IN THE SUPREME COURT OF FLORIDA

VINCENT PUGLISI,
Petitioner,

v.

STATE,
Respondent.

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

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

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

This reply 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. All references to Respondent's Answer Brief shall be referred to as "*AB*" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Petitioner reasserts and reincorporates his statement of the case and facts as set forth in his initial brief.

SUMMARY OF THE ARGUMENT

A defendant, not his lawyer, has the final right to determine which witnesses to call at trial. The issue was specifically and sufficiently raised to allow the trial court the ability to rule on the issue and for the district court to review the trial court's error. 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.

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. PRESERVATION

Respondent's contention that Petitioner's claim was neither presented to the trial court nor the district court and is not preserved, is without merit. (*AB* 7). Actually, the issue was clearly raised in lengthy discussions at the trial court, raised as error on appeal at the district court (Issue #1 in Appellant's Initial Brief), and addressed in the district court's written opinion at issue on review in this Court. In fact, Respondent failed to raise the issue of preservation at the district court, and raises it now for the first time in her Answer Brief with this Court, and it is therefore waived.

In order for an appellate court to reverse a judgment or sentence on appeal, the asserted error must either be preserved or constitute fundamental error. Petitioner asserts that the error was preserved. To preserve the error, three requirements must be met:

> First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, "[i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection,

> exception, or motion below." The purpose of this rule is to "place the trial judge on notice that error may have been committed, and provide him an opportunity to correct it at an early stage of the proceedings."

Harrell v. State, 894 So. 2d 935, 940 (Fla. 2005) (citations omitted) (quoting *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978)). These requirements are also codified in our statutes. Section 924.051, Florida Statutes (2006), outlines the "[t]erms and conditions of appeals and collateral review in criminal cases." Specifically, section 924.051(3), Florida Statutes (2006), states in part, "An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error." Subsection (1)(b) notes that an issue, legal argument or objection to evidence is preserved when it is "timely raised before, and ruled on by, the trial court . . . [and is] sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." Section 924.051(1)(b), Fla. Stat. (2006).

At the trial court, Petitioner specifically raised the issue of his disagreement with the advice of his attorneys on the decision not to call Ditto at trial. In fact, the trial court engaged in lengthy discussions with Petitioner and his attorneys about their decision not to call Ditto as a defense witness against Petitioner’s express wishes. (T. 2242-2250).

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***.

(T 2242-2243) (emphasis added).

The trial court even went so far as to request a waiver of the attorney-client privilege to inquire of the attorneys as to why they were going against Petitioner's wishes. (T 2243-2245). However, Petitioner did not understand the trial court's request for the waiver and his Defense attorneys conceded that he was not "…sufficiently informed to determine about waiving the privileges." (T 2245-2247). The Defense attorneys ultimately declined to waive the attorney-client privilege and speak about their decision-making process and reiterated that the defense's position was to not call Ditto to the stand. (T 2242-2247). Even after the trial court refused to permit Petitioner to call Ditto, Petitioner continued to assert his decision that Ditto be called to testify (during a discussion of whether the Petitioner understood that his attorneys were conceding to two misdemeanors):

THE COURT: All right, Mr. Puglisi?

> **THE DEFENDANT:** I didn't talk to them about any of this. ***I still want Mr. Ditto to come***.
> **THE COURT:** Pardon Me?
> **THE DEFENDANT:** ***I still want Mr. Ditto, I don't understand***.
> **THE COURT:** I understand, I understand, sir. Listen to me - -
> **THE DEFENDANT:** I have no idea what's going on.
> **THE COURT:** All right. Well I'm talking to you.
> **THE DEFENDANT:** I mean - -
> **THE COURT:** ***I know and recognize that you wanted Mr. Ditto***, the co-defendant, right and ***there was a great deal of discussion about that.***

(T 2356-2357) (emphasis added)

> **THE COURT:** You didn't want to testify, you wanted Mr. Ditto to testify.
> **THE DEFENDANT:** ***Yeah, I wanted Mr. Ditto to testify, I still do, yeah.***

(T. 2358).

Finally, the State directed the trial court's attention to *Blanco*[1], correctly summarizing that "the ultimate decision is the defendant's." (T 2255-2256). The State provided the trial court with the relevant law to remedy the error prior to the closing arguments.

Petitioner made a sufficiently specific objection that he wished to call Mr. Ditto against the advice of counsel, which fairly apprised the trial court of the relief sought, and the trial court had an opportunity to correct or prevent the error, and therefore, the issue is preserved for appeal.

