

Case No. SC2023-0593

In the Supreme Court of Florida

CHRISTOPHER ALLEN PRYOR,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Discretionary Review from the
Second District Court of Appeal
DCA No. 2D22-0563

ANSWER BRIEF ON THE MERITS

**ASHLEY MOODY
ATTORNEY GENERAL**

Jonathan S. Tannen
Assistant Attorney General
Florida Bar No. 70842
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7900
CrimAppTpa@myfloridalegal.com
Jonathan.Tannen@myfloridalegal.com

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

I. PROCEEDINGS IN THE TRIAL COURT.

A. The Charged Offenses.

In October of 2019, Petitioner, Christopher Allen Pryor, was charged with multiple offenses in Pinellas County circuit court following a criminal episode in which he reportedly assaulted his girlfriend (A.H.) with a firearm, punched a second person (P.D.), and assaulted a third (E.A.). (R. at 22-23, 26-31; T. at 16-23). At the time of the alleged offenses, Petitioner had multiple prior felony convictions and had served multiple prior prison sentences. According to the records of the Florida Department of Corrections (“DOC”), he was most recently released from incarceration in May of 2019 after serving an eight-year sentence for Aggravated Battery Causing Great Bodily Harm. (R. at 291-305).

The State ultimately proceeded to trial on four counts of the original eighteen-count information. Pertinent here, Petitioner was charged, in Count 2 of the information, with Possession of a Firearm and/or Ammunition by a Violent Career Criminal (“VCC”) in violation of section 790.235, Florida Statutes. In the remaining counts,

Petitioner was charged with Burglary against victim P.D. (Count 1), Aggravated Assault against victim A.H. (Count 4), and Assault against victim E.A. (Count 18). (R. at 46-49).¹

B. In Phase I of Petitioner’s Trial, the Jury Makes a Finding That He Possessed a Firearm.

Before the case proceeded to trial, Petitioner filed a motion to sever Count 2 from the remaining counts. (R. at 50-51); see Fla. R. Crim. P. 3.152(a)(2). The trial court denied the motion, but it agreed to bifurcate the trial into two phases. In the first phase, the jury would be asked to make a finding on whether Petitioner possessed a firearm. If the jury answered that question in the affirmative, it would decide, in the second phase, if he was guilty of Possession of a Firearm by a VCC. (R. at 587-90, 664-76, 776-77).

The trial began on December 1, 2021. (T. at 1-16). At the end of phase one, the jury made a finding, on Count 2, that Petitioner actually possessed a firearm. On the remaining counts, the jury

¹ The additional fourteen counts—one count of Tampering with a Witness (Count 3), one count of Violation of a Domestic Violence Injunction (Count 5), and twelve counts of Violation of a Court Order Prohibiting Contact with the Victim (Counts 6-17)—were voluntarily dismissed by the State before trial. (R. at 45).

found Petitioner guilty of the lesser offense of Battery on Count 1, guilty of the lesser offense of Improper Exhibition of a Firearm on Count 4, and not guilty on Count 18. (R. at 378-82).

C. In Phase II of Petitioner's Trial, the Jury Finds Him Guilty as Charged of Possession of a Firearm by a Violent Career Criminal.

In phase two of the trial, the State first introduced certified records from DOC showing that Petitioner was most recently released from prison on May 29, 2019. (R. at 291-305; T. at 439-40). The State thereafter introduced three certified copies of prior judgments and sentences showing that Petitioner was previously convicted of: (1) Aggravated Battery in violation of section 784.045, Florida Statutes, on May 10, 2012; (2) Burglary in violation of section 810.02, Florida Statutes, on August 4, 2005; and (3) Escape in violation of sections 944.40 and 39.061, Florida Statutes, on June 29, 1995. Included with each judgment was a clerk's certificate affirming that there was no record of Petitioner obtaining postconviction relief on the underlying offense. (R. at 306-51; T. at 442-49).

The defense did not make a motion for judgment of acquittal in phase two and rested without presenting any of its own testimony or

evidence. (T. at 449). After the jury was instructed and released for deliberations, however, Petitioner's counsel, Ms. Blaquiere, advised the trial court that Petitioner wanted to put on the record an objection to "[t]he escape conviction being counted as [if] it was an escape from a detention facility." (T. at 463-66). The trial court noted that the defense had not presented any evidence on that. It further asked if the defense was arguing, assuming Petitioner was correct, that the conviction did not meet the statutory requirements for qualification as a VCC. Petitioner's second counsel, Ms. McNally, replied that they were just expressing "what Mr. Pryor wanted" and that they did not have any "legal argument on that." (T. at 466-67).

The jury returned a verdict finding Petitioner guilty as charged of Possession of a Firearm as a VCC. (R. at 382; T. at 468-70). The trial court sentenced Petitioner to life in prison for that offense, as mandated by section 775.084(4)(d)(1), Florida Statutes, and to time served for his remaining convictions. (R. at 387-92, 1034-35). Petitioner timely appealed his convictions and sentences to the Second District Court of Appeal. (R. at 398).

II. THE SECOND DISTRICT'S DECISION.

In his initial brief in the Second District, Petitioner argued that the evidence was insufficient to support a conviction on Count 2. Specifically, Petitioner argued that although “escape” under section 944.40 is a qualifying offense for purposes of the VCC statute, *see* § 775.084(1)(d)(1)(f), Fla. Stat., the prior conviction introduced by the State was a conviction for escape from a juvenile detention facility under section 39.061. According to Petitioner, his juvenile escape conviction was not a qualifying offense that supported VCC status. In support, Petitioner cited *Lacey v. State*, 114 So. 3d 452, 453-54 (Fla. 4th DCA 2013), which held that it was fundamental error for the trial court to adjudicate the defendant guilty of escape under section 944.40 when his actual offense was escape from a juvenile facility under section 985.721 (the successor statute to section 39.061). *See* Initial Br. of Appellant at 23-25, Case No. 2D22-0563.

The Second District entered an opinion affirming Petitioner’s convictions. *See Pryor v. State*, 359 So. 3d 1216 (Fla. 2d DCA 2023). It agreed with Petitioner, citing *Lacey*, that escape from a juvenile facility under section 39.061 is not a qualifying offense under the

VCC statute. *Id.* at 1223. Nevertheless, it explained that because Petitioner had failed to challenge the use of that conviction to prove his VCC status in the trial court, the issue was unpreserved and could be reviewed only for fundamental error. The Second District continued: “And in the context of fundamental error, that means that the appellant must show that the evidence was insufficient to prove that he committed any crime at all.” *Id.* at 1223-24 (citing *Spencer v. State*, 216 So. 3d 11, 14 (Fla. 1st DCA 2015) (citing *F.B. v. State*, 852 So. 2d 226, 230 (Fla. 2003))). In its case, the Second District found that Petitioner “fail[ed] to demonstrate that he committed no crime” because the evidence showed that he was guilty of the lesser-included offense of Possession of a Firearm by a Convicted Felon. *Id.* at 1224 (citing § 790.23(1)(a), Fla. Stat.). As a result, the Second District affirmed Petitioner’s convictions “without prejudice to his challenging the possession of a firearm by a VCC conviction on collateral review.” *Id.* (citing Fla. R. Crim. P. 3.850).

III. BASIS FOR DISCRETIONARY REVIEW.

Petitioner sought review in this Court under its discretionary express-and-direct-conflict jurisdiction based on a conflict between

the Second District's decision and three decisions by other district courts of appeal: *T.E.B. v. State*, 338 So. 3d 290 (Fla. 4th DCA 2022), *Castillo v. State*, 217 So. 3d 1110 (Fla. 3d DCA 2017), and *Hamilton v. State*, 71 So. 3d 247 (Fla. 4th DCA 2011). See art. V, § 3(b)(3), Fla. Const. In each case, the Third and Fourth Districts ruled that an unpreserved challenge to the sufficiency of the evidence constituted fundamental error, despite the fact that the evidence that was presented at trial supported a conviction on a lesser offense. See *T.E.B.*, 338 So. 3d at 295; *Castillo*, 217 So. 3d at 1113-15; *Hamilton*, 71 So. 3d at 248. This Court granted review.

STATEMENT OF THE ISSUE

The question presented in this case is whether the Second District correctly affirmed Petitioner's conviction for Possession of a Firearm by a Violent Career Criminal. That question implicates two sub-issues: (1) whether sufficient evidence was presented at trial to support the conviction; and, if not, (2) whether the Second District correctly found that any error was not fundamental.

