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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. TIMOTHY W. TUTTLE, JR., Respondent.	Case No. SC14-817 2D12-3972

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

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Timothy W. Tuttle, Jr., the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal as follows:

> Timothy W. Tuttle, Jr., appeals his convictions and sentences for one count of manslaughter with a firearm and one count of armed burglary. We affirm Tuttle's conviction for manslaughter with a firearm without further discussion. However, for the reasons that follow, we must vacate Tuttle's conviction and sentence for armed burglary and remand for further proceedings.
>
> On July 10, 2010, two armed and masked men burst into the house Eric Stuebinger shared with his girlfriend and their infant son. Once inside, the perpetrators demanded drugs and money. When neither was forthcoming, one of the men shot Stuebinger. After ransacking the house and threatening Stuebinger's girlfriend with a gun, the men fled. Stuebinger subsequently died from the gunshot wound. His girlfriend was later able to identify one of the perpetrators as Tuttle, and the State charged him with one count of second-degree murder, one count of attempted home invasion robbery with a firearm causing death or great bodily harm, and one count of armed burglary. At trial, the jury found Tuttle guilty of the lesser offenses of manslaughter with a firearm and attempted home invasion robbery and guilty as charged of the armed burglary.

> At a subsequent sentencing hearing, Tuttle argued, and the State agreed, that Tuttle could not be convicted of both attempted home invasion robbery and armed burglary due to double jeopardy concerns. Tuttle and the State also agreed that the trial court should vacate the "lesser" of the two offenses. However, they disagreed on which of those two convictions was the "lesser." Tuttle contended that the armed burglary verdict should be vacated because the offense of burglary is always subsumed within the offense of home invasion robbery. The State, on the other hand, contended that the attempted home invasion robbery verdict should be vacated because that offense carried the lesser sentence. The trial court agreed with the State, vacated the attempted home invasion robbery verdict, and convicted and sentenced Tuttle on the armed burglary charge. Based upon binding precedent, this was error.

SUMMARY OF ARGUMENT

There is expressed and direct conflict within the district courts – specifically with the Second District Court of Appeal's decision in *Tuttle v. State,* and the First District Court of Appeal's decision in *Davis v. State,* 74 So. 3d 1096 (Fla. 1st DCA 2011), the Fourth District Court of Appeal's decision in *Olivera v. State*, 92 So. 3d 924 (Fla. 4th DCA 2012), *cert. denied*, 104 So. 3d 1086 (Fla. 2012), and the Fifth District Court of Appeal's decision in *Washington v. State*, 120 So. 3d 650 (Fla. 5th DCA 2013). Therefore, there is expressed and direct conflict, there is jurisdiction, and this Court should accept this case.

ARGUMENT

THE SECOND DISTRICT'S OPINION IN *TUTTLE V. STATE*, 39 FLA. L. WEEKLY D321 (FLA. 2D DCA 2014) IS IN EXPRESS AND DIRECT CONFLICT WITH OPINIONS FROM THE FIRST, FOURTH AND FIFTH DISTRICT COURTS OF APPEAL.

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, §3(b)(3), Fla. Const. The Constitution provides: "The supreme court...[m]ay review any decision of a district court of appeal ...that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

As this Court explained in *The Florida Star v. B.J.F.,* 530 So. 2d 286, 288 (Fla. 1988), the state Constitution creates two separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. *The Florida Star*, 530 So. 2d at 288.

This Court can exercise its jurisdiction where a district court's opinion "expressly and directly conflicts with the decision of another district court of appeal, or with the supreme court on the same issue of law," Art. V, § 3(b)(3), Fla. Const...., and the conflict appears on the face of the opinion. *Reaves v. State,* 485 So. 2d 829, 830 (Fla. 1986). This Court

has held the "concern in cases based on our conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law." *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985).

In *Olivera v. State*, 92 So. 3d 924 (Fla. 4th DCA 2012), *cert. denied*, 104 So. 3d 1086 (Fla. 2012), the Fourth DCA concluded that Olivera's convictions and sentences for attempted home invasion robbery with a firearm and armed burglary of a dwelling with a battery violated double jeopardy because armed burglary of a dwelling with a battery was subsumed by attempted home invasion robbery with a firearm. *Id.* at 925. In making that determination, the court turned to § 775.021(4), Fla. Stat. (2008), to determine whether attempted home invasion robbery and burglary of a dwelling with a battery or assault are separate offenses. The court noted the other district courts of appeal that had held that convictions for both home invasion robbery and burglary of a dwelling with a battery, arising out of the same criminal episode, violated double jeopardy because one offense is subsumed by the other. *Id.*, citing *Davis v. State,* 74 So. 3d 1096, 1097 (Fla. 1st DCA 2011); *Coleman v. State*, 956 So. 2d 1254, 1256–57 (Fla. 2d DCA 2007), and *Mendez v. State*, 798 So. 2d 749, 750 (Fla. 5th DCA 2001). The court noted that the Second DCA has held that convictions for attempted home invasion

robbery and for burglary of a dwelling violated double jeopardy, citing *Schulterbrandt v. State*, 984 So. 2d 542, 544 (Fla. 2d DCA 2008).

