

**IN THE SUPREME COURT OF FLORIDA**

**VINCENT J. PUGLISI**

**Petitioner,**

**v.**

**STATE OF FLORIDA,**

**Respondent.**

Case No. SC11-768  
4<sup>th</sup> DCA Case No. 4D08-3056  
L.T. Case No. 2006CF001968B

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ON REVIEW FROM A CERTIFICATION OF CONFLICT FROM THE  
FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

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**PETITIONER'S JURISDICTIONAL BRIEF**

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## **PRELIMINARY STATEMENT**

The Petitioner, Vincent J. Puglisi, was the Defendant in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County. He was the Appellant in the Fourth District Court of Appeal. The District Court decision is reported as *Puglisi v. State*, 2010 Fla. App. LEXIS 19465 (Fla. Dist. Ct. App. 4<sup>th</sup> Dist., Dec. 22, 2010); 36 Fla. L. Weekly D 7, and the suggestion of certification of conflict is reported as *Puglisi v. State*, 2011 Fla. App. LEXIS 4323 (Fla. Dist. Ct. App. 4<sup>th</sup> Dist., Mar. 30, 2011); 36 Fla. L. Weekly D 654. A timely notice to invoke this Court's jurisdiction was filed with the District Court of Appeal on April 13, 2011. A copy of the District Court's decision is included as Appendix A and a copy of the District Court's decision denying rehearing and granting certification of conflict is included as Appendix B.

## **STATEMENT OF THE CASE**

Petitioner and co-defendant, Rex Ditto, were charged with First Degree Murder and Robbery with a Deadly Weapon. Rex Ditto pled guilty as charged. After a jury trial, Petitioner was found guilty as charged.

On January 13, 2010, after the briefing concluded at the Fourth District Court of Appeal, the Office of the Public Defender for the Fifteenth Judicial Circuit ("PD15") filed a motion to withdraw based on a positional conflict. On

February 4, 2010, the Fourth District Court of Appeal granted the PD15's motion to withdraw and appointed the Office of Criminal Conflict and Civil Regional Counsel for the Fourth Region ("OCCCRC4").

The Fourth District Court of Appeal issued its opinion on December 22, 2010. OCCCRC4 timely requested an extension of time to file a motion for rehearing in order to review the record. On January 31, 2011, OCCCRC4 timely filed a motion for rehearing and suggestion of certification of conflict. On March 30, 2011, the Fourth District Court of Appeal denied the motion for rehearing, but granted the motion for certification of conflict with *Cain v. State*, 565 So.2d 875 (Fla. 5<sup>th</sup> DCA 1990).

### **STATEMENT OF THE FACTS**

In his first tape-recorded statement to police, Petitioner ("Puglisi") explained that he and the victim ("Shalleck") were gay and had a casual sexual relationship until about a month or two before Shalleck's death. Shalleck invited Puglisi over to his house on Super Bowl Sunday, but Puglisi declined. Instead, Puglisi worked on Super Bowl Sunday until about 8:00 p.m. and then went to a restaurant with Rex Ditto, whom he was dating, and they spent the night together at Puglisi's home. When the officers told Puglisi that Shalleck had been murdered in his home, Puglisis responded that Ditto could have done something like that. Puglisi stated

that he saw Ditto cleaning the front seat of a Ford Explorer with bleach and burning clothing, keys and documents the next morning.

In a second tape-recorded statement to police, Puglisi confessed to taking part in the murder after Ditto confessed and implicated Puglisi.

During trial, the State learned and served its *Brady* Notice on June 23, 2008, in which it provided notice of the following facts:

1. On June 21, 2008, the State took the deposition of Michael Zimmerman who stated that on June 12, 2008, he was in a holding cell with Rex Ditto and that Ditto told him that he was brought down by the State to testify against Puglisi. He stated however that he would say that he did everything and that Puglisi did nothing.
2. After this deposition, the undersigned, and State Attorney Investigator William [Fraser], went to the Palm Beach County Sheriff's Office and met with Rex Ditto. When confronted with Zimmerman's statement, Ditto acknowledged the statement to Zimmerman and that the statement was true. He said that he made his original statements to avoid getting the death penalty.
3. When asked how he would testify if called by either side to the witness stand, he stated that he would probably lie and testify consistently with his previous statements.

