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IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER ALLEN PRYOR, :

Petitioner, :

vs. : Case No. SC2023-593

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The primary issue presented here concerns the conflict between the opinion in the present case and three other district court opinions (discussed below) regarding the meaning of the limited test for fundamental error adopted in *F.B. v. State*, 852 So. 2d 229 (Fla. 2002) and its progeny for use with unpreserved evidence-sufficiency issues ("sufficiency issues") in direct criminal appeals. Under that limited test, only some (but not all) sufficiency issues can be reviewed for fundamental error. The secondary issue here is whether this Court should recede from *F.B., et al.,* and adopt a new rule that *all* unpreserved sufficiency issues can be reviewed for fundamental error.

The district court affirmed Petitioner's conviction for possession a firearm by a violent career criminal even though the State failed to "prove that he possessed the requisite prior convictions to qualify as a VCC [because] his juvenile escape conviction is not a qualifying offense …." *Pryor v. State*, 359 So. 3d 1216, 1222 (Fla. 2d DCA 2023).

Noting this issue was not preserved, the court said:

> [W]e review for fundamental error, [which] means that the appellant must show that *the evidence was insufficient to prove that he committed any crime at all*. [Citing *F.B.*]. … Mr. Pryor fails to demonstrate that he committed no crime [because the evidence proved he committed the lesser-included offense of felon in possession of a firearm].

Id. at 1224 (emphasis added).

This opinion conflicts with the opinions in *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). In the present case, the evidence proved a necessary-lesser of the crime of conviction but failed to prove the enhancing element needed to prove the greater offense. Interpreting *F.B.,* the district court concluded this is not fundamental error because the evidence proved that "any crime" was committed, *i.e.,* the necessary lesser of felon-in-possession. As discussed below, the three conflict cases all reach the opposite conclusion on legally identical facts. In all three cases, the evidence also proved a necessary lesser of the crime of conviction but failed to prove the enhancing element needed

to prove the greater offense. In all three cases, the courts concluded this was fundamental error.

As also discussed below, there are other unresolved issues regarding the meaning of the *F.B.* test, including whether it applies if the defendant is also convicted of a wholly unrelated (*i.e.,* not a lesser-included) offense, or if the evidence proves an uncharged offense.[1] Respectfully, Petitioner believes these issues are arising because *F.B., et al.,* are wrongly decided.

[1] One district court concluded the *F.B.* test includes unrelated crimes (*Bybee v. State*, 295 So. 3d 1229 (Fla. 2d DCA 2020)) and another applied it to include an uncharged crime. *H.R. v. State*, 298 So. 3d 1217 (Fla. 3d DCA 2020).

SUMMARY OF THE ARGUMENT

The basic argument made here is a condensed version of the one laid out in Richard Sanders, *Doin' Time for an Unproven Crime: The Problem of Unpreserved Evidence Sufficiency Issues in Criminal Appeals*, 27 St. Thomas Law R. 94 (2015). In sum, that argument is as follows:

> 1) As an abstract matter, the only valid reason to require sufficiency issues to be raised during criminal trials is to give the State a chance to cure any deficiencies in its proof before the case concludes; but
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> 2) in Florida, Rule 3.380(c), as interpreted in *State v. Stevens*, 694 So. 2d 731 (Fla. 1997), allows sufficiency issues to be initially raised post-verdict, when it is too late for the State to cure any deficiencies; so therefore
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> 3) there is no valid reason for Florida courts to require such issues to be preserved; and further
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> 4) defense counsel's failure to move for an acquittal under Rule 3.380(c) will *always* amount to ineffective assistance of counsel ("IAC").[2]

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[2] Although *F.B.* was a juvenile case and Rule 3.380(c) would not apply, the juvenile rules contain a similar provision. Fla.R.Juv.P. 8.130. Further, many of the post-*F.B.* cases involve adult convictions and no court has suggested that the applicability of *F.B.* is contingent on which rules apply.

No Florida court has ever expressly adopted this reasoning in full.

Florida courts have long wrestled with the problem of unpreserved sufficiency issues in direct criminal appeals. While some district court cases seem to suggest that *all* such issues should be reviewed for fundamental error—what could be more fundamental than failing to prove all the elements of the crime of conviction--, other Florida cases (including *F.B.*) distinguish between unpreserved-and-fundamental sufficiency issues and unpreserved-but-not-fundamental sufficiency issues. But neither the precise dividing line between the two, nor the reason for drawing that line, have been made entirely clear, although some cases expressly say (and others imply) that the line is based on the cure-the-deficiency logic.

