

**IN THE SUPREME COURT OF FLORIDA**

DIEGO TAMBRIZ-RAMIREZ,

Petitioner,

CASE No.: SC17-713

vs.

STATE OF FLORIDA,

L.T. Case No.: 4D15-2957

Respondent.

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PETITIONER'S JURISDICTIONAL BRIEF

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*On Review from the District Court of Appeal, Fourth District  
State of Florida*

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**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i

TABLE OF CITATIONS.....ii

INTRODUCTION.....1

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE AND FACTS.....2

SUMMARY OF ARGUMENT.....4

ARGUMENT.....5

ISSUE I.....5

    A. Jurisdictional Criteria.....5

    B. Discussion.....6

CONCLUSION.....9

CERTIFICATE OF SERVICE.....10

CERTIFICATE OF COMPLIANCE.....10

APPENDIX INDEX.....A

**TABLE OF CITATIONS**

**Cases**

*Baldwin v. State*, 790 So. 2d 434 (Fla. 1st DCA 2000).....4, 5, 7

*Dykes v. State*, 200 So. 3d 162 (Fla. 5th DCA 2016).....4, 5, 8

*Estremera v. State*, 107 So. 3d 511 (Fla. 5th DCA 2013).....4, 5, 8

*Green v. State*, 120 So. 3d 1276 (Fla. 1st DCA 2013).....4, 5, 8

*Hankins v. State*, 164 So. 3d 738 (Fla. 5th DCA 2015).....4, 5, 8

*McGhee v. State*, 133 So. 3d 1137 (Fla. 5th DCA 2014).....4, 5, 8

*Roughton v. State*, 185 So. 3d 1207 (Fla. 2016).....6, 7

*State v. McCloud*, 577 So. 2d 939 (Fla. 1991).....6

*Smith v. State*, 154 So. 3d 523 (Fla. 1st DCA 2015).....4, 5, 7

*Tambriz-Ramirez v. State*, 112 So. 3d 767 (Fla. 4th DCA 2013).....2

*Tambriz-Ramirez v. State*, 4D15-2957,  
2017 WL 815376 (Fla. 4th DCA Mar. 1, 2017).....*passim*

*White v. State*, 753 So.2d 668 (Fla. 1st DCA 2000).....4, 5, 8

*Williams v. State*, 189 So. 3d 288, 290 (Fla. 1st DCA 2016),  
*review granted*, SC16-785 (Fla. 2016).....9

**Statutes**

§ 775.021, Fla. Stat. (2009).....*passim*

**Rules**

Fla. R. App. P. 9.030(a)(2)(A)(vi).....4, 5

Fla. R. Crim. P. 3.850.....2, 8

**Constitutional Provisions**

U.S. Const., Amend. V.....*passim*

Art. V, § 3(b)(iv), Fla. Const.....4

Art. I, § 9, Fla. Const. ....*passim*

## **INTRODUCTION**

In the case at bar, the Fourth District Court of Appeal certified a conflict between the First and Fifth District Courts of Appeal regarding an application of double jeopardy principles. This Court has the discretionary authority to review this matter based on this certified conflict. To avoid incongruous results throughout the State of Florida, and to ensure the proper application of these principles, this Court should exercise its discretionary review to accept this case and hear it on its merits.

## **PRELIMINARY STATEMENT**

Petitioner, Diego Tambriz-Ramirez, the Appellant in the Fourth District and the defendant in the trial court, will be referenced in this brief as Petitioner or by his proper name. Respondent, the State of Florida, the Appellee in the Fourth District Court of Appeal, and the prosecution authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

## **STATEMENT OF THE CASE AND FACTS**

This brief arises from the denial of Petitioner's motion for postconviction relief by the trial court and the Fourth District's affirmance of that decision. The State charged Petitioner with the following counts: Count 1, Burglary of a Dwelling with an Assault or Battery While Armed and Masked; Count 2, Aggravated Assault with a Deadly Weapon While Masked; and Count 3, Attempted Sexual Battery-Person 12 Years of Age or Older-Using Great Force or a Deadly Weapon. Petitioner was convicted as charged on all counts. In a special interrogatory in Count 1, the jury found that during the commission of the burglary Petitioner was armed or became armed with a deadly weapon. Petitioner was sentenced to life in prison for the burglary, a consecutive 15 years in prison for the aggravated assault, and a consecutive 30 years in prison for the attempted sexual battery.

Following the imposition of this sentence, Petitioner filed a direct appeal challenging his conviction. *Tambriiz-Ramirez v. State*, 112 So. 3d 767 (Fla. 4th DCA 2013). The Fourth District affirmed in part and reversed and remanded in part to resentence Petitioner to 15 years in prison for the attempted sexual battery. *Id.* at 768. Following his direct appeal, Petitioner filed a timely motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850.

