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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-817
Lower Tribunal Case No. 2D12-3972

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STATE OF FLORIDA,

Petitioner,

versus

TIMOTHY W. TUTTLE, JR.,

Respondent.

_____

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

_____

RESPONDENT'S ANSWER BRIEF ON THE MERITS

_____

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STATEMENT OF THE CASE AND FACTS[1]

The State of Florida filed a three-count information against Respondent Timothy W. Tuttle, Jr. based on conduct the night of July 9, 2010 through the early morning of July 10, 2010 (R1:14-16). Count 1 charged Mr. Tuttle with second-degree murder with a firearm, a life felony. Count 2 charged attempted home invasion robbery with a firearm, a first-degree felony, and Count 3 charged armed first-degree burglary, a felony punishable by life imprisonment. The jury convicted Mr. Tuttle of the lesser included offense of manslaughter with a firearm (Count 1), attempted home invasion robbery with actual possession of a firearm (Count 2), and burglary while armed with a firearm (Count 3) (R7:452-455).

At the May 23, 2012 sentencing hearing, all parties agreed Mr. Tuttle could not be sentenced on both Counts 2 (attempted home invasion robbery) and 3 (burglary while armed) (R7:511-12). The dispute centered on which conviction to vacate. After argument, the court instructed the parties to brief the issue (R7:516-17; R8:571). The State's memorandum urged that the Count 2 attempted home invasion robbery conviction be vacated (R7:520-23). The Defendant's response cited Second District

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[1] The Record on Appeal consists of 13 volumes. The record documents are identified by "R" followed by a volume and page number. The trial transcripts are identified by "T" followed by the transcript volume and page number. The parties are referred to by their proper names or as they appeared in the lower tribunal.

Court of Appeal precedent, including *Schulterbrandt v. State*, 984 So. 2d 542, 544 (Fla. 2d DCA 2008), that mandated Mr. Tuttle be sentenced for the greater offense (Count 2, home invasion robbery) and that the lesser offense (Count 3, burglary) be vacated (R7:524-28). The sentencing hearing was continued until on June 27, 2012, at which time the trial judge did as the State requested, vacating the Count 2 attempted home invasion robbery conviction because it was lesser in degree of crime and in the allowable sentence (R8:571-72, 596-598; R9:631-639). The trial judge adjudicated Mr. Tuttle guilty on Counts 1 and 3 and sentenced him to life imprisonment on Count 3, with a concurrent term of thirty years on Count 1.

On appeal, the Second District Court of Appeal reversed the decision to vacate the Count 2 attempted home invasion robbery conviction. The appellate court reasoned that since the statutory elements of burglary are subsumed by home invasion robbery, the burglary conviction was the lesser offense that had to be vacated. The Second District relied principally on the Florida Supreme Court decision in *Pizzo v. State*, 945 So. 2d 1203 (Fla. 2006).

The State sought discretionary review based on express and direct conflict. On July 3, 2014, this Court accepted jurisdiction, dispensing with oral argument.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Was the Second District correct in concluding that the trial court was obligated to vacate the Count 3 burglary conviction on double jeopardy grounds where that offense was subsumed into the Count 2 attempted home invasion robbery offense?

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal correctly concluded that the Count 3 burglary conviction should be vacated. The appellate opinion properly applies this Court's seminal decision in *Pizzo v. State*, 945 So. 2d 1203 (Fla. 2006), and gives due deference to the express legislative intent of § 775.021(4)(b), Florida Statutes (2012), that a criminal defendant be sentenced on every possible criminal offense arising from a criminal transaction, except for "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense."

It has been undisputed that the elements of burglary are subsumed by the statutory elements of home invasion robbery. The burglary conviction was therefore the lesser offense, and thus the district court correctly directed its vacation. Double jeopardy and separation of powers principles require that the decision be affirmed.

Because the question was conclusively and properly decided by *Pizzo v. State*, this Court should withdraw its order accepting discretionary jurisdiction as improvidently granted, or alternatively approve the Second District's decision.

