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

NICHOLAS AGATHEAS,

Petitioner,

vs.

STATE OF FLORIDA

Appellee.
_____/

REPLY BRIEF OF PETITIONER NICHOLAS AGATHEAS

On Appeal From The Judgment, Conviction and Term 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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TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Page

CITATIONS

Cases

Other Authorities

TABLE OF CITATIONS AND AUTHORITIES (cont'd)

POINTS ON APPEAL

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

WHETHER 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?

WHETHER REVERSIBLE ERROR OCCURRED BECAUSE PETITIONER DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF CONFLICT FREE COUNSEL?

SUMMARY OF THE ARGUMENT

Fundamental error occurred when the trial court allowed the State to introduce irrelevant, confusing, unduly prejudicial evidence seized nearly five (5) years after the victim's death. Because the evidence at trial did not link the weapon and backpack seized to the crime charged, the weapon and backpack are inadmissible.

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 (5) years after the crime. The inadmissible evidence was harmful rather than harmless.

Finally, reversible error occurred because counsel did not make a knowing and intelligent waiver of conflict free counsel. Nicholas Agatheas' defense attorney was charged with and preparing to plead guilty to serious federal charges. Reversal is warranted.

ARGUMENTS

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

The State argues that the evidence of collateral crimes (Petitioner's .45 caliber weapon seized from a backpack along with latex gloves, a flashlight, batteries, a lighter a screwdriver and a bandana) was admissible because it was relevant to a material fact in issue. The State agreed that evidence of collateral crimes, wrongs, or acts committed by the defendant is only admissible if it is relevant to a material fact in issue, citing *Czubak v. State*, 570 So. 2d 925 (Fla. 1990). The State reasoned (and the Fourth District agreed) that the existence of a revolver in a backpack five years later was relevant to a material issue: the credibility of former girlfriend, Jessica Krauth, who said that the Petitioner kept a gun in his backpack five years ago. The State's entire case was built around Jessica Krauth, who testified that the Petitioner admitted to her that he killed Thomas Villano. *See Agatheas v. State*, 28 So. 3d 204, 207 (Fla. 4th DCA 2010).

While Jessica Krauth's credibility was an issue, the fact that she was the former girlfriend of the Petitioner was not in dispute, nor was it an issue whether she had the opportunity to observe his various belongings. The fact that Jessica

Krauth could identify that Petitioner owned a gun 5 years ago and kept it in a backpack is not evidence of her veracity in saying he confessed to a murder, any more than her accurate observations about the type of cell phone he used, or gym bag he owned would be relevant to her credibility. Her ability to observe his belongings did not lend credibility to her story that the Petitioner confessed to her that he committed a crime. The sole purpose of introducing the gun and contents of the backpack was to demonstrate his bad character, and therefore it was error.

The State further argues that there is no requirement that the weapon found must the exact same weapon used in the crime charged. (AB, p. 15). However, this is only true if the weapon can be linked to the weapon used in the crime. Both cases cited by the State are examples where the weapon was admitted because it *may* have been the weapon used in the crime. *See Dias v. State*, 812 So. 2d 487, 493 (Fla. 4th DCA 2002) (knife found in Defendant's van was admissible because it matched the victim's description and therefore may have been used in the crime); *Council v. State*, 691 So. 2d 1192, 1194-96 (Fla. 4th DCA 1997)(gun found under Defendant's mattress was admissible because it matched the descriptions of the victims and may have been used in the robbery). While the weapons in the above cases had probative value in determining the guilt of the

Defendants, the gun in this case had no probative value in determining if the Petitioner was guilty of murder. As the more recent cases cited in the Petitioner's Initial Brief make abundantly clear, where the evidence at trial does not link the weapon seized to the crime charged, the weapon is inadmissible. *See Thornton v. State*, 767 So.2d 1286, 1288 (Fla. 5th DCA 2002); *Robertson v. State*, 780 So.2d 94, 96 (Fla. 3rd DCA 2000); *O'Connor v. State*, 835 So.2d 1226, 1230 (Fla. 4th DCA 2003); *Jones v. State*, 32 So.3d 706 (Fla. 4th DCA 2010); *McIntosh v. State*, 858 So.2d 1098 (Fla. 4th DCA 2003); *see also* Fla. Stat. § 90.403 (2009).

