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IN THE SUPREME COURT OF FLORIDA

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

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 JURISDICTION

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STATEMENT OF THE CASE AND FACTS[1/]

A. PROCEDURAL HISTORY.

Respondent Timothy W. Tuttle, Jr. was convicted at a jury trial of the lesser offense of manslaughter with a firearm (Count 1), attempted home invasion robbery with the possession of a firearm but not the actual discharge of a firearm (Count 2), and burglary while armed with a firearm (Count 3) (R7:452-455). He was adjudicated guilty on Counts 1 and 3 and sentenced to life imprisonment on Count 3, with a concurrent term of thirty years on Count 1, with credit for 708 days time served (R8:596-598; R9:631-639). The trial court vacated Count 2 for double jeopardy reasons as being subsumed in the Count 3 burglary offense (R8:573-574; R9:637). He timely filed a Notice of Appeal (R8:617-618), was declared indigent, and received the legal services of the Public Defender on appeal (R8:611-612).

On direct appeal, the Second District vacated Tuttle's conviction and sentence for armed burglary and remanded the case for the trial judge to resentence Tuttle only for the convictions of manslaughter and attempted home invasion robbery. *Tuttle v. State*, 39 Fla. L. Weekly D321, 2014 WL 481180 (Fla. 2d DCA 2014).

[1/] The parties are referenced by proper names and as they appear in this court.

B. FACTUAL RECITATION.

Respondent Tuttle accepts the Statement of the Case and Facts recited at pages 1-2 of the Jurisdictional Brief of Petitioner.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does the Second District decision in *Tuttle v. State* expressly and directly conflict with other appellate decisions and the Florida Supreme Court on the same question of law?

SUMMARY OF THE ARGUMENT

Discretionary review based on conflicting appellate decisions requires that the opinion at issue "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv). As observed in *Aravena v. Miami-Dade County*, 928 So. 2d 1163 (Fla. 2006), a test of express and direct conflict is whether the decisions are irreconcilable. The Second District's decision is not directly irreconcilable with any other appellate decision. The Second District's application of controlling Florida law on the double jeopardy question of what constitutes a lesser included offense is directly derived from and consistent with the decision in *Pizzo v. State*, 945 So. 2d 1203, 1206 (Fla. 2006). The appellate decisions cited by petitioner as in conflict are not irreconcilable because they do not apply the *Pizzo* precedent to analogous facts

involving similar lesser and greater offenses. Accordingly, no direct and express conflict has been shown.

ARGUMENT

THE SECOND DISTRICT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH OTHER APPELLATE DECISIONS OR THE FLORIDA SUPREME COURT ON THE SAME QUESTION OF LAW.

Applying a double jeopardy analysis, the Second District ruled that the crime of armed burglary is subsumed within the offense of home invasion robbery and therefore is a lesser offense. *Tuttle v. State*, 2014 WL 481180, *2 (Fla. 2d DCA 2014). Because armed burglary is a lesser offense of home invasion robbery, a defendant cannot be convicted of both armed burglary and attempted home invasion robbery arising from the identical conduct due to double jeopardy concerns. *Id*. at *1. The remedy is for the court to vacate the armed burglary conviction in favor of the greater offense of attempted home invasion robbery. *Id*. at *3.

The Second District decision directly applied the Supreme Court precedent of *Pizzo v. State*, 945 So. 2d 1203, 1206 (Fla. 2006), in reaching this decision:

> 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." *State v. Florida*, 894 So. 2d [941] at 947 [(Fla. 2005)] (citing *State v. McCloud*, 577 So. 2d 939, 941 (Fla. 1991) (holding that an offense is a lesser offense "for purposes of

> section 775.021(4) only if the greater offense ... includes the lesser offense")). Further, section 775.021(4)(b)(3) itself states that lesser offenses are offenses "the statutory elements of which are subsumed by the greater offense." *Therefore, the statutory elements of the lesser offense must be subsumed by the statutory elements of the greater offense in order for it to be considered the lesser offense in the double jeopardy context.* (Emphasis added).

Thus, a lesser offense is determined by its statutory elements regardless of the punishment allowed.

The *Tuttle* decision, with its accurate and solid embrace of the controlling *Pizzo* decision, does not conflict with *Olivera v. State*, 92 So. 3d 924, 926 (Fla. 4th DCA), *rev. denied*, 104 So. 3d 1086 (Fla. 2012), a post-*Pizzo* case that incorrectly considered the potential penalty instead of the essential statutory elements when deciding which offense is the true lesser. *Olivera*, however, failed to cite *Pizzo* as it departed from this Court's *Pizzo* precedent in defining the lesser offense as the offense that is *lesser in degree and in penalty*, instead of the offense whose statutory elements are subsumed by the greater. *Olivera* therefore is contrary to Supreme Court precedent defining lesser offenses by examining statutory elements and does not create an exception to the well-reasoned definition of a lesser offense. It is an outlier that is not in express and direct conflict with *Tuttle*.