Three cases from this Court establish the framework within which the analysis here will proceed, *F.B.*, *Monroe v. State*, 191 So. 3d 395 (Fla. 2016), and *Steiger v. State*, 328 So. 3d 926 (Fla. 2021)

In *F.B.*, this Court held fundamental error occurs with

sufficiency issues only "when the evidence is insufficient to show that a crime was committed at all."[3] We shall call this the "a-crime-was-committed test." The Court refused to address the unpreserved sufficiency issue in *F.B.* because the evidence proved a lesser included offense.

In *Monroe*, the Court reaffirmed the *F.B.* test, which it rephrased as "there is insufficient evidence that a defendant committed *any* crime."[4] Presumably, this committed-any-crime test is meant to be identical to the a-crime-was-committed test; we shall call this combined test the "a/any-crime test." However, although the *Monroe* Court concluded no fundamental error occurred there (because, again, the evidence proved a lesser included offense), the Court nonetheless granted relief because it found that trial counsel's failure to preserve the valid sufficiency issue constituted IAC.

But in *Steiger*, the Court receded from *Monroe* on this latter

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[3] 852 So. 2d at 230.

[4] 191 So. 3d at 401.

point and held unpreserved IAC claims cannot be raised on direct appeal. However, the unpreserved issue in *Steiger* was not a sufficiency issue, and the two post-*Steiger* district court cases that grant relief on unpreserved sufficiency issues (discussed below) indicate that the precise relationship among the concepts of fundamental error, unpreserved IAC claims and unpreserved sufficiency issues is yet to be determined.

In the present case, the district court read the a/any-crime test to mean no fundamental error occurred because the evidence proved a lesser included offense. As discussed below, the three conflict cases reached the opposite result on legally identical facts. Thus, there is conflict in the district courts regarding the basic meaning of the a/any-crime test. As noted above, also unresolved is how this test applies to unrelated and uncharged crimes.

Petitioner's position is simply stated. Although the preservation rule serves several general interests, the only valid reason to require sufficiency issues to be preserved is the cure-the-deficiency logic. As

long as Rule 3.380(c) allows sufficiency issues to be initially raised post-verdict (when it is too late cure any deficiency), there is no reason to require *any* sufficiency issues to be preserved. Further, the due process clause of the United States Constitution requires that *all* unpreserved sufficiency issues be addressed on direct appeal. This Court should recede from a/any-crime test and adopt this flat rule.

Alternatively, if the Court wishes to reaffirm the a/any-crime test, it should be limited to cases involving lesser included offenses in which it's not clear whether the State could have cured-the-deficiency if the issue had been timely raised. Also, the Court should consider a rule change through which it can be quickly determined (during the direct appeal) whether the relevant deficiency could have been cured, without requiring defendants to file Rule 3.850 motions to raise the issue through an IAC claim. *Cf.* Fla.R.Crim.P. 3.800(b).

ARGUMENT

THIS COURT SHOULD RECEDE FROM THE LIMITED TEST FOR FUNDAMENTAL ERROR NOW USED FOR UNPRESERVED EVIDENCE-SUFFICIENCY ISSUES IN DIRECT CRIMINAL APPEALS, AS LAID OUT IN *F.B. V. State,* 852 So. 2d 229 (Fla. 2002) AND ITS PROGENY, AND ADOPT A RULE THAT *ALL* SUCH ISSUES CAN BE REVIEWED FOR FUNDAMENTAL ERROR.

"[T]he issue of unpreserved fundamental error [is reviewed] under the *de novo* standard." *Elliot v. State*, 49 So. 3d 269, 270 (Fla. 1st DCA 2010).

Part I of the argument outlines the general principles of the preservation rule and its fundamental-error exception. Part II summarizes the Florida cases that address the problem of unpreserved sufficiency issues in criminal cases, using the *F.B.*, *Monroe* and *Steiger* cases as benchmarks. As noted above, this Court has not concluded that *all* unpreserved sufficiency issues can be reviewed for fundamental error. This means there will be some cases where the evidence fails to prove all the elements of the crime of conviction but the court will still affirm because the issue was not

preserved. This in turn raises two questions: Why do we draw this distinction; and how is the distinction defined and applied in practice?

Part III addresses these two questions and answers them as follows: Given the answer to the first question, the second question is moot. As to the first question, the only possibly viable (in the abstract) reason for drawing this distinction is the cure-the-deficiency logic. But, as a practical matter, this is not a valid reason as long as Rule 3.380(c) allows sufficiency issues to be initially raised post-verdict. No Florida court has addressed this argument, which is detailed in Part III-B.

