

IN THE SUPREME COURT OF FLORIDA

CASE No.: SC21-1047

STATE OF FLORIDA,

Petitioner,

v.

HERBERT LEON MANAGO, JR.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL
CASE No. 5D20-632

RESPONDENT'S ANSWER BRIEF

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RECEIVED, 04/21/2022 01:13:20 PM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

Pursuant to an indictment, the State charged Manago and two others, Ronald L. Brown and Tamonta C. Sampson, with first-degree felony murder and carjacking with a firearm. (R. 1296). The indictment asserted that Manago:

...while engaged in the perpetration or attempted perpetration of the offense of Carjacking, kill and murder Donnell King, a human being, by shooting him with a firearm, or did commit said crime by aiding, abetting, counseling, hiring or otherwise procuring such offense to be committed by Tamonta Sampson and/or Ronald L. Brown and/or Adrian Nelson.

...

did the and there unlawfully by force, violence, assault or putting in fear take away from the person or custody of Ronald King a motor vehicle, to wit: a Ford Crown Victoria, the property of Ronald King, with the intent to deprive the owner of said motor vehicle and, in the course of committing said carjacking, carried a firearm, or did commit said crime by aiding, abetting, counseling, hiring or otherwise procuring such offense to be committed by Tamonta Sampson and/or Ronald Brown and/or Adrian Nelson.

(R. 1296). The indictment similarly charged Brown and Sampson with first-degree felony murder. (R. 1297).

Manago proceeded to trial. At trial, the State argued that the jury should find Manago guilty of first-degree felony murder because he shot and killed victim during an armed carjacking. (R. 200-1291).

Accounting for the possibility that one of the other co-defendant's shot and killed the victim during a group carjacking, the State alternatively argued Manago could be found guilty under the principal theory.¹ During opening, the State expressed to the jury:

But keep in mind with regard to the group and other people's involvement, who did what, you heard the charge read, and this is a charge of felony murder and carjacking, or being a principal, and you're gonna hear more testimony about this. This was a group activity.

(R. 453-454). At the charge conference, the State noted:

Your Honor, I'm sorry. Back on first degree, I would want to add in -- on three, have the -- that either he killed him or was killed by someone else where he was a principal to, because apparently Defense -- at some point it seems to be someone else shot. So the Jury could still -- you know, you could still say, well, we're not sure about who shot, but we do think this Defendant was a principal to one of the others who -- any of the others that did it. So we would have it-- on three have --

(R. 937). During closing argument, the State argued:

Another thing, and it really ties in with all the charge and it's the way this defendant - - it was charged - - and we - - the evidence clearly shows that this defendant was the gunman. I mean, he's the one who shot Donell King. But - - and, again, that's - - the evidence clearly shows that.

¹ Evidence was introduced at trial that Adrian Nelson was first identified as the shooter. (R. 677-678). At trial, Manago argued someone else was the shooter and issues of credibility and identification. (R. 1004-1026).

But under the law - - and it's important for you, when considering, if there's - - there's things have been thrown out - - and I'll talk to you later, after the defense talks - - thrown out about, well, maybe this, some conjecture or speculation about who had the gun. Maybe someone else had the gun. The principal theory applies to all the charges here. So, again, the evidence shows this defendant had the gun, but the State's not required to prove that he had the gun. If he was a principal to other participating in the carjacking, knowing there was a gun for the carjacking with a firearm charge, but for the felony murder charge, it's knowing and assisting in a carjacking. The principal theory applies to every charge here.

So, again, it's proven that he's the gunman, but that's not necessary in order to convict of the charges....

This is the principal theory, but it runs through all the charges again. Here's principal. If the defendant helped another person or persons commit a crime, the defendant is a principal and must be treated as if he had done all the things the other person or persons did if, one, the defendant had a conscious intent that the criminal act be done, one; and the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit the crime. And to be a principal, the defendant doesn't have to be present, but that's not the case here. So if the defendant has an intent that the crime be committed, i.e., carjacking, and does some act or say something to assist, that's a principal. And, again, that applies to everything here. And, again, this was a group effort. So that's important to remember throughout all these charges.

And, again, I - it's - everything so clearly points to the defendant being the gunman, but that's not even required under the law. The law simply says there was an intent

that a carjacking occur with regard to felony murder, which we're gonna talk about in a minute, and that there was - - this defendant did something to assist in that.

...

So that's what I'm getting at. In this case, look, Herbert Manago shot Donell King, but under our law, if he's assisting in a carjacking and one of the group shoots him, he's guilty also. So the standard here - - we've met the high standard that he actually shot him, because that's what the evidence shows, but it doesn't even have to for the crime of first degree felony murder.

(R. 994-997).

To account for the alternative theory, the trial court provided the jury with an instruction on principals. (R. 1441-1455).

The jury found Manago guilty of first-degree felony murder and carjacking with a firearm as charged in the indictment. (R. 1439). The jury was not asked to make nor made any special findings. (R. 1439).

The trial court adjudicated Manago guilty and sentenced him to mandatory life in prison without parole for first-degree felony murder and a concurrent 30 year prison sentence for carjacking with a firearm. (R. 1494-1501).

In 2014 and 2015, after developments in juvenile resentencing, Manago filed for postconviction relief pursuant to Florida Rules of Criminal Procedure 3.800 and 3.850 and requested to be

resentenced. (R. 1779-1789). The State ultimately conceded that Manago was entitled to be resentenced on both counts. (R. 1817-1818). The trial court entered an order granting Manago a resentencing. (R. 1820).

Prior to resentencing, Manago filed motions that requested he be resentenced for first-degree felony murder pursuant to section 775.082(1)(b)2 because the jury did not find beyond a reasonable doubt that he actually killed, intended to kill, or attempted to kill the victim. (R. 1889-1896, 1967-1968). Manago asserted that the trial court could only consider the explicit findings made by the jury. (R. 1895; 1967). Manago asserted that his Sixth Amendment right to a jury trial could not “be circumvented by the State of Florida’s desire to convince the trial judge, after the conclusion of the trial, to make a finding that the jury did not.” (R. 1895).²

² Post-resentencing hearing, Manago made a similar argument in a memorandum:

The second option would require the Court to sentence Mr. Manago under Section 775.082(1)(b)(1), but to do so there must be a jury finding that Mr. Manago actually killed, intended to kill, or attempted to kill the victim in this case. The jury did not so find. Thus, pursuant to *Williams v. State*, 242 So.3d 280 (Fla 2018), as well as *Wall* and

After receiving evidence, the trial court entered a written order. (R. 2152-2157). The trial court denied Manago's request to be resentenced pursuant to section 775.082(1)(b)2. The trial court found that "[b]ecause the Indictment in this case alternatively charged Defendant as either the actual killer or a principal, and the verdict form does not differentiate between the alternate theories, this case lacks an adequate jury finding." (R. 2154). The trial court proceeded to commit error and resentenced Manago pursuant to section 775.082(1)(b)1.³ The trial court found its error to be harmless because "the record demonstrates beyond a reasonable doubt that a rational jury would have found Defendant actually killed the victim."

Leppert, cited in the Defendant's Second Addendum re Section 775.082(1)(b)(2) F.S. efiled last week, this option is respectfully foreclosed.

(R. 2125).

³ The trial court specifically found Manago eligible to be resentenced pursuant to section 775.082(1)(b)2., but denied to do so:

This Court therefore concludes that Defendant is eligible for sentencing under section (1)(b)2., and Defendant motion to be sundered under section 775.082(1)(b)2. is denied.

(R. 2155).

(R. 2154-2155). The trial court stated that it considered section 921.1401 factors (a) through (j), but made no particularized findings other than the nature and circumstances of the offense and Manago's role in the offense. (R. 2155-2156). The trial court found that the "...Defendant committed an intentional killing, which was also executed in the course of a forcible felony. While Defendant and his co-defendants committed the carjacking together, it was the Defendant's specific actions with the firearm that led to the victim's death." (R. 2156). The trial court stated that it gave "great weight" to this finding. (R. 2156). The trial court resentenced Manago pursuant to section 775.082(1)(b)1. for first-degree felony murder to life in prison with a 25 year judicial sentence review and for carjacking with a firearm to 30 years in prison with a 20 year judicial sentence review. (R. 2156-2157).