Davis v. State, 74 So. 3d 1096 (Fla. 1st DCA 2011), unlike *Tuttle*, involves an entirely distinguishable situation of dual convictions and sentences for burglary with

an assault or battery – not armed burglary – and home-invasion robbery. Without citing *Pizzo*, the First District utilized pre-*Pizzo* authority to conclude, erroneously, that burglary with an assault or battery is the greater offense over home-invasion robbery. *Davis v. State*, 74 So. 3d at 1097. The First District cited to the pre-*Pizzo* case of *Bowers v. State*, 679 So. 2d 340, 341 (Fla. 1st DCA 1996), in allowing the penalty to be considered as controlling on the determination that burglary with an assault is the greater offense over home-invasion robbery. The *Tuttle* decision expressly distinguished *Bowers* as involving pre-*Pizzo* authority. *Tuttle*, 2014 WL 481180, *2. Because both *Davis* and *Bowers* apply pre-*Pizzo* case law and involve the distinguishable offense of burglary with an assault or battery and not armed burglary as is the case in *Tuttle*, neither decision directly and expressly conflicts on the same question of law as is required for conflict jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

The cited case of *Johnson v. State*, 133 So. 3d 602 (Fla. 1st DCA 2014), is distinguishable from *Tuttle* and does not involve the same question of law because it arises from dual convictions for burglary of a dwelling with assault or battery – not armed burglary – and home-invasion robbery. Ignoring the controlling *Pizzo* precedent, the First District instead vacated the home-invasion robbery conviction while allowing the burglary with an assault or battery conviction to stand. Since

Johnson does not apply the double jeopardy analysis to the dual offenses of armed burglary and home-invasion robbery, as is the situation in *Tuttle*, it does not involve the same question of law for purposes of determining conflict jurisdiction. Accordingly, an express and direct conflict between decisions does not exist.

Washington v. State, 120 So. 3d 650 (Fla. 5th DCA 2013), is a decision expressly distinguished in *Tuttle* as involving and applying pre-*Pizzo* precedent, and therefore provides no basis for conflict jurisdiction. *Tuttle*, 2014 WL 481180, *2. While correctly concluding "the trial court violated the prohibition against double jeopardy by entering a conviction and sentence on both the armed burglary of a dwelling conviction and the attempted armed home-invasion robbery," the Fifth District nonetheless failed to recognize or apply *Pizzo* in vacating the defendant's sentence for attempted armed home-invasion robbery and allowing the armed burglary conviction to remain. *Washington v. State*, 120 So. 3d at 651. Because *Washington* utilizes pre-*Pizzo* precedent, it is not in conflict with *Tuttle* on the same question of law. Similarly, it cites to *Jules v. State*, 113 So. 3d 949 (Fla. 5th DCA 2013), and *Mendez v. State*, 798 So. 2d 749 (Fla. 5th DCA 2001), cases that rely on pre-*Pizzo* authority and involve the distinguishable offense of burglary with an assault or battery but not armed burglary. Their reliance on the maximum allowable sentence as controlling on the definition of a lesser offense does not represent a conflict with

Tuttle on the same question of law.

Nor is *Tuttle* in conflict with this Court's decision in *State v. Barton*, 523 So. 2d 152 (Fla. 1988), a case standing for the unremarkable proposition that "when a *Carawan* [double jeopardy] analysis is applied and one of two convictions must fall, we hold that the conviction of the lesser crime should be set aside." *State v. Barton*, 523 So. 2d at 153. That is exactly the precedent applied by *Tuttle* in vacating the lesser offense of armed burglary in favor of the greater offense of attempted home-invasion robbery because the former (armed burglary) is subsumed into the latter (attempted home-invasion robbery).

Absent an express and direct conflict between *Tuttle* and other appellate decisions on the same question of law, no founded basis exists for conflict jurisdiction. Furthermore, *Tuttle* presents no legal question of significance or importance because it merely applies a precedent decided by the Florida Supreme Court, thus negating the state's contention the opinion "raises concerns about its precedential effect ..." While the question may once have been of public importance in *Pizzo*, the definitive resolution of the lesser included offense question in *Pizzo* limits the significance of case-specific applications of the *Pizzo* precedent. Accordingly, the impact of *Tuttle* on criminal justice decision-making is negligible, although it remains instructive on the proper formula to determine lesser offenses.

CONCLUSION

For the reasons set out in this brief, the *Tuttle* decision below does not expressly or directly conflict with decisions of the Florida Supreme Court or other appellate courts on the same question of law. Conflict jurisdiction should be denied.

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 certify a true and correct copy of the foregoing was delivered by email on May 24, 2014, to:

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