IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-768

VINCENT J. PUGLISI,
Petitioner,

- versus -

STATE OF FLORIDA,
Respondent.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 4D08-3056

RESPONDENT'S BRIEF ON MERITS

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Preliminary Statement

Petitioner was the Defendant in the trial court and the Appellant in the Fourth District Court of Appeal, and will be referred to herein as "Petitioner" and "Puglisi." Respondent, the State of Florida, was the Appellee in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State."

Reference to Petitioner's Initial Brief shall be (IB), followed by the appropriate page number.

A copy of the opinion issued by the Fourth District Court of Appeal on December 22, 2010 and on rehearing March 30, 2011, is attached as an Appendix.

Statement Of The Case and Facts

Respondent accepts Petitioner's statement of facts to the extent it is not argumentative subject to the following additions:

Petitioner sought to exclude "any out-of-court statements by codefendant Ditto to any of the witnesses," as violative of Crawford v. Washington, 541 U.S. 35 (2004). (R 537-560, 538). On June 23, 2008 the State served its Brady[1] Notice. (R 579-580). The State 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 Frasier, 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.
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> 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

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

his previous statements.

(R 579-580).

This issue was addressed by the court first thing Monday morning, June 23, 2008. (T 2142-2153). The State advised the court that Ditto had previously made the same assertion that Petitioner was merely present but did not participate in the murder. (T 2147). On October 11, 2007 in a statement, Ditto was confronted regarding these allegations. (T 2147). Ditto emphatically stated he lied to Mr. Gershman in confessing he was the sole participant and Petitioner was merely present. (T 2147-2149).

Subsequent to this October 11th statement, Ditto was deposed by the defense. (T 2149). During this deposition Ditto was confronted with his previous statement that Petitioner was merely present. (T 2149-2150). Ditto re-affirmed that both he and Petitioner had participated in the victim's murder. (T 2150).

Petitioner's counsel conceded that Ditto had provided various statements. (T 2150). Counsel's concern was that now Ditto indicated his prior statements were involuntary as he was threatened with the death penalty. (T 2150-2151). The State advised that Ditto indicated his initial statement implicating Petitioner prior to knowing anything about the death penalty. (T 2151-2152). In fact, Ditto had previously claimed he provided the statements because the police "beat him

up." (T 2152). The State was prepared to have officers testify to rebut this assertion. (T 2152). Further, the State was prepared to impeach Ditto should he testify. (T 2152). The court granted the defense request for a continuance to again depose Ditto. (T 2155). Petitioner advised the court it was never its prior intention to call Ditto as a witness. (T 2155). The court found there was no surprise as Ditto had clearly changed his testimony throughout the course of the pending action. (T 2156). The jury was then released for the day. (T 2158-2159). Ditto's deposition was anticipated to commence later that morning, about 11 a.m. (T 2165). The court appointed one of Ditto's previous attorneys to represent Ditto at the deposition. (T 2166).

After this deposition, Petitioner's counsel renewed the motion for mistrial. (T 2203). Counsel advised Ditto said "what State indicated he would say with regard to Mr. Puglisi's involvement." (T 2203). Petitioner's counsel acknowledged being provided a copy of Ditto's October statement. (T 2204). Ditto was then deposed in February 2008 in which he "testified consistent with the statement to the police which places much of the blame on Mr. Puglisi." (T 2204-2205, 2205). The court denied the motion for mistrial. (T 2211).

After recessing Petitioner's counsel advised the court they would not be calling Ditto as a witness. (T 2242). Petitioner advised the court he would like to

call Ditto. (T 2242). Petitioner further advised the court that he and his attorneys,

> 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 2246-2247). The State responded that Petitioner was not requesting counsel be discharged, therefore counsel's decision should govern. (T 2248).

The Fourth District Court of Appeal outlined the proceedings as follows:

> The record indicated that between October 2007 and the time of trial, Ditto had repeatedly changed his version of events. Prior to entering a plea of guilty, Ditto stated that he was completely to blame for the murder and that Puglisi was not involved. That information was provided to Puglisi's defense counsel at that time. Ditto later told the State he had lied in his previous statement, and that if he was called to testify he would explain that both he and Puglisi participated in significant acts which caused the death of Shalleck. The State did not call Ditto because he was not credible. The State argued that defense counsel had access to Ditto and knew of his change in story long before trial—if defense counsel wanted to call him as a witness, they did so at their own risk.
>
> Defense counsel informed the court that Zimmerman had stated that Ditto made like statements back in 2006. Counsel acknowledged that Ditto made various statements, but wanted to focus on the fact that Ditto had explained that his prior statements implicating Puglisi

> were made in an effort to avoid the death penalty. The State responded that Ditto implicated Puglisi to the police before he ever knew the death penalty was a possibility in his case. 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 Ditto had taken all the blame for the murder and maintained that Puglisi was merely present

Puglisi v. State, 56 So. 3d 787, 791-792 (Fla. 4th DCA 2010). Ultimately Petitioner's counsel decided not to call Ditto as a witness. Id., at 792. Petitioner disagreed with his attorney's decision and desired to call Ditto to testify. Id. The trial "court ultimately refused to allow Puglisi to call Ditto as a witness and explained to Puglisi that he had excellent attorneys who had discussed at length the issue of whether to call Ditto." Id.