Manago timely appealed. In summary, Manago argued:

A jury's finding as to whether Manago killed, intended to kill, or attempted to kill the victim was necessary for him to be resentenced pursuant to section 775.082(1)(b)1. This factual finding necessarily increased the statutory mandatory minimum of Manago's sentence to 40 years and his eligibility to judicial sentence review from 15 to 25 years. The trial court found the jury failed to make this finding. Nevertheless, the trial court proceeded to commit

error by resentencing Manago pursuant to section 775.082(1)(b)1. The trial court then proceeded to find its error to be harmless because the record established beyond a reasonable doubt that Manago intentionally shot and killed the victim during a carjacking. The trial court committed reversible error. First, the trial court erred by knowingly committing error because it found the error to be harmless. Harmless error analysis is reserved for appellate courts, not a trial court. Trial courts must be expected to faithfully apply the law. Second, the error cannot be deemed harmless based on the charge of first-degree felony murder, credibility issues, identification issues, Adrian Nelson being first identified as the shooter, the State presenting dual theories to the jury that it could convict Manago as the killer or principal, and the lack of any definitive jury finding as to whether Manago actually killed, attempted to kill, or intended to kill the victim. Moreover, at the time of Manago's trial, it did not matter in a first-degree felony murder trial that a defendant actually killed, intended to kill, or attempted to kill the victim. A life without parole sentence always followed. The issue is now of critical importance because of the enactment and retroactive application of chapter 2014-220, Laws of Florida. It is now the difference between a defendant receiving a sentence from 0 to life and 40 to life and a judicial sentence review after 15 or 25 years. Had it been such a critical issue at the time of trial, Manago could have presented his defense differently. Because this new finding may have materially hindered Manago's trial preparation or strategy, the error cannot be considered harmless.

The trial court also erred by sentencing Manago because it found he intentionally killed the victim by shooting him during a carjacking. This was an improper sentencing consideration that constitutes fundamental error.

Even if a proper consideration, the trial court erred by affording “great weight” to its finding that Manago intentionally killed the victim by shooting him during a carjacking and little to no weight to any other finding that dealt with his youthfulness and circumstances at the time of the offenses and possibility of rehabilitation. The trial court’s limited order leaves the impression that the trial court disregarded juvenile resentencing precedent and failed to correctly and adequately consider Manago’s age and circumstances at the time of the offenses and possibility of rehabilitation.

Manago respectfully requests that this Court reverse and remand for resentencing on first-degree felony murder and carjacking with a firearm before a different judge or grant any other relief that is deemed just and proper.

(Initial Brief at 9-11).

The State responded in summary,

Manago was properly resentenced. The trial judge reviewed the trial transcript and determined that the evidence presented at trial established that a rational jury would have found beyond a reasonable doubt that Manago killed the victim. In light of the decision in *Williams*, such finding by the trial judge is supported by the trial transcript, which is included in the record on appeal, as well as a decision from this court and the Alleyne error is harmless. Manago is entitled to no relief.

(Answer Brief at 13). In the event of a reversal, the State did not request the ability to empanel a jury on remand. (Answer Brief at 1-27). The State expressed at oral argument that it doubted it would empanel a jury 15 years later to do so:

...honestly, this case is 15 years old. I find it hard to believe that they would decide to empanel a jury on this. I could be wrong about that, but

See Fifth District Court of Appeal January 5, 2021 Oral Argument, <https://www.youtube.com/watch?v=5-RgRFkhYhc> (27:15 to 28:30), last visited July 27, 2021.

The Fifth District reversed. The Fifth District, in pertinent part, stated:

The Florida Supreme Court in *Williams v. State*, 242 So. 3d 280, 288 (Fla. 2018) held that, in accordance with *Alleyne v. United States*,⁴ a defendant is entitled to have a jury, rather than the sentencing judge, determine whether the defendant “actually killed, intended to kill, or attempted to kill the victim.” The court in *Williams* also held that an *Alleyne* violation² could be subject to a harmless error review. Thus, even if a trial court rather than a jury had made a finding of fact that led to a harsher sentence, *Williams* states that the *Alleyne* violation would be harmless if “the record demonstrates beyond a reasonable doubt that a rational jury would have found the juvenile offender actually killed, intended to kill, or attempted to kill the victim.” *Id.* at 290.

Appellant argues that he was entitled to be resentenced under (b)2. rather than (b)1. because there was no finding by a jury that he “actually killed, intended to kill, or attempted to kill the victim.” The resentencing court acknowledged that *Williams* required a jury to determine the existence of the (b)1. factors. It noted that because Appellant was charged as either the actual killer or a

⁴ *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

principal and the verdict form did not identify under which theory he was guilty, there was an inadequate jury finding to sentence him under (b)1.

Rather than simply sentencing Appellant pursuant to (b)2., the resentencing court conducted its own analysis to determine if it could make the requisite findings of fact required under (b)1. In other words, the resentencing court engaged in the type of fact-finding specifically forbidden by both *Alleyne* and *Williams*. It reviewed the court file, including the entire trial transcript, and concluded that the record demonstrated beyond a reasonable doubt that a rational jury would have found that Appellant actually killed the victim. Thus, the resentencing court concluded that its own *Alleyne* violation would constitute harmless error.

Based on the resentencing court's conclusion that a rational jury would have found that Appellant actually killed the victim, Appellant was resentenced pursuant to (b)1. During sentencing, the court engaged in consideration of the factors set out in section 921.1401. The court concluded that a sentence of life imprisonment was appropriate and noted that Appellant would be entitled to a sentence review after twenty-five years of incarceration on the first-degree felony murder conviction. Appellant was also resentenced to a concurrent term of thirty years in prison for carjacking with a firearm with a sentence review after twenty years of incarceration.

We agree with the Third District “that harmless error is the standard that is applicable in the reviewing court; it is not the standard employed by the trial court during resentencing.” See *Green v. State*, 314 So.3d 611 (Fla. 3d DCA Dec. 23, 2020). The resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation. “Even if the error could be considered harmless error, however, it is not appropriate

for a [trial] court to commit error simply because it might be found to be harmless.” *1195 *United States v. Salery*, 119 F. Supp. 2d 1268, 1272 n.3 (M.D. Ala. 2000). According to *Williams*, once the resentencing court determined that there was an insufficient jury finding to subject Appellant to sentencing under (b)1., it was compelled to sentence him pursuant to (b)2. See 242 So. 3d at 282, 292.

In *Green*, the Third District remanded that similar case “for resentencing pursuant to section 775.082(1)(b) 2., or, if requested by the State, to empanel a jury to make the necessary factual determinations.” 314 So.3d 611. There is certainly a logical and legal basis for empaneling a jury under certain resentencing scenarios to make factual findings that were not required in the original trial. As noted in *Green*, such a remedy is described as “proper” in *Gaymon v. State*, 288 So. 3d 1087, 1093 (Fla. 2020), which concerns a slightly different factual determination under section 775.082(10).

However, the supreme court in *Williams* specifically considered and rejected the option of empaneling a new jury to make the requisite findings, and clearly chose resentencing pursuant to section 775.082(1)(b) 2. as the sole remedy on remand. 242 So. 3d at 292–93. Under *Hoffman v. Jones*, 280 So. 2d 431, 433 (Fla. 1973), we are compelled to follow *Williams*; therefore, we will not include the option of empaneling a jury to make the requisite factual findings on remand. We certify that our decision regarding available remedies on remand expressly and directly conflicts with the decision of the Third District in *Green* on the same question of law.

Accordingly, we reverse the resentencing order and remand with instructions to conduct a de novo resentencing of Appellant for his conviction of first-degree felony murder pursuant to section 775.082(1)(b) 2., with

consideration of the factors set forth in section 921.1401, and with provision for a fifteen-year sentence review in accordance with section 921.1402(c). We find nothing in the record that requires the resentencing be conducted by a different judge.