However, pertinent to the conflict question, the Fourth DCA affirmed Olivera's conviction for armed burglary of a dwelling with a battery finding it is the greater offense because it is a first-degree felony punishable by life, and remanded with directions for the trial court to vacate the conviction and sentence for attempted home invasion robbery with a firearm, noting it was a second-degree felony and thus the lesser of the two offenses. *Id.* at 925-926.

Similarly, in *Davis v. State,* 74 So. 3d 1096 (Fla. 1st DCA 2011), the First DCA considered whether Davis' dual convictions and sentences for burglary with an assault or battery and home-invasion robbery constituted double jeopardy. The court initially noted that both offenses occurred in the same criminal episode and stemmed from a single uninvited entry into the victim's home. The court said its analysis focused on the elements of the crime "without regard to the accusatory pleading or the proof adduced at trial," citing § 775.021(4), and *Gaber v. State*, 684 So. 2d 189, 190 (Fla. 1996). *Id.* at 1097.

Although the First DCA found that burglary of a dwelling with an assault or battery is subsumed by home-invasion robbery and that convictions on both offenses violated double jeopardy,

consistent with the Fourth DCA, the court held that the burglary with an assault or battery was the greater offense and therefore it should stand. The conviction and sentence for home-invasion robbery should be vacated. The court reversed Davis' conviction for home-invasion robbery and remanded with directions that the trial court vacate that conviction and sentence.

Most recently, in *Johnson v. State,* 133 So. 3d 602 (Fla. 1st DCA 2014), decided a month after *Tuttle,* the First affirmed Johnson's conviction and sentence for burglary of a dwelling with assault or battery and reversed his conviction for home invasion robbery although noting that burglary of a dwelling with an assault or battery is subsumed by home-invasion robbery.

Consistent with the Fourth and First DCA's, the Fifth DCA in *Washington v. State*, 120 So. 3d 650 (Fla. 5th DCA 2013), reversed Washington's conviction and sentence for attempted armed home-invasion robbery which carried a fifteen year prison sentence and affirmed Washington's armed burglary of a dwelling conviction which carried a life sentence. The court cited its prior precedent in *Jules v. State,* 113 So. 3d 949 (Fla. 5th DCA 2013), and *Mendez v. State,* 798 So. 2d 749 (Fla. 5th DCA 2001)(explaining that burglary of a dwelling with an assault or battery is subsumed by home invasion robbery but because it carries the greater sentence, the home invasion robbery conviction would be vacated).

Conversely, the Second DCA in this case vacated Tuttle's conviction and sentence for armed burglary, which carried a life sentence, and remanded for the trial court to resentence Tuttle based on convictions for attempted armed home invasion robbery, a second degree felony, and manslaughter.[1] The court concluded:

> 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 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, 39 Fla. L. Weekly D321 (Fla. 2d DCA Feb. 7, 2014). While the Second DCA recognized the contrary holdings, it did not certify conflict. It rationalized that the other DCA's failed to follow *Pizzo*.

Tuttle is also contrary to a long standing policy this Court espoused in *Barton v. State*, 523 So. 2d 152, 153 (Fla. 1988):

> 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.

The *Tuttle* decision raises concerns about its precedential effect, and conflicts with the decisions reflecting the correct rule of law. *Tuttle's* ramifications reach back to the

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[1] The manslaughter conviction is not in question.

Information stage of trial court proceedings potentially affecting the State's constitutional discretion in deciding which crimes to charge and prosecute.

The decision is in express and direct conflict with the First, Fourth and Fifth DCA's. This Court should exercise its jurisdiction and accept this case.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court accept jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy of this brief on jurisdiction has been furnished to the following electronically via the Florida Courts e-filing portal on May 1, 2014: Benedict P. Kuehne, at ben.kuehnelaw.com, Special Assistant Public Defender, 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.

Respectfully submitted and certified,
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APPENDIX

Ex. 1: *Tuttle v. State*, 39 Fla. L. Weekly D321 (Fla. 2d DCA Feb. 7, 2014).