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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. TIMOTHY TUTTLE, JR., Respondent.	Case No. SC14-817

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

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This brief will refer to Respondent as such, Defendant, or by proper name, e.g., "Tuttle." Petitioner, the State of Florida, was the prosecution below and Appellee before the Second District Court of Appeal; the brief will refer to Petitioner as such, the prosecution, or the State.

STATEMENT OF THE CASE AND FACTS

On August 12, 2010, the State charged Tuttle with second degree murder with a firearm, attempted home invasion robbery with a firearm causing death or great bodily harm, and first degree burglary while armed. The case was tried before the Honorable Thomas Reese and on April 19, 2012. The jury returned a guilty verdict for the lesser included offense of manslaughter with a firearm, attempted home invasion robbery while possessing a firearm, and for the charged offense of burglary while armed.

The events leading to the charges arose in the early morning hours of July 10, 2010, when Tuttle and co-defendant Terry Ragland burst into the house Eric Stuebinger shared with his girlfriend Jaime and their 19 month old son, Eli. After demanding drugs and money from Eric, the two men, who were wearing masks, pistol whipped and tassed Eric (V2; 265-266). During the struggle, Eric was shot in the back. The evidence pointed to Tuttle as the shooter. Eric died at the scene.

Before leaving the house, Tuttle followed Jaime into the baby's room and pointed the gun at the baby's head who was crying in his crib (V2; T269). Jaime grabbed her son and begged for mercy saying he was only 19 months old (V2; T269).

When Jaime thought the men had left, she started to walk outside. Eli was still in her arms. However, the men had not left. Tuttle returned and pointed the gun in Jaime's face and said that if she "fucking" called the cops, he would kill her and her family (V2; T270). Jaime identified Tuttle as the one with the gun by his distinctive blue eyes (V2; T262, 273-274, 284-285).

At the sentencing hearing, the State asked the trial court to dismiss the attempted home invasion robbery conviction, a second degree felony, and impose sentence on the armed burglary conviction, a first degree felony punishable by life, recognizing that Tuttle could not be sentenced on both convictions because that would violate double jeopardy. The State also asked for sentence to be imposed on the manslaughter conviction. Tuttle, through counsel, argued that *Schulterbrandt v. State*, 984 So. 2d 542 (Fla. 2d DCA 2008), required that the armed burglary conviction be dismissed to avoid double jeopardy because armed burglary is subsumed by attempted home invasion robbery. After extensive argument, Judge Reese ordered both

sides to file sentencing memoranda on the issue, which they did. (V7; 520-528).

At the reconvened sentencing hearing, the judge said he considered the issues raised in *Schulterbrandt* but also read *State v. Barton*, 523 So. 2d 152 (Fla. 1988), with great interest noting the Supreme Court there directed courts how to consider the issue. The judge found *Schulterbrandt* was contrary to the position of all of the other district courts of appeal and the Florida Supreme Court and said he was going to follow the Florida Supreme Court and the analysis in *Perez v. State*.[1] (V8; 572-573). The judge vacated the attempted home invasion robbery conviction which carried the lesser sentence and entered judgment and sentence on the burglary while armed conviction.

Tuttle appealed his convictions and sentences to the Second District. The court affirmed two of the three issues raised but vacated Tuttle's conviction and life sentence on the armed burglary conviction and remanded for the trial court to resentence Tuttle on the second degree attempted home invasion robbery conviction. The Second District reasoned:

> Because of the overlapping nature of the offenses, the offense of burglary "is a lesser degree of the same substantive crime" as home invasion robbery. *Id.* at 918-19. Therefore, under the clear dictates of section 775.021(4)(b)(3) and the *Pizzo* test, burglary is a

[1] *Perez v. State*, 951 So. 2d 859 (Fla. 2d DCA 2006).

> lesser offense than home invasion robbery, and the burglary conviction should therefore be the one vacated to avoid a double jeopardy violation.

Tuttle v. State, 137 So. 3d 393, 395 (Fla. 2d DCA 2014). [2]

The State filed a motion for rehearing and rehearing *en banc*, which the court denied. The State sought discretionary review in this Court based on express and direct conflict with decisions in the First, Fourth and Fifth District Courts of Appeal. The Court granted review.

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[2] Significantly, *Schulterbrandt* does not cite *Pizzo.* Also, although not pertinent to resolution of the issue before this court, Judge Reese also entered judgment and sentence on the manslaughter conviction, and found Tuttle was a prison releasee reoffender.

SUMMARY OF ARGUMENT

The Second District Court of Appeal in *Tuttle v. State*, 137 So. 3d 393 (Fla. 2d DCA 2014), held that Tuttle's armed burglary conviction, a first degree felony punishable by life, was subsumed into the attempted home invasion robbery conviction, a second degree felony, and therefore under *Pizzo v. State*, 945 So. 2d 1203 (Fla. 2006), the trial court erred in sentencing Tuttle on the armed burglary conviction and vacating the attempted home invasion robbery conviction because armed burglary was the subsumed/lesser offense. To date, no other district court of appeal in the state agrees with the Second District's interpretation of *Pizzo* or the result reached by the Second District. There is express and direct conflict between the Second District and all of the other district courts of appeal regarding which conviction must be vacated in this context.

The *Tuttle* holding is not only legally unsupportable and bodes against clearly expressed legislative intent and public policy regarding sentencing to the fullest extent of the law, the negative ramifications of the decision reach back to the charging stage of trial court proceedings thereby infringing on prosecutorial discretion. *Tuttle* will result in prosecutors tempering their discretion in deciding which charges to bring in anticipation of possibly forfeiting a greater sentence if the

anomalous situation present in *Tuttle* occurs where the subsumed/lesser offense carries the greater sentence. The Second District failed to consider the practical ramifications of its decision which elevates the judicial branch over the executive branch, contrary to well settled law in this State, and in particular, this Court. *Tuttle* also removes from the trial court its appropriate function of determining as a matter of law which guilty verdicts will be precluded from adjudication and sentencing on double jeopardy grounds.