Manago v. State, 317 So. 3d 1192, 1194–95 (Fla. 5th DCA 2021).

On rehearing, the Fifth District stated:

Relying on *Green v. State*, 46 Fla. L. Weekly D17 (Fla. 3d DCA Dec. 23, 2020), the State argues, as grounds for rehearing, that this Court should have conducted a harmless error analysis which, the State asserts, would have demonstrated that the *Alleyne*¹ error in this case was harmless and required this Court to affirm the resentencing order.

The State is mistaken. In fact, we already conducted a harmless error review, as required by section 924.33, Florida Statutes (2020), but we decline to use the analysis from *Green* because our case does not involve traditional *Alleyne* error. In our view, the Third District's harmless error analysis in *Green* was neither required nor authorized given the decision in *Williams v. State*, 242 So. 3d 280 (Fla. 2018). The issue, and thus the error, presented to us in this case was whether the resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation. There was no doubt the resentencing court was aware that *Williams* required that Appellant be resentenced pursuant to *1196 section 775.082(1)(b) 2., Florida Statutes (2014), because the jury had not been called upon to make the requisite factual findings.²

The resentencing court was also aware the Florida Supreme Court in *Williams* held, as a matter of first impression, that an *Alleyne* violation could constitute

harmless error. However, that language in *Williams* referred only to an appellate court conducting a harmless error review. Nothing in *Williams* suggests that a resentencing court can conduct its own harmless error analysis of its concurrent *Alleyne* violation. As the Third District in *Green* and we in our original opinion noted, harmless error reviews are only conducted by appellate courts.

With this error as our focus, we cannot conclude the error was harmless beyond a reasonable doubt. Indeed, the State properly conceded that point at oral argument.

Manago, 317 So. 3d at 1195–96.

The State sought this Court to review two issues:

- (1)The decision below expressly and directly conflicts with decisions of this Court and another district on the harmless error question; and
- (2)The district court certified a direct conflict on the remedy question

This Court accepted jurisdiction as to the certified direct conflict. This Court declined to accept jurisdiction as to the express and direct conflict.

SUMMARY OF THE ARGUMENT

A jury's finding as to whether Manago killed, intended to kill, or attempted to kill the victim was necessary for him to be resentenced

pursuant to section 775.082(1)(b)1. This factual finding necessarily increased the statutory mandatory minimum of Manago's sentence to 40 years and his eligibility to judicial sentence review from 15 to 25 years. The trial court found the jury failed to make this finding. Nevertheless, the trial court proceeded to commit an *Alleyne* error by resentencing Manago pursuant to section 775.082(1)(b)1 because it found the error to be harmless in light of its finding that the record established beyond a reasonable doubt that Manago intentionally shot and killed the victim during a carjacking.

The Fifth District correctly found reversible error. A trial court cannot knowingly committ error because it finds the error to be harmless. Harmless error analysis is reserved for appellate courts, not a trial court. Trial courts must be expected to faithfully apply the law.

Even if the Fifth District needed to conduct the harmless error analysis pursuant to *Williams*, a harmful *Alleyne* error occurred. Manago was tried for first-degree felony murder. At trial, there were witness credibility and identification issues. Adrian Nelson was originally identified as the shooter. The State presented dual theories

to the jury that it could convict Manago as the killer or principal. The jury did not return a definitive jury finding as to whether Manago actually killed, attempted to kill, or intended to kill the victim.

Moreover, at the time of Manago's trial, it did not matter in a first-degree felony murder trial that a defendant actually killed, intended to kill, or attempted to kill the victim. A life without parole sentence always followed. The issue is now of critical importance because of the enactment and retroactive application of chapter 2014-220, Laws of Florida. It is now the difference between a defendant receiving a sentence from 0 to life and 40 to life and a judicial sentence review after 15 or 25 years. Had it been such a critical issue at the time of trial, Manago could have presented his defense differently. Because this new finding may have materially hindered Manago's trial preparation or strategy, the error cannot be considered harmless.

Pursuant to this Court's decision in *Williams*, the Fifth District remanded for resentencing pursuant to section 775.082(1)(b)2. This Court deny the State's request to alternatively allow for it to empanel a jury on remand to make finding that would increase the severity of

the offense and punishment. First, the State failed to preserve its request for alternative remedy for appellate review. The State did not request the alternative remedy at the trial or district court. To the contrary, when asked at oral argument, the State represented that it would likely not seek to empanel a jury. Second, there is no valid reason for this Court to depart from *Williams*. Maintaining the remedy provided for in *Williams* is consistent with the principles of *stare decisis* and avoids any constitutional pitfall, this Court legislating from the bench, and this Court becoming an outlier jurisdiction.

In conclusion, this Court should affirm the Fifth District's finding of reversible error and the remedy as provided for in *Williams*. This Court should quash the Third District's decision in *Green*.

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED BY RESENTENCING MANAGO PURSUANT TO SECTION 775.082(1)(B)1, FLA. STAT. [RESTATED].

In its brief, the State argues that the appellate court erred by failing to consider whether the trial court's *Alleyne* error was harmless pursuant to *Williams*. The State is mistaken. The Fifth

District was not required to apply the harmless error analysis of *Williams* because “the issue, and thus the error, presented...” on appeal “was whether the resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation.” *Manago*, 317 So. 3d at 1195. *Williams*, therefore, does not control the issues/error presented. Even if the Fifth District was required to apply the harmless error analysis of *Williams*, the State cannot satisfy its burden to prove that the trial court’s error was harmless beyond a reasonable doubt.

1. The Fifth District correctly decided that the trial court committed reversible error by conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation.

Under the United States and Florida constitutions, the criminally accused have the right to a trial before an impartial jury, at which the prosecutor must prove each element of the crime beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; Art. I, §§ 9, 16, Fla. Const. This means that every fact that increases the punishment for a crime must be submitted to a jury and found beyond a reasonable doubt or admitted to by the defendant. U.S. Const. Amends. VI, XIV; *Alleyne*, 133 S. Ct. at 2163; *Blakely v. Washington*, 542 U.S. 296,

313-14 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 491-92 (2000); see also *Dames v. State*, 186 So. 3d 593, 595 (Fla. 4th DCA 2016) (interpreting *Apprendi* and *Alleyne* for the proposition that “any fact increasing mandatory sentences must be charged, submitted to a jury, and proven beyond a reasonable doubt”).

The question raised both below and on appeal concerns whether Manago should have been resentenced on his first-degree felony murder conviction under section 775.082(a)(b)1. or 775.082(1)(b)2., Florida Statutes (2018). Both provisions were created through chapter 2014-220, Laws of Florida, which was enacted by the Legislature in response to *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012). See *Horsley v. State*, 160 So. 3d 393, 394 (Fla. 2015) (explaining that the legislations’ purpose was to “bring Florida’s juvenile sentencing statutes into compliance with the United States Supreme Court’s . . . Eighth Amendment juvenile sentencing jurisprudence”).

Section 775.082(1)(b)1.⁵ provides that a juvenile who “actually killed, intended to kill, or attempted to kill the victim . . . shall be

⁵ Section 775.082(1)(b)1. provides in full as follows:

punished by a term of imprisonment of at least 40 years” and is eligible for review of the sentence after serving twenty-five years. See § 921.1402(2)(a), Fla. Stat. (2018) (“A juvenile sentenced under s. 775.082(1)(b)1. is entitled to a review of his or her sentence after 25 years.”). On the other hand, section 775.082(1)(b)2. provides that a juvenile who “did not actually kill, intend to kill, or attempt to kill the victim” is not subject to a minimum sentence and can obtain review of the sentence after serving fifteen years in prison. See § 921.1402(2)(c), Fla. Stat. (2018) (“A juvenile offender sentenced to a term of more than 15 years under s. 775.082(1)(b)2 . . . is entitled to a review of his or her sentence after 15 years.”).