ARGUMENT

THE SECOND DISTRICT CORRECTLY CONCLUDED THE COUNT 3 BURGLARY WHILE ARMED CONVICTION SHOULD BE VACATED BECAUSE ITS STATUTORY ELEMENTS ARE SUBSUMED BY THE COUNT 2 ATTEMPTED HOME INVASION ROBBERY CONVICTION.

The Fifth Amendment Double Jeopardy clause, applicable to the States through the Fourteenth Amendment, provides, in pertinent part, as follows: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." Amend. V, U.S. Const. The Florida Constitution similarly protects a person from being put twice in jeopardy for the same offense. Art. I, § 9, Fla. Const. Its scope is the same as its federal counterpart, *Trotter v. State*, 825 So. 2d 362, 365 (Fla. 2002).

The protective reach of the double jeopardy clause is not limited to preventing an acquitted defendant from being tried again for the same offense. *United States v. Dixon*, 509 U.S. 688, 749 n.4 (1993). *See also Claps v. State*, 971 So. 2d 131, 133 (Fla. 2d DCA 2007) ("The concept of double jeopardy affords three basic protections: "against a second prosecution for the same offense following an acquittal, against a second prosecution for the same offense after a conviction, and against multiple punishments for the same offense.").

Double jeopardy also protects defendants like Mr. Tuttle from receiving multiple punishments for multiple offenses that arise from one criminal transaction

or episode, unless the Legislature intended otherwise. As the United States Supreme Court explained in *Brown v. Ohio*, 432 U.S. 161, 165 (1977), "Where consecutive sentences are imposed at a single criminal trial, the role of the [double jeopardy] constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."[2] "[I]f the Legislature intended separate convictions and sentences for a defendant's single criminal act, there is no double jeopardy violation for the multiple punishments." *Hayes v. State*, 803 So. 2d 695, 699 (Fla. 2001); *Hall v. State*, 517 So. 2d 678, 680-81 (Fla. 1988); *Borges v. State,* 415 So. 2d 1265 (Fla.1982); *McKnight v. State*, 906 So. 2d 368, 371 (Fla. 5th DCA 2005).

But if the Legislature did not intend for multiple punishments, then the imposition of multiple punishments violates double jeopardy. *See Ivey v. State*, 47 So. 3d 908, 911 (Fla. 3d DCA 2010) ("[W]e are convinced the Legislature did not intend to punish the single death here by two separate homicide convictions. Accordingly, the defendant's convictions for both vehicular homicide and DUI manslaughter cannot stand as they violate double jeopardy."). *See also Brown*, 432 U.S. at 165 ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix

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2 For this reason, the double jeopardy clause does not restrain the Legislature from authorizing multiple convictions for crimes arising out of the same criminal episode. *See Valdes v. State*, 3 So. 3d 1067, 1076 (Fla. 2009).

punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense . . . ."). In addition to being a double jeopardy violation, the imposition of unauthorized multiple punishments also constitutes a separation of powers violation, as the United States Supreme Court explained:

> If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.

Whalen v. United States, 445 U.S. 684, 689 (1980).

"To determine whether the Florida Legislature intended to authorize separate punishments for different offenses arising out of the same criminal transaction, courts first look to the statutes defining the crimes to see if there are any specific, clear and precise statements of legislative intent." *Rimondi v. State*, 89 So. 3d 1059, 1061 (Fla. 4th DCA 2012). Section 775.021(4)(b), as this Court recently reaffirmed in *Gil v. State*, 118 So. 3d 787, 792 (Fla. 2013), "expresses the legislative intent that defendants be charged with every offense that arises out of one criminal episode *unless* an exception applies." The exceptions are well-defined and follow:

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.

> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which **are subsumed by the greater offense.**

§ 775.021(4)(b), Fla. Stat. (emphasis added).