In this motion, Petitioner alleged his trial counsel was ineffective for various reasons<sup>1</sup>, and specifically for failing to raise a double jeopardy violation. Petitioner alleged that Count 2, aggravated assault, and Count 3, attempted sexual battery, were subsumed within Count 1, burglary with an assault or battery. As a result of trial counsel's failure, Petitioner argued trial counsel was ineffective for failing to object to these counts. The trial court held an evidentiary hearing and denied all of Petitioner's claims. Petitioner then appealed the denial of his postconviction motion to the Fourth District. Following review of Petitioner's appeal, the Fourth District affirmed the trial court, but also certified conflict with the First and Fifth District Courts of Appeal. On March 15, 2017, Petitioner filed his *pro se* Motion for Rehearing. On April 4, 2017, the Fourth District entered an Order Denying Petitioner's Motion for Rehearing. On November 17, 2017, undersigned counsel filed his Notice of Appearance and Notice to Seek Discretionary Review before this Court. On November 21, 2017, the Fourth District entered its mandate in this matter. This jurisdictional brief follows to seek this Court's discretionary review.

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<sup>1</sup> Petitioner's *pro se* postconviction relief motion alleged 9 claims. He appealed claims 4 and 5 to the Fourth District Court. The appeal before this Court only regards claim 4 of Petitioner's postconviction relief motion.

## SUMMARY OF ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, Section 3(b)(iv) of the Florida Constitution. Fla. R. App. P. 9.030(a)(2)(A)(vi). In the March 1, 2017 decision below (the “Opinion”), *see* Appendix “A”, the Fourth District certified conflict with several decisions from the First and the Fifth District Courts of Appeal. *Tambriiz-Ramirez v. State*, 4D15-2957, 2017 WL 815376, at \*4 (Fla. 4th DCA Mar. 1, 2017) (certifying conflict with *Dykes v. State*, 200 So. 3d 162 (Fla. 5th DCA 2016); *Hankins v. State*, 164 So. 3d 738 (Fla. 5th DCA 2015); *McGhee v. State*, 133 So. 3d 1137 (Fla. 5th DCA 2014); *Green v. State*, 120 So. 3d 1276 (Fla. 1st DCA 2013); *Estremera v. State*, 107 So. 3d 511 (Fla. 5th DCA 2013); *Baldwin v. State*, 790 So. 2d 434 (Fla. 1st DCA 2000); *Smith v. State*, 154 So. 3d 523 (Fla. 1st DCA 2015); *White v. State*, 753 So.2d 668 (Fla. 1st DCA 2000)). The issue before the Court is whether to grant discretionary review of this case to resolve the conflict between these various district courts of appeal.

In his postconviction motion, Petitioner argued that his convictions of Count 2 and 3 violated the double jeopardy clause of the United States and Florida Constitutions because both counts were subsumed by Count 1. As such, Petitioner alleges that his trial counsel was ineffective for failing to object to these counts.

In the Opinion, the Fourth District held that Counts 2 and 3 were not subsumed by Count 1. In coming to this holding, the Fourth District certified conflict with



multiple decisions of the First and Fifth District Courts of Appeal. *Supra* Based on this certified conflict, this Court can exercise its discretionary jurisdiction to resolve this conflict. As outlined more fully below, Petitioner requests this Court exercise its discretionary jurisdiction to resolve this conflict.

## **ARGUMENT**

### **ISSUE I**

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION IN REVIEWING THE CERTIFIED CONFLICT BETWEEN THE FOURTH DISTRICT COURT AND THE FIRST AND FIFTH DISTRICT COURTS OF APPEAL

#### **A. Jurisdictional Criteria**

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal in which a conflict is expressly certified with another district court in a majority opinion. Art. V, (b)(3)(iv), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). In the *per curiam* affirmed Opinion, the Fourth District certified conflict with the following First and Fifth District decisions:

Accordingly, we certify conflict with the decisions of the First and Fifth District Courts of Appeal in *Dykes, Hankins, McGhee, Green, Estremera, Baldwin, Smith* and *White*, which hold that an *aggravated* assault offense is subsumed within a burglary with an assault or battery.

*Tambriz-Ramirez v. State*, 4D15-2957, 2017 WL 815376, at \*4 (Fla. 4th DCA Mar. 1, 2017). Based on the foregoing, this Court can and should exercise its discretionary jurisdiction to review this case and resolve this multi district conflict.

## B. Discussion

The double jeopardy clause, in both the United States Constitution and the Florida Constitution, prohibit multiple punishments for the same offense. U.S. Const., Amend. V; Art. I, § 9, Fla. Const. However, the double jeopardy clause does not prohibit multiple punishments for different offenses that occur during the same criminal transaction or occurrence if the Legislature authorized separate punishments. *See Roughton v. State*, 185 So. 3d 1207, 1209 (Fla. 2016).

