**IN THE SUPREME COURT OF FLORIDA**

**VINCENT PUGLISI,**
**Petitioner,**

**v.**

**STATE,**
**Respondent.**

**CASE NO. SC11-768**
**4TH DCA CASE No. 4D08-3056**

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**ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT [CRIMINAL DIVISION]**

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# PETITIONER'S INITIAL BRIEF


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## PRELIMINARY STATEMENT

This initial brief is submitted on behalf of Petitioner, Vincent Puglisi. Hereinafter, Vincent Puglisi, shall be referred to as "Puglisi." The State shall be referred to as "State" or "Prosecutor." The co-defendant, Rex Ditto, shall be referred to as "Ditto." The victim, Alan Jay Shalleck, shall be referred to as "Shalleck."

All references to the Record on Appeal shall be identified as "R" followed by page numbers supplied by the Clerk of the Court. All references to the trial transcripts shall be identified as "T" followed by page numbers supplied by the court reporter or by volume "V" followed by the volume number.

## STATEMENT OF THE CASE

On February 24, 2006, Puglisi and co-defendant Ditto were indicted for Count I First Degree Murder and Count II Robbery with a Deadly Weapon for the death of Alan Jay Shalleck. (R 11-12).

Ditto pled guilty before trial. Puglisi declined the State's offer to plead guilty to the lesser included offense of Second Degree Murder in exchange for a sentence of 30 years in prison. (T 103, 158). Puglisi proceeded to trial. On June 24, 2008, the jury returned verdicts of guilty as charged as to each count. (R. 576-577). On July 16, 2008, the trial court adjudged Puglisi guilty on both counts (R 670 -671), and sentenced him to life in prison without the possibility of parole as to Count I and 30 years in prison as to Count II, concurrent with each count. (R 672-673).

Puglisi timely appealed the judgment and sentence to the Fourth District Court of Appeal. (R 679). The trial court appointed the Office of the Public Defender for the Fifteenth Judicial Circuit ("PD15") for appeal. After the briefing concluded and before the Fourth District Court of Appeal issued its opinion, the PD15 filed a motion to withdraw due to a positional conflict and the Fourth District appointed the Office of Criminal Conflict and Civil Regional Counsel. On December 22, 2010, the Fourth District affirmed Puglisi's judgment and sentence with a written opinion. *Puglisi v.*

*State*, 56 So.3d 787 (Fla. 4th DCA 2010). Undersigned counsel filed a motion for rehearing and suggestion of certification of conflict with this Court's opinion in *Blanco v. State*, 452 So.2d 520 (Fla. 1984), the Fifth District Court of Appeal's opinion in *Cain v. State*, 565 So.2d 875 (Fla. 5th DCA 1990), and the Second District Court of Appeal's opinion in *Milligan v. State*, 177 So.2d 75 (Fla. 2d DCA 1965). On March 30, 2011, the Fourth District Court of Appeal denied the motion for rehearing, but granted the motion for certification of conflict with the Fifth District Court of Appeal's opinion in *Cain v. State*, 565 So.2d 875 (Fla. 5th DCA 1990), with two judges concurring because of the retirement of Judge Farmer. *Puglisi v. State*, 2011 Fla. App. LEXIS 4323; 36 Fla. L. Weekly D 654 (Fla. 4th DCA March 30, 2011). Puglisi timely invoked the discretionary review of this Court.

On August 29, 2011, this Court accepted discretionary jurisdiction as to certified direct conflict and as to direct conflict. *Puglisi v. State*, 2011 Fla. LEXIS 2050. (Fla. August 29, 2011). This Court has jurisdiction pursuant to Article V, section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

## STATEMENT OF THE FACTS

### A. FACTS RELATED TO THE CHARGED OFFENSES

On February 7, 2006, two days after Super Bowl Sunday, a maintenance man at Royal Oaks Manor Mobile Home Park discovered the body of Alan Shalleck underneath the trash bags lying in the driveway of Shalleck's residence. (T 1186-1187, 1191, 1198). Shalleck had been stabbed thirty-seven. (T 2082). His cause of death was determined to be the result of multiple stab wounds and blunt head trauma. (T 2045). Some injuries to his face could have been caused by having a pillow pressed against him, but they were not the cause of death. (T 2052, 2123-2124).

