

SC21-1047

In the Supreme Court of Florida

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

INITIAL BRIEF ON THE MERITS

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INTRODUCTION

“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.” § 924.33, Fla. Stat. Accordingly, this Court recently held that when a defendant is sentenced under Section 775.082(1)(b)1, Fla. Stat., even though the jury did not find that he actually killed, intended to kill, or attempted to kill the victim, the courts of appeal must apply harmless-error review. *Williams v. State*, 242 So. 3d 280, 292 (Fla. 2018). Here, Respondent was sentenced under Section 775.082(1)(b)1 without such a finding, yet the Fifth District vacated his sentence without considering whether that error was harmless. The Court should therefore quash the decision below pursuant to *Williams*.

But even if the Court were to conclude that the Fifth District properly vacated Respondent’s sentence, it should quash the remedy holding in the decision below. Although in *Williams* the Court held that the remedy for a harmful *Alleyne* error should be a remand for

resentencing, 242 So. 3d at 292-93, the Court recently undermined that holding to the point of abrogation. *Gaymon v. State*, 288 So. 3d 1087, 1092 (Fla. 2020). The Court should therefore expressly recede from *Williams*' remedy holding and allow the State, if it so chooses, to empanel a jury on remand to make the required finding.

STATEMENT OF THE CASE AND FACTS

A. Legal background

In *Apprendi v. New Jersey*, the U.S. Supreme Court held that under the Sixth Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. 466, 490 (2000). In *Alleyne v. United States*, the Court “extend[ed] th[at] principle to facts increasing mandatory minimum sentences.” 570 U.S. 99, 108 (2013). Under *Alleyne*, then, any fact that increases a mandatory minimum must be found by the jury.

In *Williams v. State*, 242 So. 3d 280 (Fla. 2018), this Court addressed the effect of an *Alleyne* error on a criminal sentence

imposed under Section 775.082(1)(b). Under Section 775.082(1)(b)1, if a juvenile is convicted of murder and “actually killed, intended to kill, or attempted to kill the victim,” he is subject to a 40-year mandatory minimum and is entitled to a review of his sentence after 25 years. § 775.082(1)(b)1, Fla. Stat.; § 921.1402(2)(a), Fla. Stat. But if the juvenile “did not actually kill, intend to kill, or attempt to kill the victim,” no mandatory minimum applies, and the juvenile is entitled to review after only 15 years. § 775.082(1)(b)2; § 921.1402(2)(c). The jury in *Williams*, however, did not make the finding that supported the imposition of the 40-year mandatory minimum sentence under Section 775.082(1)(b)1 and therefore this Court held that the sentence violated *Alleyne*. 242 So. 3d at 288-89.

This Court then held that “*Alleyne* violations are subject to harmless error review.” *Id.* at 294. But in the circumstances of that case, the Court concluded that the *Alleyne* error was harmful because the record failed “to demonstrate beyond a reasonable doubt that a rational jury would have found” that the defendant “actually

killed, intended to kill, or attempted to kill” the victim. *Williams*, 242 So. 3d at 292.

The Court then concluded that the proper remedy for that harmful error was for the Court to remand for resentencing, rather than to empanel a new jury to consider whether to make the finding lacking in the jury’s verdict below. *Id.* at 292-93. Then-Justice Canady, joined by Justices Polston and Lawson, dissented from that holding, contending that the State should have an opportunity to prove to a new jury the facts needed to correct the *Alleyne* error without undergoing a full-blown resentencing proceeding. *Id.* at 294 (Canady, J., dissenting in part). As Justice Canady pointed out, refusing to allow the empaneling of a jury on remand is inconsistent with the Court’s treatment of death-penalty cases reversed because of *Hurst v. State*, 202 So.3d 40 (Fla. 2016)—itself an application of *Apprendi*. As with those cases, the State should have “an opportunity to obtain the more severe sentence available under section 775.082(1)(b).” *Id.* at 294 (Canady, J., dissenting in part).