Tuttle is an unauthorized expansion of the rule espoused in *Pizzo.* The decision resulted in a windfall to Tuttle. To the extent *Pizzo* could be read that broadly, the State requests that the supreme court reconsider that ruling.

ARGUMENT

ISSUE: WHEN A DEFENDANT IS FOUND GUILTY OF TWO OFFENSES AND CANNOT BE ADJUDICATED ON BOTH DUE TO THE PROHIBITION AGAINST DOUBLE JEOPARDY, DOES THE TRIAL COURT HAVE DISCRETION TO VACATE THE CONVICTION ON THE GREATER OFFENSE AND IMPOSE SENTENCE ON THE LESSER OFFENSE WHERE THE LESSER OFFENSE CARRIES THE GREATER SENTENCE.

This case does not involve double jeopardy. A double jeopardy violation did not occur in the trial court. The State exercised its prosecutorial discretion in charging Tuttle with second degree murder with a firearm, attempted home invasion robbery with a firearm causing death or great bodily harm, and first degree burglary while armed for Tuttle's actions in bursting into victim Eric Stuebinger's house in the middle of the night and shooting him which resulted in his death at the scene. After the jury returned a guilty verdict for manslaughter with a firearm, attempted home invasion robbery while possessing a firearm, and armed burglary, the trial court *vacated* the second degree attempted home invasion robbery conviction recognizing before it entered sentence that Tuttle could not be adjudicated and sentenced for armed burglary and attempted home invasion robbery because that would violate double jeopardy. The trial court, at the State's request, and after considering sentencing memoranda from both sides, sentenced Tuttle on the armed burglary conviction, a first degree felony punishable by life.

REVERSIBLE ERROR DID NOT OCCUR IN THE TRIAL COURT

Thus, a violation of double jeopardy did not occur in the trial court. The Honorable Thomas S. Reese recognized that potential problem before sentencing Tuttle and for that reason did not enter judgment and sentence on both convictions. Moreover, he properly vacated the attempted home invasion robbery conviction before imposing sentence. Consequently, reversible error did not occur at trial. *See Griffin v. State*, 69 So. 3d 344 (Fla. 4th DCA 2011)(The trial court's remedy of vacating the greater offense eliminated the double jeopardy violation, therefore no error has been established under the facts and circumstances of the particular case); *see also Ball v. United States*, 470 U.S. 856, 864 (1985)("Having concluded that Congress did not intend petitioner's conduct to be punishable under both §§ 922(h) and 1202(a), the only remedy consistent with the congressional intent is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions.").

Nevertheless, the Second District reversed the trial court's ruling concluding that *Pizzo v. State,* 945 So. 2d 1203 (Fla. 2006), a case involving an actual double jeopardy violation, required the trial court to vacate the armed burglary conviction because all of its elements were subsumed by attempted home invasion robbery and therefore, even though the armed burglary

conviction carried the greater sentence, it had to be the one vacated. In this, the Second District misunderstood the holding of *Pizzo,* vacating a conviction which was properly charged, upon which a guilty verdict was properly obtained, and upon which sentence was legally imposed. The Second District's decision in *Tuttle* should be reversed.

DOUBLE JEOPARDY PRINCIPLES DO NOT DICTATE WHICH CONVICTION MUST BE SET ASIDE

Double jeopardy principles do not dictate which of the two convictions must be set aside. Double jeopardy merely provides against multiple convictions for the same offense. *See Rodriguez v. State*, 875 So. 2d 642, 644 (Fla. 2d DCA 2004)(citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)(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.").

The *Blockburger* same elements test identifies those scenarios where you cannot have multiple convictions; it does not go to the question of which of the two must go. *See Ball v. United States*, 470 U.S. 856, 865 (1985)("We hold that Congress did not intend a convicted felon, in Ball's position, to be convicted of both receiving a firearm in violation of 18 U.S.C. § 922(h), and possessing that firearm in violation of 18

U.S.C.App. § 1202(a). Accordingly, we vacate the judgment of the Court of Appeals and remand with instructions to have the District Court exercise its discretion to vacate one of the convictions."). While generally the lesser conviction will be the one vacated, for compelling reasons, it may not be the *Blockburger* lesser.

A defendant does not have a constitutional right to get the benefit of the conviction which will result in a more lenient sentence when there is a choice between the two. *See e.g., United States v. Batchelder,* 442 U.S. 114 (1979)("Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced."). In accord, the Second District stated in *Claps v. State*, 971 So. 2d 131 (Fla. 2d DCA 2007),

> The Double Jeopardy Clauses of the United States and Florida Constitutions provide a defendant with a shield from punishment; conversely, they do not provide a defendant with a sword to wield against the State's executive decisions. *See Ohio v. Johnson*, 467 U.S. 493, 502, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984)(observing that a defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution" on remaining charges after being found guilty of other related offenses). Allowing the jury to exercise its fact-finding function to decide which crime-or crimes-may have been committed, even when based on the same facts, is a classic and appropriate function of the jury trial system, just as a court's determination as a matter of law which guilty verdicts will be precluded from adjudication and

> sentencing on double jeopardy grounds is a similarly appropriate function of the judiciary.

Id. at 135. The emphasis is thus on adjudications of guilt and sentences, not on jury verdicts. *See id.* at 133.

The choice of which count to vacate is fundamentally a sentencing decision. If the trial court vacates one of the two convictions, a double jeopardy problem is eliminated; if it vacates the other of the two convictions, the same double jeopardy problem is eliminated. The answer to the question, therefore, is not dictated by a double jeopardy analysis.