SUMMARY OF THE ARGUMENT

The Second District correctly affirmed Petitioner's conviction for Possession of a Firearm by a VCC. As a threshold matter, although the Second District concluded otherwise, Petitioner's prior escape conviction was in fact a qualifying offense for purposes of the VCC statute. Therefore, there was no error at all in Petitioner's conviction for that offense, let alone fundamental error. Moreover, this Court has repeatedly held that when a challenge to the sufficiency of the evidence is unpreserved in a non-capital case, relief may be granted only when the evidence was insufficient to prove that the defendant committed any crime. Here, because the evidence showed that Petitioner was guilty, at a minimum, of the lesser-included offense of Possession of a Firearm by a Convicted Felon, the Second District correctly found that any error was not fundamental.

Importantly, Petitioner does not appear to dispute that the Second District properly rejected his fundamental error claim under this Court's current precedent. Instead, Petitioner asks this Court to recede from its prior cases and hold that any deficiency in the evidence, even on a single element, always constitutes fundamental

error. Stated differently, all sufficiency-of-the-evidence claims would be reviewed on appeal under the competent, substantial evidence standard regardless of whether they were raised in the lower court—meaning that preservation would no longer be required.

For multiple reasons, this Court should reject that argument. First, preservation of error is expressly required by section 924.051. Second, preservation serves important purposes for the appellate process. It ensures that any errors are addressed and corrected at the earliest opportunity, assists appellate courts in analyzing the issues on appeal, and deters “sandbagging” by trial counsel. Further, Petitioner’s suggestion that the preservation rule violates federal due process is entirely without merit. This Court should instead continue to adhere to the framework that it has established for sufficiency-of-the-evidence claims, under which preserved claims are reviewed for competent, substantial evidence, while unpreserved claims are reviewed for evidence of any crime. Under that standard, there was no fundamental error here. The Second District’s affirmance of Petitioner’s conviction should therefore be approved.

STANDARD OF REVIEW

When a challenge to the sufficiency of the evidence to support a criminal conviction has been preserved for appellate review, the standard of review is “whether the State presented competent, substantial evidence to support the verdict.” *Bush v. State*, 295 So. 3d 179, 200-01 (Fla. 2020). Under that standard, the “appellate court must ‘view[] the evidence in the light most favorable to the State’ and, maintaining this perspective, ask whether ‘a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.’” *Id.* at 200 (original alteration) (quoting *Rogers v. State*, 285 So. 3d 872, 891 (Fla. 2019)).

However, “[a] defendant must preserve a claim of insufficiency of the evidence through a timely challenge in the trial court.” *Young v. State*, 141 So. 3d 161, 165 (Fla. 2013). “The motion or objection must be specific in order to preserve the claim for appellate review.” *Id.* In non-capital cases, when a challenge to the sufficiency of the evidence is unpreserved, the matter may be reviewed on appeal only for fundamental error. This Court has held that in the context of a sufficiency-of-the-evidence claim, fundamental error occurs only

“where the evidence does not demonstrate that a crime has been committed at all.” *Id.* (citing *F.B.*, 852 So. 2d at 230-31).

“Whether an error is fundamental—meaning that the error ‘goes to the foundation of the case or goes to the merits of the cause of action,’ *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994) (quoting *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970))—is a question of law [that this Court] review[s] de novo.” *State v. Smith*, 241 So. 3d 53, 55 (Fla. 2018). This case also presents questions of statutory interpretation, which are likewise “subject to de novo review.” *State v. McKenzie*, 331 So. 3d 666, 670 (Fla. 2021).

ARGUMENT

I. PETITIONER’S CONVICTION IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

“A threshold issue in addressing any claim of fundamental error is whether there was error at all—‘fundamental’ or not.” *State v. Dorch*, 317 So. 3d 1074, 1078-79 (Fla. 2021). In this case, although the Second District concluded otherwise, Petitioner’s conviction was correctly affirmed, first and foremost, because the State presented competent, substantial evidence showing that he in fact committed the crime of Possession of a Firearm by a VCC. As a consequence, there was no error at all in Petitioner’s conviction for that offense, let alone fundamental error.

The offense of Possession of a Firearm by a VCC is codified in section 790.235, Florida Statutes, which provides that any person who meets the criteria for VCC status in section 775.084(1)(d), and “who owns or has in his or her care, custody, possession, or control any firearm[] [or] ammunition,” commits a felony of the first degree. § 790.235(1), Fla. Stat. A VCC, in turn, is defined, in relevant part, as any person who was previously convicted three or more times for any offense included on the list of qualifying felonies set forth in

subsection 775.084(1)(d)(1), and who, within the last five years, has been released from a prison sentence that was imposed as a result of a prior conviction for a qualifying felony. See § 775.084(1)(d), Fla. Stat. The qualifying felonies identified in the VCC statute include “[a]ny forcible felony, as described in s. 776.08,” and “[e]scape, as described in s. 944.40.” § 775.084(1)(d)(1)(a), (f), Fla. Stat. The forcible felonies described in section 776.08 include both burglary and aggravated battery. See § 776.08, Fla. Stat.

Here, during the second phase of Petitioner’s trial, the State introduced copies of three judgments and sentences showing that Petitioner was previously convicted of Aggravated Battery on May 10, 2012, Burglary on August 4, 2005, and Escape on June 29, 1995. (R. at 306-51; T. at 442-49). The judgment and sentence for the escape conviction identified the relevant statute numbers for the offense as sections 944.40 and 39.061. (R. at 347). The State also introduced records from DOC showing that Petitioner was most recently released from prison on May 29, 2019, when he finished serving his eight-year prison sentence on the aggravated battery conviction. (R. at 296-97, 306-09; T. at 439-40).

In the Second District, Petitioner challenged his conviction for Possession of a Firearm by a VCC on the ground that his escape conviction concerned a violation of section 39.061, which, according to Petitioner, is not one of the qualifying offenses identified in the VCC statute. In general terms, former section 39.061, which was later renumbered as section 985.721,² proscribes escape from any juvenile detention facility, while section 944.40 proscribes escape from any adult detention facility such as a jail or a prison. See § 39.061, Fla. Stat. (1994); § 944.40, Fla. Stat (1994).

Notably, Petitioner did not present any evidence in the trial court regarding the underlying circumstances that led to his escape conviction. The judgment for the offense reflects only that Petitioner entered a guilty plea and was adjudicated guilty of violating both sections 944.40 *and* 39.061. (R. at 347). There was no evidence, for example, of the specific type of facility Petitioner was charged with escaping from, although his birthdate in the record does reflect that

² See Ch. 90-208, § 5, Laws of Fla. (creating section 39.061); Ch. 98-207, § 4, Laws of Fla. (renumbering section 39.061 as section 985.3141); Ch. 2006-120, § 99, Laws of Fla. (renumbering section 985.3141 as section 985.721).

he was still a juvenile when the escape charge was filed in 1994. (*See* R. at 22, 347). Even so, because the judgment itself showed that he was convicted of violating section 944.40 as well as section 39.061, the Second District should have found that there was competent, substantial evidence to support the jury's finding that Petitioner qualified as a VCC.

Further, even if the escape conviction had been solely under section 39.061, the express language of that statute establishes that such a conviction must be treated as a conviction under section 944.40. In 1994, section 39.061 provided:

An escape from any secure detention facility maintained for temporary detention of children, pending adjudication, disposition, or placement; an escape from any residential commitment facility defined in s. 39.01(61), maintained for the custody, treatment, punishment, or rehabilitation of children found to have committed delinquent acts or violations of law; or an escape from lawful transportation thereto or therefrom **constitutes escape within the intent and meaning of s. 944.40** and is a felony of the third degree punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 39.061, Fla. Stat. (1994) (emphasis added). The current version of the statute likewise provides that an escape from any juvenile

detention facility “constitutes escape within the intent and meaning of s. 944.40” § 985.721, Fla. Stat. (2023).

The same language was carried over from an earlier juvenile escape statute: section 39.112, Florida Statutes (1978). That statute was enacted following *In re Interest of F.G.*, 349 So. 2d 727, 728 (Fla. 4th DCA 1977), and *Prince v. State*, 360 So. 2d 1161, 1162-63 (Fla. 4th DCA 1978), which held that escapes from juvenile detention facilities did not violate section 944.40. See Ch. 78-414, § 17, Laws of Fla. The newly-created juvenile escape statute was included under former Chapter 39, titled the “Florida Juvenile Justice Act,” but the Legislature provided in section 39.112 that an escape under that section “constitutes escape within the intent and meaning of s. 944.40” Ch. 78-414, §§ 1, 17, Laws of Fla. In a subsequent case, the Fourth District observed that “the legislature in enacting Section 39.112 intended to adopt by specific reference all of the ramifications of Section 944.40” *State v. Ferguson*, 395 So. 2d 1182, 1184 (Fla. 4th DCA 1981); see also *State v. J.R.M.*, 388 So. 2d 1227, 1228-29 (Fla. 1980) (holding that section 39.112 lawfully referred to and incorporated section 944.40).