Less than two years later, this Court adopted Justice Canady’s reasoning in a case involving another subsection of Section 775.082. In *Gaymon v. State*, the Court decided the proper remedy for a harmful *Apprendi* error (there, the absence of a jury finding on the fact of dangerousness under Section 775.082(10), Fla. Stat.). 288 So. 3d 1087, 1090-93 (Fla. 2020). Relying on Justice Canady’s partial dissent, the Court held that “[r]emanding for resentencing” under the provision not requiring a jury finding of dangerousness would “be inconsistent with the approach we have taken in the death penalty context.” *Id.* at 1092. After all, the “Sixth Amendment violation” in *Gaymon* was “sufficiently similar to the capital sentencing errors to which *Hurst* applies since both ‘involve failing to present an issue to the jury that must be decided by the jury.’” *Id.*

To date, the Court has not harmonized its divergent approaches in *Williams* and *Gaymon*.

B. Facts and procedural history

1. When he was seventeen years old, Respondent Herbert Leon Manago, Jr. and three friends carjacked a vehicle and killed the

driver. App'x 5. The State presented evidence that: Respondent was the only codefendant who had a gun, R.477, 483, 641, 746; he aimed the gun at the driver and forced him into a codefendant's vehicle, R.634, 635, 644, 664, 666, 742, 744-45; after the victim began to choke a codefendant, Respondent got in the backseat and tussled with the victim, after which there was a gunshot, R.748, 789-790; when Respondent met up with two of the codefendants ten to fifteen minutes later, he stated "Man, I shot that n-----, man," because the victim had a chokehold on his codefendant, R.750, 751, 752; and he hid the gun under some bricks, R.753-54. The State also presented evidence that: Respondent's mother picked up Respondent and two of his codefendants and took them back to Tampa, and Respondent told his codefendant that he told his mother "Mom, I shot a n-----, come get me," R.755-56, 759, 795-96; Respondent stated that because he hid the gun, there was no case, R.758-59; and Respondent's codefendant's mother heard Respondent say that he hid the gun and that because the victim was tussling with his

codefendant, Respondent shot him but didn't mean to kill him, R.874, 875.¹

The State also argued “the principal theory” of first-degree felony murder in the alternative. App'x 5. The jury convicted Respondent of carjacking and first-degree felony murder, but the verdict did not specify whether he was the shooter or which theory the jury convicted him upon. App'x 5. The circuit court sentenced him to mandatory life without parole. App'x 4.

2. After the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that the Eighth Amendment forbids the imposition of mandatory life-without-parole sentences for juvenile homicide offenders), Respondent argued that his mandatory

¹ In one of Respondent's codefendants' appeals, the Fifth District recognized that the evidence supports that Respondent was the shooter. Ronald Brown appealed his conviction for manslaughter with a firearm, and the Fifth District affirmed because it concluded that “Brown was aware that [Respondent] had a gun and would use the gun” to carjack the vehicle. *Brown v. State*, 966 So. 2d 989, 991 (Fla. 5th DCA 2007). The evidence, the court stated, supported Brown's conviction because it showed that he “facilitated [Respondent]'s efforts to remove,” and “fatally sho[o]t,” the driver.” *See id.* at 990-91.

life sentence was unlawful, and he sought resentencing under Section 775.082(1)(b)2. App'x 5. The trial court granted his request for resentencing, but sentenced him under Section 775.082(1)(b)1. Acknowledging that Section 775.082(1)(b)1 requires a finding that the juvenile actually killed, intended to kill, or attempted to kill the victim, the court "noted that . . . there was an inadequate jury finding to sentence [Respondent] under (b)1." App'x 7. But it concluded that a sentence under Section 775.082(1)(b)1 was nevertheless proper because "the record demonstrate[s] beyond a reasonable doubt that a rational jury would have found that [Respondent] actually killed the victim." App'x 7. The court then considered "the factors set out in [S]ection 921.1401" and imposed "a sentence of life imprisonment" for Respondent's first-degree murder conviction and "a concurrent term of thirty years in prison for" his carjacking conviction. App'x 7.

Respondent appealed, and the Fifth District vacated the sentence. First, the Fifth District held that the trial "court erred in conducting a harmless error analysis to excuse its own concurrent . . . violation" of *Alleyne*. App'x 8. Next, without

conducting its own harmless error analysis, the court considered the proper remedy. It observed that in the “similar case” of *Green v. State*, 314 So. 3d 611 (Fla. 3d DCA 2020), the Third District had relied on *Gaymon* and remanded “for resentencing pursuant to [S]ection 775.082(1)(b)2., or, if requested by the State, to empanel a jury to make the necessary factual determinations.” App’x 8 (quotations omitted). But the Fifth District declined to provide the State that opportunity here because, in its view, *Williams*—not *Gaymon*—is binding as to the proper remedy, and *Williams* requires “resentencing pursuant to [S]ection 775.082(1)(b)2. as the sole remedy.” App’x 8. As a result, the court remanded for resentencing under Section 775.082(1)(b)2 and certified conflict with *Green*.