Finally the State argues that any error was harmless beyond a reasonable doubt pursuant to the holding of *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1996). The State argues that the evidence at trial, including that "Petitioner was known to have guns similar to the murder weapon…" is sufficient to overcome any error that occurred. (AB, p. 16). This is the same misleading argument the State used during its closing argument to the jury: "we know" he had a gun "just like" the one used in this crime in his backpack when he was arrested. (R 1019). However, the fact that petitioner had a .45 revolver five years later is not evidence that he committed this murder (where a .38 or .357 was used), and to infer otherwise negates a finding that the error was harmless beyond a reasonable

doubt. Further, there was no evidence linking Petitioner to the inside of the house where the murder took place. (R 980). There was DNA evidence in the house of other individuals, and Jessica Krauth changed her story after being questioned seven times over the course of the five year period. (R 931-932). It cannot be said that the error was harmless beyond a reasonable doubt. 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 Petitioner 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. The State argues that the contents of the backpack were admissible and therefore it was not ineffective assistance to fail to object to this admissible evidence. As stated above, under a plethora of cases requiring a link between the weapons introduced at trial and the crime charged, the contents of the backpack were inadmissible. Certainly counsel's failure to object fit a pattern of behavior throughout the trial where virtually no objections were made, and counsel was himself on the verge of entering a guilty plea and beginning a prison term immediately following the Petitioner's trial. *See* IB, Appendix.

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). The State's projectile

expert referred to the "gun in evidence" as the possible murder weapon and said it could not be excluded as the murder weapon. (R 625, 628). Again, no objection was made and no clarification was requested by the Defense to this misleading testimony. Given the lack of physical evidence linking Petitioner to the murder scene, and the inconsistency of Krauth's statements, the admission of the seized weapon was egregious enough to meet the *Strickland*[1] standard. Counsel's ineffectiveness is apparent from the face of the record, and there is no conceivable tactical explanation for allowing the introduction of the .45 caliber revolver and other backpack contents. A new trial is warranted.

[1] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)

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

Petitioner challenges his conviction because the trial court did not ensure that he made a knowing and voluntary waiver of conflict-free counsel. 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. *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996). In this case, the court failed to ensure that the Petitioner fully understood the adverse consequences of the conflict presented in open court.

The State argues that no conflict existed because Defense Attorney Garcia was not being prosecuted by the same office as Petitioner Agatheas, and therefore the federal charges amounted to nothing more than a distraction. (AB, p. 25). However, all parties to the trial recognized the potential for conflict – the State moved to remove attorney Garcia because if Garcia negotiated a plea in his own case during the Agatheas trial, it would disqualify him from the proceeding in circuit court. (R 46 [STATE]:"conflict of interest may or may not exist" and "[the federal charges] raise significant issues as to the propriety of these proceedings");

a committee at the circuit court had already decided a colloquy was required with all defendants represented by Garcia (R 60); and the federal court had scheduled Garcia's plea conference for the coming Friday, and Judge Max agreed to a "tight schedule" so that Federal District Judge Hurley would not be forced to put off the plea. (R 58). Certainly there would be a personal benefit to attorney Garcia to finish the trial within the tight schedule so as not to endanger the plea deal he had reached.

The State also argues that even if there was a conflict of interest, that conflict was waived by the 20 page colloquy. (R 49 – 63). The State makes much of the warning issued to Petitioner Agatheas during the colloquy: he would not be able to say later, "I changed my mind." (AB, p. 26). However, it does not matter how many times the Petitioner was told he could not change his mind if he was also not informed of the consequences of the waiver.

Much was discussed over the course of the hearing that morning – little of it having to do with educating the Petitioner regarding the adverse consequences of proceeding with attorney Garcia. On the contrary, the trial judge warned of the adverse consequences of switching counsel, and warned that new counsel would delay the proceedings for a year. (R 57 – 58). Specifically, Petitioner was not

warned that the federal charges could lead to a less than zealous defense because the attorney may seek to curry favor with the government, or counsel may avoid contentious motions or objections in order to speed up the proceedings to make the Friday deadline.

Finally, the State failed to address Defense Counsel's failure to file substantive pre-trial motions (R 64, Volumes 1 and 2), failure to have witness reports, refusal to interview Jessica Krauth before she testified, and failure to lodge any objections including an objection to the prejudicial introduction of Petitioner's gun, which was not used in this crime and was seized approximately five years later. (R 903) (*See* Argument II, *infr;* IB, p. 40). 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. 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 Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of this Reply Brief of Petitioner were mailed to the Clerk of the Florida Supreme Court on **February 14, 2011** 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 Petitioner, Nicholas Agatheas, certifies that this Reply Brief of Petitioner is typed in 14 point, Times New Roman.

Respectfully submitted,

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