On June 23, 2008, defense counsel moved for a mistrial in light of the above referenced *Brady* notice. The State advised the court of the history of inconsistent statements by Ditto. The record indicated that between October 2007 and the time of trial, Ditto had repeatedly changed his version of events. Prior to entering his guilty plea, Ditto stated that he was completely to blame for the murder and that Puglisi was not involved. Ditto later told the State that he had lied in his previous statement, and that he would testify that both he and Puglisi participated in significant acts which caused the death of Shalleck. The State did not call Ditto to testify at trial. The court denied the motion for mistrial but allowed defense counsel to depose Ditto once more before deciding whether to call him as a witness.

Following Ditto's deposition, defense counsel renewed its motion for mistrial and advised the court that during his deposition Ditto had taken all the blame for the murder and maintained that Puglisi was merely present. Counsel explained that Ditto's statement during the February 2008 deposition was that both men were responsible for the murder. Until the State's *Brady* notice, she had no reason to believe Ditto would testify any differently. Defense counsel informed the court that she needed to conduct an investigation before determining whether to call Ditto as a defense witness. The trial court denied the motion for mistrial, but



remained in recess until the following morning to allow defense counsel time to gather witnesses who would corroborate Ditto's most recent account.

The following morning, defense counsel advised the court they would not call Ditto as a witness. Puglisi stated that he would like to call Ditto and reiterated that he and his attorneys disagree often. Puglisi told the court that he believed he had nothing to lose by calling Ditto. The court ultimately refused to allow Puglisi to call Ditto as a witness and explained to him that he had excellent attorneys who had discussed at length the issue of whether to call Ditto. The defense did not put on any witnesses.

### **SUMMARY OF THE ARGUMENT**

The Fourth District Court of Appeal certified conflict in this case with the Fifth District Court of Appeal decision in *Cain v. State*, 565 So.2d 875 (Fla. 5<sup>th</sup> DCA 1990) 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 reasoned that the decision is better made by the attorney. The Fifth District, relying on *Blanco v. State*, 452 So.2d 520 (Fla. 1984), reasoned that the defendant must make the ultimate decision. These two decisions expressly and directly conflict and cannot be reconciled.

## JURISDICTIONAL STATEMENT

The Florida Supreme 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).

## ARGUMENT

**The decision of the Fourth District Court of Appeal in this case expressly and directly conflicts with the Fifth District Court of Appeal in *Cain v. State* on the issue of who gets to make the final decision when the lawyer and the client disagree on how to conduct the trial.**

At the Fourth District Court of Appeal, Appellant relied on this Court's decision in *Blanco v. State*, 452 So.2d 520 (Fla. 1984), to argue that the trial court committed fundamental error when it denied him the opportunity to call the co-defendant as a defense witness against his attorney's decision. In *Blanco*, this Court held that the ultimate decision-making function is the client's, citing *Milligan v. State*, 177 So.2d 75 (Fla. 2d DCA 1965). In *Blanco*, the 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, 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 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.

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*, 2010 Fla. App. LEXIS 19465; 36 Fla. L. Weekly D 7 at 14 (emphasis added).

However, the Fifth District Court of Appeal, in *Cain v. State*, 565 So.2d 875 (Fla. 5<sup>th</sup> DCA 1990) framed the issue more broadly and reached a contrary decision in applying *Blanco*.

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 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, distinguishing *Blanco*, as one where the lawyer must make the ultimate decision. These two decisions expressly and directly conflict and cannot be reconciled.

The Fourth District Court of Appeal decision expressly and directly conflicts with the Fifth District Court of Appeal decision in *Cain* regarding whether the defendant or the lawyer has the authority to make the final decision on

which witnesses the defense will call. These conflicting decisions create inconsistency and confusion within the state. This Court must address the issue to ensure that similarly-situated clients within the state do not suffer an inequity.

### **CONCLUSION**

Petitioner has demonstrated the existence of an express and direct conflict, and this Court should grant the petition for discretionary review pursuant to Art. V, section 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

Respectfully Submitted,  
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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Petitioner's Jurisdictional Brief has been furnished by U.S. Mail on this \_\_\_\_\_ day of April, 2011 to: **Office of the Florida Attorney General**, Assistant Attorney General Sue-Ellen Kenny, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401; **Vincent J. Puglisi**, DC#715844, Okeechobee Correctional Institution, 3420 NE 168<sup>th</sup> Street, Okeechobee, FL 34972.

By: \_\_\_\_\_  
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**CERTIFICATE OF COMPLIANCE**

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

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