IN THE SUPREME COURT OF THE STATE OF FLORIDA,

NICHOLAS AGATHEAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC10-602

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

BILL McCOLLUM
Attorney General
Tallahassee, Florida

JAMES J. CARNEY
Florida Bar No. 475246
Sr. Asst. Attorney General

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 0134924
1515 North Flagler Drive
West Palm Beach, FL 33401
Telephone (561) 837-5000

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page Number**

STATE CASES

Statutes Cited

PRELIMINARY STATEMENT

Petitioner was the appellant and Respondent was the appellee in the Florida Fourth District Court of Appeal. The issue on appeal was whether Petitioner received ineffective assistance when his counsel failed to object to the admission into evidence of the contents of a backpack which was found in his closet at the time of his arrest. The Fourth District Court found that the contents of the backpack, including a .45 caliber revolver and a bandana were relevant to prove the credibility of Petitioner's former girlfriend, who testified that he had confessed the murder to her. The Fourth District Court concluded, "The defendant's trial attorney was not ineffective for failing to object to evidence that we conclude was relevant and admissible."

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

JB = Petitioner's Initial Brief on Jurisdiction

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

The procedural history and facts on which the Fourth District Court of Appeal relied in making its decision are found in *Agatheas v. State*, 28 So.3d 204 (Fla. 4th DCA 2010), which Respondent adopts as its statement of the case and facts for the purpose of determining jurisdiction in this appeal. A copy of the Fourth District Court of Appeal's decision is attached hereto for the convenience of this Court.

SUMMARY OF THE ARGUMENT

Petitioner has failed to show conflict with any decision of this Court or the settled rule of law.

The cases cited by Petitioner which appear to be in conflict with the case at bar are in fact distinguishable in that complained-of evidence admitted at the trial was admitted to establish the factual guilt of the defendant. Here, the complained-of evidence was admitted – as explained by the Fourth District Court of Appeal – to corroborate Petitioner's former girlfriend's testimony. The former girlfriend was an key witness because she testified that Petitioner had confessed the murder to her the day after he committed it. Obviously, credibility was sharply attacked by Petitioner at trial.

In finding the complained-of evidence relevant and therefore that counsel provided effective assistance, the opinion of the Fourth District Court of Appeal is not in conflict with the holdings of this Court, nor is it in conflict with the holdings of any other district court. Petitioner's petition for discretionary review should be denied.

ARGUMENT

PETITIONER HAS IMPROPERLY INVOKED THE JURISDICTION OF THIS COURT; THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR WITH THE SETTLED RULE OF LAW.

Petitioner asks this Court to use its power of discretionary jurisdiction to review a decision of the Florida Fourth District Court of Appeal. He contends the Fourth District opinion conflicts with several opinions of the Fourth District itself, as well as opinions of other district courts of appeal and opinions of this Court.

In his dissenting opinion in *Robertson v. State,* 829 So.2d 901 (Fla. 2002), Justice Wells reminded this Court of its jurisdiction as set forth in the Florida Constitution, and the meaning of "conflict":

> I believe it to be exceedingly important to the administration of justice in our state that this Court respect that it is a court of limited jurisdiction under Florida's Constitution. In *Mystan Marine, Inc. v. Harrington,* 339 So.2d 200, 201 (Fla.1976) (footnotes omitted), this Court made the essential point:
>
> The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution. Time and again we have noted the limitations on our review and we have refused to become a court of select errors. As we explained in *Ansin v. Thurston,* [101 So.2d 808, 811 (Fla.1958),] Article V uses the words "direct conflict" to manifest a "concern with decisions as precedents as opposed to adjudications of the rights of particular litigants."

An examination of the opinions cited by Petitioner shows there is no conflict; in fact, Petitioner's argument rests on *obiter dicta* of some opinions, and, in one case, *Jones*, on language from a Fourth District opinion that has not been released for publication in the permanent law reports.

Petitioner begins by citing language from the Fourth District's opinion in *Jones v. State*, --- So.3d ---, 2010 WL 1329047, 35 Fla. L. Weekly D788 (Fla. 4th DCA April 7, 2010), which, on the date of this brief, had not been released for publication in the permanent law reports. Furthermore, the issues on appeal in Jones was whether the trial court erred in finding there had been no discovery violation and whether the trial court erred abused its discretion in refusing to grant a recess. The court held, "We conclude that the denial of the motion for recess to allow counsel sufficient time to investigate the matter was an abuse of discretion warranting a new trial." Then, in passing, the Fourth District "commented briefly" on the admission of a gun cleaning kit, and said that it should not have been admitted at trial because "there is nothing unlawful about the defendant's ownership of a gun cleaning kit and nothing was shown to connect it to the crimes charged. Its admission served only to suggest that at some point the defendant owned a gun." Whether the Jones opinion was published or not, the fact is that dicta cannot be used to support a conflict argument. See e.g., *Ciongoli v. State*,