The State moved for rehearing, arguing that the district court erred in failing to consider itself whether the *Alleyne* violation was harmless, as *Williams* requires. See App’x 10-11. In other words, the State argued, the Fifth District did not consider whether a rational jury would have found that Respondent actually killed the victim. Mot. for Reh’g, *Manago v. State*, No. 5D20-632, at *2-3 (Fla. 5th DCA

Feb. 18, 2021). The court denied rehearing, however, concluding that it is improper for the district court to perform harmless-error analysis regarding an *Alleyne* error when the trial court did so in the first instance. App'x 11. And although the Third District had conducted a harmless error analysis in similar circumstances, the Fifth District held that the *Green* court's "harmless error analysis . . . was neither required nor authorized." App'x 11.

The State invoked this Court's discretionary jurisdiction, and on October 12, 2021, the Court accepted jurisdiction.

SUMMARY OF ARGUMENT

I. The Fifth District erred in vacating Respondent's sentence without first considering whether the *Alleyne* error was harmless. That holding is contrary to this Court's decision in *Williams*, which held that such errors are indeed subject to harmless-error review. Instead of conducting that review, the Fifth District vacated Respondent's sentence simply because the trial court conducted its own analysis of whether any rational jury would likewise have made the finding. But whether or not the trial court's reasoning was

correct, the Fifth District was required to consider whether the *Alleyne* error here was harmless. The district court thus erred in vacating Respondent's sentence based solely on this perceived flaw in the trial court's opinion.

II. Even if the Court approves the Fifth District's holding that Respondent's sentence should be vacated, the Court should allow the State the choice of empaneling a jury on remand to make the requisite finding. The Court should recede from *Williams* to the extent it precludes such a result. This Court's subsequent decision in *Gaymon* has undermined it on that issue and stare decisis does not counsel in favor of adhering to *Williams*. Moreover, the Double Jeopardy Clause does not preclude empaneling a jury on remand.

ARGUMENT

I. UNDER *WILLIAMS*, THE FIFTH DISTRICT WAS REQUIRED TO CONSIDER WHETHER THE TRIAL COURT'S *ALLEYNE* ERROR WAS HARMLESS.

In *Williams v. State*, this Court considered whether *Alleyne* errors are subject to harmless-error review. 242 So. 3d 280, 289-90 (Fla. 2018). The Court answered that question in the affirmative: "*Alleyne* violations are subject to harmless error review." *Id.* at 294.

In fact, the Court reached that conclusion regarding an *Alleyne* error pertaining to the same statutory provision at issue here, Section 775.082(1)(b). The Court held that “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.” *Id.* at 290. “[S]tated differently,” courts must consider “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.*

Here, the Fifth District at first appeared to recognize that *Williams* requires district courts to consider whether an *Alleyne* violation constitutes harmless error. App’x 6. It also appeared to recognize that “harmless error is the standard that is applicable in the reviewing court,” i.e., the district court. App’x 7. Yet because in the Fifth District’s view the *trial court* had erred in conducting its own

analysis of whether the jury's failure² to make the finding required by *Alleyne* was harmful, the Fifth District refused to consider harmless error. That itself was error.

Under *Apprendi*, if a judge rather than a jury finds a fact that would enhance a defendant's sentence, and then sentences the defendant to the enhanced sentence, that is error—but it is subject to harmless-error review. *Williams*, 242 So. 3d at 294. Here, the Fifth District reversed because it concluded that “the resentencing court engaged in the type of fact-finding specifically forbidden by both *Alleyne* and *Williams*”: it “concluded that the record demonstrated beyond a reasonable doubt that a rational jury would have found that [Respondent] actually killed the victim.” App'x 7. In other words, the Fifth District concluded that because the trial court, not a jury, found the enhancing fact, Respondent's sentence was per se reversible. Yet under *Williams*, when a trial court rather than a jury finds the

² When Respondent was first sentenced, the jury was not required to make the Section 775.082(1)(b)1 finding.

enhancing fact, appellate courts must subject the *Alleyne* error to harmless-error review.