Moreover, if either conviction can stand without violating double jeopardy, there is no reason why the State should not have the election. "Indeed, there seems to be no restriction upon the State Attorney's prerogative at any stage of the proceedings, even post-verdict. Obviously, the defendant cannot be heard to complain...of his being acquitted of an additional possible charge." *Bogan v. State*, 552 So. 2d 1171, 1173, n.4. (Fla. 3d DCA 1989). "While the existence of more than one conviction and sentence for the same conduct directly violates the double jeopardy clause and is fundamentally erroneous, this is not true of the determination of which of multiple judgments should be set aside: because, in a word, it is not error at all to punish the defendant for either one." *Gracia v. State*, 98 So. 3d 1243, 1244 (Fla. 3d DCA 2012)(citations omitted).

As further stated by the Third District, "...a contrary conclusion would mean that a defendant, specifically the appellant, would be better off if his conduct violated an additional statute than if, in this case, the possession charge had been dropped by the prosecution or the court below or had never brought. There is nothing in our oaths to follow the law to require a result as to which the adjective absurd is an understatement." *Id.* at 1245, n.3.

In *Tuttle,* it was entirely within the prosecutor's discretion whether to bring the attempted home invasion robbery charge against Tuttle at all. *See generally Bogan v. State*, 552 So. 2d 1171, 1173 (Fla. 3d DCA 1989), *citing State v. Cogswell*, 521 So. 2d 1081 (Fla. 1988) and *Madrigal v. State*, 545 So. 2d 392 (Fla. 3d DCA 1989). If Tuttle had been charged with and convicted only of armed burglary (or even found not guilty of attempted home invasion robbery), there would be no question of the propriety of his being sentenced as he was by the trial court. "It simply boggles the mind, therefore, even to suggest that the defendant may be placed in a better position, as he vehemently contends, by virtue of having been convicted of an additional offense." *Bogan*, 552 So. 2d at 1173.

The trial court properly exercised its discretion in entering judgment and sentence on Tuttle's armed burglary conviction which carried a life sentence, rather than the

attempted home invasion robbery conviction. Double jeopardy principles do not dictate which conviction had to be set aside.

To the extent *Pizzo* could be read to direct trial courts to always vacate the subsumed/lesser conviction without regard to the length of sentence, thereby eclipsing the trial court's discretion in sentencing, the State asks this Court to reconsider *Pizzo*. The specific facts in *Pizzo* appear to have dictated the result and accounted for the Second District's holding in *Tuttle*. Also, to the extent *Pizzo* directs the appellate court, when it determines dual convictions are impermissible, to reverse the lesser offense conviction and affirm the greater, *Pizzo*, 945 So. 2d at 1206, the State asks this court to reconsider *Pizzo* and follow the United States Supreme Court in *Ball, supra,* and instead direct appellate courts to reverse and remand with instructions to have the trial court exercise its discretion to vacate one of the convictions. [3]

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[3] The federal and Florida constitutions prohibit being twice placed in jeopardy for the same offense. The Fifth Amendment to the federal constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Florida Constitution provides: "No person shall ... be twice put in jeopardy for the same offense...." Art. I, § 9, Fla. Const. The scope of the Double Jeopardy Clause is the same in both the federal constitution and the Florida Constitution. *See Carawan v. State,* 515 So. 2d 161, 164 (Fla. 1987), *superseded on other grounds by* ch. 88-131, § 7, Laws of Fla.

***TUTTLE* CONFLICTS WITH THE OTHER DISTRICT COURTS OF APPEAL**

The First, Fourth and Fifth District Courts of Appeal considered the same or similar offenses yet, vacated the technically greater offense, but which carried the lesser sentence. *See Washington v. State,* 120 So. 3d 650 (Fla. 5th DCA 2013); *Olivera v. State*, 92 So. 3d 924 (Fla. 4th DCA 2012), *rev. denied*, 104 So. 3d 1085 (Fla. 2012); *Johnson v. State*, 133 So. 3d 602 (Fla. 1st DCA 2014); *Davis v. State*, 74 So. 3d 1096 (Fla. 1st DCA 2011).

For instance, *Washington* involved convictions for both armed burglary of a dwelling and attempted armed home invasion robbery. The Fifth District cited *Schulterbrandt v. State,* 984 So. 2d 542 (Fla. 2d DCA 2008), as well as *Olivera*, and held that the convictions violated double jeopardy. Notably, the Fifth District also cited *Mendez v. State*, 798 So. 2d 749 (Fla. 5th DCA 2001), which stated "[T]he crime of burglary of a dwelling is subsumed by the offense of home invasion robbery." *Id.* at 750. *Mendez* further held, "[S]ince 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." *Id.* at 750.

In accord with the Fourth and First Districts, the Fifth reversed Washington's conviction and sentence for attempted armed home-invasion robbery, which carried a fifteen year prison

sentence and affirmed the armed burglary of a dwelling conviction which carried a life sentence. *Washington v. State*, 120 So. 3d at 651. *Washington* is in express and direct conflict with *Tuttle*.[4]

The Third District in *Gracia v. State,* 98 So. 3d 1243 (Fla. 3d DCA 2012), squarely considered the issue of which offense to vacate and in a well-reasoned decision which is supported by the law, legislative intent, and common sense, came to the same conclusion as the First, Fourth and Fifth District Courts of Appeal. Pertinent to this issue, Gracia was found guilty of aggravated assault with a firearm and unlawful possession of the same firearm while engaged in the commission of a felony. The Third District agreed with Gracia's contention that the convictions and sentences entered as to both offenses could not stand under that aspect of double jeopardy which forbids more than one successful prosecution for the same criminal conduct. The Third District stated however that the harder issue, and the only one which has practical significance, is which of the two sets of convictions and sentences should be vacated. *Id.* at 1244.

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[4] The cases in conflict from the First and Fourth Districts are analyzed in the State's jurisdictional brief and in the interest of brevity that analysis will not be repeated here.