A person who actually killed, intended to kill, or attempted to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s.921.1401, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(a).

Prior to resentencing in this case, this Court analyzed the Sixth Amendment implications of these statutory provisions in *Williams*, 242 So. 3d at 280. There, a jury convicted the juvenile defendant of first-degree murder and kidnapping, but the verdict form was general in form and did not specify whether the murder conviction was for premeditated or felony murder. During a resentencing, the trial court denied the defendant's request to impanel a jury to make the finding as to whether he actually killed, intended to kill, or attempted to kill the victim. Rather, the trial court held its own hearing and found that the defendant both actually killed and intended to kill the victim.

This Court held that *Alleyne* requires a jury to make the factual finding that a defendant "actually killed, intended to kill, or attempted to kill the victim" under section 775.082(1)(b)1. *Id.* at 282, 288. This is because, without such a finding, "the trial court is not required to impose a minimum sentence" and the defendant is entitled "to a sentence review in fifteen years" rather than twenty-five years. *Id.* at 288. Thus, "a finding of actual killing, intent to kill, or attempt to kill aggravates the legally prescribed range of allowable sentences . . . by increasing the sentencing floor from zero to forty

years and lengthening the time before which a juvenile is entitled to a sentence review from fifteen to twenty-five years” *Id.* (internal quotation omitted).

This Court held, however, that such an *Alleyne* error can be harmless. As the Court explained, “the applicable question in evaluating whether an *Alleyne* violation is harmful with respect to section 775.082(1)(b) is whether the failure to have the jury make the finding as to whether a juvenile offender actually killed, intended to kill, or attempted to kill the victim contributed to his sentence—stated differently, whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the juvenile offender actually killed, intended to kill, or attempted to kill the victim.” *Id.* at 290. As applied to the case, this Court found the error was not harmless because the defendant “disputed both that he killed [the victim] and that he was a willing participant in the murder.” *Id.* at 291.

The harmless error analysis employed in *Williams* derived from this Court’s prior decision in *Galindez v. State*, 955 So. 2d 517, 523-24 (Fla. 2007). There, the defendant proceeded to trial on charges of

lewd and lascivious actions on a minor and child abuse. *Id.* at 519-20. The State presented admissions from the defendant that he repeatedly had sexual relations with the victim and impregnated her. *Id.* at 519. The victim's testimony confirmed the same. *Id.* at 519, 522. The theory of defense "was that the . . . victim consented." *Id.* at 522. "Thus, [the defendant] did not dispute the facts of the sexual relationship at trial, and he did not contest them at resentencing, either." *Id.* at 524. Under these circumstances, this Court held that "no reasonable jury would have returned a verdict finding there was no penetration." *Id.*

For harmless error purposes, the relevant question was "whether the record demonstrate[d] beyond a reasonable doubt that a rational jury would have found penetration." *Id.* at 523. The only reason the jury did not make a finding of sexual penetration in *Galindez* was because the verdict form did not ask them to do so. By finding the defendant guilty of the charged offenses, the jury necessarily found that the defendant penetrated the victim to impregnate her — the defendant had no counterargument to this allegation at trial, and his defense was solely that of consent.

Here, the trial court concluded that the jury did not find whether Manago killed, intended to kill, or attempted to kill the victim:

Because the Indictment in this case alternatively charged Defendant as either the actual killer or a principal, and the verdict form does not differentiate between the alternate theories, this case lacks an adequate jury finding.

(R. 2154). In light of this finding and pursuant to *Williams*, the trial court was required to resentence Manago to section 775.082(1)(b)2. The trial court did not. Instead, the trial court proceeded to knowingly commit an *Alleyne* error and resentenced Manago pursuant to section 775.082(1)(b)1. because it found the error would be harmless.

The trial court erred by knowingly committing error because it found the error to be harmless. The harmless error analysis is designed for appellate courts in their reviewing capacity, not trial courts. § 924.33 Fla. Stat. codifies the harmless error rule in criminal cases as follows:

No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be

presumed that error injuriously affected the substantial rights of the appellant.

A trial court cannot knowingly commit error because it finds its error to be harmless:

it is not appropriate for a district court to commit error simply because it might be found to be harmless. Indeed, nothing could be more elementary than that the court must be faithful to the law, and therefore, the court cannot knowingly commit an error, even a harmless one.

United States v. Artis, 358 F. Supp. 2d 1094, 1099 (M.D. Ala. 2005) (internal citations and quotations omitted); *Green*, 314 So.3d at 611 (“that harmless error is the standard that is applicable in the reviewing court; it is not the standard employed by the trial court during resentencing.”); *United States v. Salery*, 119 F. Supp. 2d 1268, 1272 n.3 (M.D. Ala. 2000); (“Even if the error could be considered harmless error, however, it is not appropriate for a [trial] court to commit error simply because it might be found to be harmless.”).

While this Court in *Williams* noted that *Alleyne* errors are subject to harmless error review, it undoubtedly was not providing the “green light” for trial courts to knowingly commit an *Alleyne* error it deems would be harmless. Indeed, a dangerous precedent would

be set if trial courts are permitted to knowingly commit errors that it deems would be harmless. Trial courts must be expected to faithfully apply the law.

The State argues that the Fifth District should have additionally considered whether the trial court's *Alleyne* error was harmless pursuant to *Williams*. The harmless error analysis of *Williams*, however, was not applicable to the issue raised on appeal. On appeal, "[t]he issue, and thus the error, presented... was whether the resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation." *Manago*, 317 So. 3d at 1195. The decision of *Williams* does not address this question of law. Instead,

Williams held, as a matter of first impression, that an Alleyne violation could constitute harmless error. However, that language in Williams referred only to an appellate court conducting a harmless error review. Nothing in Williams suggests that a resentencing court can conduct its own harmless error analysis of its concurrent Alleyne violation.

In other words, the "issue, and thus the error, presented" on appeal "was whether the resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation."

Controlling case law established that it was not harmless error for the trial court to do so. The Fifth District was not required or authorized to conduct a harmless error analysis pursuant to *Williams* because, the “case does not involve traditional *Alleyne* error.”

2. Even if the Fifth District was required to apply the harmless error analysis of *Williams*, the State cannot satisfy its burden to prove the error harmless beyond a reasonable doubt.

Since this Court’s decision in *Williams*, the appellate courts have applied the harmless error analysis in several written decisions. For instance, in *Wall v. State*, 251 So. 3d 1014 (Fla. 5th DCA 2018), the defendant was indicted jointly with his codefendant for offenses including first-degree premeditated murder. The defendant was convicted of offenses including second-degree murder. The Fifth District found that the jury failed to decide whether the defendant actually killed, intended to kill, or attempted to kill the victim. The Fifth District found the error harmful, “We note that Wall’s second-degree murder conviction did not clearly include a finding by the jury that Wall actually killed Gorney due to the wording in the verdict form and jury instructions.”

In *Leppert v. State*, 249 So. 3d 1322 (Fla. 5th DCA 2018), the Fifth District found a similar *Alleyne* error to be harmful:

In the case at hand, the jury was instructed on first-degree premeditated murder and first-degree felony murder with burglary or robbery as the underlying felony. The verdict form did not require the jury to specify under which theory it found Leppert guilty. Based upon a similar fact pattern, the Florida Supreme Court determined in *Williams* that there was no clear jury finding that the defendant actually killed, intended to kill, or attempted to kill the victim and that the error was not harmless. 242 So.3d at 289, 291. The court further held that “[w]here the error cannot be deemed harmless, the proper remedy is to resentence the juvenile offender pursuant to section 775.082(1)(b)2., Florida Statutes (2016).” *Id.* at 282. Because we conclude that the error was not harmless, we reverse the sentence imposed for the murder conviction and remand for Leppert to be resentenced on that charge pursuant to section 775.082(1)(b) 2.