Summary of the Argument

The Fourth District Court of Appeal correctly determined that the tactical decision regarding which witnesses to call during trial is a decision that is properly made by trial counsel. This Court's opinion in Blanco v. State , 452 So. 2d 520 (Fla. 1984) is distinguishable, and the Fifth District Court of Appeals decision in Cain v. State, 565 So. 2d 875 (Fla. 5th DCA 1990) upon which conflict is distinguishable or incorrect.

Argument

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT THE DECISION REGARDING WHICH WITNESSES TO CALL AT TRIAL IS A TACTICAL ONE AND IS WITHIN THE PROVINCE OF SUCH DECISIONS ENTRUSTED TO COUNSEL. (Restated)

Standard of Review:

"The issue in this case is a pure question of law and therefore the standard of review is de novo." Cromartie v. State, 70 So.3d 559, 563 (Fla. 2011).

Preservation:

"It is a longstanding principle of our jurisprudence that for a claim to be

addressed by this Court, it must be raised by the party before the trial court, or it has been waived." Baptiste v. State, 995 So.2d 285, 301-302 (Fla. 2008). Petitioner's current argument was never raised in either the trial court or the district court. Therefore this matter has not been preserved. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). "We even apply this tenet in death cases—without question, the most serious cases that we address, with the most severe consequences." Baptiste, at 301-302, referencing Overton v. State, 976 So.2d 536, 546–47 (Fla. 2007).

Merits:

The gravamen of Petitioner's argument is that pursuant to well established law in Florida, the ultimate decision regarding the presentation of a particular witness rest with the defendant. Petitioner relies on Blanco v. State, 452 So. 2d 520 (Fla. 1984) for this proposition. Petitioner is completely wrong on the law and he misapplies Blanco and Cain v. State, 565 So. 2d 875 (Fla. 5th DCA 1990). The law in Florida is that whether to call a particular witness is a **strategic decision** properly made by the attorney.

This Court has recognized countless times that the decision to call or not call any particular witness is a strategic decision that is made by trial counsel.

Marquard v. State , 850 So. 2d 417, 427 (Fla. 2002). In fact, this Court has explicitly found that trial counsel's decision not to call a witness due to credibility problems is a reasonable **strategic decision** of trial counsel. Bolin v. State , 41 So. 3d 151, 159-160)(Fla. 2010); See Evans v. State, 995 So.2d 933, 943 (Fla. 2008) (trial counsel's tactical decision not to present witnesses with questionable credibility does not constitute ineffective assistance); Lamarca v. State, 931 So.2d 838, 848-49 (Fla. 2006) (reasonable trial strategy for counsel not to call people who were not credible and would not have made good defense witnesses); Mendoza v. State, 36 Fla. L. Weekly S427 (Fla., July 8, 2011); 2011 WL 652193, 6 (Fla. 2011)(same); Burns v. State, 944 So.2d 234, 242–43 (Fla. 2006)(same).

"[T]his Court has 'consistently held that a trial counsel's decision to not call certain witnesses to testify at trial can be reasonable trial strategy.'" Johnston v. State 63 So.3d 730, 741 (Fla. 2011), citing Everett v. State, 54 So.3d 464, 474 (Fla. 2010). Cf. Laidler v. State, 10 So.3d 1136, 1138 (Fla. 4th DCA 2009)(recognizing that request a continuance is defense counsel's decision and should be granted when appropriate even in opposition to defendant's wishes); Lawrence v. State, 831 So.2d 121, 131 (Fla. 2002)(explaining that the decision to concede guilt to a lesser included offense is also considered a tactical decision which does not require the defendant's consent); Atwater v. State, 788 So.2d 223,

231 (Fla. 2001)(same); Brown v. State, 755 So.2d 616 (Fla. 2000) (holding that concession of guilt of lesser offense did not require defendant's consent and was proper strategy in attempt to avoid death sentence in light of overwhelming evidence); Walker v. State, 862 So.2d 888, 890 (Fla. 5th DCA 2003) (holding that waiving the first closing without defendant's consent is another one of those trial strategy decisions that needs to be left to the independent judgment of trial counsel); Demurjian v. State, 727 So.2d 324, 327 (Fla. 4th DCA 1999)(finding that whether to present an "all or nothing" closing argument is a matter of trial strategy which does not require a defendant's consent).