The Third District initially noted that a "mistake" like this is ordinarily remedied by setting aside the "lesser" offense, citing *Pizzo v. State*, 945 So. 2d 1203 (Fla. 2006), and *State v. Barton,* 523 So. 2d 152 (Fla. 1988). *Id.* However, in this case the trial judge imposed a "greater" sentence on the supposedly "lesser" offense. Specifically, the judge sentenced Gracia for aggravated assault, a third degree felony, to the three-year mandatory-minimum prison sentence required under section 775.087(2)(a) 1.f., Fla. Stat. (2009), because a firearm was involved, and one year probation for the possession charge, notwithstanding that it is, counterintuitively, a "more serious" second degree felony. The Third District stated, "In these circumstances, applying the 'usual rule' would therefore result in an unwarranted windfall to the defendant and an obvious injustice to the prosecution. We decline to do so." *Id*.

The court further reasoned,

> In support of this result, we note that, while the existence of more than one conviction and sentence for the same conduct directly violates the double jeopardy clause and is fundamentally erroneous, this is not true of the determination of which of multiple judgments should be set aside: because, in a word, it is not error at all to punish the defendant for either one. We made just that point in *Vizcon v. State,* 771 So. 2d 3, 6 n. 4 (Fla. 3d DCA 2000). Hence, the general rule which requires, in the absence of fundamental error, preservation of a favorable position below, should be applied. This is the case here because the very purpose of the preservation doctrine, which is to further the avoidance of error in the first place, see *Diaz v. Rodriguez*, 384 So. 2d 906 (Fla. 3d DCA 1980), would be directly served by its application to these

> circumstances; it is obvious that, if the problem had been called to the trial court's attention, the two sentences would have been restructured accordingly, *see Herring v. State,* 411 So. 2d 966 (Fla. 3d DCA 1982), or, more likely, the conviction and sentence for possession would not have been entered at all. *See Nicholson v. State,* 757 So. 2d 1227 (Fla. 4th DCA 2000)(indicating that appellant's failure to raise the issue below waived claim that double jeopardy was violated based on two identically worded counts of information); *Vizcon,* 771 So. 2d at 6 n. 4 (following *Nicholson).*

Id. at 1244-1245.

Significantly, the Third District found additional support for its holding by considering legislative intent. The court stated:

> Thus, we feel free, indeed obliged, to effectuate the intention of the Legislature, which governs in determining these issues. *See McKinney v. State*, 66 So. 3d 852 (Fla. 2011)(intention of the legislature is the controlling factor in determining the proper application of double jeopardy protection issues), *cert. denied,* --- U.S. ----, 132 S.Ct. 527, 181 L.Ed.2d 369 (2011). In this case, its intention, as expressed by the minimum-maximum statute, that guilt of such conduct committed with a firearm should be punished by a substantial criminal sentence, is stated in so many words by section 775.087(2)(d):
>
> > It is the intent of the Legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.

Quoting *Mendenhall v. State*, 48 So. 3d 740, 747 (Fla. 2010). *Id.* at 1245. The Third said they vindicated this intent by dropping

the possession charge and affirming the judgment and sentence for aggravated assault. *Id.*

The Third District's reasoning is logically persuasive. The court considered the holding in *Pizzo* yet, reached the opposite conclusion from the Second District in *Tuttle*. *Gracia* conflicts with *Tuttle*, as well.

The Second District was aware of contrary holdings in the district courts of appeal, but justified its *Tuttle* holding by reasoning,

> All of the cases relied upon by the State in this appeal to argue otherwise either pre-date *Pizzo, see, e.g., Mendez v. State*, 798 So. 2d 749 (Fla. 5th DCA 2001); *Braggs v. State*, 789 So. 2d 1151 (Fla. 3d DCA 2001); *Barboza v. State*, 786 So. 2d 675 (Fla. 3d DCA 2001); *Smith v. State*, 741 So. 2d 579 (Fla. 3d DCA 1999); *Bowers v. State*, 679 So. 2d 340 (Fla. 1st DCA 1996), and hence no longer apply, or simply cite to pre-*Pizzo* authority with no analysis of whether that authority remained good law after *Pizzo, see Washington v. State*, 120 So. 3d 650 (Fla. 5th DCA 2013); *Olivera v. State*, 92 So. 3d 924 (Fla. 4th DCA 2012); *Davis v. State*, 74 So. 3d 1096 (Fla. 1st DCA 2011). In light of the fact that the pre-*Pizzo* cases focused on a comparison of the punishments rather than the statutory elements to reach their conclusions—an approach explicitly rejected by *Pizzo*—these pre-*Pizzo* cases are no longer good law. And post-*Pizzo* cases relying exclusively on pre-*Pizzo* authority cannot alter the analysis that the *Pizzo* decision requires.

Tuttle, 137 So. 3d at 396. This pre/post *Pizzo* analysis assumes that only the Second District understood the holding in *Pizzo.* It further presumes this Court intended in *Pizzo* to reverse a large body of well-settled case law regarding sentencing on the highest offense and the policy in this State that the purpose of

sentencing is to punish and that the penalty imposed should be commensurate with the severity of the convicted offense. Fla. R. Crim. P. 3.701(b)(2), (3).

***TUTTLE* INFRINGES UPON PROSECUTORIAL DISCRETION**

The legally unsupportable and most damaging ramification of *Tuttle* is its infringement upon prosecutorial discretion. Application of the *Tuttle* holding could reach back to the charging phase of trial court proceedings negatively impacting prosecutorial discretion in deciding which charges to bring. *Tuttle* informs the prosecution that it will not be able to seek adjudication and sentencing on a conviction properly charged and properly obtained which carries the greater sentence if the elements of that crime happen to be subsumed by another crime also charged. A prosecutor's discretion is impacted by having to choose among which charges to bring, pre-trial, to avoid at sentencing the outcome which occurred in *Tuttle*. That outcome is not mandated by *Pizzo.* Thus, *Tuttle* is an unauthorized expansion of *Pizzo* and mandates that in every case where one of the charged offenses is subsumed by another charged offense, the trial court must vacate that conviction at sentencing without regard to the length of the sentence or the State's preference.