In *Pizzo v. State*, 945 So. 2d 1203 (Fla. 2006), this Court considered the very issue raised by this appeal, whether the allowable penalty should be considered in deciding which offense is the lesser offense under Section 775.021. The *Pizzo* defendant was found guilty of six counts of grand theft and one count of organized fraud, convictions that raised double jeopardy concerns. *Id*. at 1205. The six grand theft convictions collectively and the organized fraud conviction individually both had a maximum penalty of 30 years imprisonment. The Second District agreed that the lesser offense should be vacated, but instructed the trial court to determine the lesser offense and acquit Pizzo of it. *Id*. This ruling placed it in conflict with another district court that had vacated the grand theft convictions because it identified the lesser offense by comparing the statutory elements of organized fraud and grand theft. *Id*. The State advanced the same position advanced in this appeal, that the punishments should be considered in determining which offense is the lesser. This Court ensuing *Pizzo* decision resoundingly rejected this position, holding that the determination of which offense is the lesser turns on the statutory elements, not the penalty attached. *Id*. at 1207 ("A comparison of statutory elements is the proper method for determining

a lesser offense in the double jeopardy context, and based upon a comparison of the statutory elements, we find that grand theft is a lesser offense of organized fraud.").

In the instant case, the Second District Court of Appeal properly applied § 775.021's legislative mandate, confirmed by this Court's *Pizzo* holding, in ruling that Mr. Tuttle should be convicted for and sentenced on every possible criminal offense except "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." The armed burglary count is unequivocally the offense excepted from the Legislature's proscription that a person be sentenced on every possible criminal offense, because its elements are subsumed by armed home invasion robbery, the greater offense.[3] *See Pizzo*, 945 So. 2d 1206 (Fla. 2006) ("In distinguishing lesser offenses from greater offenses when faced with a double jeopardy violation, this Court has stated that based upon section 775.021(4), lesser offenses 'are those in which the elements of the lesser offense are always subsumed within the greater, without regard to the charging document or evidence at trial.'"

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[3] This language is clear and different from subsections 1 and 2, both of which leave room for discretion. While subsection 3 specifically identifies which of the conflicting offenses should be excepted from the rule that a criminal defendant be convicted and sentenced on each possible criminal offense, the other subsections do not so specify. They only state the legislative intent that the defendant not be convicted of both offenses. In this regard, the State's argument that the choice of which offense to adjudicate and sentence falls within the discretion of the sentencing judge, might be allowable if this case concerned application of subsections 1 or 2. This case, however, does not. Subsection 3's plain language controls.

(quoting *State v. Florida,* 894 So. 2d 941, 947 (Fla. 2005), *overruled in part, Valdes v. State*, 3 So. 3d 1067, 1077 (Fla. 2009))). *See also Davis v. State*, 74 So. 3d 1096, 1097 (Fla. 1st DCA 2011) ("This analysis focuses on the elements of the crime 'without regard to the accusatory pleading or the proof adduced at trial.'").

The State does not dispute what the District Courts of Appeal have consistently acknowledged — that burglary's statutory elements are subsumed by the elements of the greater offense of home invasion robbery. *Davis v. State*, 74 So. 3d 1096, 1097 (Fla. 1st DCA 2011) ("Burglary of a dwelling with an assault or battery is subsumed by home-invasion robbery, such that convictions of both offenses arising from a single criminal episode violate the principles of double jeopardy."); *Perez v. State*, 951 So. 2d 859, 860 (Fla. 2d DCA 2006) ("Thus, Mr. Perez's conviction for armed burglary must be vacated as it is subsumed by the greater offense of armed home invasion robbery."); *Black v. State*, 677 So. 2d 22 (Fla. 4th DCA 1996) ("All of the elements of burglary are included in the offense of home invasion robbery, of which appellant was also convicted."); *Mendez v. State*, 798 So. 2d 749, 750 (Fla. 5th DCA 2001) ("The crime of burglary of a dwelling with an assault or battery is subsumed by the offense of home invasion robbery.").[4] *But see Weiss v. State*, 720 So. 2d 1113, 1113

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It is true that many decisions have involved various forms of burglaries (i.e., burglary with an assault, burglary of a dwelling) and various types of home invasion robberies (i.e., armed home invasion robbery). The analysis, however, has never

(Fla. 3d DCA 1998) ("As the State concedes, the conviction for home invasion robbery must be vacated on double jeopardy grounds as subsumed by the "greater" conviction for burglary with an assault."); *Braggs v. State*, 789 So. 2d 1151, 1153 (Fla. 3d DCA 2001) (same); *Barboza v. State*, 786 So. 2d 675 (Fla. 3d DCA 2001) (same); *Smith v. State*, 741 So. 2d 579, 579 (Fla. 3d DCA 1999) (same).

