not have time to intelligently consider the implications to his defense because he did not know what the charges were, or understand the severity of the crimes. The first time the Appellant learned of the exact charges[2] was toward the end of the waiver hearing, on the first day of trial. The court then failed in its obligation to explain to the Appellant how the conflict could affect the defense.

The Court failed to explain all the potential ramifications possibly because "by committee[3] we [Circuit Court judges] decided that the proper way to

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[1] As reflected in the documents contained in the Appendix, in actuality, Garcia plead guilty to three Counts of structuring financial transactions and one count of making a false statement.

[2] And even those charges were incorrect.

[3] Nicholas Agatheas knows nothing whatsoever about an alleged "committee" which analyzed what judges should do concerning cases in which John Garcia as counsel was involved. No Record of the make-up of "the committee" or any

address it is to have each client state on the record that they are aware of the facts and whether or not they wish to have Mr. Garcia continue to represent him." (R 60).

The manner employed in this case, i.e. a "secret committee" considering John Garcia's predicament does not meet the Constitutional standards under Florida and federal law. While the Court *did* inform the Appellant that the charges could be considered as crimes of dishonesty (R 61-62), the Court never informed the Appellant that his counsel may be inclined to provide a less than zealous defense in order to curry favor with the government, or that counsel may be preoccupied with his pending jail term and loss of his license to practice law. The Appellant did not understand how the conflict could affect his defense – it was never explained to him. The waiver was therefore invalid.

The waiver colloquy was also inadequate because, instead of informing Appellant that he was entitled to new counsel, the Court told the Appellant that he could have new counsel, but he would not get a new trial for another year. Nicholas Agatheas had already been in custody for 18 months at that time. The Court was frustrated that the State waited until the first day of trial to move for disqualification. ("Why didn't we address this sooner . . ." R 48). The Court

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matters which "the committee" considered is available.

advised Appellant that he could have new counsel, *but that this would delay his trial for a year*. ("I feel . . . this case is old . . . for another attorney to come in now, we're talking about, you know, probably a year delay in getting this case tried." R 57 - 58). That dissuaded the Appellant from exercising his Constitutional right to conflict free counsel. It is inconceivable that a criminal defendant would have the foresight to demand new counsel after learning he would have to stay in jail another year despite his proclaimed innocence. It was error to color the Appellant's waiver hearing with the Court's pessimistic prediction of another year in jail, and it was error not to explain to the Appellant the likely consequences of the conflict.

C. It Is Not Necessary To Determine Prejudice When The Waiver Is Invalid, But Nevertheless, Prejudice Is Apparent

An invalid waiver of conflict free counsel cannot be deemed harmless error. *A.P. v. State*, 958 So. 2d 519 (Fla. 2nd DCA 2007). "The assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Lee*. 690 So. 2d at 668 (*quoting Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824 (1967). In *Lee,* the defendant had an extensive waiver hearing of his right to conflict free counsel, but the judge had neglected to inform the defendant of his right to newly appointed counsel. The

appellate court explained that it is not necessary for a reviewing court to determine the degree of prejudice resulting from an actual conflict of interest because the conflict itself demonstrates a denial of the right to counsel. *Id.* Therefore, a new trial is warranted in this case because the waiver was invalid.

While the infraction here cannot be treated as harmless error, the prejudice to the defense is apparent. No substantive pre-trial motions were filed (R 64, Volumes 1 and 2, generally.) No witnesses were called for the defense (R 951). Attorney Garcia stipulated to all exhibits. (R 376-377). Virtually no objections were lodged during trial - not even an objection to the prejudicial introduction of Appellant's gun, which was not even alleged to be used in this crime and was seized approximately five years later. (R 903) (*See* argument II, *infra)*. (Only four or five objections were made by the defense during the entire trial (R 603, 766, 943, 963). The defense did not have a witness report for State's Medical Examiner, who provided key evidence regarding the crime scene and stolen car (R 687). The defense did not accept the State's offer to interview their star witness, Jessica Krauth, before she testified. ("I don't want to talk to her" R 556). Her testimony was the cornerstone of the State's case, and after she had been interviewed by law enforcement *seven* times from August 2000 to April 2005 (R 930-932), she changed her story and told police that Appellant was the killer. A

full reading of the Record in this case gives the distinct impression that counsel did not prepare for trial, and then during trial, made the case as easy for the State as was possible. Counsel acted like a man on his way to a felony sentencing – unwilling to create further conflict with the government - a far cry from providing zealous advocacy, which is the cornerstone of our system of justice. Reversal is required.

CONCLUSION

Based upon the foregoing grounds and authority, Nicholas Agatheas respectfully requests this Honorable Court enter an Order reversing the judgment, convictions and sentences imposed, remanding this matter with directions to the trial court to conduct a new trial or to discharge the Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of this Initial Brief of Appellant were mailed to the Clerk of the Florida Supreme Court on **November 1, 2010** and a copy mailed to the Office of the Attorney General, 1515 N. Flagler Drive (9th Floor), West Palm Bch., FL 33401-3432.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2), FLA. R. APP. P.

Pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, the Appellant, Nicholas Agatheas, certifies that this Initial Brief of Appellant is typed in 14 point, Times New Roman.

Respectfully submitted,

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