As discussed above, section 775.084 states that a qualifying offense for purposes of VCC status is “[e]scape, as described in s. 944.40” § 775.084(1)(d)(1)(f), Fla. Stat. And section 39.061 states that an escape from a juvenile facility “constitutes escape within the intent and meaning of s. 944.40” § 39.061, Fla. Stat. (1994). Moreover, while the 1995 judgment shows that Petitioner was convicted as an adult, section 790.235 states that, for purposes of the offense of Possession of a Firearm by a VCC, “the previous felony convictions necessary to meet the [VCC] criteria under s. 775.084(1)(d) may be convictions for felonies committed as an adult or adjudications of delinquency for felonies committed as a juvenile.” § 790.235(2), Fla. Stat. Therefore, Petitioner’s juvenile status at the time of his 1995 escape conviction is irrelevant.

Because a violation of section 39.061 “constitutes escape within the intent and meaning of s. 944.40,” Petitioner’s escape conviction was properly considered by the jury in determining whether Petitioner was a VCC. The State therefore presented competent, substantial evidence of three prior qualifying convictions under the VCC statute. For that reason, although it was not the reason relied

upon by the Second District, Petitioner's conviction for Possession of a Firearm by a VCC was correctly affirmed.

In concluding that the evidence was insufficient to support Petitioner's conviction, the Second District cited the Fourth District's decision in *Lacey* for the proposition that "[t]he offenses proscribed by sections 985.721 and 944.40 are not interchangeable." *Pryor*, 359 So. 3d at 1223. *Lacey*, however, is inapposite.

In *Lacey*, the defendant entered a plea of no contest to escape in violation of section 944.40 and was sentenced to four years in prison followed by five years of probation. *See Lacey*, 114 So. 3d at 453. On appeal, the Fourth District ruled that the trial court erred by accepting the plea because the factual basis for the plea in the record showed that the defendant had escaped from the custody of the Department of Juvenile Justice. *Id.*; *see Fla. R. Crim. P. 3.172(a)* ("Before accepting a plea of guilty or nolo contendere, the trial judge shall determine that the plea is voluntarily entered and that a factual basis for the plea exists."). Thus, the Fourth District concluded that the escape was controlled by section 985.721, rather than section 944.40. *See Lacey*, 114 So. 3d at 453-54.

The distinction between the two statutes was important in that case because a conviction under section 944.40 is a second-degree felony punishable by up to fifteen years in prison, while a conviction under section 985.721 is a third-degree felony punishable by up to five years in prison. *See id.* at 453 n.1. As a result, Lacey’s sentence of four years in prison followed by five years of probation, totaling nine years, exceeded the maximum sentence he could have received if he had entered a plea under the correct statute. *See Borrego v. State*, 98 So. 3d 225, 225 (Fla. 2d DCA 2012) (“When a trial court imposes a sentence of incarceration followed by probation, the combined term cannot exceed the statutory maximum for the offense.”). The Fourth District further concluded that although the error was unpreserved, the failure of Lacey’s counsel to recognize the issue “resulted in a fundamentally erroneous plea” and constituted ineffective assistance on the face of the record. *Lacey*, 114 So. 3d at 454 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

As the foregoing discussion makes clear, the issue in *Lacey* was whether the defendant could be lawfully convicted and sentenced under section 944.40 when the offending conduct was an escape

from a juvenile facility, which is a lower-level felony. That is a separate question from whether a prior juvenile escape conviction under section 985.721, or any of its predecessor statutes, is a qualifying felony for purposes of determining whether a defendant meets the statutory definition of a VCC.

On the latter question, the Legislature has instructed that escape from a juvenile facility “constitutes escape within the intent and meaning of s. 944.40.” § 39.061, Fla. Stat. (1994). It follows from that language that Petitioner’s conviction for escape, whether it was from a juvenile facility or an adult facility, was an “[e]scape, as described in s. 944.40.” § 775.084(1)(d)(1)(f), Fla. Stat.

In short, the statutory text makes clear that an escape under section 39.061 is an escape within the meaning of section 944.40, with all of the collateral ramifications that such a conviction entails. *See Ferguson*, 395 So. 2d at 1184. As such, the jury properly found, based on competent, substantial evidence, that Petitioner qualified as a VCC. And because there was no deficiency in the evidence at all, this Court should approve the Second District’s affirmance of Petitioner’s conviction for Possession of a Firearm as a VCC, albeit

not for the reason that was given below. *See, e.g., Knight v. State*, 286 So. 3d 147, 148 (Fla. 2019) (“[W]e approve the result of the First District’s decision but not its reasoning.”).

II. ANY ERROR WAS NOT FUNDAMENTAL.

However, even if the Second District had been correct that Petitioner’s prior escape conviction was not a qualifying felony for purposes of the VCC statute, his conviction was still correctly affirmed. The record makes clear that Petitioner did not preserve his challenge to the sufficiency of the evidence in the trial court. Petitioner did not make any motion for judgment of acquittal at the second phase of his trial. (*See T. at 449*). And although his trial counsel briefly objected to “[t]he escape conviction being counted as [if] it was an escape from a detention facility,” they did not specifically argue that it could not be counted because it was a conviction for escape from a juvenile facility under section 39.061. (*T. at 466-67*). It is well-established that an argument is not preserved for appeal unless it was “the specific contention asserted as legal ground for the objection, exception, or motion below.” *Figueroa-Sanabria v. State*, 366 So. 3d 1035, 1049 (Fla. 2023) (quoting *Steinhorst v. State*, 412

So. 2d 332, 338 (Fla. 1982)). In his Initial Brief, moreover, Petitioner does not dispute that the issue was not preserved.

Because the argument was not preserved, Petitioner would be entitled to appellate relief only if the error—assuming there was any error at all—rises to the level of fundamental error. See § 924.051(3), Fla. Stat. This Court has held that in the sufficiency-of-the-evidence context, fundamental error occurs only “when there is insufficient evidence that a defendant committed *any* crime.” *Monroe v. State*, 191 So. 3d 395, 401 (Fla. 2016) (original emphasis), *receded from on other grounds*, *Steiger v. State*, 328 So. 3d 926 (Fla. 2021); *see also F.B. v. State*, 852 So. 2d 226, 230 (Fla. 2003) (holding that, in non-capital cases, the only exception to the preservation requirement for challenges to the sufficiency of the evidence is “when the evidence is insufficient to show that a crime was committed at all”).

Petitioner correctly observes that this Court has never defined the precise scope of what he calls the “a/any-crime test,” which this Court first articulated in *F.B.* (Initial Br. at 14, 46). As the Third District has noted: “*F.B.* engendered some uncertainty over whether this . . . exception . . . applies solely where the evidence wholly fails

to prove any crime occurred or also applies where the evidence fails to prove the charged crime occurred (or a middle ground—where the evidence fails to prove the charged crime or any necessarily lesser-included crime occurred).” *H.R. v. State*, 298 So. 3d 1217, 1221-22 (Fla. 3d DCA 2020). In *H.R.*, the Third District adopted the first of those interpretations and held that there was no fundamental error where the evidence failed to prove the charged crime of resisting an officer without violence or any lesser-included offense to that crime, but still supported a finding that the juvenile delinquent committed the uncharged crime of assault. *See id.* at 1223-24; *see also Bybee v. State*, 295 So. 3d 1229, 1232 (Fla. 2d DCA 2020) (finding no fundamental error where the evidence was insufficient to support the defendant’s kidnapping conviction or any lesser-included offense, but still supported his convictions on other counts).

On one point, however, this Court’s precedent is clear: “the State’s failure to prove *an element* of a crime beyond a reasonable doubt does not constitute fundamental error.” *Monroe*, 191 So. 3d at 400 (emphasis added) (citing *F.B.*, 852 So. 2d at 227). Thus, this Court has consistently held that where the evidence was insufficient

to prove a single element of an offense but would still have supported a guilty verdict on a lesser-included offense to that crime, then the matter does not rise to the level of fundamental error. Indeed, this Court held in *Monroe* that such a deficiency is not fundamental even if the defendant's sentence would have been unconstitutional if it had been imposed for the lesser offense. *See id.* at 400-02.

In Petitioner's case, even if the evidence was insufficient to prove that he committed the charged offense of Possession of a Firearm by a VCC, the evidence still, at a minimum, supported a conviction on the lesser-included offense of Possession of a Firearm by a Convicted Felon. Therefore, the Second District correctly found that there was no fundamental error and affirmed the conviction.