The State has instead presented a number of decisions that ignore *Pizzo* and disregard the clearly expressed legislative intent that a defendant not be sentenced on the lesser offense. *See Johnson v. State*, 133 So. 3d 602, 604 (Fla. 1st DCA 2014) (recognizing case law that burglary is subsumed by home-invasion robbery, but reversing the home-invasion robbery offense); *Washington v. State*, 120 So. 3d 650, 651 (Fla. 5th DCA 2013) (same); *Olivera v. State*, 92 So. 3d 924, 925-26 (Fla. 4th DCA 2012) ("Based on the foregoing, we affirm the conviction for the greater offense, armed burglary of a dwelling with a battery, which is a first-degree felony punishable

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considered enhancements and other the variations of the offense. The focus has always been on the core statutory elements of the offense. That Mr. Tuttle was convicted of *attempted* home invasion robbery does not change the analysis. It matters not that the greater offense (attempted home invasion robbery) is an attempt, because it nonetheless subsumes the statutory elements of the lesser offense (burglary). *See Gutierrez v. State*, 860 So. 2d 1043, 1044 (Fla. 5th DCA 2003) (in deciding whether the statutory elements of aggravated battery causing great bodily harm were subsumed by attempted second-degree murder, not considering the fact that the purported greater was an attempt); *Legette v. State*, 694 So. 2d 826, 827 (Fla. 2d DCA 1997) (in deciding whether the statutory elements of improper exhibition of a firearm were subsumed by attempted robbery with a firearm, not considering the fact that the purported greater was an attempt).

by life. *See* § 810.02(2)(a)-(b), Fla. Stat. (2008). We remand with directions that the trial court vacate the conviction and sentence for the attempted home invasion robbery with a firearm, a second-degree felony, and thus the lesser of the two offenses."); *Davis v. State*, 74 So. 3d 1096, 1097 (Fla. 1st DCA 2011) (acknowledging that the burglary elements are subsumed by home invasion robbery, but nonetheless ruling that "[b]ecause burglary with an assault or battery is the greater offense, this conviction should stand, and the conviction and sentence for home-invasion robbery should be vacated"); *Mendez*, 798 So. 2d at 750 ("Since the subsumed offense (burglary of a dwelling with a battery) carries the greater sentence in this case, we vacate the conviction for home invasion robbery.").[5]

The Second District correctly concluded these cases were abrogated by *Pizzo* and the law holding that the lesser offense analysis focuses on the statutory elements, not the penalty. *See Pizzo*, 945 So. 2d at 1206 ("When an appellate court determines that dual convictions are impermissible, the appellate court should reverse the lesser offense conviction and affirm the greater."); *Lester v. State*, 25 So. 3d 623, 625 (Fla.

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[5] Moreover, a number of decisions reverse the home invasion robbery, without any discussion, presumably because the burglary conviction carried a greater maximum penalty. *Elmy v. State*, 667 So. 2d 392 (Fla. 1st DCA 1995) ("Thomas Lee Elmy (Elmy) pleaded no contest to burglary with assault, robbery, and home invasion robbery, and was sentenced to three concurrent eighty-month prison terms. We vacate Elmy's sentence for home invasion robbery."); *Jules v. State*, 113 So. 3d 949 (Fla. 5th DCA 2013) (reversing home-invasion robbery conviction without discussion).

3d DCA 2009) ("Lesser included offenses are determined on the elements of the offenses, not on the penalties attached." (quoting *Carle v. State*, 983 So. 2d 693, 695 (Fla. 1st DCA 2008))); *Haliburton v. State*, 7 So. 3d 601, 604 (Fla. 4th DCA 2009) (lesser included offenses are based on the elements of the offense, not the penalty).