Homicide Detective Chris Crawford called a number which had been dialed from Shalleck's telephone. (T 1574). The dialed number belonged to Puglisi, who answered and arranged to meet with Detective Crawford the next day. (T 1577, 1579). When they met, Puglisi agreed to accompany the police back to the station. (T 1591). At the police department, Puglisi stated that he met Shalleck about a year earlier through a gay magazine soliciting spanking. (T 1608-1609). The two had sex approximately every couple of weeks until about a month or two before Shalleck's death. (T 1610, 1624). In one instance, Shalleck whipped Puglisi until he bled. (T 1625). Puglisi

said he worked until 8 P.M on Super Bowl Sunday, and then went out to a restaurant with Ditto, whom he was dating. (T 1614-1615, 1622-1623). The two spent the night at Puglisi's home after the Super Bowl game. (T 1614-1615, 1622).

During the police interview, the Detectives informed Puglisi that Shalleck had been murdered in his home. (T 1636). Puglisi responded that Ditto is the kind of guy that could have done something like that. (T 1638). In the early morning hours of February 6, Puglisi observed Ditto cleaning the front seat of his Ford Explorer with bleach and burning clothing and documents in a pile outside of his back door. (T 1638).

In a second statement to police, later the same day, Puglisi admitted that he and Ditto went to Shalleck's home, at his invitation, after watching the Super Bowl at a restaurant. (T 1648-1649). Ditto and Puglisi had previously discussed robbing Shalleck while at the restaurant. (T 1663, 1671-1672). After watching the game together, Shalleck expressed interest in having sex with Ditto. (T 1650-1651). Shalleck called Puglisi into the bedroom where he saw Shalleck performing oral sex on Ditto. (T 1651-1652, 1659). Ditto then freaked out and began to strangle Shalleck and hit him over the head with a paddle bloodying his entire head. (T 1652, 1660, 1662). Ditto told Puglisi to hold Shalleck down while he retrieved a knife,

so Puglisi held a pillow over Shalleck's face. (T 1652). Ditto stabbed Shalleck multiple times, eventually breaking two knives. (T 1653). Ditto requested that Puglisi get something, so Puglisi retrieved two candleholders, which broke when he threw them down at Shalleck. (T 1653). When that did not work, Ditto returned to the kitchen to get a third knife. (T 1653). Ditto asked Puglisi to stab Shalleck with the third knife and Puglisi refused. (T 1654). Puglisi left the room and heard Ditto repeatedly say that Shalleck just would not die. (T 1653-1654). Ditto came out of the room and told Puglisi that Shalleck was dead. (T 1655). Although Ditto stated they should dispose of the body in Alligator Alley, Shalleck's body was too heavy and they left him in the driveway covered with trash bags from Puglisi's car. (T 1655, 1661, 1664-1665).

Ditto took Shalleck's Fossil watch and wrote a $450 check on Shalleck's account. (T 1656-1657). Puglisi later pawned Shalleck's gold ring. (T 1657).

Puglisi told police that he never stabbed Shalleck himself: he was afraid. "I don't have the nerve to do it." (T 1661). He was upset and shocked that this had happened, but he was in love with Ditto and "went along with his plan because of the fact that I cared about him and I did not realize the seriousness of the consequences." (T 1677). He refused to leave

town as Ditto had suggested, because "I'm not going to spend the rest of my life running." (T 1677).

After this interview, the police arrested Puglisi. (T 1690).

A friend of Puglisi's, Joseph Carney, visited him in jail several times after his arrest. (T 1771). At first, Puglisi denied having anything to do with the killing, but later he admitted to being present. (T 1775). Carney went to the pawn shop and retrieved the ring Puglisi had pawned. (T 1776, 1780). On Carney's last jail visit he told Puglisi that he did not believe his protestations of innocence. (T 1788). Puglisi became upset and angrily told Carney, "I killed the old son of a bitch, now what do you want out of me," and the two began crying. (T 1788,1798).

A handwriting expert testified that the handwriting on the check written on Shalleck's account and directions to Shalleck's home were written by Puglisi. (T 1892, 1909).

Eyeglasses taken from Rex Ditto had blood stains on one of the lenses (T 1404-1405). A DNA expert testified that the only DNA samples found at the scene in which Puglisi could not be excluded from having contributed to was found on a pillow. (T 1980-1981). Ditto and a close friend of Shalleck's, Michael Raber, could not be excluded from contributing to the DNA found on a knife handle (T 1982). Raber testified that on February 5,

he and Shalleck had dinner at a restaurant, and then he drove Shalleck home. (T 1750).

