IN THE SUPREME COURT OF FLORIDA

CASE NO: SC10-602

NICHOLAS AGATHEAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE FOURTH DISTRICT COURT OF APPEALS

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout Petitioner's Brief on Jurisdiction. The term "Petitioner" shall refer to the Defendant in the Circuit Court, Nicholas Agatheas. The term "Respondent" shall refer to the Plaintiff in the Circuit Court, the State of Florida. An Appendix has been filed in accordance with Rule 9.220, Fla. R. App. P. References to the documents contained in the Appendix shall be indicated by an "A" followed by the appropriate page number (A). All emphasis indicated herein have been supplied by Petitioner unless otherwise specified herein.

STATEMENT OF THE CASE

Nicholas Agatheas seeks discretionary review of the affirmance of his judgment, conviction and sentence for first degree murder. The Petitioner was indicted by a Grand Jury in Palm Beach County on May 10, 2005, for the July 2000 murder of Thomas Villano. He was convicted after a trial by jury and was sentenced to life without the possibility of parole.

Few objections from the Defense were lodged before or during trial. No pre-trial motions were filed (R 64, Volumes 1 and 2, generally.) Attorney John 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 federal proceedings wherein he was the criminal defendant (R 60).

Nicholas Agatheas timely filed a Notice of Appeal and raised the following issues:

I. Reversible Error Occurred Where Petitioner Did Not Make a Knowing and Intelligent Waiver of Conflict Free Counsel

A Petitioner's Trial Counsel Choreographed the Trial and Sentencing in This Case With Counsel's Guilty Plea to Federal Charges and Ultimately, Counsel's Incarceration in Federal prison

B. The Waiver Colloquy was Insufficient, and Thus the Waiver was Invalid

C. It is Not Necessary to Determine Prejudice When the Waiver is Invalid, But Nevertheless, Prejudice is Apparent

II. Fundamental Error Occurred Because Petitioner's Gun, Seized During His Arrest was Inadmissible and Highly Prejudicial

III. A New Trial Is Warranted Because A Violation of Petitioner's Sixth Amendment Right to Effective Assistance of Counsel is Apparent on the Record

In *Agatheas v. State*, 4D06-4870 the Fourth District Court of Appeal affirmed the conviction and sentence, but wrote to address Nicholas Agatheas' argument that his counsel provided ineffective assistance of counsel by failing to

object to prejudicial irrelevant evidence and that reversible error occurred as a result of admission of the prejudicial evidence lacked any meaningful prejudicial value. The 4th DCA held:

> At trial, the State introduced the actual contents of the defendant's backpack and photographs of the contents, which included the .45 caliber revolver, latex gloves nestled inside another pair of gloves, a flashlight, batteries, a lighter, a screwdriver, and a bandana. However, as established by uncontroverted expert testimony, the gun used to murder the victim was a ".38 caliber gun or a .38 class gun." The defendant's counsel did not object at trial to the introduction of this evidence. (Opinion at pg. 2)
>
> * * *
>
> On appeal, the defendant claims that his trial counsel was ineffective for failing to object to the introduction of the .45 caliber revolver and the other contents of his backpack, and that the facts giving rise to this claim are apparent on the face of the record. (*Id*.)
>
> * * *
>
> The defendant also argues that the introduction of the revolver was highly prejudicial and that it was fundamental error for the trial court to admit this evidence because the State failed to connect the revolver to the murder. As to the first prong of the Strickland test, as cited in Pearce, the defendant argues that his trial counsel should have objected to the admissibility of the backpack contents because the State failed to show how the contents were linked to the murder, and the evidence suggested that the defendant had a propensity to engage in criminal activities.
>
> Although we have not found, and the State has not identified, any evidence connecting the flashlight, batteries, lighter, and screwdriver to the murder, we conclude that the erroneous admission of these items did not undermine confidence in the outcome of this cause and that the admission of this evidence was harmless. See *State v. DiGuilio,* 491 So. 2d 1129, 1139 (Fla. 1986). Accordingly, we hold

> that the defendant has not stated a claim for ineffective assistance of counsel regarding the trial attorney's failure to object to these items.
>
> Having concluded that the .45 caliber revolver, bandana, and latex gloves, and photographs of these items were relevant and admissible, and that the admission of the other backpack contents was harmless error, we need not address the defendant's claim that the admission of this evidence constitutes fundamental error. (Opinion at pg. 2-4)

In the Fourth DCA's initial opinion, the Court wrote that only photographs of the allegedly improper evidence was introduced and that the error was harmless. Although the Court denied a rehearing, the Court issued a substituted opinion acknowledging that not just photographs of the improper evidence was introduced – the actual exhibits, i.e., the wrong gun and various other prejudicial evidence and photographs thereof were shown to the jury. In fact, the incorrect gun was not only shown to the jury, it was pointed at the jurors by the prosecutor during closing argument. A Notice of Intent to Invoke Discretionary Review was timely filed. This Brief on Jurisdiction ensues. Nicholas Agatheas remains incarcerated, presently housed at Taylor Correctional Institution in Perry, FL[1]

STATEMENT OF THE FACTS

The defense claimed below that trial counsel provided ineffective assistance of counsel. More specifically, counsel failed to file a Motion in Limine or lodge

[1] The Department of Correction's website concerning Nicholas Agatheas is located at http://www.dc.state.fl.us/activeinmates/detail.asp?bookmark=1&from=list&sessionid=345186432.

any objections to the admission of prejudicial evidence which became a feature of the trial: the actual contents of the Defendant's backpack and photographs of the contents, which included the .45 caliber revolver, latex gloves, a flashlight, batteries, a lighter, a screwdriver, and a bandana. The Fourth DCA expressly stated "[H]owever, as established by uncontroverted expert testimony, the gun used to murder the victim was a '.38 caliber gun or a .38 class gun.' " (Opinion at pg. 2). The State agreed below that the gun and contents of the backpack admitted into evidence at trial were never linked to the crime charged. (B 26, AB 14). The State conceded that the gun introduced as well as the photos thereof was not the murder weapon and that the contents of the backpack bore no relation to the crime (R 615).