Indeed, the Second District is not the only district to so rule, as the First and Fifth Districts have also vacated the lesser offense when presented with a double jeopardy quandary, without regard to the penalties associated with the greater and lesser offenses. *See Means v. State*, 127 So. 3d 750, 752 (Fla. 1st DCA 2013) (citing *Pizzo* to vacate the conviction for obtaining a vehicle with intent to defraud by trick or false representation under § 817.52(1), because its elements are included within the elements of grand theft under § 812.014(1)); *Fleming v. State*, 75 So. 3d 397, 399 (Fla. 5th DCA 2011) (vacating the burglary of a dwelling with an assault or battery conviction where the simultaneous conviction for home-invasion robbery violated double jeopardy). *See also Schulterbrandt v. State*, 984 So. 2d 542, 544 (Fla. 2d DCA 2008) (reversing burglary of a dwelling conviction but affirming attempted home-invasion robbery conviction); *Perez v. State*, 951 So. 2d 859, 860 (Fla. 2d DCA 2006) ("Thus, Mr. Perez's conviction for armed burglary must be vacated as it is subsumed by the greater offense of armed home invasion robbery.").

A. Which Conviction to Vacate Does Not Fall within the Sentencing Judge's Discretion, Contrary to the State's Position.

The State has not challenged the recognized conclusion that burglary's statutory elements are contained in, and therefore subsumed by, home invasion robbery. It instead posits that deciding which conviction to vacate is never a part of the double jeopardy analysis but instead belongs solely to the sentencing judge's discretion. Accordingly, so long as the defendant is convicted of one offense, double jeopardy has been satisfied (Petitioner Initial Br. 9-11). This argument is incorrect for two reasons. First, a double jeopardy violation and the remedy for the violation are bound together. Contained within the express legislative intent avoiding multiple sentences is its requirement that a defendant must not be sentenced for a lesser offense. § 775.021(4)(b). Because the Legislature has already directed that the lesser offense be excepted from the general rule in favor of multiple convictions for each criminal transaction, the trial judge has no discretion in deciding which offense to dismiss.

Focusing the applicable statute on this case, the Legislature did not intend for Mr. Tuttle to be convicted of the burglary charge and home invasion robbery, the greater offense defined by the statutory elements. Mr. Tuttle's double jeopardy violation occurred when he was simultaneously convicted of the home invasion robbery charge, a greater offense that arose from the same criminal transaction as the lesser burglary charge. The simultaneous burglary conviction was not authorized by

the Legislature and therefore constituted the double jeopardy violation. *See Rodriguez v. State*, 441 So. 2d 1129, 1139 (Fla. 3d DCA 1983) ("Where, as here, the court exceeds its authority by imposing multiple punishments not authorized by the legislature, it not only violates double jeopardy but, by usurping a function relegated solely to the legislature, violates the doctrine of separation of powers."). It thus naturally follows that the double jeopardy violation be cured by the dismissal of the burglary conviction, since it is the offense disapproved of by the Legislature.

Moreover, "[a] double jeopardy violation is not harmless simply because the defendant was adjudicated guilty and sentenced only on one of the offenses; rather, 'the proper remedy is to vacate the verdict of guilt as to one of the offenses.'" *Johnson v. State*, 133 So. 3d 602, 604 (Fla. 1st DCA 2014); *Bolding v. State*, 28 So. 3d 956, 957 (Fla. 1st DCA 2010). In *Johnson*, the sentencing judge believed the double jeopardy issue was remedied because he did not adjudicate and sentence the defendant on both convictions. The First District rejected this argument, reasoning that "the constitutional prohibition against multiple convictions for the same criminal offense is violated even when a trial court adjudicates the defendant guilty of one offense and withholds adjudication of guilt as to the other offense. *Id.* at 956. Analogously, just because the court dismissed one of Mr. Tuttle's offenses did not mean the double jeopardy violation was properly addressed. Full application of § 775.021(4)(b)

required that Mr. Tuttle be sentenced only on the greater offense. Accordingly, the trial judge's discretion was not improperly disregarded by the Second District's correct decision to vacate the lesser conviction, burglary.