The Fifth District had no power to reverse the sentence without first finding that the error was harmful. The Legislature has said that “[n]o 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.” § 924.33, Fla. Stat.; *see also State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986) (“The authority of the legislature to enact harmless error statutes is unquestioned.”). By definition, a harmless error does not “injuriously affec[t]” the defendant’s “substantial rights.” The Fifth District was therefore bound to consider whether the *Alleyne* violation in fact prejudiced Respondent in the imposition of his sentence before reversing it. Moreover, the Fifth District erred in reversing simply because it disagreed with the trial court’s reasoning. The district courts of appeals review judgments of trial courts, not just their reasoning. *See Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (“It is elementary that

the theories or reasons assigned by the lower court as its basis for the order or judgment appealed from, although sometimes helpful, are not in any way controlling on appeal and the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor.”).

As a result, this Court should reverse and remand for the Fifth District to conduct harmless-error review of the *Alleyne* error.

II. ALTERNATIVELY, THE APPROPRIATE REMEDY FOR A HARMFUL *ALLEYNE* ERROR IS TO REMAND FOR A JURY TO MAKE THE REQUISITE FINDING IF THE STATE CHOOSES TO PURSUE THE ENHANCED SENTENCE.

If the Court finds no error in the Fifth District’s refusal to weigh the harm of the *Alleyne* error, the Court should still quash the decision below because it erroneously concluded that the only remedy for an *Alleyne* violation is resentencing under Section 775.082(1)(b)2.³ The proper remedy for an *Alleyne* error is to remand

³ Should the Court quash the Fifth District’s decision based on Issue I, it may nevertheless wish to clarify the correct remedy for an *Alleyne* violation. That remedy question is recurring and important. In *Puzio v. State*, the Court declined to decide this issue “for a couple

to correct Respondent’s sentence *or* to allow the State, if it chooses, to empanel a jury to make the Section 775.082(1)(b)1 finding that the prior jury did not make. Although *Williams* foreclosed the option of empaneling a jury, that holding was erroneous, and this Court’s subsequent decision in *Gaymon v. State*, 288 So. 3d 1087 (Fla. 2020), has undermined *Williams* to the point of abrogation.⁴

As this Court explained in *Gaymon*, this Court has recognized that an *Apprendi* error, which involves a required finding that a jury

of reasons.” 320 So. 3d 684, 688 (Fla. 2021). First, Puzio’s case had “unique facts” that made it “a less-than-ideal vehicle”; unlike *Puzio*, this case does not contain such unique facts that would complicate any double-jeopardy analysis. *Id.* Second, the Court noted that “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.” *Id.* Here, however, the potential double jeopardy implications are discussed below. More recently, the Court dismissed the State’s petition for review in *State v. O’Neal*, which also squarely presented this question. No. SC20-1023, 2021 WL 4453462, at *1 (Fla. Sept. 29, 2021). And resolving the remedy question here would serve the interests of judicial economy if, on remand, the Fifth District were to find that the *Alleyne* error was harmful, triggering the need to impose the correct remedy.

⁴ Notably, this Court reached the remedy holding in *Williams* without “the benefit of briefing on th[e] issue” in *Williams*. 242 So. 3d at 294 (Canady, J., dissenting).

failed to make, may be corrected by empaneling a new jury to make that finding. See 288 So. 3d at 1092. That reasoning fully applies to *Alleyne* errors too, which are also Sixth Amendment errors that flow from the jury's failure to find facts required by *Apprendi*. "Because *Alleyne* derives from *Apprendi*," the Court in *Williams* explained, the remedy for *Apprendi/Alleyne* errors should be the same as for *Apprendi/Blakely*⁵ errors. *Williams*, 242 So. 3d at 292-93. Each of these violations, in other words, is a species of Sixth Amendment error that results when a judge, rather than a jury, finds a fact that increases the potential punishment for the crime.

Nor does the fact that *Gaymon* involved a different statutory provision suggest that the remedy here should be different. On the contrary, the reasons for allowing a remand for a jury here are the same as those recounted in *Gaymon*. It would be "consistent with how [the Court has] treated *Hurst* resentencing proceedings, [would]

⁵ *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that *Apprendi* applies to any fact that increases a mandatory sentencing guideline).

protec[t] the due process rights of defendants, [and would] compl[y] with the de novo nature of sentencing proceedings.” *Gaymon*, 288 So. 3d at 1092. Indeed, it “is the least intrusive remedy to both safeguard defendants’ Sixth Amendment rights and effectuate the Legislature’s clear purpose in enacting subsection [(1)].” *Id.* at 1093. And the fact that cases involving the dangerousness finding under Section 775.082(10) necessarily require bifurcated proceedings does not suggest that separate juries in a case like this are fundamentally inappropriate absent some other limit on empaneling a jury on remand.