SUMMARY OF THE ARGUMENT

Discretionary review is warranted in this case in light of the express and direct conflict in the case law. Nicholas Agatheas contends that his trial was riddled with unobjected to errors as a result of ineffective assistance of counsel and fundamental error in admitting highly prejudicial, non-probative evidence unconnected to the crime. Importantly, on the morning of trial, Nicholas Agatheas was advised by his defense counsel that he was indicted and was pleading guilty to federal money laundering (structuring) obstruction.

Because the panel's ruling expressly and directly conflicts with other decisions concerning the admission of highly prejudicial evidence which lacks probative values, review is warranted. Specifically, the prosecution was permitted to introduce a firearm which was concededly not the one alleged to have been used in the murder, together with other incriminatory evidence seized from the Defendant's backpack years after the homicide. Discretionary review shall allow this Court to uniformly decide cases wherein constitutional error occurred which expressly and directly conflicts with the Florida Rules of Evidence, and case law throughout the State of Florida.

ARGUMENT

I. CERTIORARI REVIEW IS REQUIRED IN LIGHT OF THE EXPRESS AND DIRECT CONFLICT IN THE CASE LAW

Sub judice, the Fourth DCA's ruling with regarding to admission of a wholly unrelated firearm and the contents of Nicholas Agatheas' backpack found nearly five years after the offense constitutes reversible error and directly and expressly conflicts with rulings of several courts and the Florida Evidence Code.

First, the ruling in *Agatheas* directly conflicts with several intra district decisions, most specifically *Jones v. State*, ___ So.3d ___ (Fla. 4th DCA 2010)[4D07-5014], *O'Connor v. State*, 835 So.2d 1226, 1231 (Fla. 4th DCA 2003), and *Huhn v. State*, 511 So.2d 583, 589 (Fla. 4th DCA 1987). As set forth in *Jones*:

> At the commencement of trial, the defendant moved in limine to exclude the gun cleaning kit seized from the defendant's home on the ground that it was irrelevant and that any probative value of this evidence was outweighed by its prejudicial effect. We conclude that the trial court erred in denying the motion and admitting the gun cleaning kit into evidence.
>
> [W]here the evidence at trial does not link a weapon seized to the crime charged, the weapon is inadmissible." *O'Connor v. State*, 835 So. 2d 1226, 1231 (Fla. 4th DCA 2003). Accord *Huhn v. State*, 511 So. 2d 583, 589 (Fla. 4th DCA 1987) ("Here, there is nothing unlawful about Huhn's ownership of the gun, and nothing to connect the particular gun to the crimes for which Huhn was on trial. We conclude that the gun was not relevant to the case.").
>
> Similarly, in this case, there was 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. [Emphasis added]
>
> See also, *McIntosh v. State*, 858 So.2d 1098 (Fla. 4th DCA 2003).

Further, while an eye-witness' description of a weapon they believed they saw the crime being committed with was similar to a weapon found a few weeks later in a Defendant's possession, at bar the former girlfriend was not an eyewitness to any criminal activity and it was proven by the defense and conceded by the State that the gun seized was not related to the murder. See *Diaz v. State*, 812 So.2d 487, 493 (Fla. 4th DCA 2002). Second, the ruling in *Agatheas* directly conflicts with decisions from sister jurisdictions. For example, the decision at bar conflicts with the 5th DCA's opinion in *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 whatsoever 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 concerning an incident which occurred six years earlier concerning 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 defense's failure to object.

Further, *Agatheas* flies in the face of Section 90.403, Fla. Stat., because the evidence in question did not have any relevance to this offense and even if marginally relevant to corroborate the former girlfriend's testimony[2], it was substantially outweighed by the danger of unfair prejudice.

Simply put, the *Agatheas* decision contradicts the Federal and Florida Evidence Code, specifically Sections 403, F.R.E. and 90.403, Fla.R.Evid. It also conflicts with inter district and intra district opinions concerning the exact same issue. In order to maintain uniformity in the decision making process, review should be granted and this matter fully brief on the merits of Nicholas Agatheas' claims.

[2] Which the Petitioner vehemently denies.

CONCLUSION

Based upon the foregoing grounds and authority, the Florida Supreme Court should invoke discretionary jurisdiction to review the Fourth District Court of Appeal's Opinion in *Agatheas v. State*, 4D06-4780.

CERTIFICATE REGARDING TYPE, SIZE AND STYLE

Petitioner, Nicholas Agatheas, certifies that this Brief on Jurisdiction is typed in 14 point, Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished via United States Postal Service, this **21st day of April, 2010**, to: Office of the Attorney General, 1515 North Flagler Drive (9th Floor), West Palm Beach, Florida 33401-3432.

Respectfully Submitted,

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