I. THE PRESERVATION RULE AND FUNDAMENTAL ERROR

The preservation rule is justified on several general bases: 1) It promotes judicial economy and order by encouraging the correction of errors at the earliest opportunity, which eliminates the need for appeals and retrials; 2) it discourages "sandbagging" by trial counsel; 3) it keeps trial judges in their proper role as neutral arbiters, a role

that might be compromised if they are encouraged to correct *sua sponte* unobjected-to errors; and 4) it alerts opposing parties to problems with their proof and gives them a chance to cure that deficiency before the case concludes.[5] As will be seen, Florida courts cite this cure-the-deficiency basis to justify the preservation rule for sufficiency issues in criminal cases.

The preservation rule is a procedural rule designed to achieve certain practical results, and it evolved over many decades to apply in *all* appeals, to *all* issues and *all* parties. But criminal defendants, and their sufficiency issues, are unique for three reasons.

First, criminal defendants have constitutional rights that other litigants do not, some of which were not firmly established when the preservation rule was being formulated and first applied in criminal cases. Three of these rights are relevant here: 1) the right to effective

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[5] *See Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010, 1016–17, 1026 (Fla. 2000); *State v. Rhoden*, 448 So. 2d 1013, 1016 (Fla. 1984), *receded from on other grounds, Maddox v. State,* 760 So. 2d 89 (Fla. 2000); *Pinder v. State*, 396 So. 2d 272, 273 (Fla. 3d DCA 1981); *Porter v. State*, 356 So. 2d 1268, 1270–71 (Fla. 3d DCA 1978) (Hubbart, J., dissenting).

assistance of counsel;[6] 2) the right to require the State to prove every element of the crime of conviction beyond reasonable doubt;[7] and 3) the double jeopardy right not to be retried if the State fails to prove the crime of conviction.[8]

Second, at least for indigent defendants (as most are), appeals—particularly after jury trials—are almost automatic and, for the most part, are publicly financed and cost free for defendants. Collateral relief is also more readily available and more often used; and here too the costs are borne mostly by the public. Thus, society has significant financial interests in criminal appeals that it doesn't have in other types of appeals (in addition to the general "fairness" interest in not seeing defendants convicted of, and punished for, crimes that the State didn't prove).

Finally, the consequences of losing in the trial court are

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[6] *Strickland v. Washington,* 466 U.S. 668 (1984).

[7] *In Re Winship*, 397 U.S. 358 (1970).

[8] *Burks v. United States*, 437 U.S. 1 (1978).

qualitatively different for criminal defendants, which make their sufficiency issues all the more compelling.

We cannot reflexively apply the preservation rule to sufficiency issues in criminal defense appeals without regard for these differences.

Florida courts recognize an exception to the preservation rule called fundamental error, which this Court has defined as an error that 1) "goes to the foundation of the case or the merits of the cause of action;"[9] or 2) "amount[s] to a denial of due process"[10] (although "not all errors of constitutional dimension are fundamental");[11] or 3) "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 ... error."[12]

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[9] *State v. Smith*, 240 So. 2d 807, 810 (Fla. 1970).

[10] *Castor v. State*, 365 So. 2d 701, 704, n.7 (Fla. 1978).

[11] *Clark v. State*, 336 So. 2d 468, 472 (Fla. 2d DCA 1976), *aff'd*, 363 So. 2d 331 (Fla. 1978).

[12] *State v. Delva*, 575 So. 2d 643, 644–45 (Fla. 1991).

This Court has also said fundamental error is recognized, “not to protect the interests of [the litigant], but rather to protect the interests of justice itself.”[13] Given "the overarching concern that a litigant receive a fair trial and that our system operate so as to deserve public trust and confidence," an error is fundamental if it "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial."[14]

II. FLORIDA CASES ON EVIDENCE SUFFICIENCY AND FUNDAMENTAL ERROR

However we define fundamental error, a conviction based on insufficient evidence seems to be the quintessential example. Due process requires the State to “pro[ve] beyond a reasonable doubt [all elements] necessary to constitute the crime [of conviction].”[15] Given this, a conviction on insufficient evidence seems to “amount to a

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[13] *Maddox*, 760 So. 2d at 98.

[14] *Murphy*, 766 So. 2d at 1026, 1030.

[15] *In re Winship*, 397 U.S. 358, 364 (1970).

denial of due process;"[16] at the least, "a verdict of guilty could not

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[16] *Castor*, 365 So. 2d at 704, n.7.