In *Ball v. United States,* 470 U.S. 856, 859 (1985), the supreme court stated that it has long acknowledged the Government's broad discretion to conduct criminal prosecutions,

including its power to select the charges to be brought in a particular case. The court noted that the Double Jeopardy Clause imposes no prohibition to simultaneous prosecutions, citing *Ohio v. Johnson*, 467 U.S. 493, 500 (1984)("The Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution."). *Id.*, n.7.

In *State v. Bloom,* 497 So. 2d 2 (Fla. 1986), a prohibition proceeding instituted to prohibit the trial judge from determining the appropriateness of the death penalty in a capital case prior to trial, this Court noted that under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute, citing Art. II, § 3, Fla. Const.; *Cleveland v. State*, 417 So. 2d 653 (Fla. 1982); *State v. Cain*, 381 So. 2d 1361 (Fla. 1980); and *Johnson v. State,* 314 So. 2d 573 (Fla. 1975). *Id.* at 3. This Court noted that in *State v. Jogan*, 388 So. 2d 322 (Fla. 3d DCA 1980), the Third District reversed a trial court's dismissal of an information against a defendant conditioned on his military enlistment. The district court held that the pre-trial decision to prosecute or nol-pros is a responsibility vested solely in the state attorney. While recognizing a court's latitude and discretion during post-trial disposition, *Jogan* reiterated the state has absolute discretion pre-trial.

Bloom further noted that in considering similar circumstances, federal courts have held:

> [T]he decision of whether or not to prosecute in any given instance must be left to the discretion of the prosecutor. This discretion has been curbed by the judiciary only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights.

United States v. Smith, 523 F.2d 771, 782 (5th Cir. 1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976). *Id.* *Bloom* concluded, "We apply these principles and hold that article II, section 3, of the Florida Constitution prohibits the judiciary from interfering with this kind of discretionary executive function of a prosecutor." *Id.*

Similarly, the executive branch is given the discretion to choose which available punishments to apply to convicted offenders. *See generally Barber v. State*, 564 So. 2d 1169, 1171 (Fla. 1st DCA 1990), *citing, e.g., United States v. Batchelder,* 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)(no equal protection violation because prosecutor has discretion to choose which of two statutes with identical elements to prosecute defendant under, and which penalty scheme to apply to defendant), and *Sullivan v. Askew*, 348 So. 2d 312 (Fla. 1977) (constitutional rights of prisoner who seeks clemency from a death sentence are not offended by the unrestricted discretion

vested in the executive), *cert. denied*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159 (1977).

In *Batchelder*, Justice Marshall, for a unanimous United States Supreme Court, held:

> [T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements....The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.

442 U.S. at 125, 99 S.Ct. at 2205. The Supreme Court rejected as legally unsound the argument that, when two statutes prohibit exactly the same conduct but have disparate penalties, the prosecutor's selection between the two statutes would be unfettered, and such prosecutorial discretion would produce unequal justice and a constitutional violation. *See also State v. Cogswell*, 521 So. 2d 1081 (Fla. 1988)(citing *Batchelder* and concluding that the state may prosecute bookmaking as either a felony or misdemeanor under either of two statutes).

Furthermore, in *Fayerweather v. State*, 332 So. 2d 21 (Fla. 1976), this Court considered "whether conduct which violates both the State Credit Card Crime Act, Section 817.60(1), (3), Fla. Stat. 1973, and the provision making it unlawful to receive stolen property, Section 811.16, Fla. Stat. 1973," could be

punished under the latter, more severe punishment. *Id.* at 22. In approving the more severe sentence, this Court stated:

> It is not unusual for a course of criminal conduct to violate laws that overlap yet vary in their penalties. Multiple sentences are even allowed for conduct arising from the same incident. Traditionally, the legislature has left to the prosecutor's discretion which violations to prosecute and hence which range of penalties to visit upon the offender.

Id.

The *Tuttle* court failed to consider its own precedent regarding prosecutorial discretion. In *Claps v. State*, 971 So. 2d 131 (Fla. 2d DCA 2007), a case decided a year after *Pizzo,* the Second recognized that it is the State's prerogative to present multiple counts to the jury even though double jeopardy issues would arise if convictions were entered on both. The court ruled,

> We write to make it explicit what has long been implicit in Florida regarding double jeopardy: a 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 prohibitions against double jeopardy.

Id. at 132-133.

Claps alleged in postconviction that trial counsel was ineffective for failing to move prior to trial for dismissal on double jeopardy grounds of some of the charges against him and that this failure resulted in prejudice to him. In particular, Claps asserted that counsel should have moved for dismissal of

the charges resulting in guilty verdicts on the counts for which he was neither adjudicated nor sentenced, arguing that merely presenting those charges to the jury violated his right against double jeopardy and prejudiced his defense. *Id.* at 133.

Following his jury trial, the court sentenced Claps for DUI manslaughter, leaving the scene of an accident involving injury and/or death, driving under the influence of alcoholic beverages or controlled substances with injury, and two counts of driving under the influence of alcoholic beverages or controlled substances with property damage. On double jeopardy grounds, the trial court neither adjudicated nor sentenced Claps on three other charges. The court sentenced him to consecutive fifteen-year prison terms for the offenses of DUI manslaughter and leaving the scene and to time served for the remaining offenses. The Second District affirmed the judgment and sentences on direct appeal. *See Claps v. State*, 860 So. 2d 416 (Fla. 2d DCA 2003)(table).