The State asks this Court to reconsider *Pizzo* so as not to "eclipse" the sentencing judge's unbridled discretion (Initial Br. 13). The State is simply mistaken. *Pizzo* correctly applies the § 775.021(4)(b) mandate that a defendant be "convict[ed] and sentence[d] for each criminal offense committed in the course of one criminal episode or transaction" except for "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." It does not provide for the exclusion of *offenses that carry a lesser sentence where the defendant is convicted of both the greater and the lesser offense.* And the statute's irrefutable plain language must control. *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1074 (Fla. 2011). *See also Dennis v. State*, 51 So. 3d 456, 461-62 (Fla. 2010) (statutes should be interpreted in a way that will accomplish, rather than defeat, their purpose); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 332 (Fla. 2013) (a statute should be interpreted to accord harmony to all its parts). The Legislature has prohibited courts from sentencing criminal defendants on lesser offenses, when he or she is also convicted of a greater offense arising from the same criminal transaction. Because *Pizzo* correctly applies this law, *Pizzo*'s holding should be reaffirmed.

B. The State Incorrectly Asserts That the Second District's Correct Application of *Pizzo* Infringes upon Prosecutorial Discretion.

The State also advances that the decision "infringes upon prosecutorial discretion." (Petitioner Initial Br. 19-26). This argument overlooks the fundamental purpose of the double jeopardy clause. From its inception, the primary purpose of the Fifth Amendment's mandate that no person be twice placed in jeopardy for the same offense has been to restrain courts and prosecutors. *Gil v. State*, 118 So. 3d 787, 792 (Fla. 2013); *Drawdy v. State*, 98 So. 3d 165, 167 (Fla. 2d DCA 2012), *rev'd on other grounds*, 136 So. 3d 1209 (Fla. 2014); *Bishop v. State*, 46 So. 3d 75, 80 (Fla. 5th DCA 2010). The United States Supreme Court settled this in *Brown v. Ohio*:

> Because it was designed originally to embody the protection of the common-law pleas of former jeopardy, *see United States v. Wilson*, 420 U.S. 332, 339-340, 95 S. Ct. 1013, 1019-1020 (1975), the Fifth Amendment **double jeopardy guarantee serves principally as a restraint on courts and prosecutors**.

432 U.S. 161, 165 (1977) (emphasis added). Thus, while the State has discretion to choose what crimes to charge, *see State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) ("the state attorney has complete discretion in deciding whether and how to prosecute"), that discretion is subject to the double jeopardy clause. Prosecutorial discretion does not extend to determining the offense of conviction or the sentence to be imposed.

In the instant case, the State had the discretion to dismiss the home invasion robbery count, the greater offense, before trial, consistent with its discretion to decide

whether and how to prosecute. *See State v. Cain*, 381 So. 2d 1361, 1367 (Fla. 1980) (explaining that "the discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice"); *Barnett v. Antonacci*, 122 So. 3d 400, 405 (Fla. 4th DCA 2013); *State v. Brosky*, 79 So. 3d 134, 135 (Fla. 3d DCA 2012); *McArthur v. State*, 597 So. 2d 406 (Fla. 1st DCA 1992); *State v. Jogan*, 388 So. 2d 322, 323 (Fla. 3d DCA 1980).[6] But once the jury returned a verdict on both counts, the State was powerless to dictate the remedy for the double jeopardy violation arising from Mr. Tuttle's dual convictions.

The Third District recently came to this same conclusion in *Muhammad v. State*, 99 So. 3d 964 (Fla. 3d DCA 2011), a case in which the defendant was convicted of a lesser and greater offense (one count of organized scheme to defraud and four counts of grand theft). To comply with double jeopardy principles, the prosecution nolle prossed the organized fraud conviction in an "election" to have the defendant

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6 The cases cited by the State all support this proposition — the State's authority and discretion extend to which crimes to pursue and prosecute (Petitioner Initial Br. 19-26). The cases do not support the State's assertion that the prosecutor's charging discretion extends beyond the rendering of the jury's verdict. *E.g., Ball v. United States*, 470 U.S. 856, 859 (1985) (discussing prosecutor's "broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case."); *State v. Jogan*, 388 So. 2d 322, 323 (Fla. 3d DCA 1980) (same); *Claps v. State*, 971 So. 2d 131, 132 (Fla. 2d DCA 2007) (explaining that "defendant may be charged and tried for both an offense and a necessarily lesser-included offense even though the defendant cannot ultimately be adjudicated and sentenced for both offenses due to the protections afforded by the prohibition against double jeopardy").