A. Governing Precedent.

1. F.B.

As discussed, this Court first set out the test for fundamental error in the sufficiency-of-the-evidence context in *F.B.* There, a juvenile offender was adjudicated delinquent on the charge of petit theft of items valued at \$100 or more but less than \$300, a first-degree misdemeanor. For the first time on appeal, F.B. attempted to

challenge the adjudication on the basis that the State had failed to present any evidence about the value of the stolen items. *See F.B.*, 852 So. 2d at 227. The Fourth District affirmed the adjudication on the ground that the issue was unpreserved, but it certified conflict with *T.E.J. v. State*, 749 So. 2d 557, 558 (Fla. 2d DCA 2000), where the Second District reversed an adjudication of delinquency for first-degree petit theft under materially identical facts and remanded with instructions that the adjudication be reduced to one for second-degree petit theft. *See F.B.*, 852 So. 2d at 227-28.

On discretionary review, this Court held that “the insufficiency of the evidence to prove one element of a crime does not constitute fundamental error, and therefore this claim must first be raised in the trial court to be preserved for appellate review.” *Id.* at 227. The Court, in its opinion, first discussed the principles underlying the requirement that errors raised on appeal must be preserved, as well as the fundamental error exception to that requirement. *Id.* at 229. As to preservation of error, this Court stated that

[t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an

opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Id. (original alteration) (quoting *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978)). The Court further explained that preservation “thus not only affords trial judges the opportunity to address and possibly redress a claimed error, it also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client’s tactical advantage.” *Id.*

As to the fundamental error exception, this Court began by citing the familiar test—to which the Court still adheres—that “in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” *Id.* (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)); accord *Loyd v. State*, No. SC2022-0378, 2023 WL 7815783, at *4 (Fla. Nov. 16, 2023). The Court noted that “[t]he doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling

demand for its application.” *F.B.*, 852 So. 2d at 229 (quoting *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988)).

Continuing, the Court concluded that “the interests of justice are better served by applying this general rule to challenges to the sufficiency of the evidence,” since “[a]ny technical deficiency in proof may be readily addressed by timely objection or motion, thus allowing the State to correct the error, if indeed it is correctable, before the trial concludes.” *Id.* at 229-30. The Court found that its decision was also supported by “[t]he deferential standard of review appellate courts apply to claims of insufficiency of the evidence,” *i.e.*, the competent, substantial evidence standard. *Id.* at 230 (citing *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981)).

Based on those considerations, the Court held “that, with two exceptions, a defendant must preserve a claim of insufficiency of the evidence through [a] timely challenge in the trial court.” *Id.* The first exception is in death penalty cases, where “this Court is required to review the sufficiency of the evidence to support the conviction.” *Id.*; see Fla. R. App. P. 9.142(a)(5). The second exception, applicable in non-capital cases, “occurs when the evidence is insufficient to show

that a crime was committed at all.” *Id.* To illustrate the latter exception, the Court cited two of its prior cases in which the defendants, in both cases, were convicted for two counts of the same offense, but the evidence in each case supported only one conviction. *Id.* (citing *Troedel v. State*, 462 So. 2d 392, 399 (Fla. 1984), and *Vance v. State*, 472 So. 2d 734, 735 (Fla. 1985)).

The Court then repeated its holding that “an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved,” and cited, as further examples, four district court cases. *Id.* at 230-31 (citing *Stanton v. State*, 746 So. 2d 1229, 1230 (Fla. 3d DCA 1999), *Griffin v. State*, 705 So. 2d 572, 574 (Fla. 4th DCA 1998), *Harris v. State*, 647 So. 2d 206, 208 (Fla. 1st DCA 1994), and *Nelson v. State*, 543 So. 2d 1308, 1309 (Fla. 2d DCA 1989)). The Court concluded by “reaffirm[ing], with the two discrete exceptions explicated above, the longstanding rule that claims of insufficiency of the evidence must be specifically preserved for appellate review.” *Id.* at 231. It therefore approved the Fourth District’s decision and disapproved *T.E.J.* *Id.*

As noted above, the Third District recently observed that “*F.B.* engendered some uncertainty over” the precise scope of the second exception, which was due in part to the district court cases cited in *F.B.*’s penultimate paragraph. *H.R.*, 298 So. 3d at 1221-22. In particular, two of those cases (*Griffin* and *Nelson*) seemed to suggest that the fundamental error test was satisfied as long as the evidence was insufficient to prove the specific crime for which the defendant was convicted, as opposed to insufficient to prove any crime. *See id.* at 1222.

Nonetheless, the decision of the Court, as stated at the very beginning of its opinion, was to approve the holding of the Fourth District “that the insufficiency of the evidence to prove one element of a crime does not constitute fundamental error” *F.B.*, 852 So. 2d at 227. Thus, this Court approved the Fourth District’s finding that there was no fundamental error where the evidence—although insufficient to prove the offense for which *F.B.* was adjudicated delinquent—still proved the lesser-included offense of second-degree petit theft. *See F.B.*, 852 So. 2d at 227-28.

2. *Young*.

The Court next addressed the issue in *Young*. In that case, the defendant was found guilty by a jury of burglary of a dwelling, among other offenses. After that conviction was affirmed on direct appeal by the Fifth District, this Court granted review, in part, to resolve a conflict between the Fifth and Second Districts as to whether a structure undergoing substantial renovations constitutes a “dwelling” within the meaning of the burglary statute. *See Young*, 141 So. 3d at 163-64. This Court found, initially, that Young had failed to preserve the issue by raising it in his motion for judgment of acquittal. *See id.* at 165. It then reiterated its holding from *F.B.* that the only “exceptions to the requirement that a timely objection be made to the trial court[] [are] (1) where the defendant is sentenced to death; and (2) where the evidence is insufficient to show that a crime was committed at all.” *Id.* (citing *F.B.*, 852 So. 2d at 230).

In *Young*’s case, the Court found that there was no fundamental error because, regardless of whether the location Young entered met the definition of a dwelling, “the evidence presented suggests, at the least, that Young committed a burglary of a structure.” *Id.*; *see also*

Daniel v. State, 137 So. 3d 1181, 1185 (Fla. 3d DCA 2014) (noting that “[b]urglary to a structure is a lesser-included offense that is two degrees removed from the offense of armed burglary of a dwelling”). The Court explained that “[a]s the evidence indicates that a crime was in fact committed by Young, Young’s conviction cannot be said to be fundamental error.” *Young*, 141 So. 3d at 165. Accordingly, because the evidence demonstrated that Young was guilty, at least, of a lesser-included offense, this Court again found that any error was not fundamental, just as it did in *F.B.*

3. *Monroe.*

This Court reached that same conclusion for a third time in *Monroe*. The defendant in that case, Monroe, was convicted after a jury trial of sexual battery on a child under 12 by a person 18 years of age or older, a capital felony, and lewd or lascivious molestation of a child under 12 by a person 18 years of age or older, a life felony. *See Monroe v. State*, 148 So. 3d 850, 852, 858 (Fla. 1st DCA 2014). The evidence at Monroe’s trial established that he sexually battered and molested the child victim during his (Monroe’s) senior year of high school. On appeal, however, Monroe argued, and the First

District agreed, that there was no evidence from which the jury could have determined whether the offenses were committed before or after Monroe's eighteenth birthday. *See id.* at 857.

Monroe conceded that the issue was unpreserved and that he would therefore be entitled to relief only if the deficiency constituted fundamental error. *Id.* at 857-58. Citing *F.B.* and *Young*, the First District ruled that because “[t]he evidence was legally sufficient to show that Monroe committed sexual battery and lewd or lascivious molestation at least as a juvenile, even if not as an adult . . . his convictions cannot be said to be fundamental error under Florida Supreme Court precedent.” *Id.* at 858-59. In reaching that decision, the First District agreed with Monroe that some district court cases citing *F.B.* appeared to support the principle that “fundamental error occurs where there is a complete failure of proof that the crime for which the defendant was convicted, as opposed to simply *any* crime, occurred.” *Id.* at 858 (original emphasis) (citing, as examples, *Crain v. State*, 79 So. 3d 118 (Fla. 1st DCA 2012), *Hamilton v. State*, 71 So. 3d 247 (Fla. 4th DCA 2011), and *Rodriguez v. State*, 964 So. 2d 833 (Fla. 2d DCA 2007)). The First District concluded, however, that

those cases had been superseded by *Young*, which supported “the more stringent reading of *F.B.*” that, in order to meet the standard for fundamental error, the evidence must be insufficient to support a conviction for “any crime whatsoever.” *Id.* at 859.