On February 8, the police found a burn pile at Puglisi's home. (T 1475-1476). In the burn pile, the police discovered keys belonging to the blue car parked in Shalleck's carport, his front door, and for a safe located in his home, and some jewelry identified as belonging to Shalleck. (T 1480-1481, 1554)

## B. FACTS RELATED TO WHICH WITNESSES TO CALL

After the State rested, Puglisi's attorneys learned that the co-defendant, Ditto, was prepared to testify that Puglisi did nothing, and that Ditto was solely responsible for the death of Shalleck. (T 2142). Ditto lied in the past because he feared the death penalty. (T 2142). The State took the deposition of a defense witness, Michael Zimmerman, who was in jail with Ditto in the past. (T 2143). Ditto told Zimmerman that Puglisi is not responsible for any part of this crime. (T 2143). The Defense attorneys interviewed Ditto over the weekend and he said that he was prepared to testify that he was solely responsible and that Puglisi was present but did not participate in the murder. (T 2143). Ditto told the Defense attorneys that he lied in his past statement to police and in his deposition because he feared

getting the death penalty. (T 2143-2144). The Defense moved for a mistrial based on their inability to properly prepare and determine whether or not to call Ditto as a witness. (T 2144-2145). The State informed the trial court that during the course of conversations with Ditto over the weekend he confirmed that he had done all of the acts resulting in the death of Shalleck and that Puglisi had done nothing. (T 2146). Furthermore, Ditto admitted that he lied previously to avoid the death penalty. (T 2146-2147). However, Ditto told the State that if he was called to testify by either side he would probably lie and testify consistent with his previous statements. (T 2147).

The State further informed the court that in October 2007, just prior to entering his guilty plea, Ditto informed his attorney that Puglisi was not involved. (T 2147). At that time, on October 11, 2007, the State took a statement from Ditto where he stated that he lied to his attorney and that he did not act alone and that Puglisi was involved in the murder. (T. 2147-2149). This statement was incorporated by reference into Ditto's negotiated plea agreement. (T 2148-2149). This inconsistent information was provided to Puglisi's defense attorneys at the time of Ditto's plea. (T 2147). The defense then deposed Ditto with knowledge of the prior inconsistent statements. (T 2149-2150).

The Defense attorneys made a motion for mistrial arguing that that they will have to litigate the admissibility of Ditto's prior statements as involuntarily made because of the threat of the death penalty pursuant to *Brewer v. State,* 386 So.2d 232 (Fla. 1980) (T 2150-2151).

After the court denied the motion for mistrial, the Defense attorneys requested to continue the case to depose Ditto. (T 2153, 2155). The court stated, "…I'm prepared to allow you to continue to decide whether or not you wish to call Mr. Ditto." (T 2153). The court dismissed the jury for the day to allow the defense to depose Ditto. (T 2158).

The court contacted Ditto's trial attorney, Robert Gershman, and had him appear outside the presence of the jury. (T 2164). The court informed Gershman that Ditto may be in violation of his plea agreement that he testify consistently with the factual basis given for his plea. (T 2164-2165). He told the State and Defense attorneys last weekend that he lied in his statement and plea out of fear, and the truth is that he alone was responsible for the crime. (T 2164-2165).

The court reserved ruling on the culpable negligence jury instruction. (T 2173-2174, 2198-2200). "If they follow the principal instruction that ***if in fact Mr. Ditto comes in and says Mr. Puglisi had nothing to do with it and was in the other room then I would be inclined to give culpable***

***negligence***. So I will base my decision on any testimony that I hear tomorrow." (T 2173-2174) (emphasis added). The court also considered giving the ***independent act instruction if Ditto's testimony is what was represented to the court, in that he acted alone***. (T 2196, 2202-2203) (emphasis added).

After deposing Ditto, the Defense attorneys informed the court that during Ditto's trial recess deposition he stated that he told a variety of people that Puglisi was not involved in this, including his roommate in prison; Michael Zimmerman and Mark Barro, among other prison inmates; a New York Times reporter; a reporter who was writing a book about this case; and a reporter from New Time, all of whom had visited him in prison in Lake Correctional Institution. (T 2205-2207). The State took Mr. Zimmerman's deposition over the weekend, and he stated that Ditto was making some of these statements as early as 2006. (T 2208). Ditto made these statements to his attorneys, one of which is Mr. Gershman. (T 2206). In his deposition, Ditto stated that he told all of those people the same thing that he said in his deposition today. (T 2207). During this deposition, Ditto stated that he planned to testify truthfully that Puglisi was not involved and that he lied initially because of his fear of the death penalty, but that now he does not want to subject Puglisi to the death penalty as a result of his lies. (T 2209-

2210). The Defense attorneys acknowledged that Ditto was "…***obviously a very significant witness in this case has exculpatory testimony.***" (T 2208). The Defense attorneys requested a mistrial "…to ***properly investigate the statement to make a decision about putting Mr. Ditto on the witness stand at this point***." (T 2209). The Defense attorneys requested the mistrial to fully investigate and interview the people whom Ditto confided in with these either prior inconsistent or prior consistent statements. (T 2209-2210).