Claps argued that trial counsel was ineffective for not moving to prevent the jury from hearing all of the charges which the State felt it could prove, when both the State and the trial court knew he could not lawfully be adjudicated and sentenced for some of the charges if found guilty on others. 971 So. 2d at 134. However, according to the Second District, the postconviction court properly concluded that while the rule

against convictions for multiple counts arising from a single act is clear, no law prevents charging a defendant with multiple counts. *Id.*

Claps argued that the Second District should extend double jeopardy protections to an earlier stage in the proceedings, such as the information or jury selection phase. The Second District strongly disagreed, reasoning:

> His argument, though, fails for the reasoning already noted. Double jeopardy concerns require only that the trial judge filter out multiple punishments at the end of the trial, not at the beginning. Although Claps argues that he suffered prejudice when the jury was faced with considering multiple charges, "[t]he purpose [of double jeopardy] is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *See Jones,* 491 U.S. at 381, 109 S.Ct. 2522. It is the legislature's prerogative to define the elements of a statutory crime, *Burnette v. State*, 901 So. 2d 925, 927 (Fla. 2d DCA 2005), and proof of essential elements of crimes, such as those applicable to Claps, is achievable in more than one manner, *see, e.g., State v. Tinsley*, 683 So.2d 1089 (Fla. 5th DCA 1996)(holding that the elements of second-degree murder can be satisfied in a variety of ways other than by use of a weapon). The State's ability to choose from a menu of options to pursue a criminal conviction in no way conflicts with double jeopardy considerations.
>
> Claps, however, would have us usurp the State's discretion to make strategic decisions about charging alleged criminal activity. Further, he would have us usurp the jury's role in deciding facts and determining guilt or innocence. This would be an inappropriate judicial function, infringing on the executive domain of state attorneys to make strategic and tactical decisions within the boundaries of their policies and duty to follow the law. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)(noting the

> discretion afforded prosecutors-"so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute"-to decide whether to prosecute and which charges to bring); *see also Wilcott v. State,* 509 So.2d 261, 265 (Fla. 1987)(Shaw, J., dissenting)(asserting that the State is entitled to charge "so-called permissive lesser included offenses as separate offenses" if it so chooses and commenting that "[i]t is not the prerogative of the courts to substitute their judgment for that of the prosecutor on what charges should be brought").

Id. at 134-135.

Despite the foregoing decision, the Second District in *Tuttle* has done exactly what Claps desired. By foreclosing the State's prerogative to request sentencing on the subsumed offense which carries the greater sentence, the Second District has usurped the State's discretion to make strategic decisions about charging alleged criminal activity because the State would be forced to forego charging the greater crime which carried the lesser sentence to prevent the *Tuttle* outcome, which amounts to judicial overreach into the executive domain of state attorneys. "It is not the prerogative of the courts to substitute their judgment for that of the prosecutor on what charges should be brought." *Id., quoting Wilcott v. State,* 509 So. 2d 261, 265 (Fla. 1987)(Shaw, J., dissenting). *Tuttle* infringes upon prosecutorial discretion and should be reversed.

THE SECOND DISTRICT'S PRE/POST *PIZZO* REASONING FAILS TO WITHSTAND SCRUTINY.

The pre/post *Pizzo* reasoning utilized by the Second District to discount the contrary holdings of its sister

district courts of appeal fails to withstand scrutiny, as the State pointed out in detail its motion for rehearing to the Second District. For instance, in *Olivera,* the Fourth District cited *Schulterbrandt v. State*, 984 So. 2d 542 (Fla. 2d DCA 2008), a "post-*Pizzo*" case, which the Second District relied upon in *Tuttle.* However, with virtually identical convictions, the Fourth District affirmed the conviction for the armed burglary of a dwelling with a battery, a first degree felony punishable by life, and remanded with directions to vacate the conviction and sentence for the attempted home invasion robbery with a firearm, a second degree felony, after noting that the courts have held "that convictions for both home invasion robbery and burglary of a dwelling with a battery, arising out of the same episode, violate double jeopardy because *one offense is subsumed by the other.*" *Id.* at 925. (emphasis added) The Fourth District also cited as authority the Second District's decision in *Coleman v. State*, 956 So. 2d 1254 (Fla. 2d DCA 2007), a "post-*Pizzo*" case.

Additionally, the *Olivera* court quoted § 775.021(4), Fla. Stat., the same statute relied upon by this Court in *Pizzo*, in determining whether attempted home invasion robbery and burglary of a dwelling with a battery or assault are separate offenses. *Id.* The Fourth District stated, "Our courts have held that convictions for both home invasion robbery and burglary of a

dwelling with a battery, arising out of the same episode, violate double jeopardy because one offense is subsumed by the other." *Id.* The Fourth then cited *Schulterbrandt* in stating that convictions for attempted home invasion robbery and for burglary of a dwelling violate double jeopardy. *Id.*

Thus, not only did the Fourth District utilize the same statute and subsuming elements test applied in *Pizzo,* it quoted *Schulterbrandt* yet, reached the opposite conclusion regarding which conviction had to be vacated. Contrary to the Second District's pre/post reasoning, the Fourth District did not rely exclusively on pre-*Pizzo* authority or cite to pre-*Pizzo* authority with no analysis of whether that authority remained good law after *Pizzo*. *See Tuttle*, 137 So. 3d at 396.

In *Davis v. State*, 74 So. 3d 1096 (Fla. 1st DCA 2011), the First District also applied the subsuming elements test applied in *Pizzo.* "This analysis focuses on the elements of the crime 'without regard to the accusatory pleading or the proof adduced at trial.'" *Id.* at 1097 (citations omitted). The court continued, "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." *Id.* Clearly, the court's analysis focused on a comparison of the statutory elements. Yet, just like the Fourth District, the First District vacated

the home invasion robbery conviction and affirmed the conviction for burglary with an assault and battery because it carried the greater sentence. *Id. See also Johnson v. State,* 133 So. 3d 602 (Fla. 1st DCA 2014)(Appellant's conviction for burglary of a dwelling with assault or battery was subsumed by home-invasion robbery conviction but court reversed home invasion robbery conviction).