The Fourth District Court of Appeal explained the rationale for not requiring a defendant's consent to strategy decisions as follows,

> there is no requirement for counsel to obtain a client's consent for trial strategy decisions. To require such consent would severely undermine the value of the "constitutionally protected independence of counsel" and would begin the imposition of a set of rules that was rejected by Strickland,[1] 466 U.S. at 689, 104 S.Ct. at 2065.

Demurjian , 727 So.2d at 327. The court's holding is consistent with the United States Supreme Court's holdings on the issue. In Florida v. Nixon, 543 U.S. 175, 187 (2004), the Court, over the suggestion of this Court, refused to expand the list of fundamental rights that are personal only to the defendant beyond "whether to

plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Indeed the Court refused to impose a rule that would require a defense attorney to obtain the express consent of a defendant before conceding to a jury, the defendant's guilt to the crime charged. See also Harvey v. State, 946 So. 2d 937,947 (Fla. 2006)(recognizing that under Nixon a trial counsel's strategic decision to concede guilt is a decision that is viewed under Strickland regardless of whether the defendant consented to the strategy). Consequently, the law is clear, decisions to call particular witnesses are within the sound discretion of the attorney and cannot be circumscribed by the need for a defendant's approval. Petitioner's argument that trial counsel was required to call Ditto as a witness because such decisions are fundamental to the defendant is clearly not the law in Florida.

In denying relief on this claim, the Fourth District Court of Appeal held,

> 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). Appellant's reliance on

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[1] Strickland v. Washington, 466 U.S. 668 (1984).

Blanco and Cain, for a contrary position is of no moment. The Fourth District Court of Appeal found Blanco inapposite to the case at bar. Puglisi, at 793. That finding was correct. Blanco specifically requested that his lawyer call certain witnesses despite his attorney's advice such testimony would be detrimental. Blanco, at 524. The trial court ultimately granted Blanco's request and permitted the witnesses to testify against advice from counsel. Id. On appeal Blanco argued the trial court reversibly erred by granting **his** request to allow the witnesses to testify. This Court held "under these circumstances the trial court did not err in allowing appellant to present witnesses." Id., at 524. In other words, this Court refused to reward Blanco for creating error and then seek relief from his invited error.[2] Because the Blanco opinion never addressed the distinction between decisions which must ultimately be determined by the defendant and strategy

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[2] In reviewing Blanco the Eleventh Circuit Court of Appeal noted,

> the trial court overreached its authority and infringed upon the relationship between Blanco and his attorneys by requiring defense counsel to call two additional witnesses. Generally, trial tactics are for defense counsel to formulate. The decision as to which witnesses to call is an aspect of trial tactics that is normally entrusted to counsel.

Blanco v. Singletary, 943 F.2d 1477, 1495 (11th Cir. 1991)(footnotes omitted).

decisions, it cannot be considered to have extended "fundamental decisions" to encompass the tactical decision not to call a witness. As such, the decision at bar is not contrary to Blanco or Cain. Respondent asserts that this is a critical distinction which did not go unnoticed by the Fourth District when it held simply because this court would not find error in a trial court's decision to accede to the wishes of the defendant, does not mean that the a trial court must do so. Similarly, in Cain the defendant invited the court's ruling. Therein a disagreement arose between Cain and his attorney regarding the jury's composition. The trial court acquiesced to Cain's wishes and he was convicted. On appeal, Cain sought reversal based on the trial court's ruling. Denying the court relied on Milligan v. State, 177 So. 2d 75 (Fla. 2nd DCA 1965) noting that, "Cain chose his jury and was convicted." Id., at 876.

Both Cain and Blanco stand for the proposition that when a defendant requests the trial court allow him to pursue certain tactics in contravention of his attorney's advice, such defendant will not be heard on appeal that it was error for the trial court to grant the request. Similarly, when an attorney honors his client's wishes regarding strategy or tactics, the attorney will not be deemed ineffective. Brown v. State, 894 So.2d 137, 146 (Fla. 2004). See also Sims v. State, 602 So.2d 1253, 1257-58 (Fla. 1992) ("[W]e do not believe counsel can be considered

ineffective for honoring the client's wishes."). Neither Blanco nor Cain discuss or even note the critical distinction between fundamental decisions with constitutional significance personal to the defendant and those decisions implicating trial strategy and tactics which are within the province of counsel. See Jones v. Barnes, 463 U.S. 745 (1983), United States v. Burke, 257 F. 2d 1321 (11th Cir. 2001).