The court denied the motion for mistrial and recessed for the day. (T 2205-2212).

The next morning, June 24, 2008, the State filed a *Brady* Notice[1] which specifically memorialized Zimmerman's deposition testimony that Ditto claimed total responsibility for the murder. Also, that Ditto acknowledged to the Assistant State Attorney and his investigator during an interview at the Palm Beach County Sheriff's Office that his statement to Zimmerman was true and he made his original statements in order to avoid the death penalty. The Notice also indicated that Ditto stated he would probably lie and testify consistently with his previous statement if he were called to testify by either side.

(R 579-580).

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963).

Also, on June 24, the Defense attorneys informed the court that they were unable to complete their investigation by speaking with those incarcerated witnesses and they were ***not prepared to make a decision on whether or not to call Ditto***. (T 2220) (emphasis added). The Defense requested a continuance. (T 2221). The court agreed to allow the defense a brief time to confer with the local witnesses. (T 2228, 2231-2232, 2234). However, when the court called the jury in a few minutes later, the defense rested, noting their intention to enter a previously agreed upon stipulation. (T 2229).

The court recessed briefly to allow the Defense attorneys to speak with Puglisi. (T 2234-2235). Then, the following occurred:

> **MS. ELLIS (DEFENSE)**:…At this time ***Mr. Puglisi's lawyers, myself, Ms. Haughwout and Ms. Vrod have decided that we are not -- we do not wish to call Mr. Ditto; however, I believe Mr. Puglisi is -- has another position regarding that issue***.
> **THE COURT**: Okay. What do you want to tell me, Mr. Puglisi?
> **THE DEFENDANT**: ***I'd like to call Mr. Ditto***.
> **THE COURT**: Well, you have some of the best attorneys in the courthouse and they are advising you against that, do you understand that?
> **THE DEFENDANT**: Yes.
> **THE COURT**: And ***in the end this is your trial***, but I'm serious these attorneys are very, very experienced, excellent attorneys and ***it's their opinion that you should not call Mr. Ditto in the proceeding***, do you understand that?
> **THE DEFENDANT**: Yes.
> **THE COURT**: And ***you still want him to be called as a witness?***
> **THE DEFENDANT**: ***Yes***.
> **THE COURT**: All right. Anybody else want anything on the record.

**MS. HAUGHWOUT (DEFENSE)**: Judge, ***we're not going to call Mr. Ditto***.
**THE COURT**: ***You're not going to call Mr. Ditto?*** Well, do you want to tell me a little bit more about that, Ms. Haughwout? I mean, in the end I think we all know full and well and vetted this pretty well over the last several days what Mr. Ditto would testify to and I understand there's attorney/client privilege and Mr. Ditto is saying - - ***I mean, Mr. Puglisi is saying he wants Mr. Ditto to be called and this is obviously going to be an issue the appellate courts will look at.*** So, Mr. Puglisi, in order to explore that I want to ask Ms. Haughwout some questions that would invade your attorney/client privilege, do you understand that?
**THE DEFENDANT**: Yes, Your Honor.
**THE COURT**: And do you waive your right to keep those - - that privilege? I need to ***discuss with her why that decision is being made against your wishes*** and I want her to be able to discuss with me things that she might have discussed with you that would fall under what is known as the attorney/client privilege, do you understand that?
**THE DEFENDANT**: I'm not - -
**THE COURT**: Anything that you tell any of your attorneys is private and confidential and cannot be disclosed to anyone. It is a tightly kept secret and under the law it cannot be disclosed. That's known as the attorney/client privilege, do you understand that?
**THE DEFENDANT**: I understand that.
**THE COURT**: ***And this is a big deal here that you want to call a witness in your own defense and your three attorneys do not believe that this is in your best interest and best for the case*** and I'm sure they've discussed that with you, is that correct?
**THE DEFENDANT**: (Nods head.)
**THE COURT**: I need you to speak out loud, sir.
**THE DEFENDANT**: Yes, Your Honor.
**THE COURT**: All right. And so, it's obviously if there were to be a conviction in this case that ***the appellate courts are going to look at the fact that you wanted that witness called and your attorneys didn't***. So, I want to do a question and answer session with the lawyers so that they can tell me why they are making that decision and it might entail them discussing things that would have been attorney/client privilege or would have been conversations that they

