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

REPLY BRIEF

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INTRODUCTION

Respondent does not engage with *Williams*' holding that district courts must apply harmless-error review on appeal when a defendant is sentenced under Section 775.082(1)(b)1. without the requisite jury finding. Though at times Respondent acknowledges that the trial court's ultimate error was sentencing him without that finding, elsewhere he attempts to recast the "issue" as whether the trial court's reasoning—that the trial court could consider the harmlessness of its own *Alleyne* error—was incorrect. But appellate courts review judgments, not lower court reasoning. Thus, whether or not the trial court thought it could sentence Respondent under Section 775.082(1)(b)1., the question for the Fifth District in reviewing Respondent's sentence was whether the absence of the jury finding constituted harmless error. The Fifth District erroneously vacated Respondent's sentence without considering that question.

Alternatively, the Court should clarify that the appropriate remedy for a harmful *Alleyne* error is to remand for resentencing or for the State to empanel a jury to make the requisite finding if it so desires. Despite Respondent's arguments, this is an appropriate case

in which to decide the issue; *Gaymon* makes clear that *Williams* should be overruled; stare decisis does not counsel against it; and the Double Jeopardy Clause would not be implicated by 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.

Respondent acknowledges that the trial court's "error" was "resentencing [him] pursuant to section 775.082(1)(b)1" without a jury finding that he killed, intended to kill, or attempted to kill the victim. *See*, *e.g.*, Ans. Br. 15. He does not dispute that an "*Alleyne* error" (*id.* at 24) of that sort is subject to harmless-error review. Indeed, that was precisely the holding of *Williams v. State*, where this Court explained that the applicable inquiry is "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." 242 So. 3d 280, 290 (Fla. 2013).

Because the trial court committed an *Alleyne* error by sentencing Respondent under Section 775.082(1)(b)1. without the

requisite jury finding, *Williams* required the district court to ask whether that error was harmful. It failed to do so.

Respondent nevertheless seeks to evade *Williams*'s holding by recasting the "'issue, and thus the error, presented' on appeal," as "'whether the resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation.'" Ans. Br. 18 (quoting *Manago v. State*, 317 So. 3d 1192, 1195 (Fla. 5th DCA 2021)). But an appellate court does not review the lower court's *reasoning*; it reviews the *judgment*. Philip J. Padovano, 2 Fla. Prac., Appellate Practice § 20:2 (Mar. 2022 update) ("The task of the appellate court is to determine whether the order is correct, not whether the underlying rationale is correct."). As a result, "the theories or reasons assigned by the lower court as its basis for the order or judgment appealed from . . . are not in any way controlling on appeal," and the reviewing court will instead "make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor." *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). Respondent appealed his sentence, not the trial court's analysis.

At bottom, Respondent's argument is that the Fifth District could reverse solely because the "trial court erred by knowingly committing error because it found the error to be harmless." Ans. Br. 24. In support of that argument—which treats the trial court's mistaken reasoning as per se reversible error—Respondent relies not on "[c]ontrolling case law" (Ans. Br. 27), but on two cases from the Middle District of Alabama and on *Green v. State*, 314 So. 3d 611 (Fla. 3d DCA 2020). Those cases contain the uncontroversial proposition that harmless-error review is the standard to be applied by the court of appeals, not the trial court. They do not hold or even suggest that if the trial court applies harmless-error review, the performance of that analysis itself constitutes per se reversible error.[1] Respondent has pointed to no authority overriding this Court's command in *Williams* that *Alleyne* errors are subject to harmless-

[1] In *Green*, the Third District held the opposite, of course, as it continued to perform harmless-error review itself after noting that the trial court should not have done so. 314 So. 3d at 614-16. And in *United States v. Artis*, the court admitted that "[i]t might be that if the court" did knowingly violate *Apprendi* by performing harmless error itself, and the defendant appealed, "the Court of Appeals for the Eleventh Circuit would hold that this court's error was harmless." 358 F. Supp. 2d 1094, 1099 (M.D. Ala. 2005).

error review—regardless of the reasoning employed by the trial court in sentencing the defendant absent the requisite jury finding.

Respondent also argues (Ans. Br. 27-36) that, in the alternative, the Court should itself apply harmless-error review and hold that the State cannot meet its burden in this case to show that a rational jury would have found beyond a reasonable doubt that he actually killed, intended to kill, or attempted to kill the victim. That heavily fact-bound and record-intensive analysis, however, should be performed by the Fifth District in the first instance. Thus, if the Court holds that the Fifth District was required to perform harmless-error review, it should remand for the Fifth District to do so. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (refusing to consider arguments not passed on below, "mindful that [the Supreme Court is] a court of review, not of first view").

Should the Court conduct the inquiry itself, however, ample reason exists to conclude that the error was harmless. As the trial court explained, "the evidence demonstrated that, of [the] four accomplices" to the carjacking, Respondent "possessed a gun and shot the victim at close range." R.2155. Just before the carjacking,

Respondent "expressed that he had a gun." *Id.* The State presented evidence that he aimed the gun at the driver and, after he tussled with the victim, there was a gunshot. R.748, 789-790. The State also presented evidence that Respondent admitted to the shooting both to his codefendants and to his mother. R.750, 751, 752, 755-56, 759, 795-96. "Other passengers of the carjacked vehicle ruled out other members of the carjacking party as the shooter," and one of Respondent's accomplices "testified as to [Respondent's] participation in these crimes." R.2155. And the firearm was recovered from the path that a person matching Respondent's description had taken during his flight from the scene. R.753-54, R.2155. But, as explained, the Fifth District should review the record and perform the harmless-error analysis in the first instance.