The fallacy of Puglisi's argument is further illustrated by examination of Milligan , cited in Blanco. In Milligan the minor defendant was represented by counsel and entered a guilty plea. Pursuant to this plea, Milligan was adjudicated guilty and sentenced to 5 years imprisonment. Milligan sought post-conviction relief because the trial court failed to comply with the statutory notice to parents requirement. Failure to follow this notification requirement renders a judgment and sentence void. Milligan, at 76. Although the minor Milligan's parents were not notified, his attorney was present. Milligan, at 77. The trial court denied post-conviction relief in part because Milligan "was represented by an attorney at arraignment and all subsequent stages of the proceedings." Milligan, at 76. At issue was whether the child's parents or his attorney were more important to the protection of the minor defendant. The court found,

> The obvious purpose of Section 932.38 is to furnish a safegoard [*sic*] to minors accused of crimes by requiring

> that the opportunity be made available for consultation and advice with the individuals, who, society must assume, are those most vitally concerned with the minor's best interests. It can be argued that the presence of an attorney provides greater safeguards for a minor defendant's rights than does the presence of his lay parents. This argument fails, however, to recognize that the attorney's function is to present alternative courses of action, not make decisions. The ultimate decision-making function is to be left to the client. It is here that the need of advice and counsel by the minor's parents or guardians arises.

Milligan, at 77. Thus, the court held the presence of counsel did not off-set or neutralize the failure to provide the statutorily required notice to the minor's parents. Id., at 77. This holding offers no support for Petitioner's argument. First, the respective importance of the guidance provided to a minor by either his parents or his attorney at the time of the minor's arrest has absolutely no relevance to the issue regarding strategic decisions at trial. Moreover, Milligan involved a defendant's decision to exercise a recognized fundamental right, i.e., taking a plea. That is not the issue herein, and therefore Milligan offers absolutely no support for Pugilsi. Simply because this Court cited to Milligan in Blanco does not transform the issue into something it is not. Respondent would also note that Millgan was decided almost twenty years before Strickland. Likewise, Blanco was decided before, Strickland became final.

Contrary to Petitioner's assertion (IB 25), this Court in Blanco did not convert the tactical decision regarding which witnesses to call to one of those fundamental rights exclusively within a defendant's control. Antithetical to Petitioner's claim (IB 29), he was not deprived of the opportunity to make important tactical decisions. In fact, counsel thoroughly discussed the matter with Puglisi and decided against calling Ditto. Had Puglisi unequivocally requested discharge of his court appointed counsel, the trial court could have conducted hearings pursuant to both Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) and Faretta v. California, 422 U.S. 806 (1975). It is certain, that a defendant does have the right to choose and conduct **his own** defense. However, that is a right of **self representation.** That right does not permit a defendant to override decisions of counsel. Indeed, under our adversarial system, the assistance of a lawyer is considered crucial to a fair trial. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938);Powell v. Alabama, 287 U.S. 45 (1932).

Consequently Puglisi could have represented himself, and then he could have pursued his own tactics and strategy. He did not choose to do that. Moreover, Puglisi also has a second remedy pursuant to Fla. R. Crim. P. 3.850 by which he may challenge his counsel's strategic decision through a motion for post

conviction relief. Therefore he is not without available remedies. However forcing an attorney to follow the wishes of a client at trial, regarding a classic strategic decision, is not an appropriate remedy to protect a defendant's Sixth Amendment right to effective counsel. In fact, such a rule would seriously undermine that right as explained by the United States Supreme Court in Nixon. See also Roe v. Flores-Ortega, 528 U.S. 470 (2000)(refusing to impose bright line rules on defense counsel must be free to explore and exercise professional judgment)

The decision of the Fourth District Court of Appeal should be affirmed. There is no precedent from this Court that recognizes a defendant's right to override the strategic decision of his counsel during a continued representation. Puglisi's reliance on Blanco and Cain for that proposition is incorrect.

Conclusion

Consequently, this Court should AFFIRM the Fourth District Court of Appeal's opinion in this case.

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MELANIE L. CASPER, ESQUIRE**, Office of Criminal Conflict and Civil Regional Counsel, Fourth District, 605 North Olive Avenue, Second Floor, West Palm Beach, Florida 33401 on this _____ day of December, 2011 and electronically transmitted to mcasper@rc-4.com

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Certificate of Font Compliance

I HEREBY CERTIFY that this document, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, has been prepared with Times New Roman 14-point font.

_/s/_____
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