had with you that shouldn't be disclosed because of that. So, do you waive the right to have those discussions kept confidential?
**THE DEFENDANT**: I don't understand what that means.
**THE COURT**: Well, ***this is really a big issue***.
**THE DEFENDANT**: Right, I understand that.
**THE COURT**: You want something and your attorneys don't believe that it's in your best interest.
**THE DEFENDANT**: I understand that.
**THE COURT**: And ***you have now stated on the record that you want Mr. Ditto to be called as a witness***.
**THE DEFENDANT**: Yes.
**THE COURT**: So, ***I want your attorneys to tell me why they have made that decision and why they're going against your wishes***, do you understand that?
**THE DEFENDANT**: Do you want me to answer that or the attorneys to answer that?
**THE COURT**: Well, do you feel like you've had ample time to discuss with your attorneys why they think it's not in your best interest.
**THE DEFENDANT**: We don't agree on a lot of stuff. My attorneys want me to take a plea, I do not want to take a plea. They talk to me every day about a plea. I don't want to take a plea. As far as my attorneys are concerned, it's hopeless, I'm gonna - - they've already got me hung, ***I'm losing the case. That's why I figured, well, if I have nothing to lose, that's why I want to call Mr. Ditto, because that's maybe my one last chance of hope, you know, if he'll come clean and be honest*** and that's what's going on.

(T 2242-2247) (emphasis added).

The defense declined to waive the attorney-client privilege and speak about their decision-making process and reiterated that the defense's position is to not call Ditto to the stand. (T 2242-2247). Addressing Puglisi, the trial court stated:

> **THE COURT**: All right, Mr. Puglisi, let me just say this, your attorneys are excellent attorneys, they really are. And they have been doing a spectacular job representing you. So, I know that you have

> indicated you have some discontent about the way things are proceeding and that ***you disagree with their strategy decision not to call Mr. Ditto*** and I know that you have been sitting here throughout the discussion of what the issues are as it relates to Mr. Ditto, but your attorneys have discussed it at length amongst themselves and you, some of which has occurred in my presence. So, ***I'm sorry and it's unfortunate that you disagree with their strategy but they represent you and that's their decision***. So, we're going to proceed and so we'll go right into closing arguments then.

(T 2249-2250) (emphasis added).

The court never inquired into Puglisi's decision to testify, and the record contains no mention of any colloquy into Puglisi's fundamental decision to testify on his own behalf.

Finally, the State approached the court, prior to closing argument, and informed her of this Court's *Blanco*[2] decision that it is the defendant's ultimate decision to determine which witnesses are called. (T 2255-2256). The court took another brief recess to read *Blanco*, but the record does not reflect any additional discussion of *Blanco*. (T 2256).

At an ex parte bench conference, Puglisi reiterated that he still wanted Ditto and other witnesses to come in to testify. (T 2356-2358). The Defense attorneys informed the court that the defense is not calling any witnesses and "***[i]t was a strategic decision amongst his lawyers***." (T 2357).

[2] *Blanco v. State*, 452 So.2d 520 (Fla. 1984).

## SUMMARY OF THE ARGUMENT

A defendant, not his lawyer, has the final right to determine which witnesses to call at trial. The Fourth District Court of Appeal's opinion allowing defense counsel to unilaterally decline to call a defense witness in contravention of Petitioner's express wishes, directly and expressly conflicts with this Court's opinion in *Blanco* and the Fifth District Court of Appeal's opinion in *Cain* and violates Puglisi's due process rights. This Court and the Fifth District, relying on this Court's opinion in *Blanco*, concluded that the defendant must make the ultimate decision. The Fourth District erroneously concluded that the decision is better made by the attorney. These decisions expressly and directly conflict and cannot be reconciled.

## ARGUMENT

**THE FOURTH DISTRICT COURT OF APPEAL'S OPINION IS CLEARLY ERRONEOUS AND IN CONFLICT WITH THIS COURT'S OPINION IN *BLANCO* BECAUSE IT IS THE DEFENDANT WHO MUST MAKE THE ULTIMATE DECISION WHETHER TO CALL A WITNESS DURING TRIAL.**

### A. JURISDICTION

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V, section 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