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.

The Court should also clarify that the appropriate remedy for a harmful *Alleyne* error is to remand to correct the sentence or to allow the State, if it chooses, to seek the required jury finding. *See* Init. Br. 15-21. Respondent's arguments to the contrary are unavailing.

First, relying on *Puzio v. State*, 320 So. 3d 684 (Fla. 2021), Respondent argues that the Court should decline to address the appropriate remedy because the State purportedly "failed to preserve the issue for appeal." Ans. Br. 37; *see also* Init. Br. 15 n.3 (distinguishing other vehicle issues in *Puzio*). But the Fifth District was bound by this Court's holding in *Williams*, and it would have been futile to argue otherwise. *See Hunt v. State*, 613 So. 2d 893, 898 n.4 (Fla. 1992) ("[F]utile efforts are not required to preserve matters for appeal."). In any event, the Court granted review despite Respondent's preservation argument, *see* Jur. Br. of Resp. 8, and did so *after* the Court declined to reach the remedy issue in *Puzio*. Order, *State v. Manago*, No. SC21-1047 (Fla. Oct. 12, 2021) (accepting jurisdiction as to certified direct conflict).

Respondent's suggestion that the Court "cannot properly exercise its judicial power" (Ans. Br. 39) to decide the issue is also mistaken: Although during oral argument below the State expressed doubt as to whether it would seek to empanel a jury, it has not disclaimed any intent to do so. And that decision will ultimately be up to prosecutors on remand.

Second, Respondent argues that *Gaymon v. State*, 288 So. 3d 1087 (Fla. 2020) is "factually different and addresses a different question of law." Ans. Br. 45. Yet *Gaymon* did not undermine *Williams* to the point of abrogation because it was factually and legally on all fours with *Williams*. It did so through its logic and reasoning. *See* Init. Br. 16-20. Remanding for a jury, as in *Gaymon*, would be "consistent with how [the Court has] treated *Hurst* resentencing proceedings, [would] 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. It would also comport with *Williams*' explanation that the remedy for *Apprendi/Alleyne* errors should be the same as for *Apprendi/Blakely* errors.

Third, Respondent contends that stare decisis counsels in favor of adhering to *Williams*. Ans. Br. 42-45. Not so. *See* Init. Br. 20-21. As Respondent notes, *Williams* was decided only four years ago. It was then undermined to the point of abrogation almost immediately in *Gaymon*. Indeed, Respondent points to several cases from the district courts that apply *Gaymon*'s remedy holding, not *Williams*'

remedy holding, in other contexts. *See* Ans. Br. 52-54. Confirmation from this Court that *Gaymon*, not *Williams*, provides the appropriate remedy for harmful *Alleyne* errors would give the lower courts much-needed guidance.

Fourth, Respondent suggests that overruling *Williams* would be tantamount to legislating from the bench. Ans. Br. 46-48. But the fact that the Legislature has provided for bifurcated guilt and penalty phases in the death-penalty context does not somehow preclude the Court from prescribing the appropriate remedy for a sentencing error. Instead, allowing juries to be empaneled on remand in this context would bring the remedy into line with the remedy the Court has employed in *Hurst* resentencing proceedings. And Respondent's argument (Ans. Br. 48) that there is no legislatively approved "mechanism" for empaneling juries on remand in this circumstance is inconsistent with *Gaymon*, where the Court applied that remedy despite no statute so providing. When a defendant is convicted and sentenced of an offense but one or more of the elements were not found by a jury, the remedy is always to remand for a jury to make

the requisite findings. *See*, *e.g.*, *Ramroop v. State*, 214 So. 3d 657, 667-68 (Fla. 2017).

Finally, relying on *United States v. Pena*, 742 F.3d 508 (1st Cir. 2014), Respondent erroneously contends that "[i]mplications of the Double Jeopardy Clause should persuade this Court to not depart from *Williams*." Ans. Br. 48. Even in *Pena*, though, the First Circuit explained that "[i]f this conviction were final, the constraint of double jeopardy would be clearer," and that "double jeopardy safeguards do not usually apply to resentencing." *Pena*, 742 F.3d at 518; *see also Trotter v. State*, 825 So. 2d 362, 365 (Fla. 2002); *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980). Just as when a jury is not properly instructed on an element and a district court remands for a new jury trial, *see Ramroop*, 214 So. 3d at 667-68, remanding for a jury to make the finding here would not implicate double jeopardy. Unlike in the cases cited by Respondent (Ans. Br. 51-52), a remand here would not allow the State to impose a more severe sentence than that originally imposed, but would allow the State only to seek the proper foundation for the originally imposed sentence.

CONCLUSION

For the foregoing reasons, and the reasons stated in the State's initial brief, 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 23rd day of May, 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 1,954 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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