IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC21-1047

THE STATE OF FLORIDA,

Petitioner,

v.

HERBERT LEON MANAGO, JR.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

For purposes of this jurisdictional proceeding, Herbert Leon Manago, Jr. (Manago) accepts the State's Statement of the Case and Facts with exception to the second and final paragraph.

In the second paragraph, the State cites to *Brown v. State*, 966 So. 2d 989, 991 (Fla. 5th DCA 2007) for the proposition that "the Fifth District Court of Appeal recognized that the evidence supports that Respondent was the shooter." The decision in *Brown* is not relevant. Manago was not a party to this appeal or trial proceeding.

In the final paragraph, the State provides a synopsis of the Fifth District's order denying rehearing. Manago believes that this synopsis is incomplete/not accurate because it fails to recognize that the Fifth District reversed because "the resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation." For sake of clarity, Manago provides and emphasizes the relevant portion of the Fifth District's 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 section 775.082(1)(b)2., Florida Statutes (2014), because the jury had not been called upon to make the requisite factual findings.[1]
>
> 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.**

(Appx. at 8-9) (emphasis added).

SUMMARY OF THE ARGUMENT

The Fifth District reversed because the resentencing court conducted a harmless error analysis meant for reviewing courts to excuse its own concurrent *Alleyne* violation. Neither this Court's

[1] This is not a "pipeline case" in which resentencing occurred prior to the release of the Florida Supreme Court's decision in Williams.

decision in *Williams* nor the Third District's decision in *Green* was decided on this same question of law nor is in conflict. This Court should deny the State's request for discretionary review of the error on the basis of an express and direct conflict.

The State never sought nor advanced at the trial or district court level an argument to empanel a jury to make the necessary finding to enhance Manago's sentence pursuant to section 775.082(1)(b)1, Fla. Stat. In fact, when asked at oral argument by the Fifth District, the State expressed that it doubted it would empanel a jury 15 years later. The State has not even sought a stay of the Fifth District's mandate. The State cannot use this appellate proceeding as a method to simply obtain the answer to a legal question not previously raised nor applicable. This Court should decline to exercise jurisdiction on the conflict certified by the Fifth District because this is not the right case to resolve the issue.

ARGUMENT

The State of Florida seeks discretionary review with this Court pursuant to Article V, Section 3(b)(3) of the Florida Constitution. *See also* Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court

of appeal decision if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986), this Court explained, "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Id.* at 830, n.3. Tests used by this Court are (1) whether the decisions are irreconcilable, *Aravena v. Miami–Dade County*, 928 So. 2d 1163 (Fla. 2006), and (2) whether there has been a misapplication of a decision, *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

I. THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL FINDING THAT THE TRIAL COURT ERRED BY CONDUCTING A HARMLESS ERROR ANALYSIS MEANT FOR REVIEWING COURTS TO EXCUSE ITS OWN CONCURRENT *ALLEYNE* VIOLATION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT OR DISTRICT COURT OF APPEAL.

In its brief on jurisdiction, the State first asserts that the Fifth District's decision on the error is in direct and express conflict with decisions of this Court and the Third District on the same question of law: "whether a district court can forgo examining whether a rational jury would have found that the defendant actually killed

the victim because the circuit court itself performed that review." The cases cited by the State are *Williams v. State*, 242 So. 3d 280 (Fla. 2018) and *Green v. State*, 314 So. 3d 611 (Fla. 3d DCA 2020). The State is mistaken.

"The issue, and thus the error, presented to" the Fifth District in the instant case "was whether the resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne*[2] violation." (Appx. at 8).

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.

(Appx. at 8-9). Since *Williams* does not address the same question of law and is not inconsistent, the Fifth District's decision is not in express and direct conflict.

In *Green*, the appellant argued only that the State could not prove the *Alleyene* error to be harmless "because there were no

[2] *Alleyne v. United States*, 570 U.S. 99 (2013)

eyewitnesses, no forensic evidence linking Green to the crime, Laurenvil testified that Green said he did not intend to kill the victim, and Green himself consistently denied killing the victim in statements to the police and at trial." *Green*, 314 So. 3d at 615. The Third District addressed the issue presented and reversed because if found the error to not be harmless. While the Third District's holding did not turn on the question of law as raised in this case by Manago, the Third District "emphasize[d] that harmless error is the standard is applicable in the *reviewing court*, it is not the standard employed by the trial court during resentencing." *Id.* at 615.[3] Because *Green* was not decided on the same question of law and consistently found that harmless error analysis to be applicable in the reviewing court, the Fifth District's decision is not in express and direct conflict.

This Court should deny the State's request for discretionary review.

[3] Because it emphasized this point *sua sponte*, the Third District's decision may have very well have mirrored the Fifth District had the issue been raised.

II. THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION ON THE CERTIFIED CONFLICT CONCERNING AVAILABLE REMEDIES BECAUSE THIS IS NOT THE RIGHT CASE TO RESOLVE THE ISSUE.

The State next seeks discretionary review for the conflict certified by the Fifth District regarding available remedies. The State is seeking to expand *Williams* to afford it the opportunity to empanel a jury on resentencing to make the finding required to enhance Manago's sentence pursuant to section 775.082(1)(b)1, Fla. Stat. Manago submits that this Court should exercise its discretion and deny the State's request because, like *Puzio v. State*, 46 Fla. L Weekly S197 (Fla. June 24, 2021), this is not the right case to resolve the issue.

In *Puzio*, the State similarly asked this Court to expand *Williams* to afford it the opportunity to empanel a jury. This Court declined to decide the issue for multiple reasons, including most "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." *Id.* at *4.

Here, 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. The State has not even sought a stay of the Fifth District's mandate.

In light of the State not seeking or advancing an argument to empanel a jury at the trial or district court level, Manago submits that the State is attempting to use his 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).

This Court should exercise its discretion and deny the State's request to review the conflict certified by the Fifth District.

CONCLUSION

Based on the argument and authorities presented herein, Manago respectfully requests that this Honorable Court decline to accept jurisdiction in this case.

DATED this 2nd day of August, 2021.

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 2nd day of August, 2021 to the Attorney General's Office in the State of Florida at crimappdba@myfloridalegal.com and the Office of the Solicitor General at kevin.golembiewski@myfloridalegal.com.

/s/ Matthew R. McLain

Matthew R. McLain, Esquire

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.045(e) that the Initial Brief of Appellant complies with the type size and typeface requirement because this document has been prepared in a proportionally spaced typeface using Bookman Old Style 14-point font size. Undersigned counsel also certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Jurisdiction Brief complies with word count limit because this document contains 2,229 words.

/s/ *Matthew R. McLain*

Matthew R. McLain, Esquire