In *Colon v. State*, 291 So. 3d 643 (Fla. 5th DCA 2020), the defendant was indicted on one count of first-degree premeditated murder. The victim was shot and killed at close range. The State made no argument that there was another shooter who could have caused the victim’s death. To the contrary, the State’s trial evidence was that the defendant was the only shooter, primarily because he had confessed to law enforcement that he shot the victim. The State also presented testimony from multiple witnesses, other than law

enforcement officers, to whom the defendant had also admitted to shooting the victim. The jury returned its verdict finding the defendant guilty of first-degree murder “as charged in the indictment.” It also found, in a separate special verdict, that the defendant “did use, carry or display a firearm in commission of this offense.” The Fifth District found an *Alleyne* error because the jury was instructed on felony murder and principal theories and the verdict form did not differentiate between premeditated and felony murder. However, the Fifth District concluded the error was harmless because:

Based on Colon's multiple admissions to several persons, including law enforcement, that he shot the victim, coupled with Colon being in possession of the murder weapon when arrested, no other person having been charged with the murder, nor there being any competent evidence at trial that anyone other than Colon was present at the time McRae was murdered, we conclude that had a rational jury been given the opportunity, it would have found, beyond a reasonable doubt, that Colon actually killed McRae with a firearm.

In *Robinson v. State*, 256 So. 3d 217 (Fla. 5th DCA 2018), the Fifth District rejected the defendant’s argument that he was entitled to be resentenced because he “was only charged with first-degree

premeditated murder, and so the jury's guilty verdict contains an inherent unambiguous finding of intent to kill."

Other appellate courts have decided similar cases. *See, e.g., O'Neal v. State*, 298 So 3d 77 (Fla. 4th DCA 2020) (failure to make finding that defendant actually killed, attempted to kill, or intended to kill constituted harmful error); *Toye v. State*, 2019 WL 6720431 (Fla. 2d DCA 2019) (same); *Puzio v. State*, 278 So. 3d 82 (Fla. 4th DCA 2019) (same); *Washington v. State*, 257 So. 3d 520 (Fla. 2d DCA 2018) (same); *Brown v. State*, 277 So. 3d 616 (Fla. 3d DCA 2018) (failure to make finding that defendant actually killed, attempted to kill, or intended to kill constituted harmless error).

Manago's case fits within the appellate court decisions that find the *Alleyne* error harmful. The State charged Manago and other co-defendants with first-degree felony murder. To account for the possibility that one of the other co-defendant's shot and killed the victim during an armed carjacking, the State argued throughout trial that Manago could alternatively be found guilty under the principal theory:

But keep in mind with regard to the group and other people's involvement, who did what, you heard the charge

read, and this is a charge of felony murder and carjacking, or being a principal, and you're gonna hear more testimony about this. This was a group activity.

(R. 453-454).

Your Honor, I'm sorry. Back on first degree, I would want to add in -- on three, have the -- that either he killed him or was killed by someone else where he was a principal to, because apparently Defense -- at some point it seems to be someone else shot. So the Jury could still -- you know, you could still say, well, we're not sure about who shot, but we do think this Defendant was a principal to one of the others who -- any of the others that did it. So we would have it-- on three have --

(R. 937).

Another thing, and it really ties in with all the charge and it's the way this defendant - - it was charged - - and we - - the evidence clearly shows that this defendant was the gunman. I mean, he's the one who shot Donell King. But - - and, again, that's - - the evidence clearly shows that. But under the law - - and it's important for you, when considering, if there's - - there's things have been thrown out - - and I'll talk to you later, after the defense talks - - thrown out about, well, maybe this, some conjecture or speculation about who had the gun. Maybe someone else had the gun. The principal theory applies to all the charges here. So, again, the evidence shows this defendant had the gun, but the State's not required to prove that he had the gun. If he was a principal to other participating in the carjacking, knowing there was a gun for the carjacking with a firearm charge, but for the felony murder charge, it's knowing and assisting in a carjacking. The principal theory applies to every charge here.

So, again, it's proven that he's the gunman, but that's not necessary in order to convict of the charges....

This is the principal theory, but it runs through all the charges again. Here's principal. If the defendant helped another person or persons commit a crime, the defendant is a principal and must be treated as if he had done all the things the other person or persons did if, one, the defendant had a conscious intent that the criminal act be done, one; and the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit the crime. And to be a principal, the defendant doesn't have to be present, but that's not the case here. So if the defendant has an intent that the crime be committed, i.e., carjacking, and does some act or say something to assist, that's a principal. And, again, that applies to everything here. And, again, this was a group effort. So that's important to remember throughout all these charges.

And, again, I - it's - everything so clearly points to the defendant being the gunman, but that's not even required under the law. The law simply says there was an intent that a carjacking occur with regard to felony murder, which we're gonna talk about in a minute, and that there was - - this defendant did something to assist in that.

...

So that's what I'm getting at. In this case, look, Herbert Manago shot Donell King, but under our law, if he's assisting in a carjacking and one of the group shoots him, he's guilty also. So the standard here - - we've met the high standard that he actually shot him, because that's what the evidence shows, but it doesn't even have to for the crime of first degree felony murder.

(R. 994-997). The trial court instructed the jury on the theory of principals. The jury found Manago guilty of first-degree felony murder and carjacking with a firearm as charged in the indictment. The jury's verdict forms, however, contain no special findings. Based on the charge of first-degree felony murder, credibility issues, identification issues, Adrian Nelson being first identified as the shooter, the State presenting dual theories to the jury that it could convict Manago as the killer or principal, and the lack of any definitive jury finding as to whether Manago actually killed, attempted to kill, or intended to kill the victim, the trial court erred by finding the *Alleyne* error to be harmless.

Moreover, at the time of Manago's trial, it did not matter in a first-degree felony murder trial that somebody killed, intended to kill, or attempted to kill the victim. A life without parole sentence always followed. The issue of whether somebody killed, intended to kill, or attempted to kill the victim is now of critical importance because of the enactment and retroactive application of chapter 2014-220, Laws of Florida. It is now the difference between a defendant receiving a sentence from 0 to life and 40 to life and receiving a judicial sentence

review after 15 or 25 years. Had it been such a critical issue at the time of trial, Manago could have presented his defense differently or asked for a special finding by the jury.⁶ Because this new finding may have materially hindered Manago's trial preparation or strategy, the error cannot be considered harmless. *See, e.g., Muniz v. State*, 988 So. 2d 1194 (Fla. 2d DCA 2008) (trial court's error in not holding an adequate *Richardson* hearing on a discovery violation, consisting of the State's late disclosure of a rebuttal witness, was not harmless in trial for grand theft of a motor vehicle, where the defense's strategy was that defendant had permission to take the vehicle, the testimony of the witness who was disclosed late rebutted testimony that defendant had permission to take the vehicle, and, had the defense known of the witness who was disclosed late and had an opportunity to depose him prior to trial, the defense may have changed its strategy.). Surely, the inability of Manago to be on notice of such a

⁶ For instance, Manago asserted in his 2009 postconviction motion that Mandy Gaddis should have been called to testify as a witness at trial. (R. 1578-1582). Gaddis was a victim of the crime and witnessed the shooting. She identified Sampson as the shooter, not Manago. She described the shooter as light-skinned, whereas Manago is very dark-skinned.

critical issue at the time of his trial has serious due process implications. *See, e.g., Blue v. State*, 876 So. 2d 1273 (Fla. 2d DCA 2004) (the state could not, after resting its case at trial on a charge of throwing a deadly missile into a building, amend the information to allege that the defendant threw a trailer hitch into an occupied vehicle; the amendment changed an element of the offense, and it resulted in the defendant being convicted of an offense with which he was not charged, in violation of due process.).