The First District expressed concern about that result because it exposed Monroe to a significantly higher sentence than he might otherwise have received. *Id.* at 861. Because Monroe was convicted of sexually battering a child as an adult, the only lawful sentence in his case was life without the possibility of parole. If the offense had been committed when Monroe was 17 years old, by contrast, the trial court would have had the discretion to impose a lesser sentence. *Id.* at 858. The First District also observed that under *Graham v. Florida*, 560 U.S. 48, 74 (2010), “a mandatory sentence of life without parole for a nonhomicide offense is unconstitutional when imposed against a juvenile offender.” *Monroe*, 148 So. 3d at 861. In light of those circumstances, the First District certified the following question to this Court as one of great public importance:

DO *F.B.* . . . AND *YOUNG* . . . REQUIRE PRESERVATION OF AN EVIDENTIARY DEFICIENCY WHERE THE STATE PROVED ONLY A LESSER INCLUDED OFFENSE AND THE SENTENCE REQUIRED FOR THE GREATER

OFFENSE WOULD BE UNCONSTITUTIONAL AS APPLIED
TO THE LESSER OFFENSE?

Id. (original capitalization).

This Court approved the First District’s decision and held that the deficiency in the evidence did not constitute fundamental error. *See Monroe*, 191 So. 3d at 401-02. The Court explained once again that “[a] fundamental error ‘must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.’” *Id.* at 401 (quoting *F.B.*, 852 So. 2d at 229). And it again warned that appellate courts “‘should exercise [their] discretion under the doctrine of fundamental error very guardedly.’” *Id.* (quoting *Sanford*, 237 So. 2d at 137). The Court continued:

We have even more narrowly applied the fundamental error doctrine to alleged errors of insufficient evidence. There are only two instances in which an unpreserved challenge to the sufficiency of the evidence can be reviewed: (1) the mandatory review by this Court of the evidence by which a capital defendant was convicted and sentenced to death; and (2) when there is insufficient evidence that a defendant committed *any* crime.

Id. (original emphasis).

The Court also rejected Monroe’s suggestion that it should replace the existing fundamental error standard with the “manifest miscarriage of justice” exception that federal appellate courts apply to unpreserved sufficiency-of-the-evidence arguments. *Id.* at 402. For two reasons, the Court explained, it “should not expand [its] jurisprudence under such a nebulous standard.” *Id.* The first reason was that the federal standard “offers little meaningful guidance for the appellate courts of this State. As acknowledged by counsel for Monroe during oral argument, one knows a manifest miscarriage of justice only when one sees it.” *Id.* (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)). The second reason, the Court observed, was that “the federal standard does not appear to be nearly as uniform or straightforward as Monroe suggests,” given that even federal courts appear to disagree over the proper standard for unpreserved sufficiency arguments. *Id.* (comparing *United States v. Fries*, 725 F.3d 1286, 1291 n.5 (11th Cir. 2013) (rejecting a “plain error” standard for unpreserved challenges to the sufficiency of the evidence in favor of the “manifest miscarriage of justice” standard), with *United States v. Spinner*, 152 F.3d 950, 956 (D.C. Cir. 1998)

(applying the “plain error” standard), *and United States v. Meadows*, 91 F.3d 851, 854-55 (7th Cir. 1996) (same)).

This Court concluded: “Without a clearly articulable and readily applicable standard, we will not expand the narrow exceptions to the fundamental error doctrine with respect to sufficiency of the evidence claims.” *Id.* Accordingly, the Court answered the First District’s certified question in the affirmative, thereby confirming—once again—that because the evidence in Monroe’s case was sufficient to support a conviction on a lesser-included offense, the deficiency did not constitute fundamental error. *See id.*

Even so, the Court went on to explain that its determination that there was no fundamental error was not the end of the matter. Under the facts before it, the Court held that the failure of Monroe’s counsel to seek a judgment of acquittal met both prongs of the test for ineffective assistance of counsel under *Strickland v. Washington*. *Id.* at 402-04. In *Strickland*, the United States Supreme Court held that a defendant is deprived of the right to counsel under the Sixth Amendment when (1) his counsel rendered deficient performance, and (2) the deficiency resulted in prejudice. *See* 466 U.S. at 687. To

meet the first prong, the defendant must show that his “counsel’s representation fell below an objective standard of reasonableness . . . under prevailing professional norms.” *Id.* at 688. As to the second prong, the defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

This Court observed in *Monroe* that “[a]ppellate courts do not ordinarily address ineffective assistance of counsel concerns until a defendant seeks postconviction relief because such courts are limited to reviewing the record directly before them.” *Monroe*, 191 So. 3d at 403. The Court concluded, however, that both prongs of *Strickland* were met on the face of the record, and that it would therefore “be a waste of judicial resources to wait until Monroe seeks postconviction relief” for the matter to be addressed. *Id.* 403-04. With that finding, the Court remanded the case to the First District for further proceedings consistent with its opinion. *Id.* at 404.

4. *Steiger.*

In one respect, this Court later receded from *Monroe*. In *Steiger*, the Court concluded that the practice of allowing defendants to raise

unpreserved errors on direct appeal through the rubric of an ineffective assistance of counsel claim, without any showing of fundamental error, contradicts the plain text of section 924.051, which states that relief may not be granted by an appellate court “unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.” *Steiger*, 328 So. 3d at 929-31 (quoting § 924.051(3), Fla. Stat.).

This Court explained that its determination that ineffective assistance of counsel claims cannot be used to circumvent section 924.051(3) “flows from the fact that ineffective assistance of trial counsel claims under *Strickland* afford criminal defendants an easier path to relief than claims of fundamental error.” *Steiger*, 328 So. 3d at 930. “In contrast to the showing of prejudice required by *Strickland* . . . establishing fundamental error is more difficult because, to be fundamental, an ‘error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.’” *Id.* at 930-31 (quoting *F.B.*, 852 So. 2d at 229 (quoting *Brown*, 124 So. 2d at 484)). The Court added that while it had reasoned in *Monroe*

that addressing certain ineffectiveness claims on direct appeal may conserve judicial resources, “the State correctly argues that section 924.051(3) does not contain a waste-of-judicial-resources exception, and we cannot rewrite the statute.” *Id.* at 931.

The Court further rejected Steiger’s argument that applying section 924.051(3) to bar claims of ineffective assistance of counsel on direct appeal would somehow “abrogate[] the Sixth Amendment’s guarantee to effective assistance of counsel,” explaining that the statute “merely operates as a condition to the right to direct appeal and places unpreserved ineffective assistance of trial counsel claims within the postconviction framework.” *Id.*³ The Court also rejected Steiger’s assertion that its holding infringed on the separation of

³ “The procedure for raising a claim of ineffective assistance of counsel is . . . well known: the defendant must make sworn allegations in the trial court by motion for postconviction relief pursuant to Florida Rules of Criminal Procedure 3.850 or 3.851.” *Latson v. State*, 193 So. 3d 1070, 1072-73 (Fla. 1st DCA 2016) (Winokur, J., concurring). “This procedure makes sense because ineffective assistance of counsel claims are generally fact-specific, and both sides are entitled to present relevant evidence to the trial court to resolve those issues.” *Id.* at 1073 (citations and quotation marks omitted). “Moreover, counsel accused of unprofessional errors . . . ought to be afforded an opportunity to explain their actions, which cannot happen in an appellate proceeding.” *Id.*

powers. As the Court noted, it previously rejected just such a challenge to section 924.051(3) and had held that, while “this Court continues to have jurisdiction over the practice and procedure relating to appeals[,] . . . the legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error.” *Id.* (quoting *Amends. to Fla. Rules of App. Pro.*, 696 So. 2d 1103, 1104-05 (Fla. 1996)).

Despite its conclusion that the matter was controlled by the plain text of section 924.051(3), the Court acknowledged that there may be “rare case[s] where appellate counsel reasonably concludes that ineffective assistance of the appellant’s trial counsel appears on the face of the record” *Id.* at 932. As a potential remedy, the Court directed the criminal procedure rules committee to consider proposing a rule “that would allow the trial court to consider the claim and grant relief before merits briefing in the direct appeal,” citing rule 3.800(b) as a possible model. *Id.* Aside from that suggestion, the Court receded in part from *Monroe* and held that “to raise and prevail on any unpreserved claim of error on direct appeal, the defendant must demonstrate fundamental error.” *Id.*

B. The Second District Correctly Affirmed the Conviction Based on a Finding that Petitioner Was Proved Guilty, at a Minimum, of a Lesser-Included Offense.

Under this Court's precedent, as described above, the following principles are clear. In order to be raised on direct appeal from a criminal conviction, a claim of error must be preserved through a timely and specific motion or objection in the trial court. If the claim is not preserved, the defendant is entitled to appellate relief only if the matter rises to the level of fundamental error. *See* § 924.051(3), Fla. Stat.; *Young*, 141 So. 3d at 165. Fundamental error, this Court has long held, means an error from which "a verdict of guilty could not have been obtained without the assistance of the alleged error." *Monroe*, 191 So. 3d at 401 (quoting *F.B.*, 852 So. 2d at 229) (citing *Brown*, 124 So. 2d at 484)). And in the specific context of a challenge to the sufficiency of the evidence, the fundamental error standard is met only "when there is insufficient evidence that a defendant committed *any* crime." *Id.* (original emphasis).

