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SC21-____

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
DCA No. 5D20-632

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

1. Harmless-error review applies when a circuit court sentences a defendant under Section 775.082(1)(b)1. in violation of *Alleyne*. *Williams v. State*, 242 So. 3d 280, 290 (Fla. 2018). The district court must ask "whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the [defendant] actually killed . . . the victim." *Id.* If so, the sentence should be affirmed.

The first question presented is whether the district court erred in vacating Respondent's Section 775.082(1)(b)1. sentence without performing that review.

2. In *Williams*, this Court held that in the context of Section 775.082(1)(b)1., the proper remedy for a harmful *Alleyne* violation is resentencing under Section 775.082(1)(b)2., which does not require the actually-killed jury finding. Later, in *Gaymon v. State*, 288 So. 3d 1087 (Fla. 2020), the Court addressed the proper remedy for a similar Sixth Amendment violation, adopted Chief Justice Canady's dissent in *Williams*, and held that the State should have an opportunity on remand to empanel a jury to make the necessary finding.

The second question is whether this Court should recede in part from *Williams* and adopt *Gaymon*'s remedy.

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STATEMENT OF THE CASE AND FACTS

In 2004, when Respondent Herbert Leon Manago, Jr., was 17 years old, he and three friends carjacked a vehicle and killed the driver. App'x 2. At trial, the State asserted that Respondent was the shooter, while arguing "the principal theory" in the alternative. *Id.* The jury convicted Respondent of carjacking and first-degree murder, but the verdict did not specify whether he was the shooter. *Id.* The court sentenced him to mandatory life without parole. *Id.* at 1.

Later, the Fifth District Court of Appeal recognized that the evidence supports that Respondent was the shooter. Ronald Brown, one of Respondent's co-defendants, 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 Fifth District 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.

After the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), Respondent requested resentencing,

arguing that his mandatory life sentence was unlawful because he committed his offenses as a juvenile. App'x 2. He sought a sentence under Section 775.082(1)(b)2., Florida Statutes, which applies to juvenile offenders who "did not actually kill, intend to kill, or attempt to kill the victim." § 775.082(1)(b)2., Fla. Stat.

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 but may seek review of his sentence after 25 years. *Id.* § 775.082(1)(b)1.; *id.* § 921.1402(2)(a). But if the juvenile "did not actually kill, intend to kill, or attempt to kill the victim," no mandatory minimum applies and he may seek review after only 15 years. *Id.* § 775.082(1)(b)2.; *id.* § 921.1402(2)(c).

The circuit court granted Respondent's request for resentencing but sentenced him under Section 775.082(1)(b)1. Though the court "noted that . . . there was an inadequate jury finding to sentence [Respondent] under (b)1.," it ruled that a (b)1. sentence was 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 4. 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. *Id.*

On appeal, the Fifth District vacated the sentence. It first held that the circuit "court erred in conducting a harmless error analysis to excuse its own concurrent . . . violation" of *Alleyne v. United States*, 570 U.S. 99 (2013). App'x 5. Then, it 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 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 5 (quotations omitted). But the Fifth District declined to provide the State that opportunity because, in its view, *Williams*—not *Gaymon*—is binding as to the proper remedy, and it requires "resentencing pursuant to [S]ection 775.082(1)(b)2. as the sole remedy." *Id.*

The Fifth District therefore remanded for resentencing under Section 775.082(1)(b)2. and "certif[ied] that [its] decision regarding

available remedies . . . expressly and directly conflicts with" *Green* "on the same question of law." *Id.*

The State moved for rehearing, arguing that the Fifth District "overlooked or misapprehended" this Court's holding in *Williams* on harmless-error review because the Fifth District "conducted no harmless error analysis" of its own, failing to consider whether a rational jury would have found that Respondent actually killed the victim. Mot. for Reh'g 2–3, *Manago*, No. 5D20-632 (Fla. 5th DCA Feb. 18, 2021). Regardless whether the circuit court performed that analysis, the State asserted, "[o]nce [Respondent] appealed, it was then for [the Fifth District] to determine if the *Alleyne* error was harmless pursuant to *Williams*." *Id.* at 4. Indeed, "in *Green*," the Third District performed that analysis after the circuit court had done so during resentencing. *See id.* at 5–6. There too the circuit court reasoned that a (b)1. sentence was appropriate because a rational jury would have found that the defendant actually killed the victim. *See id.*; *Green*, 314 So. 3d at 614.