The trial court stated the following to justify its harmless error finding:

The victim, Donnell King, was killed during a carjacking by Defendant, Tamonta Sampson, Ronald L. Brown, and/or Adrian Nelson. At trial, the evidence demonstrated that, of these four accomplices, Defendant possessed a gun and shot the victim at close range. Just prior to the carjacking, Defendant expressed that he had a gun. As Mr. Nelson took the driver's seat of the vehicle subject to the carjacking, the victim grabbed him. Defendant then shot the victim in the left side of the neck. Mr. Sampson (1) testified that Defendant admitted to shooting the victim and (2) matched Defendant's description (gray hooded sweatshirt) at the time of the incident with other eyewitnesses, such as Ronald King, the victim's brother. Ronald King testified that the fleeing perpetrator wore a gray hooded sweatshirt. The murder weapon was recovered from the path of this assailant. Sally Sampson, the mother of Mr. Sampson, testified that she heard Defendant disclose the location of this firearm, and that

he shot the victim. Other passengers of the carjacked vehicle ruled out other members of the carjacking party as the shooter. Mr. Nelson also testified as to Defendant's participation in these crimes. Based on the numerous eyewitness testimony from the trial, this Court finds that the record demonstrates beyond a reasonable doubt that a rational jury would have found Defendant actually killed the victim.

(R. 2155). The trial court's finding of harmless error is more akin to a sufficiency of evidence analysis than a harmless error analysis:

The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

State v. Digulio, 491 So. 2d 1129, 1138-39 (Fla. 1986). The trial court's harmless error finding fails to account for the impact of the charge of first-degree felony murder, credibility issues, identification issues, Adrian Nelson being first identified as the shooter, the State presenting dual theories to the jury that it could convict Manago as the killer or principal, and the lack of any definitive jury finding as to whether Manago actually killed, attempted to kill, or intended to kill the victim.

Manago submits that one cannot conclude that the record demonstrates beyond a reasonable doubt that a rational jury would have found that he actually killed, intended to kill, or attempted to kill the victim. Accordingly, notwithstanding the fact that the trial court knowingly committed an *Alleyne* error, the *Alleyne* error in this case cannot be deemed harmless under *Williams*.

II. THE APPROPRIATE REMEDY, AS PREVIOUSLY ESTABLISHED BY WILLIAMS, IS FOR MANAGO TO BE RESENTENCED PURSUANT TO SECTION 775.082(1)(B)2. [RESTATED].

In its brief, the State argues that if a harmful *Alleyne* error occurred, then it should be permitted to empanel a jury on remand to make the requisite findings necessary to increase the severity of Manago's offense and punishment. The State asks this court to expressly recede from *Williams*' remedy holding. This Court should reject the State's request for the following reasons.

1. This is not the appropriate case to reconsider the remedy provided for in *Williams* because, like in *Puzio*, the State failed to preserve the issue for appeal.

In *Puzio v. State*, 320 3d 684 (Fla. 2021), the State similarly asked for this Court to depart from *Williams* and allow for a jury to

be empaneled to make the requisite findings. This Court declined the State's request for multiple reasons:

We decline to decide this issue for a couple of reasons. First, Puzio argues that his jury already found that he did not actually kill, intend to kill, or attempt to kill the victims. Regardless of whether or not he is correct, the unique facts of Puzio's case make it a less-than-ideal vehicle for revisiting the double-jeopardy concerns that caused the *Williams* court to forego the possibility of empaneling a jury and hold instead that the remedy of "resentencing pursuant to section 775.082(1)(b) 2. is the more prudent course." *Williams*, 242 So. 3d at 293. Moreover, and perhaps even more critically, the State neither asked the trial court to empanel a jury nor raised the issue in the district court, and the potential double jeopardy implications of empaneling a jury have not been fully briefed. Accordingly, we limit our holding to the jurisdictional issue. See *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) ("[A]uthority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued").

Id. at 688.

In this case, like in *Puzio*, the State never asked the trial court to empanel a jury nor raised the issue in the district court. In fact, when asked at oral argument about the appropriate remedy in the event of a reversal, the State did not advance the argument of empaneling a jury and stated that it doubts it would seek to empanel a jury 15 years later to make the necessary finding:

...honestly, this case is 15 years old. I find it hard to believe that they would decide to empanel a jury on this. I could be wrong about that, but

See Fifth District Court of Appeal January 5, 2021 Oral Argument, <https://www.youtube.com/watch?v=5-RgRFkhYhc> (27:15 to 28:30), last visited July 27, 2021.

In light of the State not seeking or advancing an argument to empanel a jury at the trial or district court level and instead insisting that it likely would not empanel a jury, Manago submits that the State has not preserved the issue for appellate review. The State is attempting to use Manago's appellate proceeding as a method to obtain the answer to a legal question not previously raised or applicable. This Court cannot properly exercise its judicial power to review merely to render a decision. *Sarasota-Fruitville Drainage Dist. v. Certain Lands Within Said Dist. Upon Which Drainage Taxes for the Year 1952 Have Not Been Paid*, 80 So. 2d 335 (Fla. 1955) (explaining that appellate jurisdiction may be used only to resolve justiciable controversies between parties). If anything, the State should be required to present and preserve the remedy issue at the trial court.

2. This Court previously decided in *Williams* on the appropriate remedy and rejected the Williams’ request to empanel a jury.

In *Williams*, this Court considered the appropriate remedy for an *Alleyne* violation in the context of the juvenile resentencing statutes and whether a defendant actually killed, intended to kill, or attempted to kill the victim. This Court held that “resentencing [under section 775.082(1)(b)2.] is the appropriate remedy for an *Alleyne* violation that is not harmless.” *Williams*, 242 So. 3d at 292-93. This Court considered and rejected Williams’ similar request to empanel a jury to make the requisite findings.⁷ This Court stated:

The dissent questions whether this remedy is necessary or appropriate, and suggests that nothing precludes the empaneling of a jury to make the factual determination. We are, however, hesitant to wade into “a thicket of potential and thorny double jeopardy issues.” *United States v. Pena*, 742 F.3d 508, 518 (1st Cir. 2014). In *Pena*, a case that involved guilty pleas to drug offenses, the United States conceded an *Alleyne* error occurred that was not harmless, but requested that a “sentencing” jury be empaneled to make a factual determination as to an element that, if found beyond a reasonable doubt, would authorize an enhanced mandatory minimum sentence. *Id.* at 509, 514.¹⁴ In declining this request, the United States Court of Appeals for the First Circuit first noted:

⁷ Unlike in this case, the defendant requested the ability to empanel a jury.

Decisions of the Courts of Appeals after *Alleyne* have remanded for resentencing by the court. We are not aware of any court that has been confronted with facts analogous to those here. But in at least nine circuit court cases that have found reversible *Alleyne* error, the sentence was vacated and remanded for resentencing by the district judge. We are aware of no case, and the parties have cited none, remanding for use of a sentencing jury after a reversible *Alleyne* error.

Id. at 517–18 (footnote omitted). Further, with respect to double jeopardy concerns, the First Circuit stated:

If this conviction were final, the constraint of double jeopardy would be clearer. It is also true that those double jeopardy safeguards do not usually apply to resentencing. But the effect of *Alleyne* and its predecessors is to preclude certain sentences from being imposed unless the elements supporting them have been proven to a jury beyond a reasonable doubt. The Supreme Court has not yet dealt with the double jeopardy issues in this context, much less in these transition cases where what was once thought to be a sentencing issue has been recognized instead to be an element of a crime.

....

The prosecution's proposed course of action here seeks to ... obtain the benefit of the plea's admissions to the essential elements of the two drug crimes, which are also among the essential elements ... of the aggravated “death resulting” crime. Indeed, the prosecution's brief is explicit that the sentencing jury would take the admissions of guilt from the plea for the other elements and then decide only the “death resulting” issue. Under the doctrine of constitutional avoidance, we do not decide the double jeopardy issues associated with the government's request, but note them and avoid them.

Id. at 518–19 (citation omitted). In light of the constitutional concerns presented by the *Pena* court with respect to empaneling a jury where a harmful *Alleyne* error has occurred, we conclude that resentencing pursuant to section 775.082(1)(b) 2. is the more prudent course.

Williams, 242 So. 3d at 293.