Consequently, if the record shows that the defendant would have been properly convicted, at a minimum, of a lesser-included offense, any defect in the evidence is not fundamental error. *See id.*

at 401-02. In that circumstance, the defendant may not obtain relief on direct appeal, but must instead seek collateral relief through a postconviction motion challenging his trial counsel's failure to seek a judgment of acquittal. *See Steiger*, 328 So. 3d at 932.

In light of the foregoing, there can be no question that the Second District correctly affirmed Petitioner's conviction. The State presented evidence at Petitioner's trial that he possessed a firearm despite his prior felony convictions for aggravated battery, burglary, and escape. (R. at 306-51, 379; T. at 442-49). The jury was instructed at phase two of the trial that if it decided that the main charge was not proven beyond a reasonable doubt, it should consider whether he was guilty of the lesser crime of Possession of a Firearm by a Convicted Felon. The sole element of that offense, since the jury had found in phase one that Petitioner possessed a firearm, was that "[p]rior to September 11, 2019, [Petitioner was] convicted of a felony." (R. at 385-86); *see* § 790.23(1)(a), Fla. Stat. (2019).

Accordingly, even if the Second District was correct that the escape conviction was not a qualifying offense for purposes of the VCC statute, it was not the case that the State failed to prove that

Petitioner committed *any* crime. *See Monroe*, 191 So. 3d at 401. Thus, the Second District properly affirmed Petitioner’s convictions “without prejudice to his challenging the possession of a firearm by a VCC conviction on collateral review.” *Pryor*, 359 So. 3d at 1224; *see Steiger*, 328 So. 3d at 932. To the extent that there was a deficiency at all, the Second District’s decision correctly applies the fundamental error test and should be approved.

C. The Conflict Cases Misapply this Court’s Precedent and Should be Disapproved.

By contrast, in each of the three conflict cases—*T.E.B.*, *Castillo*, and *Hamilton*—the Third and Fourth Districts reversed convictions based on unreserved challenges to the sufficiency of the evidence despite finding that the evidence was sufficient to support a guilty verdict on a lesser-included offense. These cases misapply this Court’s precedent and should be disapproved.

In the most recent conflict case, *T.E.B.*, a juvenile challenged his adjudication of delinquency for the offenses of attempted first-degree murder, felony battery, and robbery. Among other issues, *T.E.B.* argued that there was insufficient evidence to support the trial court’s findings that he committed felony battery. *See T.E.B.*, 338

So. 3d at 291. The Fourth District agreed with T.E.B. that his two counts of misdemeanor battery were incorrectly reclassified as felonies based on a prior withheld adjudication in juvenile court, which “may not be used as a predicate offense to elevate misdemeanor battery to felony battery.” *Id.* at 294-95 (quoting *W.J.H. v. State*, 922 So. 2d 458, 459 (Fla. 4th DCA 2006)).

Significantly, T.E.B.’s counsel had failed to preserve the issue in the trial court. T.E.B. therefore argued, on direct appeal, that his trial counsel was ineffective. *See id.* at 294. The Fourth District acknowledged that under this Court’s holding in *Steiger*, it could not grant relief “absent a showing of fundamental error.” *Id.* When addressing whether the error was fundamental, however, the Fourth District simply stated that “it was fundamental error to convict of a greater crime where there was no proof of underlying elements.” *Id.* at 295. In support, it cited this Court’s statement in *F.B.* that “[a]n argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved.” *Id.* (quoting *F.B.*, 852 So. 2d at 230). Without any further analysis, the Fourth District reversed the two felony battery adjudications and

remanded “with instructions for the trial court to adjudicate appellant guilty of two counts of simple battery.” *Id.*

The Fourth District did not acknowledge or address this Court’s instruction in *F.B.* that “the insufficiency of the evidence to prove one element of a crime does not constitute fundamental error” *F.B.*, 852 So. 2d at 227. Nor did it acknowledge this Court’s subsequent holding in *Monroe* that where the evidence supports a conviction on a lesser-included offense, there is no fundamental error even if the defendant’s sentence would be unconstitutional as applied to the lesser offense. Because the Fourth District in *T.E.B.* found that the evidence was sufficient to prove the lesser-included offenses of simple battery, it should have concluded that there was no fundamental error and affirmed the delinquency adjudications without prejudice to T.E.B. seeking collateral relief. *See H.R.*, 298 So. 3d at 1218 n.1 (explaining that a juvenile may “seek [collateral] relief from an adjudication of delinquency based upon ineffective assistance of the juvenile’s adjudicatory hearing counsel”). In holding otherwise, its decision failed to follow the precedent of this Court.

In the next conflict case, *Castillo*, the defendant was convicted of second-degree murder with a deadly weapon. Although second-degree murder is ordinarily a first-degree felony, the conviction was enhanced to a life felony based on the jury's finding that Castillo "carried, displayed, or used a deadly weapon." *Castillo*, 217 So. 3d at 1111-13; see §§ 776.087(1)(a), 782.04(2), Fla. Stat. On appeal, Castillo argued that the enhancement was not supported by any substantive evidence. See *Castillo*, 217 So. 3d at 1112. The Third District acknowledged that because the issue was not preserved, its standard of review was fundamental error. And it went on to discuss both *F.B.* and *Monroe*. See *id.* at 1113-14.

However, after conducting a merits analysis *without* regard to whether the error was fundamental, the Third District held that "[b]ecause the State presented no substantive evidence that Castillo used or had personal possession of a deadly weapon . . . the trial court erred in reclassifying Castillo's conviction from a felony of the first degree to a life felony" *Id.* at 1114-15. On that basis, it affirmed Castillo's murder conviction but reversed his sentence and remanded for resentencing. *Id.* at 1115. Again, because the evidence

was sufficient to show that the defendant committed a lesser offense, the Third District erred by granting relief.

The earliest of the three cases, *Hamilton*, was already implicitly disapproved in *Monroe*. As noted previously, *Hamilton* was cited in the First District's *Monroe* opinion as an example of a decision that seemed to construe *F.B.* "as holding that fundamental error occurs where there is a complete failure of proof that the crime for which the defendant was convicted, as opposed to simply *any* crime, occurred." *Monroe*, 148 So. 3d at 858 (original emphasis). This Court, of course, approved the First District's conclusion that in order to satisfy the fundamental error test, there must be "insufficient evidence that a defendant committed *any* crime." *Monroe*, 191 So. 3d at 401 (original emphasis).

Hamilton is inconsistent with that holding. In *Hamilton*, the defendant was convicted of armed robbery with a deadly weapon. See 71 So. 3d at 247. The Fourth District found insufficient evidence that a deadly weapon was used, since the gun used in the robbery was in fact a toy. Despite the fact that the issue was unpreserved, the Fourth District wrote that it was "compelled to reverse," citing in

support this Court’s statement in *F.B.* that “[a]n argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime . . . meets the requirement of fundamental error” *Id.* (quoting *F.B.*, 852 So. 2d at 230). The Fourth District then remanded the case “for the entry of judgment and resentencing on the lesser included offense of robbery” *Id.*

As the First District observed, the Fourth District in *Hamilton* appears to have interpreted *F.B.* as holding that fundamental error occurs when the evidence is insufficient to support the specific crime for which the defendant was convicted. *See Monroe*, 148 So. 3d at 858. This Court, however, rejected that position and approved the First District’s holding that because the evidence in *Monroe*’s case supported a conviction on a lesser-included offense, there was no fundamental error. *See Monroe*, 191 So. 3d at 401-02. Accordingly, *Hamilton*’s interpretation of *F.B.* was already rejected by this Court in *Monroe*. To the extent that any further clarification is required, *Hamilton* should be expressly disapproved here.

III. THIS COURT SHOULD REJECT PETITIONER’S INVITATION TO ELIMINATE THE PRESERVATION REQUIREMENT FOR SUFFICIENCY-OF-THE-EVIDENCE ARGUMENTS.

In his Initial Brief, Petitioner does not appear to dispute that under this Court’s existing precedent, the Second District correctly found that there was no fundamental error in his case and affirmed his conviction. Petitioner argues, instead, that “this Court should recede from *F.B.* [and its progeny] and adopt a new rule that *all* unpreserved sufficiency issues can be reviewed for fundamental error.” (Initial Br. at 12) (original emphasis).

