IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ELIZABETH FRANCES MARSH, Respondent.	Case No. SC18-1108 Lower Tribunal No(s).: 2D16-3542 2015-CF-3622

JURISDICTIONAL BRIEF OF THE RESPONDENT

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C. STATEMENT OF THE FACTS.

In the decision below, the Second District Court of Appeal provided the following factual backdrop for this case:

> Elizabeth Marsh rear-ended another vehicle while under the influence of illegal substances causing serious bodily injury to two of its passengers. As to each passenger she was convicted of driving under the influence (DUI) with serious bodily injury and driving while license suspended (DWLS) with serious bodily injury. We conclude that the dual convictions as to each victim based on the serious bodily injury arising from one act violate the constitutional prohibition against double jeopardy. We therefore affirm the convictions for DUI causing serious bodily injury but reverse the convictions for DWLS causing serious bodily injury and remand with directions to enter convictions for two counts of DWLS.
>
> Marsh entered an open, no contest plea to the above third-degree felony charges and to the second-degree misdemeanor charge of failure to carry adequate liability insurance. *The trial court imposed consecutive five-year sentences for each felony count* and sentenced Marsh to time-served for the misdemeanor count.

Marsh v. State, 43 Fla. L. Weekly D751, D751 (Fla. 2d DCA Apr. 6, 2018) (emphasis added).

D. SUMMARY OF ARGUMENT.

In the decision below, the Second District Court of Appeal correctly applied this Court's precedents in *State v. Cooper*, 634 So. 2d 1074 (Fla. 1994), and *State v. Chapman*, 625 So. 2d 838 (Fla. 1993), which precluded dual convictions for the single death of a victim that occurred as a result of one act of operating a vehicle (and the Second District properly concluded that causing serious bodily is analogous to causing death and therefore the principle announced in *Cooper* and *Chapman* applies to the Respondent's case – i.e., double jeopardy prohibits punishing a defendant twice for causing injury to a single victim by one act). Accordingly, because the Second District properly applied this Court's holdings in *Cooper* and *Chapman*, the Court should exercise its discretion to deny the petition for review.

E. ARGUMENT AND CITATIONS OF AUTHORITY.

The Second District Court of Appeal correctly applied this Court's precedents in *State v. Cooper*, 634 So. 2d 1074 (Fla. 1994), and *State v. Chapman*, 625 So. 2d 838 (Fla. 1993), and therefore the Court should exercise its discretion to deny the petition for review.

In concluding that the Respondent's multiple convictions for the single act of driving, the Second District Court of Appeal correctly applied this Court's precedents in *State v. Cooper*, 634 So. 2d 1074 (Fla. 1994), and *State v. Chapman*, 625 So. 2d 838 (Fla. 1993):

> . . . On the merits, this case is controlled by our decision in *Kelly v. State*, 987 So. 2d 1237, 1238 (Fla. 2d DCA 2008), in which this court addressed a double jeopardy challenge to dual convictions for DUI with serious bodily injury and driving without a valid license with serious bodily injury, both convictions being based on the same injury.
>
> In *Kelly*, the defendant argued that the convictions were impermissible because they punished the defendant twice for causing injury to a single victim by one act. *Id.* This court agreed based on the longstanding double jeopardy principle applied in *State v. Cooper*, 634 So. 2d 1074 (Fla. 1994), and *State v. Chapman*, 625 So. 2d 838 (Fla. 1993), precluding dual convictions for the single death of a victim that occurred as a result of one act of operating a vehicle while under the influence. *Kelly*, 987 So. 2d at 1238-39. This court noted that this principle had been applied in *Cooper* to determine that convictions for both DUI manslaughter and DWLS causing death were impermissible. *Kelly*, 987 So. 2d at 1238 (citing *Cooper*, 634 So. 2d at 1075).
>
> This court found the *Kelly* defendant's dual convictions for DUI causing serious bodily injury and driving without a valid license causing serious bodily injury were analogous to those in *Cooper* in that they imposed two penalties for causing serious injury to a single victim by one act of operating a vehicle while under the influence. *Id.* at 1239. Thus, the dual convictions violated the defendant's double jeopardy

rights. *Id.*

In this case, the defendant was convicted of DUI causing serious bodily injury and DWLS causing serious bodily injury. As in *Kelly*, her convictions were enhanced for causing serious injury to a victim as the result of the defendant's single act of operating her vehicle. Thus, Marsh's convictions for both offenses for each victim violate the constitutional prohibition against double jeopardy.

The State asserts that *Kelly* was erroneously decided because it improperly extended the rule precluding dual punishment for a single homicide to dual punishment for a single injury. . . .

. . . .

We remain unconvinced that *Kelly* was wrongly decided. The rule set forth in *Cooper* and *Chapman* is referred to as the "single homicide rule." *See McCullough v. State*, 230 So. 3d 586 (Fla. 2d DCA 2017). The rule, which is based on the premise "that the legislature did not intend to punish a single homicide under two different statutes," applies even in circumstances where the double jeopardy analysis set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), may not grant relief. *McCullough*, 230 So. 3d at 591 (quoting *Houser v. State*, 474 So. 2d 1193, 1197 (Fla. 1985)).