The Fifth District in *Washington, supra*, cited *Schulterbrandt* and *Olivera*, both "post-*Pizzo*" cases. *Id.* at 651. It also cited *Mendez,* a pre-*Pizzo* case, but which utilized the subsuming elements test. *Id.*, citing *Mendez v. State*, 798 So. 2d at 750. In accordance with the Fourth and First Districts, the Fifth reversed the "greater" offense which carried the lesser sentence. *Id.*

It is clear *Tuttle* has thrown a body of well-established case law into question. The Second District overlooked that the subsuming elements test has been applied by Florida courts long before *Pizzo* and therefore, *Pizzo* did not establish a new pre/post dividing line as the Second District reasoned in disregarding those contrary holdings which applied the subsuming elements test in the double jeopardy context.

Even this Court in *Pizzo* stated that its precedent called for a comparison of statutory elements when determining lesser offenses, and cited *Blockburger v. United States*, 284 U.S. 299,

304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and section 775.021(4)(b), Fla. Stat. *Id.* at 1206. *Pizzo* did not establish a new dividing line. The Second District's pre/post *Pizzo* reasoning is unsound and fails to withstand scrutiny.

***TUTTLE* IS LEGALLY UNSUPPORTABLE**

The decisions in the First, Third, Fourth and Fifth Districts are not only supported by common sense, but also by the policy behind Fla. R. Crim. P. 3.701(d), which sets forth the general rules and definitions for guideline scoresheets. That section provides in pertinent part:

> (3) "Primary offense" is defined as the offense at conviction that, when scored on the guidelines scoresheet, recommends the most severe sanction. In the case of multiple offenses, the primary offense is determined in the following manner:
>
> (A) A separate guidelines scoresheet shall be prepared scoring each offense at conviction as the "primary offense at conviction" with the other offenses at conviction scored as "additional offenses at conviction."
>
> (B) The guidelines scoresheet that recommends the most severe sentence range shall be the scoresheet to be utilized by the sentencing judge pursuant to these guidelines.
>
> (4) All other offenses for which the offender is convicted and that are pending before the court for sentencing at the same time shall be scored as additional offenses based on their degree and the number of counts each.

See also Bogan v. State, 552 So. 2d 1171, 1172 (Fla. 3d DCA 1989)("...the fact that one of the very foundations of the

guidelines is that the calculation which results in the highest sentence must be applied, *see* Fla. R. Crim. 3.701 d.3, argues most persuasively against a result which applies the lesser penalty instead); *Jeter v. State*, 604 So. 2d 1250 (Fla. 1st DCA 1992)(All counts of offenses involving highest statutory degree and carrying most severe sanction should be scored together as primary offense, regardless of dates of offenses or separate informations).

This Court in *Pizzo* quoted *State v. Barton*, 523 So. 2d 152, 153 (Fla. 1988). It did not recede from *Barton. Pizzo v. State*, 945 So. 2d at 1206. The State argued *Barton* in its answer brief and at oral argument before the Second District. This Court stated in *Barton*, "As in cases where double jeopardy is applied to dual convictions, *Shade v. State*, 400 So. 2d 850 (Fla. 1st DCA 1981), there appears to be no reason why the lesser conviction should not be vacated since the defendant has been found guilty of both crimes." *Id.* at 153. Further, footnote 3 states: "In cases involving convictions of both the greater and lesser included offenses, it is the lesser rather than the greater *sentence* which is vacated." (emphasis added) Justice Shaw stated that the court's ruling is consistent with the rule in the standard jury instructions that the jury find guilt on the greater, not the lesser included, offense if both offenses are proven. *Id.* at 154 (Shaw, J. concurring in part).

Barton espouses a long-held policy in this State. Thus, case law, the rules, and common sense argue against the *Tuttle* holding which reversed the greater life sentence.

PIZZO IS LEGALLY AND FACTUALLY DISTINGUISHABLE FROM _TUTTLE_ AND THEREFORE IS NOT AUTHORITY FOR REVERSAL OF TUTTLE'S ARMED BURGLARY CONVICTION.

The procedural posture in *Tuttle* is significantly different from *Pizzo*. In *Pizzo,* the trial court entered judgment and sentence for both grand theft and organized fraud which the Second District determined violated double jeopardy. *Pizzo v. State,* 916 So. 2d 828, 834 (Fla. 2d DCA 2005). This Court found that Pizzo's grand theft convictions were lesser included offenses of organized fraud because all of its elements were subsumed by organized fraud and therefore, the appellate court should have vacated the grand theft convictions instead of remanding for the trial court to determine which was the lesser offense. *Pizzo v. State,* 945 So. 2d 1203, 1206 (Fla. 2006)("When an appellate court determines that dual convictions are impermissible, the appellate court should reverse the lesser offense conviction and affirm the greater.").[5] Thus, *Pizzo* dealt

[5] The *Tuttle* court expanded this holding to trial courts. Citing this same page in *Pizzo, Tuttle* states, "Thus, the *Pizzo* court held that **trial courts** are to rely *exclusively* on an analysis of the statutory elements of the crimes to determine which is the 'lesser,' and it *explicitly* rejected the argument advanced by the State that the determination of which offense is

with an actual double jeopardy violation, which is a legal determination for the court to decide. *See generally Rimondi v. State*, 89 So. 3d 1059, 1060 (Fla. 4th DCA 2012)("Because double jeopardy issues involve purely legal determinations, the standard of review is *de novo*."); *Johnson v. State,* 460 So. 2d 954, 958 (Fla. 5th DCA 1984)(en banc)("A violation of defendant's substantive constitutional double rights...is per se harmful and judicially correctable without a showing of prejudice."); *see also Claps v. State*, 971 So. 2d 131, 135 (Fla. 2d DCA 2007)("Allowing the jury to exercise its fact-finding function to decide which crime-or crimes-may have been committed, even when based on the same facts, is a classic and appropriate function of the jury trial system, just as a court's determination as a matter of law which guilty verdicts will be precluded from adjudication and sentencing on double jeopardy grounds is a similarly appropriate function of the judiciary."). The judiciary has the exclusive power to vacate existing convictions that violate double jeopardy.