3. The principles of *stare decisis* counsel this Court to follow *Williams*.

The principle of *stare decisis* “counsels [the Court] to follow [its] precedents unless there has been ‘a significant change in circumstances after the adoption of the legal rule, or ... an error in legal analysis.’ ” *Valdes v. State*, 3 So.3d 1067, 1076 (Fla. 2009) (quoting *Rotemi Realty, Inc. v. Act Realty Co.*, 911 So.2d 1181, 1188 (Fla. 2005)).

...

As the United States Supreme Court has explained, the principle of *stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

...

The presumption in favor of *stare decisis* can only be overcome upon consideration of the following factors:

- (1) Has the prior decision proved unworkable due to reliance on an impractical legal “fiction”? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the

law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification? *Valdes*, 3 So.3d at 1077 (quoting *Strand v. Escambia Cty.*, 992 So.2d 150, 159 (Fla. 2008)).

State v. Michel, 257 So. 3d 3, 10 (Fla. 2018) (Pariente, J., dissenting)

Here, the principles of stare decisis counsel this Court to follow *Williams*. Regarding the first factor, there is no indication that the remedy chosen in *Williams* has proven to be unworkable. Indeed, the holding is simple and easy to apply. If a harmful *Alleyne* error occurs, the remedy is to remand with directions to resentence without regard to the enhanced offense or punishment. This Court and the district courts of appeal have been able to apply and rely on *Williams* when deciding *Alleyne* issues in the juvenile sentencing context. See, e.g., *Puzio*, 320 So. 3d at 684; *Romero v. State*, 315 So. 3d 1245 (Fla. 1st DCA 2021); *Washington v. State*, 328 So. 3d 1118 (Fla. 2d DCA 2021); *O'Neal*, 298 So. 3d at 77; *Leppert*, 249 So. 3d at 1322; but see *Green*, 314 So. 3d at 611. Federal appellate courts have provided for and applied the same workable remedy in the context of other harmful *Alleyne* errors. See, e.g., *United States v. Pena*, 742 F. 3d 508 (1st Cir. 2013); *United States v. Golding*, 653

Fed. Appx. 28 (2d Cir. 2016); *United States v. Armour*, 840 F. 3d 904 (7th Cir. 2016); *United States v. Lara-Ruiz*, 721 F. 3d 554 (8th Cir. 2013); *United States v. Johnson*, 878 F. 3d 925 (10th Cir. 2017).

As to the second factor, departing from *Williams* would cause serious injustice and create instability with the law. Manago, unlike *Williams* and others who have been afforded relief pursuant to *Williams*, would be subjected to a new trial proceeding that exposes him to be convicted of an enhanced offense and receive an enhanced sentence. The departure from *Williams* would also create a serious disruption in the law. *Williams* was decided only 4 years ago. There is no case law to support the State's requested remedy. There is no judicial or legislative guidance as to the proper process if the State's remedy request is granted. Permitting the State's remedy would lead to new constitutional and procedural issues.

In regard to the final factor, the factual premises underlying the decision have not changed so drastically as to leave the central holding of *Williams* utterly without legal justification. To the contrary, the remedy provided for in *Williams* has legal justification. The remedy provided for *Williams* is consistent with the holdings of

seemingly every other jurisdiction.⁸ This is not a situation like in *Michel*, 257 So. 3d at 6, where this Court found departure from *Atwell* was necessary in light of subsequent case law from the Supreme Court that made the *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016) decision inconsistent with United States Supreme Court precedent.

4. This Court's decision in *Gaymon*, which formed the basis for the Fourth District's conflict decision in *Green*, should not persuade this Court to depart from *Williams*.

The State heavily relies on *Gaymon v. State*, 288 So. 3d 1087 (Fla. 2020), which formed the basis for the Fourth District's decision in *Green*, to support its request for a remedy to empanel a jury. *Gaymon*, however, is factually different and addresses a different question of law. The decision of *Williams* and *Gaymon*, therefore, can co-exist. As argued by counsel for *Puzio* in reply:

Gaymon and *Williams* are not in conflict. The cases are factually different and address different questions of law. In *Gaymon*, the Court determined the remedy for a harmful *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004) violation under Section 775.082(10). *Gaymon*, at 1089-90

In *Williams*, the Court determined the remedy for a harmful *Alleyne* violation under Section 775.082(1)(b)1.

⁸ The State has not provided case law from any other jurisdiction that approves of the requested remedy.

The remedy was resentencing. *Williams* at 282 Likewise, the remedy for the harmful error in *Alleyne* itself was for resentencing consistent with the jury's verdict. *Alleyne v. United States*, 570 U.S. 99, 118 (2013).

In situations like *Gaymon*, the State seeks to have the potential punishment increased with a finding of dangerousness. The State has a similar interest in a death penalty case. In both contexts, the jury proceedings must be bifurcated.

Bifurcation is necessary in a situation like *Gaymon* to ensure that the defendant's presumption of innocence is not diminished by evidence of dangerousness. Moreover, evidence of dangerousness only becomes relevant if the defendant is found guilty of a qualifying offense. In a situation like *Gaymon*, during the second proceeding, the jury does not deliberate on any fact or statutory element of the qualifying offense.

Conversely, in *Williams*, and those alike, the original jury deliberated on the statutory elements of first-degree murder based on multiple theories of guilt. The jury was given a general verdict form and reached a verdict of guilty. If the State empaneled a second jury, that jury would determine whether the defendant attempted, intended, or actually killed the victim.

Had *Gaymon* overruled *Williams*, this Court would have said it in *Gaymon* or in *Puzio*. This Court did not.

5. Cases related to Florida's death penalty should not persuade this Court to depart from *Williams*.

The State also cites to death penalty cases to argue that it should be allowed to empanel a jury to make the requisite factual

findings. This case, however, does not involve the death penalty. Unlike in the death penalty context, the Legislature has not approved a process for the State's proposed remedy. The Legislature has not done so even though this Court, in *Williams*, rejected its law that provided for a judge to decide whether the defendant actually killed, intended to kill, or attempted to kill the victim. § 775.082(1)(b)3, Fla. Stat. By creating a process for the State to empanel a jury post-conviction in a non-capital case, this Court would be legislating on an issue that the Legislature is aware of and has chosen not to address.⁹ The Pennsylvania Superior Court, rejected a similar request to legislate and permit a jury to be empaneled to correct an *Alleyne* error as follows:

We find that Subsections (a) and (c) of Section 9712.1 are essentially and inseparably connected. Following *Alleyne*, Subsection (a) must be regarded as the elements of the aggravated crime of possessing a firearm while trafficking drugs. If Subsection (a) is the predicate arm of Section 9712.1, then Subsection (c) is the “enforcement” arm. Without Subsection (c), there is no mechanism in place to determine whether the predicate of

⁹ This is Court has amended the standard jury instruction for first-degree felony murder, instruction 7.3, to include an instruction on whether a juvenile defendant killed, intended to kill, or attempted to kill the victim. Presumably, juries moving forward will be provided this instruction when deliberating a defendant's guilt.

Subsection (a) has been met. The Commonwealth's suggestion that we remand for a sentencing jury would require this court to manufacture whole cloth a replacement enforcement mechanism for Section 9712.1 ; in other words, the Commonwealth is asking us to legislate. We recognize that in the prosecution of capital cases in Pennsylvania, there is a similar, bifurcated process where the jury first determines guilt in the trial proceeding (the guilt phase) and then weighs aggravating and mitigating factors in the sentencing proceeding (the penalty phase). However, this mechanism was created by the General Assembly and is enshrined in our statutes at 42 Pa.C.S.A. § 9711. We find that it is manifestly the province of the General Assembly to determine what new procedures must be created in order to impose mandatory minimum sentences in Pennsylvania following *Alleyne*. We cannot do so.

Com. v. Newman, 99 A. 3d 86 (Superior Court of Pennsylvania 2014).