337 So.2d 780 (Fla.1976) (declining to exercise conflict jurisdiction because conflicting language was obiter dicta).

In citing the Fourth District's opinion in *O'Connor v. State,* 835 So.2d 1226 (Fla. 4th DCA 2003), Petitioner is at least within the ballpark; but he does not score a hit. The complained-of evidence in *O'Connor* – photographs of a shotgun and a bullet-proof vest – was admitted, the State argued, to prove the defendant's motive and mental state, and a State witness testified that "people often wear a bullet-proof vest when they are doing an 'drug armed robbery.'" In other words, the evidence was being used to establish the *mens rea* of the defendant. Not so in the case at bar. Here, the Fourth District concluded the complained-of evidence was properly admitted to corroborate Petitioner's former girlfriend's testimony and noted that "on several occasions throughout the trial" Petitioner's attorney attacked her credibility, arguing that she fabricated the story that Petitioner regularly kept a gun in his backpack. (The former girlfriend was the State's key witness. The Court noted that, "It was not until the former girlfriend came forward years later that there was sufficient evidence to charge the defendant.")

The remaining cases cited by Petitioner support the opinion of the Fourth District in the case at bar. In *Thornton v. State,* 767 So.2d 1286 (Fla. 5th DCA 2000), the Fifth District Court of Appeal affirmed the trial court's admission of a

gun found in the co-defendant's desk drawer, saying, "We do not think it is necessary to establish the weapon was the one actually used in the robbery. (citation omitted) It was probative to establish the identity of the perpetrators of the robbery – Olsen and Thornton." In *Sosa v. State,* 639 So.2d 173 (Fla. 3rd DCA 1994), where the Third District reversed, it did so because it specifically said that bullets found in a defendant's car, "with nothing to connect them to the crime for which Sosa was charged . . . are not relevant to the case." Thus, while the outcome of Sosa was a reversal, the logic applied by the Third District was identical to the reasoning applied by the Fourth District in the case at bar: in Sosa there was nothing to connect the complained of evidence to the crime; at bar, the connection was through the testimony of the former girlfriend, and, therefore, the evidence was admissible. The same rationale applies to the more recent case of *Moore v. State,* 1 So.3d 1177 (Fla. 5th DCA 2009), where the Fifth District Court of Appeal reversed and remanded a trial court's denial of an ineffective assistance of counsel claim based on counsel's failure to object to evidence. Contrary to Petitioner's reading, the Fifth District said, "Of course <u>if</u> there was no evidence linking any of the firearms [found in the defendant's home] to the charged crime, evidence of the firearms <u>would</u> <u>be</u> irrelevant, and should have been excluded upon proper objection." (emphasis added). Once again, in the case at bar, the evidence was

found to be relevant.

Finally, many of the cases cited by Petitioner are on a completely different subject: the admissibility of similar-fact evidence. In *Robertson v. State, supra,* for example, this Court reversed the Third District because the appellate court had improperly relied on the *Williams* rule[1] to affirm the admission of the defendant's ex-wife's testimony of a prior threat "because there was no evidence in the record to support the Third District's holding that the previous threat was admissible under the *Williams* rule." In reversing, this Court said, "It this case, the crime with which Robertson was charged was the completed offense of murder against his girlfriend utilizing a handgun. The prior offense, assuming it occurred, involved a threat of violence against Robertson's former wife, involving an assault rifle."

The opinion of the Fourth District Court of Appeal in the case at bar is not in conflict with the holding of any other district court not is it in conflict with the published opinions of this Court. Accordingly, Petitioner's petition for discretionary review should be denied.

[1] *Williams v. State,* 110 So.2d 654 (Fla. 1959)

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent respectfully contends the decision of the Fourth District Court of Appeal is not in conflict with any decision of this Court or any of the district courts, and, therefore, this Court should decline jurisdiction in the premises.

Respectfully submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

_____
JAMES J. CARNEY
Senior Asst. Attorney General
Florida Bar No. 475246

_____
JOSEPH A. TRINGALI,
Assistant Attorney General
Florida Bar No. 0134924
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401
Telephone (561) 837-5000

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on Jurisdiction" was sent by United States mail to RICHARD L. ROSENBAUM, Esq., Arnstein & Lehr, LLP, 200 E. Las Olas Boulevard, Suite 1700, Fort Lauderdale, FL 33301 on May 17, 2010.

_____

JOSEPH A. TRINGALI,
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Respondent/Appellee hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

_____

JOSEPH A. TRINGALI,
Assistant Attorney General
Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF FLORIDA,

NICHOLAS AGATHEAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC10-602

****

APPENDIX

****

BILL McCOLLUM
Attorney General
Tallahassee, Florida

JAMES J. CARNEY
Sr. Asst. Attorney General
Florida Bar No. 475246

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 0134924
1515 North Flagler Drive
West Palm Beach, FL 33401
Telephone (561) 837-5000

Counsel for Respondent