The Fifth District denied rehearing. App'x 9. In a written opinion explaining its decision, it stated that, when a circuit court considers

whether a rational jury would have found that the defendant actually killed the victim, it is improper for the district court to perform that analysis. *Id.* at 7–8. Instead, the district court must vacate the defendant's sentence and remand for resentencing under Section 775.082(1)(b)2. *See id.* at 6, 8. "The Third District's harmless error analysis in *Green*," the Fifth District held, "was neither required nor authorized." *Id.* at 8.

The State now seeks review of the Fifth District's decision.

ARGUMENT

I. THIS COURT HAS JURISDICTION FOR TWO INDEPENDENT REASONS.

A. The decision below expressly and directly conflicts with decisions of this Court and another district on the harmless-error question.

This Court has discretionary jurisdiction because the decision below "expressly and directly conflicts with" *Green* and *Williams* "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. *See* Art. V, § 3(b)(3), Fla. Const.

In *Green*, the defendant was resentenced under Section 775.082(1)(b) after being convicted of first-degree murder as a

juvenile. 314 So. 3d at 613. Although "there was no jury finding that he actually killed . . . the victim," the circuit court imposed a sentence under Section 775.082(1)(b)1. *Id.* at 614. It concluded that a rational jury would have made the finding, so even though a sentence under Section 775.082(1)(b)1. violated *Alleyne*, the violation was harmless. *See id.*

The Third District vacated and remanded. *Id.* at 616. It began its analysis by recognizing that under *Williams*, a district court considering an *Alleyne* violation must assess "whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the juvenile offender actually killed . . . the victim." *Id.* at 614 (quotations omitted). Then, after noting that the circuit court should not have conducted such review, the Third District performed its own review, determined that the *Alleyne* violation could not "be deemed harmless," and vacated and remanded for resentencing. *Id.* at 614–16.

In the decision below, the Fifth District expressly repudiated the Third District's conclusion that it must perform harmless-error review, stating that "the Third District's harmless-error analysis . . .

was neither required nor authorized." App'x 8. In the Fifth District's view, when a circuit court considers whether a rational jury would have found that the defendant actually killed the victim, the district court must vacate the defendant's sentence without performing that review and remand for resentencing under Section 775.082(1)(b)2. *See id.* at 6–8.

That holding conflicts with not only *Green* but also *Williams*, under which district courts must perform "harmless error review" before vacating a (b)1. sentence based on *Alleyne*. *See Williams*, 242 So. 3d at 290–91. In *Williams*, this Court concluded that "an *Alleyne* violation occurred" but that such violations "can be harmless" so the defendant was not entitled to automatic reversal. *Id.* at 289. Instead, the Court held that the violation was subject to harmless-error review, with "the applicable question" being "whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the [defendant] actually killed" the victim. *Id.* at 290.

This Court therefore has jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution. The Fifth District's "announcement of a conflicting rule of law" triggers the Court's

express-and-direct-conflict jurisdiction. *See Kartsonis v. State*, ___ So. 3d ___, 2021 WL 2371734, at *1 (Fla. June 10, 2021).

B. The district court certified a direct conflict on the remedy question.

This Court also has discretionary jurisdiction under Article V, Section 3(b)(4) because the Fifth District certified the decision below to be in direct conflict with *Green* on whether "the option of empaneling a new jury to make the requisite findings" is a proper remedy for a harmful *Alleyne* violation. App'x 5. In *Green*, the Third District applied this Court's decision in *Gaymon* and held that the proper remedy for a harmful *Alleyne* violation is "remand 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 determination." *Green*, 314 So. 3d at 616. But in the decision below, the Fifth District held that it is "compelled to follow *Williams*" and therefore cannot "include the option of empaneling a jury to make the requisite factual findings on remand." App'x 5.

II. THIS COURT SHOULD GRANT REVIEW.

For two reasons, this Court should exercise its discretion and grant review on both questions presented.