It is important to clarify what Petitioner means. This Court previously held in *F.B.* that “a defendant must preserve a claim of insufficiency of the evidence through [a] timely challenge in the trial court,” and that, if an insufficiency claim was not preserved, relief may be granted on direct appeal only if the “failure of the evidence meets the requirements of fundamental error—i.e., an error that reaches to the foundation of the case and is equal to a denial of due process.” *F.B.*, 852 So. 2d at 230-31. Accordingly, unpreserved sufficiency issues, like all unpreserved issues and arguments, are already reviewed for fundamental error.

Petitioner’s argument is not that unpreserved challenges to the sufficiency of the evidence should be *reviewed* for fundamental error, which they already are, but rather, that this Court should hold that a deficiency in the evidence, even on a single element, is *always* fundamental error. Stated differently, if a defendant would have been entitled to relief under the competent, substantial evidence standard that is currently applied only to preserved sufficiency challenges, then the defendant would succeed in showing fundamental error. In short, such claims would be subject to the same standard of review regardless of whether they were raised in the trial court—meaning that preservation would no longer be required.

This Court should reject Petitioner’s invitation to eliminate the preservation requirement for sufficiency-of-the-evidence arguments. As a threshold matter, preservation is expressly required by section 924.051, and this Court may not circumvent the statute’s plain language by simply reclassifying ordinary merits review as a review for fundamental error. Moreover, the requirement that such claims must be first raised before and ruled on by the trial court serves important purposes for the appellate process. It ensures that any

errors are addressed and corrected at the earliest opportunity, assists appellate lawyers and judges in analyzing the issues raised on appeal, and deters “sandbagging” by trial counsel.

Those purposes are appropriately served by this Court’s current framework for evidentiary sufficiency claims. If the argument was preserved in the lower court, then the conviction is reviewed for competent, substantial evidence, meaning evidence from which “a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.” *Bush*, 295 So. 3d at 200. If the argument was not preserved, then the conviction is reviewed under the more demanding standard for fundamental error, which occurs only when “a verdict of guilty could not have been obtained without the assistance of the alleged error.” *F.B.*, 852 So. 2d at 229. In the sufficiency context, that standard is not satisfied unless the evidence was “insufficient to show that a crime was committed at all.” *Id.* at 230; *see also Monroe*, 191 So. 3d at 401.

That binary framework—reviewing preserved challenges for evidence of the specific crime for which the defendant was convicted and unpreserved challenges for evidence of any crime—both accords

with the general standard for fundamental error and supports the purposes of the preservation rule and section 924.051. This Court should continue to maintain that distinction between preserved and unpreserved sufficiency-of-the-evidence claims.

A. Preservation is Required by Section 924.051.

As this Court observed in *Steiger*, 328 So. 3d at 929-31, the Legislature in section 924.051 established a clear division between the manner in which preserved and unpreserved claims must be addressed on appeal. Subsection (3) provides in full:

An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

§ 924.051(3), Fla. Stat. “‘Preserved’ means that an issue[] [or] legal argument . . . was timely raised before, and ruled on by, the trial court” § 924.051(1)(b), Fla. Stat.

The Legislature further instructed, in subsection (2), that “[t]he right to direct appeal and the provisions for collateral review created

in this chapter may only be implemented in strict accordance with the terms and conditions of this section.” § 924.051(2), Fla. Stat. In addition, subsection (8) provides:

It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature’s intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

§ 924.051(8), Fla. Stat.

This Court has explained that when interpreting statutes, it follows “the ‘supremacy-of-text principle’—namely, the principle that [t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *State v. McKenzie*, 331 So. 3d 666, 670 (Fla. 2021) (original alteration) (quoting *Ham v. Portfolio Recovery Assoc., LLC*, 308 So. 3d 942, 946 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012))). “[E]very word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.” *Id.* at 670-71 (original alterations) (quoting Joseph

Story, *Commentaries on the Constitution of the United States* 157-58 (1833), *quoted in* Scalia & Garner, *Reading Law* at 69).

Read together, the foregoing portions of section 924.051 stand for two principles. First, there is a distinction between mere “prejudicial error,” which must be preserved to be raised on appeal, and “fundamental error.” § 924.051(3), Fla. Stat. Second, appellate courts must “strictly enforce” all procedural bars on direct appeal—including subsection (3)’s preservation requirement—in order “to ensure that all claims of error are raised and resolved at the first opportunity.” § 924.051(2), (8), Fla. Stat.

Holding that any deficiency in the evidence rises to the level of fundamental error, as Petitioner asks this Court to do, would violate both of those principles. It would eliminate any distinction between prejudicial error and fundamental error in the sufficiency context, and it would result in such claims no longer having to be preserved in order to be addressed on appeal. That would be the very opposite of strictly enforcing the preservation rule “to ensure that all claims of error are raised and resolved at the first opportunity.” § 924.051(8), Fla. Stat. Indeed, this Court rejected that exact result in *F.B.*, where

it held that in light of the “deferential standard of review” that already applies to preserved sufficiency claims, as well as “the interests the contemporaneous objection rule serves,” such claims must be preserved. *F.B.*, 852 So. 2d at 230. To hold otherwise would be to contradict section 924.051’s clear instructions.

Moreover, while “the legislature did not undertake to define ‘fundamental error’” when it enacted section 924.051, it “knew that the judiciary has endeavored to be circumspect in its application of the fundamental error doctrine.” *Bain v. State*, 730 So. 2d 296, 304 (Fla. 2d DCA 1999). This Court, as the Court observed in *F.B.*, “has cautioned that the fundamental error doctrine should be used ‘very guardedly.’” *F.B.*, 852 So. 2d at 229 (quoting *Hopkins*, 632 So. 2d at 1374 (quoting *Sanford*, 237 So. 2d at 137)). As the Court also stated in *F.B.*, an error is not fundamental unless it “reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” *Id.* (quoting *Brown*, 124 So. 2d at 484 (citing *Hamilton v. State*, 88 So. 2d 606, 607 (Fla. 1956))).

The standard for fundamental error that was adopted in *F.B.* conforms to that long-established test. If the evidence appears to have been deficient as to a single element of an offense, but would have supported a conviction on a lesser-included offense, then it is not the case that “a verdict of guilty could not have been obtained without the assistance of the alleged error.” *Id.* In such cases, the defendant will still have been properly convicted of a crime, even if it is not the same crime that the jury found. Further, it is possible in such cases that if the defendant had raised the issue through a timely motion for judgment of acquittal, then the State might have been able to present additional evidence to correct the deficiency. *See F.B.*, 852 So. 2d at 230-31. Alternatively, if the evidence would have been sufficient to support a conviction on a different crime from the one that was charged, then the State might have been able to amend the information during the trial to conform to the evidence. *See Thatch v. State*, 342 So. 3d 620, 621 (Fla. 2022) (holding that midtrial amendments to the charging document are permitted as long as they do not “prejudice the substantial rights of the defendant”).

Under section 924.051, the preservation rule must be strictly enforced to ensure that errors are raised and corrected at the first opportunity. Petitioner's argument that this Court should eliminate the preservation requirement for sufficiency-of-the-evidence claims by redefining any deficiency as fundamental error contradicts the statute's plain language and undermines its express purpose. For that reason alone, his argument must be rejected.

B. Preservation Avoids Unnecessary Appeals and Improves the Appellate Process.

Furthermore, leaving section 924.051 aside, the preservation requirement for such claims improves the appellate process and the administration of justice in multiple respects.

First, it is always better, as a matter of "practical necessity and basic fairness in the operation of a judicial system," for errors to be corrected at the earliest opportunity. *F.B.*, 852 So. 2d at 229 (quoting *Castor*, 365 So. 2d at 703). The appellate process is often lengthy and time-intensive. If the evidence is truly insufficient to support a conviction, then it is better for the administration of justice for the matter to be resolved early on in the trial court, rather than through an appeal that will take months or years to complete. "Delay and an

unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.” *Id.*

Second, requiring challenges to the sufficiency of the evidence to be raised in the trial court improves the ability of appellate courts to review the issue. The trial attorneys and trial judge, by virtue of having sat through the trial, will be more directly familiar with the evidence than appellate attorneys or appellate courts. In making a challenge in the trial court, defense counsel must identify the specific elements of the offense that are alleged to be unsupported by the evidence. *See Fla. R. Crim. P. 3.380(b)* (“A motion for judgment of acquittal . . . must fully set forth the grounds on which it is based.”); *see also* § 924.051(1)(b), Fla. Stat. In response, the prosecutor will generally identify the evidence that supports that part of the State’s case, and the trial court will identify the basis for its ruling. That record, in turn, assists appellate courts in examining whether the conviction was supported by competent, substantial evidence. *See Philip J. Padovano, Florida Appellate Practice* § 27:2 (2023 ed.) (“In criminal appeals, as in all other kinds of review proceedings, the function of the appellate court is to review rulings and orders of the

trial courts and not to make abstract determinations on matters that might have been raised and decided in the trial courts.”).