Nor can *Williams* be sustained on this point because of “double jeopardy concerns.” 242 So. 3d at 293. This Court has elsewhere observed that “double jeopardy is not implicated in the context of a resentencing following an appeal of a sentencing issue.” *Trotter v. State*, 825 So. 2d 362 (Fla. 2002) (citing *Harris v. State*, 645 So. 2d 386, 388 (Fla. 1994)). That is because “a sentence does not have the qualities of constitutional finality that attend an acquittal.” *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980). Respondent “has no

expectation of finality in his sentence until th[is] appeal is concluded.” *Id.* at 136; *see Harris*, 645 So. 2d at 388. The Double Jeopardy Clause consists of three separate protections: “It 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.” *Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994) (emphasis omitted). None of those three protections is implicated in a resentencing proceeding.

A commonsense analogy underscores the point. When this Court finds that a jury charge improperly omitted an element of the offense, it remands for a new trial with a proper set of jury instructions; it does not prevent the State from empaneling a new jury. *See Ramroop v. State*, 214 So. 3d 657, 667-68 (Fla. 2017). That traditional remedy hardly offends double jeopardy. And just like in that setting, an *Alleyne* violation results when the jury is initially not tasked with finding an element of the offense—here, that the defendant actually killed, intended to kill, or attempted to kill the

victim. In short, the Double Jeopardy Clause does not preclude the empaneling of a jury on remand here.

That the required finding relates to Respondent's offense and how he conducted it does not present any Double Jeopardy concerns either. This Court routinely allows the empaneling of juries to consider and make findings about how a convicted defendant committed an offense in the *Hurst* context by making findings on aggravators and mitigators relating to the offense conduct. See *Gaymon*, 288 So. 3d at 1092 (explaining that the Court has “summarily rejected as ‘without merit’ claims based ‘on double jeopardy and due process grounds’ that the State ‘is precluded from seeking the death penalty’ in *Hurst* resentencing proceedings”). Even the case on which *Williams* relied “d[id] not decide the double jeopardy issues associated with the government’s request, but note[d] them and avoid[ed] them.” 242 So. 3d at 293 (quoting *United States v. Pena*, 742 F.3d 508, 518 (1st Cir. 2014)).

Stare decisis does not warrant adherence to *Williams*. *Gaymon* undermined *Williams* to the point of abrogation on this issue. See *In*

re Lambrix, 776 F.3d 789, 794 (11th Cir. 2015) (stating that a decision is not binding if it has been “undermined to the point of abrogation”). And *Gaymon* effectively adopted Chief Justice Canady’s dissent in *Williams*, thus recognizing that the decision is erroneous. No reliance interests, moreover, justify standing by *Williams*—it is a four-year-old decision, addressing a narrow criminal-procedure issue. See *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020) (“[R]eliance interests are lowest in cases . . . involving procedural and evidentiary rules.” (quotations omitted)). Adhering to *Williams* would also entrench an anomaly in this Court’s jurisprudence and detract from the stability and predictability of the law. Lower courts would have inconsistent guidance on how *Alleyne* errors involving other statutes should be remedied. See *Golphin v. State*, 945 So. 2d 1174, 1199 n.17 (Fla. 2006) (Pariante, J., concurring) (stare decisis must yield when a decision “has become an impediment to clarity and predictability in this state’s . . . jurisprudence”). To clarify its precedent, the Court should expressly recede from the remedy holding in *Williams*.

CONCLUSION

For the foregoing reasons, the Court should quash the Fifth District's opinion and remand for the Fifth District to consider whether the trial court's *Alleyne* error was harmless. The Court should also expressly recede from *Williams* to the extent it precludes the State from empaneling a jury on remand to make a Section 775.082(1)(b)1 finding, if necessary.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished via the E-Filing Portal on this 17th day of February, 2022, on all parties required to be served.

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CERTIFICATE OF COMPLIANCE

I 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 3,626 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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