On the issue of who gets to make the final decision when the lawyer and the defendant disagree on how to conduct a trial, the Fourth District Court of Appeal erroneously concluded that the decision is better made by the attorney in contravention to this Court's decision in *Blanco v. State*, 452 So.2d 520 (Fla. 1984). The Fourth District erroneously dismissed this Court's decision in *Blanco v. State*, *supra*, in finding that the trial court committed no error in denying Petitioner the opportunity to call the co-defendant as a defense witness against his attorney's decision. In *Blanco*, appellant argued that the trial court erred in allowing him to call witnesses against his trial counsel's advice, thereby interfering with the presentation of

his defense. There, trial counsel explained several times to appellant that he considered it not to be in appellant's best interests to call the witnesses, but appellant insisted. The record reflected, and appellant conceded in his brief, that he was told that the witnesses' testimony would be detrimental to his case. The trial court finally ruled in favor of allowing appellant to present to the jury whatever evidence appellant felt was beneficial. This Court found that under those circumstances, the trial court did not err in allowing appellant to present witnesses. The ultimate decision is the defendant's. *Milligan v. State*, 177 So.2d 75 (Fla. 2d DCA 1965).

The Fourth District Court of Appeal distinguished Petitioner's reliance on this Court's opinion in *Blanco v. State*, 452 So.2d 520 (Fla. 1984), finding it inapposite to this case.

> Determining **which witnesses should be called by the defense** is not a fundamental decision to be made by the defendant himself. The trial court properly denied Puglisi's demands that Ditto be called to testify because **such a decision is better made by a professional advocate who is considering not just what the anticipated testimony might be, but issues of credibility and potential harm to the defendant as well**.

*Puglisi v. State*, 56 So.3d 787, 793 (Fla. 4th DCA 2010) (emphasis added).

However, the Fifth District Court of Appeal, in *Cain v. State*, 565 So.2d 875 (Fla. 5th DCA 1990) framed the issue more broadly and reached a contrary decision in applying *Blanco v. State*, 452 So.2d 520 (Fla. 1984). The Fifth District, relying on this Court's decision in *Blanco v. State*, *supra*, reasoned that the defendant must make the ultimate decision.

In its short opinion, the Fifth District explained,

> But, this is not a case of who is representing Cain -- clearly the lawyer is - - but **who gets to make the final decision when the lawyer and the client disagree on how to conduct the trial**.
> The **lawyer's function** is to present alternative courses of action, **not make decisions in contravention to his client's wishes**. *Milligan v. State*, 177 So.2d 75 (Fla. 2d DCA 1965). In cases where the **attorney and defendant disagree as to trial strategy, the defendant must make the ultimate decision**. *Blanco v. State*, 452 So.2d 520 (Fla. 1984).

*Cain*, 565 So.2d at 876. (emphasis added).

The Fourth District Court of Appeal's decision interpreting *Blanco* expressly and directly conflicts with the Fifth District Court of Appeal decision in *Cain.* Both decisions apply *Blanco* to trial situations when the lawyer and client disagree on how to conduct the trial. The Fifth District expressly decided the issue, relying on *Blanco*, as one where the defendant must make the ultimate decision. The Fourth District expressly decided the

issue differently determining that which witnesses should be called by the defense is better made by the attorney. In distinguishing *Blanco*, the Fourth District reasoned that the trial court allowing a defendant to call the witnesses did not constitute reversible error does not in turn mean that the trial court's refusal to allow Petitioner to call Ditto in the instant case is reversible error. These decisions expressly and directly conflict and cannot be reconciled.

**B. APPLICATION OF *BLANCO***

In the case *sub judice*, Petitioner's co-defendant, Ditto, avoided the death penalty and received a life sentence for his part in Shalleck's death by telling police that Petitioner actively participated in the crime (T 565, 2143, 2150). However, Ditto also made statements to a cellmate, his attorneys, and several other individuals that Petitioner, while present, did not participate in the crime, explaining that he had lied in previous statements to avoid the death penalty (T 2142-2143, 2146, 2147, 2205). According to the State, Ditto also stated that if he were called to testify he would repeat his lies implicating Petitioner to avoid a perjury charge. (T 2147, 2166).

Defense attorneys decided, against Petitioner's express wishes, not to call Ditto as a defense witness. (T. 2242, 2243, 2249). The trial court refused to permit Petitioner to call Ditto stating:

> So, I know that you have indicated you have some discontent about the way things are proceeding and that ***you disagree with their strategy decision not to call Mr. Ditto*** and I know that you have been sitting here throughout the discussion of what the issues are as it relates to Mr. Ditto, but ***your attorneys have discussed it at length amongst themselves and with you***, some of which has occurred in my presence. So, ***I'm sorry and it's unfortunate that you disagree with their strategy but they represent you and that's their decision***. So, we're going to proceed and so we'll go right into closing arguments then.