6. Implications of the Double Jeopardy Clause should persuade this Court to not depart from *Williams*.

In *Pena*, the First Circuit rejected the prosecution's similar request to empanel a jury post-conviction. In doing so the First Circuit noted constitutional concerns and avoided them. In *Williams*, this Court addressed and relied on *Pena* as follows:

In *Pena*, a case that involved guilty pleas to drug offenses, the United States conceded an *Alleyne* error occurred that was not harmless, but requested that a "sentencing" jury be empaneled to make a factual determination as to an element that, if found beyond a reasonable doubt, would authorize an enhanced mandatory minimum sentence. *Id.* at 509, 514.¹⁴ In

declining this request, the United States Court of Appeals for the First Circuit first noted:

Decisions of the Courts of Appeals after *Alleyne* have remanded for resentencing by the court. We are not aware of any court that has been confronted with facts analogous to those here. But in at least nine circuit court cases that have found reversible *Alleyne* error, the sentence was vacated and remanded for resentencing by the district judge. We are aware of no case, and the parties have cited none, remanding for use of a sentencing jury after a reversible *Alleyne* error.

Id. at 517–18 (footnote omitted). Further, with respect to double jeopardy concerns, the First Circuit stated:

If this conviction were final, the constraint of double jeopardy would be clearer. It is also true that those double jeopardy safeguards do not usually apply to resentencing. But the effect of *Alleyne* and its predecessors is to preclude certain sentences from being imposed unless the elements supporting them have been proven to a jury beyond a reasonable doubt. The Supreme Court has not yet dealt with the double jeopardy issues in this context, much less in these transition cases where what was once thought to be a sentencing issue has been recognized instead to be an element of a crime.

....

The prosecution's proposed course of action here seeks to ... obtain the benefit of the plea's admissions to the essential elements of the two drug crimes, which are also among the essential elements ... of the aggravated “death resulting” crime. Indeed, the prosecution's brief is explicit that the sentencing jury would take the admissions of guilt from the plea for the other elements and then decide only the “death resulting” issue. Under the doctrine of constitutional avoidance, we do not

decide the double jeopardy issues associated with the government's request, but note them and avoid them.

Id. at 518–19 (citation omitted). In light of the constitutional concerns presented by the *Pena* court with respect to empaneling a jury where a harmful *Alleyne* error has occurred, we conclude that resentencing pursuant to section 775.082(1)(b) 2. is the more prudent course.

Williams, 242 So. 3d at 293.

The Double Jeopardy Clause in the Fifth Amendment to the US Constitution provides in relevant part that “No person shall... be subject for the same offense to be twice in jeopardy of life or limb....” In *Brown*, the United States Supreme Court stated the following protections under the Double Jeopardy Clause:

Under the Double Jeopardy Clause, a defendant cannot be retried for a crime that is of a higher The Double Jeopardy Clause “protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. Where successive prosecutions are at stake, the guarantee serves “a constitutional policy of finality for the defendant's benefit.” That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal and from attempts to secure additional punishment after a prior conviction and

sentence.

Brown v. Ohio, 432 U.S. 161, 165–66 (1977) (internal citations omitted).

Although no case has squarely addressed the Double Jeopardy Clause in the context of the present circumstances, Manago submits the Double Jeopardy Clause must prevent the remedy being requested by the State. Here, Manago has challenged his sentence not his conviction. Despite not challenging the conviction, the State’s requested remedy would allow Manago’s conviction to be reopened. The State would then be provided an additional opportunity to have a jury decide an element of the offense and, if found beyond a reasonable doubt, increase the severity to Manago’s conviction and sentence. Allowing this to occur would be against the “constitutional policy of finality for the defendant’s benefit” and “attempts to secure additional punishment after a prior conviction and sentence.” See also *Williams v. State*, 595 So. 2d 936, 938 (Fla. 1992) (“The double jeopardy clause prevents a new penalty phase proceeding before a new jury that could subject the defendant to an increased penalty.”)

citing *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Bullington v. Missouri*, 451 U.S. 430 (1981); and *United States v. Jorn*, 400 U.S. 470 (1971).

In essence, the State is seeking additional opportunities/dockets to increase the severity of a defendant's conviction and sentence after a defendant has been convicted by having a new jury empaneled make additional findings related to the offense.¹⁰ The State's requested remedy would not call for merely a sentencing jury, but a jury to make an additional finding related to an element of the offense. This practice cannot be permitted in Manago's case or in cases like *Green*, *Bethea*, and *Narvaes*, which citing to *Gaymon*, have approved the practice:

Because a jury did not determine whether Green actually killed or intended to kill the victim, and we conclude this violation cannot be deemed harmless, we vacate the sentence and remand for resentencing pursuant to section

¹⁰ Manago recognizes that chapter 2014-220, Laws of Florida, did not exist at the time of his trial proceedings and is being retroactively applied. Manago, however, is not sympathetic to the State's request to have an opportunity for a jury to decide whether he actually killed, intended to kill, or attempted to the kill the victim. The State had the opportunity to have the jury make findings consistent with Manago killing, intending, or attempting to kill the victim. The State could have proceeded under a premeditated theory. It did not. The State could have asked for the jury make a special finding related to Manago's use of a firearm. It did not. The State could have proceeded without alternatively relying on the principal theory. It did not.

775.082(1)(b) 2, or, if requested by the State, to empanel a jury to make the necessary factual determination. *Cf. Gaymon v. State*, 288 So. 3d 1087, 1093 (Fla. 2020) (“[T]he proper remedy for harmful error resulting from the court, not the jury, finding the fact of dangerousness under section 775.082(10) is to remand for resentencing with instructions to empanel a jury to make such a determination, if the State seeks that finding in the defendant's case.”).

Green v. State, 314 So. 3d 611, 616 (Fla. 3d DCA 2020).

Here, the jury was charged only on misdemeanor battery. It was not asked to make findings regarding bodily harm or injury of the victim or the victim's status as a “family or household member” of Appellant. Under *Alleyne*, the judge was precluded from making the domestic violence finding on her own.

Applying *Gaymon v. State*, 288 So. 3d 1087 (Fla. 2020), we remand for resentencing with instructions to empanel a jury to make the “domestic violence” determination, if the State seeks that finding in this case. If the State no longer seeks that finding, the trial court shall enter an amended judgment of conviction and probation order without the domestic violence designation.

Bethea v. State, 319 So. 3d 666, 668–69 (Fla. 4th DCA 2021), review denied, SC21-994, 2021 WL 5984422 (Fla. Dec. 17, 2021)

As in *Bethea*, the jury instruction given at appellant's trial failed to mention domestic violence in any way, and thus, appellant should not have been sentenced using that designation. *Bethea*, 319 So. 3d at 666–68. As a result, appellant is entitled to the same relief as described in *Bethea*.

We reverse and remand for the trial court to correct the sentence to misdemeanor battery or empanel a jury to determine whether appellant committed domestic battery in accordance with this opinion. *See id.* at 669. At the hearing on remand, appellant's presence is not required for resentencing if the trial court merely corrects the sentence to battery; the correction would only be ministerial as the trial court would not be giving any additional consideration to the sentence or exercising any sentencing discretion. *See Jordan v. State*, 143 So. 3d 335, 339 (Fla. 2014); *see also Lecroy v. State*, 954 So. 2d 747, 747–48 (Fla. 4th DCA 2007). However, if the State seeks the domestic violence designation, the trial court must empanel a jury to make that determination, and in that instance, the presence of appellant would be required. *See Burgess v. State*, 182 So. 3d 841, 842 (Fla. 4th DCA 2016) (holding “resentencing at which the trial judge has judicial discretion is not a ministerial act, and thus Appellant's presence” is required).

Narvaez v. State, 4D20-245, 2022 WL 790729, at *2 (Fla. 4th DCA Mar. 16, 2022).

CONCLUSION

Based upon the above, this Court should affirm the Fifth District’s finding of reversible error and the remedy as provided for in *Williams*. This Court should quash the Third District’s decision in *Green*.

DATED this 21st day of April, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email this 21st day of April, 2022 to opposing counsel at Christopher.Baum@myfloridalegal.com.

/s/ Matthew R. McLain
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure; and that it contains 12,862 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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