The single homicide rule was first adopted by the supreme court in *Houser* to preclude dual convictions for DWI manslaughter and vehicular homicide based on a single death. *Id.* The *Houser* court recognized that the two crimes passed muster under *Blockburger*, but it explained that "*Blockburger* and its statutory equivalent in section 775.024(1), Fla. Stat. (1983), are only tools of statutory interpretation which cannot contravene the contrary intent of the legislature." *Houser*, 474 So. 2d at 1196. Because "Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two different statutes," these dual convictions were impermissible regardless of whether the offenses satisfy the *Blockburger* test. *Id.* at 1197.

The single homicide rule "is based on notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing." *Gordon v. State*, 780 So. 2d 17, 25 (Fla. 2001), *receded from on other grounds by Valdes v. State*, 3 So. 3d 1067 (Fla. 2009). "[P]hysical injury and physical injury causing death,

merge into one and it is rationally defensible to conclude that the legislature did not intend to impose cumulative punishments." *Id.* (quoting *Carawan v. State*, 515 So. 2d 161, 173 (Fla. 1987) (Shaw, J., dissenting)). Although there was no death in *Gordon*, the supreme court determined that "the logical extension of" the single homicide rule precludes dual convictions based on a single attempted homicide. *Id.*

In *Kelly*, this court applied the same principle to preclude enhancements to dual convictions for single acts of operating a vehicle that cause serious bodily injury to another. The "notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing," *Gordon*, 780 So. 2d at 25, and a singular attempted killing, *see id.*, apply with equal force to multiple punishments for a singular serious bodily injury committed during a single act.

This principle is reinforced by a comparison of the facts of *Cooper* with those in this case. In *Cooper*, the supreme court applied the single homicide rule to hold that dual convictions for DUI manslaughter and DWLS causing death violate double jeopardy when there is only a single death. 634 So. 2d at 1075. The defendant had rear-ended a vehicle while driving under the influence, and the crash had caused the death of its passenger. *Cooper v. State*, 621 So. 2d 729, 730 (Fla. 5th DCA 1993), *approved*, 634 So. 2d 1074 (Fla. 1994). The supreme court determined that the defendant could be convicted of both DUI manslaughter and DWLS as long as the latter charge was not enhanced for causing death as provided in section 322.34(3), Florida Statutes (1991). *Cooper*, 634 So. 2d at 1075.

In this case, Marsh was convicted of DUI with serious bodily injury and DWLS causing serious bodily injury for rear-ending a vehicle while driving under the influence and causing serious bodily injury to two of its passengers. Marsh's convictions for DWLS causing serious bodily injury were actually enhanced by a later version of the same enhancement statute in *Cooper*. *See* § 322.34(6), Fla. Stat. (2014). Both versions provide for enhancement when the defendant "causes the death of *or serious bodily injury to* another." § 322.34(3), Fla. Stat. (1991) (emphasis added); § 322.34(6), Fla. Stat. (2014) (emphasis added).

The fact that Marsh did not kill the victims in the vehicle she rear-ended does not distinguish this case from *Cooper* in any meaningful

> way. If enhancement of the *Cooper* defendant's charge for DWLS was improperly cumulative, then enhancement of Marsh's charge for DWLS was likewise improperly cumulative. Thus, the *Kelly* court properly relied upon *Cooper* and *Chapman* to conclude that convictions for DUI causing serious bodily injury and driving without a valid license causing serious bodily injury to the same victim placed the defendant in double jeopardy.
>
> In conclusion, we reject the State's assertion that *Kelly* improperly extended the rule precluding dual punishment for a single homicide to precluding dual punishment for a single injury. And for the reasons set forth in *Kelly*, Marsh's dual enhancements for causing serious bodily injury for each victim violate the constitutional prohibition against double jeopardy. Thus, we affirm Marsh's convictions for two counts of DUI causing serious bodily injury but reverse the convictions for two counts of DWLS causing serious bodily injury and remand with directions to enter convictions for two counts of DWLS.

Marsh v. State, 43 Fla. L. Weekly D751, D751-D752 (Fla. 2d DCA Apr. 6, 2018).

Because the decision below properly applied this Court's holdings in *Cooper* and *Chapman*, the Court should exercise its discretion to deny the petition for review. *See, e.g.*, Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 523 (2005) ("Even if discretion exists, the Court is free to deny the petition if the issues seem unimportant or the result is essentially fair or correct, among other reasons.") (footnote omitted).

F. CONCLUSION

For the reasons set forth above, the Court should deny the petition for review.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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by email delivery this 22nd day of August, 2018.

Respectfully submitted,

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[1] Assistant Attorney General Wendy Buffington co-authored the Petitioner's Jurisdictional Brief. Undersigned counsel's office has been informed that Mr. Hurley is now assigned to this case.

H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Jurisdictional Brief of the Respondent complies with the type-font limitation.

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