(T 2249-2250). Petitioner continued to assert his decision that Ditto be called to testify (T 2242-2247, 2356-2358).

The trial court and the Fourth District Court of Appeal got it wrong. It is well-established in this State that the defendant has the sole right to determine which witnesses are called on his behalf, regardless of the advice of his counsel. *Blanco v. State*, 452 So. 2d 520, 524 (Fla. 1984).[3] The attorney's function is to present alternative courses of action to his client, not to make decisions in contravention to his client's wishes. *Cain*, 565 So.2d

[3] The prosecutor directed the court's attention to *Blanco*, correctly summarizing that "the ultimate decision is the defendant's." (T 2255-2256). The court announced that it would "go read Blanco" but did not refer to the decision again. (T. 2256).

876, *citing Milligan v. State*, 177 So. 2d 75, 77 (Fla. 2d DCA 1965). This erroneous legal conclusion of the trial court is reviewed *de novo*. *E.g.*, *Nelson v. State*, 850 So.2d 514, 522 (Fla. 2003) (describing the standard of review for orders on motions to suppress alleging constitutional violations). Because the trial court's refusal to recognize this fundamental right of the defendant in the instant case deprived Petitioner of the single most critical witness to his defense, its error requires reversal of the conviction below.

The Fourth District Court of Appeal distinguished Petitioner's reliance on this Court's opinion in *Blanco v. State*, 452 So.2d 520 (Fla. 1984), finding it inapposite to this case without providing any factual distinctions. Actually, Petitioner and Blanco are similarly situated factually. Both Petitioner and Blanco were represented by counsel. Both Petitioner and Blanco sought to call witnesses against advice of counsel. Both Petitioner and Blanco went to trial. Both Petitioner and Blanco were informed of the potentially detrimental nature of the testimony. One glaringly substantial difference is that in Petitioner's case, the witness was not only potentially detrimental, but exculpatory. But, in *Blanco*, the trial court allowed him to call the potentially detrimental witnesses in contravention to his counsel's advice and this Court found that under those circumstances, the trial court did not err in allowing appellant to present

witnesses. The ultimate decision is the defendant's. But, in this similar case *sub judice*, the trial court did not allow the Petitioner to call a potentially exculpatory witness in contravention to his counsel's advice, and the Fourth District erroneously affirmed that decision distinguishing *Blanco* without applying the relevant facts to *Blanco*. The facts of this case require reversal under this Court's precedent in *Blanco*.

The Fourth District, mainly relying on *United States v. Burke*, 257 F. 3d 1321 (11th Cir. 2001), held that determining which witnesses to call is not a fundamental right. *Puglisi v. State*, 56 So.3d 787, 792-793 (Fla. 4th DCA 2010). *Burke* cites the 1983 U.S. Supreme Court decision of *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L. Ed. 2d 987 (1983) where the Court said that the defendant has the ultimate authority to make fundamental decisions in whether to plead guilty, waive a jury trial, testify in his or her own behalf and to take an appeal. While this Court is required to follow the United States Supreme Court decision[4] in not limiting those recognized fundamental rights, this Court can and has expanded upon those rights. This

[4] *Gioia v. Gioia*, 435 So.2d 367, 368 (Fla.4th DCA 1983) ("We are bound by the decisions of the United States Supreme Court when those decisions invoke a provision of the United States Constitution"); Art. VI, U.S. Const. (federal constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Court's opinion in *Blanco, supra,* decided a year after *Jones*, *supra*, expanded upon a defendant's due process rights and recognized the defendant's right to make the ultimate decision of which witnesses to call. The Fourth District ignored the fact that *Blanco* specifically expanded a defendant's rights in contravention to *Burke*.

The trial court's decision to allow Petitioner's attorney's to unilaterally make the ultimate decision of which witnesses to call in contravention to Petitioner's wishes prejudiced him and constituted fundamental error. "Fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." *Clark v. State*, 363 So.2d 331, 333 (Fla. 1978). The error here reached "down into the validity of the trial itself to the extent that a verdict of guilty ... could not have been obtained without the assistance of the alleged error." *Doorbal v. State*, 837 So.2d 940, 954-955 (Fla. 2003). Fundamental error is that which is so prejudicial it vitiates the entire trial. *Id*. at 955.

The harmless error doctrine cannot be applied here, because the State cannot prove beyond a reasonable doubt that the error in question did not contribute to the verdict or that there is no reasonable probability that it contributed to the verdict. *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.