First, both are recurring questions, with each arising in multiple district courts in the past year alone. *See id.* at 5, 8 (presenting both questions); *Green*, 314 So. 3d at 616 (same); *Romero v. State*, 315 So. 3d 1245, 1252 (Fla. 1st DCA 2021) (presenting remedy question); *O'Neal v. State*, 298 So. 3d 77, 83 (Fla. 4th DCA 2020) (same). Indeed, one of the questions—the remedy question—not only was presented in a case that this Court recently decided but also is presented in a case that is pending before the Court. *See Puzio v. State*, ___ So. 3d ___, 2021 WL 2583946, at *4 (Fla. June 24, 2021) (noting that the issue has yet to be decided but declining to consider it because of vehicle problems); Init. Br. 17, *State v. O'Neal*, No. SC20-1023 (Fla. Apr. 14, 2021) (raising the issue).

Second, the decision below got both questions wrong. As to the harmless-error question, the decision conflicts with *Williams*, under which *Alleyne* violations are subject to harmless-error review and district courts must uphold a Section 775.082(1)(b)1. sentence if an *Alleyne* violation is harmless beyond a reasonable doubt. A district court cannot, as the Fifth District did here, disturb a defendant's sentence without first determining whether "the record demonstrates

beyond a reasonable doubt that a rational jury would have found the [defendant] actually killed . . . the victim." *Williams*, 242 So. 3d at 290.

The Fifth District likewise erred in denying the State an opportunity to empanel a jury on remand; under this Court's ruling in *Gaymon*, the State is entitled to that opportunity. In *Williams*, this Court concluded that the proper remedy is resentencing under Section 775.082(1)(b)2. *See* 242 So. 3d at 292–93. But *Gaymon* retreated from that holding, citing Chief Justice Canady's dissent in *Williams* and concluding that when a sentence under Section 775.082(10) violates the Sixth Amendment because it lacks a necessary jury finding, the State should receive an opportunity on remand to empanel a jury to make the finding. *Gaymon*, 288 So. 3d at 1091–92.

That is the proper remedy here. Both here and in *Gaymon*, the Sixth Amendment precluded an enhanced sentence because a particular jury finding was absent. And the reasons for allowing a remand for a jury here are the same as those recounted in *Gaymon*: it is "consistent with how [the Court has] treated *Hurst* resentencing

proceedings"; it "protects the due process rights of defendants"; and it "complies with the de novo nature of sentencing proceedings." *See* 288 So. 3d at 1093.

Nor are "double-jeopardy concerns" a basis for distinguishing *Gaymon* from this case. *See Puzio*, 2021 WL 2583946, at *4 (noting "the double-jeopardy concerns that caused" *Williams* to forgo "the possibility of empaneling a jury"). The "proscription against double jeopardy" protects defendants from (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *State v. Akins*, 69 So. 3d 261, 269 (Fla. 2015). None of those circumstances is implicated here. A resentencing proceeding is not a second prosecution, nor does it result in multiple punishments for the same offense. *See Trotter v. State*, 825 So. 2d 362, 365 (Fla. 2002) ("[D]ouble jeopardy is not implicated in the context of a resentencing following an appeal of a sentencing issue.").

Double jeopardy is not implicated merely because the jury at Respondent's resentencing would be charged with making a finding—the actually-killed finding—that relates to offense conduct. *See*

Williams, 242 So. 3d at 293 (expressing concerns about a new jury making such a finding). In addressing other *Apprendi*-derived violations, *see id.* at 292 ("*Alleyne* derives from *Apprendi.*"), this Court has consistently held that it is proper for a new jury to make findings related to offense conduct on remand. For example, the Court allows the empaneling of a jury in *Hurst* resentencing proceedings to make findings about how the defendant committed his offense. *See Gaymon*, 288 So. 3d at 1092 (explaining that the Court has "rejected as without merit claims based on double jeopardy . . . that the State is precluded from seeking the death penalty in *Hurst* resentencing proceedings" (quotations omitted)). And when a defendant's jury is not instructed on a finding that is necessary to convict him, but he is nevertheless convicted, the Court remands for a new trial, allowing a new jury to make the finding. *See Ramroop v. State*, 214 So. 3d 657, 665 (Fla. 2017).

In short, as to both questions presented, the decision below is incorrect, and this Court's review is necessary to ensure uniformity in the case law.

CONCLUSION

This Court should grant review.

Dated: July 15, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font and contains 2,313 words, in compliance with Florida Rule of Appellate Procedure 9.045(e).

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this **fifteenth** day of July 2021 to:

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