The Florida Legislature has provided that “offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.” § 775.021(4)(a), Fla. Stat. (2009). There are three exceptions to this requirement of the statute. § 775.021(4)(b)1.-3. The applicable exception in this case states that

The intent of the Legislature is to convict and sentence [a defendant] for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity ... to determine the legislative intent. Exceptions to this rule of construction are ... [o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§ 775.021(4)(b)3., Fla. Stat. (2009).

This third exception, the “subsumed-within exception” applies “if the greater offense necessarily includes the lesser offense.” *State v. McCloud*, 577 So. 2d 939, 941 (Fla. 1991) (emphasis maintained). In interpreting section 775.021, Florida Statute, this Court has held, “Where even a single act constitutes multiple separate criminal

offenses, as defined in section 775.021(4)(a), the offender must be sentenced separately for each offense unless one of the three exceptions in section 775.021(4)(b) applies.” *Roughton*, 185 So.3d at 1210. The application of this legislative directive has at times conflicted with the principles and application of the double jeopardy clause.

Petitioner argues that his convictions based on Count 2 (aggravated assault) and Count 3 (attempted sexual battery) are subsumed within Count 1 (the burglary offense) and these convictions should be vacated because his trial counsel should have objected to these counts as violating the double jeopardy clause. The certified conflict arises because in the Opinion, the Fourth District stated that “some decisions of the First and Fifth District Courts of Appeal have held that convictions for burglary with an assault and aggravated assault violate double jeopardy.” *Tambriz-Ramirez*, 2017 WL 815376, at \*4. Specifically, the Fourth District alluded to the belief that “these courts may have relied on the fact the defendant was charged and convicted of using or being armed with a firearm as to both the burglary and aggravated assault offenses.” *Id.* (citing *Baldwin*, 790 So. 2d at 435 (“Because all of the elements of the crime of aggravated assault with a firearm are contained within the crime of burglary with assault while armed with a firearm, Baldwin's dual convictions are in violation of the prohibition against double jeopardy.”)); *Smith*, 154 So. 3d at 524 (concluding that aggravated assault convictions were subsumed within

a conviction for armed burglary with assault); *McGhee*, 133 So. 3d at 1138 (reversing “the conviction for aggravated assault with a firearm because it is subsumed into the greater offense of burglary of a dwelling with an assault or battery while armed with a firearm”); *Green*, 120 So. 3d at 1278 (same); *Estremera*, 107 So. 3d at 511 (same); *White*, 753 So. 2d at 669 (same); *Dykes*, 200 So. 3d at 163 (remanding a rule 3.850 claim for the trial court to determine “if double jeopardy bars [defendant]'s convictions for aggravated battery with a firearm and aggravated assault with a firearm because they were subsumed into the greater offense of burglary of a dwelling with an assault or battery with a firearm”); *Hankins*, 164 So. 3d at 738 (granting relief where the State conceded that “convictions for aggravated battery with a firearm and aggravated assault with a firearm violate double jeopardy because they were subsumed into the greater offense of burglary of a dwelling with an assault or battery with a firearm”)).

In identifying these cases, the Fourth District stated that these prior holdings from the First and Fifth Districts “cannot be reconciled with the requirement that the analysis be conducted ‘*without regard to the accusatory pleading or the proof adduced at trial.*’” *Tambriz-Ramirez*, 2017 WL 815376, at \*4 (citing § 775.021(4)(a) Fla. Stat. (2009)) (emphasis maintained). Based on the foregoing, the Fourth District certified conflict with the Opinion and the various cases from the First and Fifth Districts. *Id.*

Additionally, “for analogous reasons”, the Fourth District rejected Petitioner’s claim that “his attempted sexual battery is subsumed within his burglary with an assault or battery offense.” *Id.* at \*6 (citing *State v. Nardi*, 779 So.2d 596 (Fla. 4th DCA 2001)).

To avoid “geographically incongruous results” certified conflict is an appropriate vehicle to seek this Court’s review to avoid misunderstanding and misapplication of the law. *Williams v. State*, 189 So. 3d 288, 290 (Fla. 1st DCA 2016) (Makar, J., concurring with opinion), *review granted*, SC16-785 (Fla. 2016). Here, allowing the Opinion to stand without resolving this conflict would result in a geographically incongruous result between the First, Fourth, and Fifth District Courts of Appeal in the courts varied interpretations and applications of a fundamental constitutional right that is protected by both the United States and Florida Constitutions. As such, Petitioner respectfully requests this Court exercises its discretionary jurisdiction to review and resolve this certified conflict.

### **CONCLUSION**

This Court has the discretionary jurisdiction to review the Fourth District’s decision in this case. Based on the foregoing, this Court should exercise its discretion to consider the merits of Petitioner’s arguments.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail on this 23rd day of April 2017.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

*/s/ Rocco J. Carbone, III*  
ROCCO J. CARBONE, III

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**APPENDIX**

A. Fourth District's March 1, 2017 opinion in Case No.: 4D15-2957