Further, when a defendant’s trial counsel failed to move for a judgment of acquittal, they may have had reasons for not doing so that are not apparent on the face of the appellate record. An aspect of the offense (*e.g.*, the age of a sexual battery victim or perpetrator) might not have been in dispute, or could have been easily supplied by the State if the issue had been raised, rendering any motion for judgment of acquittal on the issue pointless. Trial counsel might have been aware of a statute or case law that controlled an issue that was not known to or discovered by appellate counsel. In some cases, there may be gaps or errors in the record on appeal.

Certainly, the defendant’s trial counsel could simply have made a mistake in failing to raise the issue. Nonetheless, appellate courts should be cautious in attributing errors to trial counsel based on matters that were never addressed in the lower court. In the absence of fundamental error, as this Court has defined it, the better practice is to affirm the conviction without prejudice to the defendant’s right to raise the matter in a postconviction ineffective assistance claim,

thereby giving trial counsel “an opportunity to explain their actions, which cannot happen in an appellate proceeding.” *Latson*, 193 So. 3d at 1073 (Winokur, J., concurring).

Third, the preservation requirement “prevent[s] attorneys from subsequently using an error to gain a tactical advantage, or ‘sandbag’ opposing counsel.” *Monroe*, 191 So. 3d at 400 (citing *F.B.*, 852 So. 2d at 229); *see also Knight v. State*, 267 So. 3d 38, 47 (Fla. 1st DCA 2018) (“Reviewing courts should not countenance counsel’s tactical inaction. We will not promote the possibility of ‘deliberate sandbagging.’”) (citations omitted), *approved on other grounds*, 286 So. 3d 147 (Fla. 2019). As discussed above, for some unpreserved deficiencies, it is possible that if the matter had been raised at trial, the State could have corrected the issue. If sufficiency claims did not have to be preserved, by contrast, then defense counsel’s incentive would be to refrain from raising the issue in order to prevent “the State [from] correct[ing] the error, if indeed it is correctable, before the trial concludes.” *F.B.*, 852 So. 2d at 230.

Petitioner argues that the goal of preventing such deliberate sandbagging is undermined by rule 3.380(c), which allows motions

for judgment of acquittal to “be *made or renewed* within 10 days after the reception of a verdict” (Emphasis added). In *State v. Stevens*, 694 So. 2d 731, 732 (Fla. 1997), this Court held that the rule allows grounds for a judgment of acquittal to be raised for the first time in a post-trial motion. Petitioner asserts that because the rule could be used to raise new issues that a defendant’s counsel deliberately refrained from making at trial—thereby preserving an argument while depriving the State of the opportunity to correct the error—there is no reason to require sufficiency issues to be preserved at all. To the extent that rule 3.380(c) could be or is being abused to engage in inappropriate “tactical inaction,” *Knight*, 267 So. 3d at 47, that would be a reason to amend the rule to prevent such abuse. It does not, however, justify dispensing altogether with the preservation requirement for sufficiency-of-the-evidence claims.

C. Federal Due Process.

Citing several state court decisions, Petitioner also argues that reviewing unpreserved sufficiency claims under a more demanding standard on appeal than preserved sufficiency claims violates federal due process. (See Initial Br. at 26 n.16). His argument is premised

on the fact that the competent, substantial evidence standard that applies to motions for judgment of acquittal in Florida mirrors the federal due process standard for sufficiency-of-the-evidence claims that was adopted by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). See *Mulnix v. Sec’y for Dep’t of Corr.*, 254 F. App’x 763, 764 (11th Cir. 2007) (recognizing that the Florida and federal sufficiency standards are identical).

But the United States Supreme Court has never held that the same standard must be applied on appeal when a sufficiency claim was not preserved in the lower court. Federal courts, like Florida courts, require sufficiency claims to be preserved and apply a more restrictive standard of review on appeal when such claims have not been preserved. See *Fries*, 725 F.3d at 1291. Although federal courts apply different standards for unpreserved claims than Florida courts—such as the amorphous “manifest miscarriage of justice” standard that this Court rejected in *Monroe*—Petitioner cites no authority suggesting that any particular standard of appellate review is constitutionally required when a claim was not preserved. As the

Court pointed out in *Monroe*, even federal courts disagree over the proper standard. *See Monroe*, 191 So. 3d at 402.

Moreover, it is well-established that states have broad authority to establish their own procedural rules. *See Johnson v. Lee*, 578 U.S. 605, 612 (2016) (“A State’s procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.”) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)); *see also Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 653 (7th Cir. 2014) (Sykes, J., concurring) (“The States have the sovereign authority to establish the jurisdictional and procedural rules that apply in their courts.”). Thus, when reviewing state-court convictions in federal habeas cases, federal courts generally defer to any state procedural bars—including bars to review of sufficiency claims. *See Johnson*, 578 U.S. at 606 (“Federal habeas courts generally refuse to hear claims ‘defaulted . . . in state court pursuant to an independent and adequate state procedural rule.’”) (original alteration) (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)); *see also Johnson v. Alabama*, 256 F.3d 1156, 1170 (11th Cir. 2001) (deferring, on

federal habeas review, to the Alabama Court of Criminal Appeals' finding that "Johnson's sufficiency of the evidence challenge was procedurally barred as a matter of Alabama law"). Petitioner's federal due process argument is therefore meritless.

D. The Scope of the Fundamental Error Test.

Finally, Petitioner argues that if this Court does not eliminate the preservation requirement for sufficiency-of-the-evidence claims, then it should limit the fundamental error test to cases involving lesser-included offenses. In that view, an unpreserved deficiency in the evidence would *always* constitute fundamental error *unless* the evidence would have supported a conviction on a lesser-included offense. As such, Petitioner effectively asks this Court to disapprove the Second and Third District's decisions in *Bybee* and *H.R.*, which held that there was no fundamental error where, even though there was insufficient evidence to support the challenged offense or any lesser-included offense, it was still not the case that the State failed to prove that the defendant committed *any* crime. *See Bybee*, 295 So. 3d at 1232; *H.R.*, 298 So. 3d at 1223-24.

The circumstances presented in *Bybee* and *H.R.* are not before this Court. There is no need for the Court to address whether those cases were correctly decided, since the evidence in this case showed that Petitioner was guilty, at a minimum, of a lesser-included offense. Even so, Respondent submits that the fundamental error standard for unpreserved sufficiency claims should remain in its current form according to the definition that was set out by this Court in *F.B., Young*, and *Monroe*: *i.e.*, that fundamental error does not occur unless the evidence is insufficient to support a conviction for any crime. If the evidence would still have supported a conviction for a crime, even if it is not the same crime for which the defendant was convicted, then it is not the case that “a verdict of guilty could not have been obtained without the assistance of the alleged error.” *F.B.*, 852 So. 2d at 229 (quoting *Brown*, 124 So. 2d at 484). Even for uncharged crimes, it is possible that the State might have been able to amend the information during the trial to conform to the evidence. *See Thatch*, 342 So. 3d at 621. In such cases, the proper remedy is to affirm the conviction without prejudice to the defendant’s right to seek relief through a postconviction *Strickland* claim.

However, even if the fundamental error standard were limited to cases where the evidence failed to prove the charged offense or any lesser-included offense, that would still not help Petitioner. The evidence in Petitioner's case clearly supported a conviction, at the very least, for the lesser-included offense of Possession of a Firearm by a Convicted Felon. Therefore, the Second District correctly found that there was no fundamental error. For all of the reasons discussed above, that decision should be approved.

CONCLUSION

Based on the authorities and arguments presented herein, the State of Florida respectfully requests that this Honorable Court approve the Second District's affirmance of Petitioner's conviction for Possession of a Firearm by a Violent Career Criminal.

/s/Jonathan S. Tannen
JONATHAN S. TANNEN

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 22, 2024, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal system, which will send a notice of electronic filing to Richard J. Sanders, Assistant Public Defender, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831 (appealfilings@pd10.org; rsanders@pd10.org; rwilliamson@pd10.org).

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.045(b). This brief contains 12,970 words.

Respectfully submitted,

**ASHLEY MOODY
ATTORNEY GENERAL**

/s/Jonathan S. Tannen

Jonathan S. Tannen

Assistant Attorney General

Florida Bar No. 70842

Office of the Attorney General

3507 E. Frontage Road, Suite 200

Tampa, Florida 33607-7013

Telephone: (813) 287-7900

CrimAppTPA@myfloridalegal.com

Jonathan.Tannen@myfloridalegal.com

COUNSEL FOR RESPONDENT