adjudicated and sentenced on the four grand theft counts. *Id.* The Third District reversed, reasoning that since the dual convictions were impermissible, the conviction for the lesser crime was to be set aside. *Id*. Furthermore, "The State's election to nolle pros the defendant's organized fraud conviction after the jury returned a verdict [was] **a nullity** and [could] have no effect upon remand." *Id*. (emphasis added).

The grand theft sentences in *Muhammad v. State* were vacated and the case remanded with orders that the defendant be sentenced only on the greater offense of organized fraud. *See also Flores v. State*, 958 So. 2d 1026, 1027 (Fla. 5th DCA 2007) (explaining that "the State has no authority to nolle pros a charge after a jury is sworn"); *Ray v. State*, 231 So. 2d 813, 816 (Fla. 1969) ("the judgment of conviction of Petitioner in 1945 under the first information (#28734) is reinstated because the attempted nolle prosequi of the State after judgment and after jeopardy had attached was a mere brutum fulmen" (citing *Reyes v. Kelly*, 224 So. 2d 303, 306 (Fla. 1969)). "[T]he course of trial must be in control of the court," *Reyes*, 224 So. 2d at 306, and the State accordingly has no discretion or authority to determine how the double jeopardy violation will be remedied under § 775.021(4)(b)(3). It therefore follows that application of *Pizzo* and the plain language of § 775.021 could not infringe upon prosecutorial discretion, since there is no discretion to choose the remedy.

Given the express legislative intent that a defendant not be adjudicated and

sentenced on a lesser offense when also convicted of the greater offense, the prosecutor who tries an offense where the crime with the greatest sentence exposure is actually the lesser offense does so at his or her own peril,[7] equally as a defendant who seeks an instruction on lesser-included offenses does so at his own peril where the lessers, after enhancements, may carry the same penalty as the greater.[8]

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[7] That the lesser offense in this case had a greater penalty than the greater offense did not create a windfall for Mr. Tuttle. This is a case in which the State filed these charges, fully aware of the potential double jeopardy issues that would follow should it prevail on both counts. Second, this is not a case where the defendant sat silently through sentencing, as the defendant did in *Garcia*, and let the judge give a greater sentence on the true lesser offense and award probation on the greater offense.

[8] This Court, in *Sanders v. State*, 944 So. 2d 203, 205 (Fla. 2006), reviewed a situation where this might occur and analyzed a request that the penalty be considered in determining what is the true lesser offense:

> On appeal, Sanders alleged that he was entitled to a new trial, arguing that the lesser included offense of which the jury found him guilty was not a true lesser included offense because the penalty imposed was not less than the penalty for the main offense charged. *Id.* The maximum sentence for the core offense of attempted first-degree murder is thirty years, while the sentence for attempted second-degree murder without any enhancements is fifteen years. However, with the application of the ten-twenty-life statute, the resulting maximum sentence for both attempted first- and second-degree murder while discharging a firearm and inflicting great bodily harm is the same-life.

This Court concluded that the lesser offense was the offense whose elements were subsumed by the greater, **regardless of the penalty**. *Id.* at 206. The Court further declined to redefine the definition of a lesser included offense or otherwise

CONCLUSION

For the reasons set out in this Brief, this court should vacate the decision accepting jurisdiction as improvidently granted. Alternatively, this Court should validate and approve the decision of the Second District Court of Appeal.

CERTIFICATE OF COMPLIANCE

This brief complies with the requirement of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. It is printed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I hereby the foregoing was emailed on October 17, 2014, to:

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Respectfully submitted,

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make an exception given the anomaly created by application of the definition of a lesser offense to that particular circumstance. In this case, the Second District correctly rebuffed the State's effort to obtain the same ill-considered exception to the definition of lesser offense, and this Court should affirm and again decline to amend the definition of lesser offense.

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