At the district court, Petitioner also raised this claim on appeal and the Fourth District Court of Appeal specifically rejected Petitioner's argument,

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

finding *Blanco* inapposite. Petitioner moved for rehearing on this issue and certified conflict to this Court on this specifically raised and preserved issue now before this Court.

Finally, it is disingenuous for the Respondent to argue otherwise. The issue was specifically and sufficiently raised to allow the trial court the ability to rule on the issue and for the district court to review the trial court's error.

However, should this Court find that the error is not preserved, Petitioner reasserts that the issue is fundamental error based on this Court's decision in *Blanco*. "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. Here, the record is clear that the error is so prejudicial it vitiated the entire trial, and 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.

B. MERITS

The defendant has the 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).[2] 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 v. State*, 565 So.2d 876, *citing Milligan v. State*, 177 So. 2d 75, 77 (Fla. 2d DCA 1965).

The Respondent cites cases specifically addressing issues of ineffective assistance of counsel cognizable under Florida Rule of Criminal Procedure 3.850. Respondent's reliance on these cases relating to 3.850 claims is misplaced. Ineffective assistance of counsel claims look backwards at counsel's performance after the conviction to determine whether counsel's performance was deficient. In ineffective assistance of counsel claims, there is a strong presumption that trial counsel's performance was not ineffective. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). "A fair assessment of attorney performance requires that every effort be made to **eliminate the distorting effects of hindsight**, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at

[2] The prosecutor directed the court's attention to *Blanco*, correctly summarizing that "the ultimate decision is the defendant's." (T 2255-2256).

689 (emphasis added). Moreover, "**the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions**." *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000) (quoting *Strickland*, 466 U.S. at 691) (emphasis added). The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action '**might** be considered sound trial strategy.' " *Id*. (emphasis added) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). In *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000), this Court held that "strategic decisions do not constitute ineffective assistance of counsel **if alternative courses have been considered and rejected** and counsel's decision was reasonable under the norms of professional conduct."

In this case, there is no 3.850 claim requiring an evidentiary hearing on whether this was a sound trial strategy based on second guessing decisions made after a conviction. The Petitioner clearly indicated a disagreement with this course of action and requested numerous times to have Ditto testify. In fact, the defense's whole trial theory, which the Defense attorney's chose to forgo in failing to call Ditto in contravention to Petitioner's wishes, was never given to the jury for consideration during deliberations. It cannot be said that counsel considered alternative courses

and rejected them in favor of not calling Ditto. Here, if Ditto had been called to testify, and if 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, Petitioner's own statements and actions asserting his desire to call Ditto undermines the reasonableness of Respondent's argument that this was sound trial strategy. Applying the facts of this case, the trial court should have allowed Puglisi to make the ultimate informed decision.

The State's reliance on this Court's decision in *Bolin v. State*, 41 So.3d 151 (Fla. 2010) is wrong. This Court did not defer simply to trial counsel's decision not to call a witness as a reasonable strategic decision of trial counsel in denying 3.850 relief, as stated by the Respondent. (*AB* 8). But, this Court went further to specifically state that the decision not to call the witness was a **tactical decision made by counsel, and it was made with the agreement of Defendant**. *Bolin*, 41 So.3d at 159.

Respondent attempts to distinguish *Blanco v. State*, 452 So.2d 520 (Fla. 1984). However, Petitioner and Blanco are similarly situated factually. Both Petitioner and Blanco were represented by counsel, both sought to call witnesses against advice of counsel, and both proceeded to trial informed of the potentially detrimental nature of the testimony. One significant 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*.

Furthermore, Respondent completely ignores the fact that *Cain v. State*, 565 So.2d 875 (Fla. 5th DCA 1990), decided 4 years after *Strickland*, squarely applied *Blanco*[3] and *Milligan*[4] to trial situations when the lawyer and client disagree on how to conduct the trial and expressly decided the issue as one where the defendant must make the ultimate decision.

> 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. 2nd DCA 1965). In cases where the attorney and the defendant disagree as to trial strategy, the defendant must make the ultimate decision. *Blanco v. State*, 452 So.2d 520 (Fla. 1984).

Cain v. State, 565 So.2d 875 (Fla. 5th DCA 1990).

It is clear from the short *Cain* decision that application of the principles of *Milligan* and *Blanco* led the Fifth District to conclude that an attorney's function is to present alternatives, but the ultimate decision on how to conduct the trial is the defendant's.

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[3] *Blanco v.* State, 452 So.2d 520 (Fla. 1984).
[4] *Milligan v.* State, 177 So.2d 75 (Fla. 2d DCA 1965).

CONCLUSION

Petitioner respectfully prays that this Honorable Court disapprove 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 January, 2012, 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.

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