1986). Ditto made contradictory statements throughout the pendency of the case. The Defense attorneys interviewed Ditto over the weekend and he said that he was prepared to testify that he was solely responsible and that Puglisi was present but did not participate in the murder. (T 2143). Ditto told the Defense attorneys that he lied in his past statement to police and in his deposition because he feared getting the death penalty. (T 2143-2144). If Ditto were called to testify, and he were faced with his prior consistent and inconsistent statements, his credibility would have been an issue for the jury to decide. The Defense attorney's acknowledgment that Ditto is "…***obviously a very significant witness in this case has exculpatory testimony***" (T 2208) (emphasis added); the trial court's concern in her dialogue with Puglisi's attorneys, "***You're not going to call Mr. Ditto?*** … ***I mean, Mr. Puglisi is saying he wants Mr. Ditto to be called and this is obviously going to be an issue the appellate courts will look at***" (T 2243) (emphasis added); coupled with Puglisi's insistence, "***I'm losing the case. That's why I figured, well, if I have nothing to lose, that's why I want to call Mr. Ditto, because that's maybe my one last chance of hope, you know, if he'll come clean and be honest*** and that's what's going on" (T 2247) (emphasis added) highlights the extreme importance of Ditto's

testimony. Under these circumstances, the court should have allowed Puglisi to make the ultimate informed decision.

Furthermore, Ditto's testimony would have had an impact on the jury instructions as well which could have contributed to the verdict. The court reserved ruling on the culpable negligence jury instruction. (T 2173-2174, 2198-2200). "If they follow the principal instruction that ***if in fact Mr. Ditto comes in and says Mr. Puglisi had nothing to do with it and was in the other room then I would be inclined to give culpable negligence***. So I will base my decision on any testimony that I hear tomorrow." (T 2173-2174) (emphasis added).

The court also considered giving the ***independent act instruction if Ditto's testimony is what was represented to the court, in that he acted alone***. (T 2196, 2202-2203) (emphasis added). If Ditto testified to an independent act, which he admitted in some of his statements, the trial court

would have instructed the jury on independent act. [5] However, because the defense attorneys did not call Ditto to testify, the independent act instruction was not given to the jury. The defense's whole trial theory, contingent on Ditto's testimony, which the Defense attorney's chose to forgo in contravention to Petitioner's wishes, was never given to the jury for consideration during deliberations. This error contributed to the verdict and prejudiced the Petitioner.

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[5] The Florida Standard Jury Instruction is as follows:

> If you find that the crime alleged was committed, an issue in this case is whether the crime of (crime alleged) was an independent act of a person other than the defendant. An independent act occurs when a person other than the commits or attempts to commit a crime
>
> 1. which the defendant did not intend to occur, and
> 2. in which the defendant did not participate, and
> 3. which was outside of and not a reasonably forseeable consequence of the common design or unlawful act contemplated by the defendant.
>
> If you find the defendant was not present when the crime of (crime alleged) occurred, that, in and of itself, does not establish that the (crime alleged) was an independent act of another.
>
> If you find that the (crime alleged) was an independent act of [another] [(name of individual)], then you should find (defendant) not guilty of the crime of (crime alleged).

Florida Standard Jury Instruction 3.6(l) (2008).

The record is clear that the error here is so prejudicial and vitiated the entire trial. Rule 9.140(h) of the Florida Rules of Appellate Procedure provides that in ***the interest of justice***, the court may grant any relief to which any party is entitled. Fla. R. App. P. 9.140 (h) (emphasis added).

Finally, it is critical that a defendant be competent to meaningfully participate in his own defense. Applying this reasoning, a competent defendant, especially one facing the ultimate penalty of death, should not be deprived of the right to make important tactical decisions merely because counsel disagrees with the defendant's choice.

## CONCLUSION

This Court "is the final arbiter of issues of Florida law" and lower courts are bound by its pronouncements. *Brim v. State*, 779 So.2d 427, 437 n.20 (Fla. 5th DCA 2000); *State v. Dwyer*, 332 So.2d 333, 335 (Fla. 1976). This Court is not precluded by appellate precedent from deciding the issue presented in this brief, and is instead compelled by its own precedent to grant relief.

Petitioner respectfully prays that this Honorable Court quash the opinion of the Fourth District Court of Appeal and reverse the judgment and sentence and remand with directions for a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was mailed via U.S. Mail first class, postage prepaid, on this ____ day of October, 2011, to: **Office of the Florida Attorney General**, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401; **Vincent J. Puglisi**, DC#715844, Okeechobee Correctional Institution, 3420 NE 168th Street, Okeechobee, FL 34972.

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## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that this initial brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: _____
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