Tuttle does not involve a double jeopardy violation. The trial judge recognized, after the prosecutor reminded him at the sentencing hearing, that Tuttle could not be adjudicated and

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the 'lesser' offense should be based on a comparison of the punishments for the two offenses. *Id*." *Tuttle,* 137 So. 3d at 395.

sentenced for armed burglary and attempted home invasion robbery because it would violate double jeopardy, and the judge did not sentence on both convictions. Moreover, the judge correctly vacated the attempted home invasion robbery conviction. Thus, *Tuttle* is not a double jeopardy case. *Pizzo* is inapplicable.

This distinction is significant because at the pre-sentencing stage, the State still retains its prerogative to abandon a particular prosecution. *See Bogan v. State,* 552 So. 2d 1171, n4. (Fla. 3d DCA 1989). Thus, unlike *Pizzo*, where improperly entered convictions and sentences had to be reversed as violative of double jeopardy, the Second District in *Tuttle* reversed a conviction and sentence properly entered by the trial judge. The trial judge, who in his discretion had resolved the double jeopardy issue by not entering sentence for the attempted home invasion robbery, entered the conviction and sentence only on the armed burglary conviction. As the Third District quoted in *Bogan,*

> Notwithstanding the wording in *Barton,* there is no reason why the trial judge, at the state's request, should not be allowed to impose judgment on the count that would result in the defendant receiving the toughest sentence. Nor is there any reason to allow the defendant to benefit from the lesser sentence simply because one of the two convictions cannot stand under *Carawan.*

Id. at 1172, quoting *Gibbons v. State*, 540 So. 2d 144, 145-146 (Fla. 4th DCA 1989)(Stone, J., dissenting in part).

Tuttle is also factually distinguishable from *Pizzo*. In *Tuttle,* the subsumed offense of armed burglary, a first degree felony punishable by life, carries a greater sentence that the attempted home invasion robbery which is a second degree felony. However, the grand thefts in *Pizzo* were third degree felonies which carried a lesser sentence than the greater offense of organized fraud which was a first degree felony. Thus, the holding that the grand theft convictions must be vacated upon remand, did not result in the greater sentence being vacated, the result reached in *Tuttle*. Moreover, any notion held by the Second District in its *Pizzo* decision, 916 So. 2d 838, that the six grand theft convictions could be the "greater" offenses assumedly because the trial court on remand could run them consecutive to each other, would likely run afoul of due process of law. *See Blackshear v. State,* 531 So. 2d 956 (Fla. 1988)(Defendant could not be sentenced to a term more than that originally imposed in the absence of an intervening event justifying a greater sentence); *see also Ashley v. State*, 850 So. 2d 1265 (Fla. 2003)(Once a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of double jeopardy principles).

In the great majority of cases, the lesser/subsumed offense will carry the lesser sentence, as it did in *Pizzo*. *Tuttle* presents the anomalous situation where the subsumed offense

carries the greater sentence. While *Pizzo* holds that a comparison of statutory elements is the proper method for determining which is the lesser offense in the double jeopardy context, and based upon a comparison of the statutory elements grand theft is a lesser offense of organized fraud, *id*. at 1207, this Court did not go the additional step taken by the *Tuttle* court and mandate that in every case trial courts must vacate the subsumed offense without regard to length of sentence. In this, the Second District expanded the breadth of *Pizzo*. To date, no other district court of appeal has followed the Second District down that road. *Pizzo* does not support the armed burglary reversal in *Tuttle*.

THE SECOND DISTRICT'S DECISION RESULTS IN AN UNAUTHORIZED WINDFALL TO TUTTLE.

Despite long-held policy to the contrary, the Second District handed Tuttle a windfall in vacating his life sentence for armed burglary. There is no policy or constitutional right supporting this ruling as Tuttle was properly convicted of armed burglary by a jury. As noted by the Third District in *Gracia*, the legislature expressed its intent that offenders who possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices be punished to the fullest extent of the law. *Id*. at 1245, citing *Mendenhall v. State*, 48 So. 3d 740, 747 (Fla. 2010). *See also Perreault v. State,* 853 So. 2d 604

(Fla. 5th DCA 2003)(Orfinger, J., concurrence quoting CS/SB 194, which became chapter 99-12, Laws of Florida, creating subsection 775.087(2), stating intent of the legislature in revising 775.087(2)). *Tuttle* is a case of judicial overreach into the executive domain. It handed Tuttle a windfall.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court quash *Tuttle* and approve the decisions in the First, Third, Fourth and Fifth District Courts of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been furnished to the following electronically via the Florida Courts e-filing portal on August 26, 2014: Benedict P. Kuehne at ben.kuehne@kuehnelaw.com, Special Assistant Public Defender, dmorgan@pd10.state.fl.us, and appealfilings@pd10.state.fl.us, Office of the Public Defender, P.O. Box 9000 -- Drawer PD, Bartow, Florida 33831.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. TIMOTHY W. TUTTLE, Jr. , Respondent.	Case No. SC14-817

APPENDIX

Ex. 1: *Tuttle v. State*, 137 So. 3d 393 (Fla. 2d DCA 2014).