Several State courts have concluded that federal due process principles require courts to address the merits of all unpreserved sufficiency issues. *McCoy v. People*, 442 P.3d 379, 385 (Col. 2019) ("sufficiency claims may be raised for the first time on appeal and are not subject to plain error review"; "a defendant challeng[ing] the sufficiency of the evidence … is asserting that the prosecution has not proven every fact necessary to establish the crime at issue, and thus, it has not established that the defendant … committed a crime. Appellate review of such a claim thus serves to protect an essential component of due process … and we do not believe that plain error review could, consistent with due process, result in the affirmance of a conviction that was unsupported by legally sufficient evidence") (citation omitted); *State v. Adams*, 623 A.2d 42, 45, n.3 (Conn. 1993) ("defendant claims that the insufficiency of the evidence violated his due process rights under [the federal] constitution[]," even though "he did not preserve [that issue]"; "[i]f an appellate court is presented with [a sufficiency] claim, reversal is constitutionally required if, 'after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'") (citations omitted); *Garza v. State*, 670 S.E.2d 73, 79, n.7 (Ga. 2008) ("Because due process requires the existence of sufficient evidence as to every element of the crime of which a defendant is convicted, the fact that this issue was not explicitly raised does not prevent us from addressing (nor, more importantly, does it justify a refusal to address) the issue") (citation omitted), *superseded on other grounds by statute*, Ga. Code § 16–5–40(b)(2) (2009); *State v. Crawford*, 972 N.W.2d 189, 200, 202 (Iowa 2022) ("The continuing punishment of a defendant where the state has failed to prove the [crime of conviction] violates the defendant's [due process] rights and requires relief notwithstanding error

have been obtained"[17] without the error. Also, allowing convictions to stand even though the crime of conviction was not proven would "so damage[] the fairness of the trial that the public's interest in our system of justice requires [a remedy.]"[18]

But Florida courts have not viewed the matter this way.

A. THE PRE-*F.B.* CASES

We begin with the two cases that eventually caused the conflict in the district courts that the *F.B.* court had to resolve, *State v. Barber*, 301 So. 2d 7 (Fla. 1974) and *Negron v. State*, 306 So. 2d 104 (Fla. 1974). In both cases, the defendants were convicted of grand

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preservation"; "A defendant's trial and the imposition of sentence … are sufficient to preserve error [as] to any challenge to the sufficiency of the evidence"); *State v. Green*, 691 So. 2d 1273 (La.Ct.App. 1997) ("we simply are not allowed to *choose* not to review the constitutional due process sufficiency when it is assigned as an error," even though the issue was not preserved in the trial court).

Rather than unduly lengthen this brief, on this constitutional point Petitioner adopts the arguments made in these cases.

[17] *Delva*, 575 So. 2d at 645.

[18] *Murphy*, 766 So. 2d at 1030.

larceny; but the State didn't prove the required value element; and the issue wasn't preserved. The *Barber* court held this was not fundamental error;[19] the *Negron* Court (which didn't note *Barber*) said it was.[20]

Ten years later, this Court held a specific type of sufficiency issue was fundamental error in *Troedel v. State*, 462 So. 2d 392 (Fla. 1984) and *Vance v. State*, 472 So. 2d 734 (Fla. 1985). Based on a single entry into a home, Troedel was convicted of two counts of burglary (armed burglary and burglary-with-assault). Vance was convicted of two counts of improper exhibition of a firearm under a statute that banned such exhibitions "in the presence of one or more persons";[21] the two convictions were based on the fact that he simultaneously exhibited a firearm to two people.

This Court vacated the second conviction in both cases. Troedel

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[19] 301 So. 2d at 9–10.

[20] 306 So. 2d at 107–08.

[21] §790.10, Fla. Stat. (1985).

entered the home only once and "proof of both enhancement factors can[not] transform one instance of unlawful entry from one crime into two crimes."[22] And Vance's "exhibition of the firearm in the presence of two persons ... violated the statute only one time."[23] Although neither defendant preserved the issue, in both cases this Court said "a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error."[24] Neither case cited *Barber*.

The issue in *Troedel-Vance* is not the usual sufficiency issue (as was true in *Barber-Negron* and in the present case). *Troedel-Vance* address a unit-of-prosecution issue, *i.e.,* did the legislature intend the proven facts to be a single offense or multiple offenses? It is a

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[22] 462 So. 2d at 399.

[23] 472 So. 2d at 735.

[24] *Vance*, 472 So. 2d at 735; *Troedel*, 462 So. 2d at 399.

double jeopardy violation if multiple convictions are based on facts the legislature intended to be a single offense.[25]

In cases like *Troedel-Vance*, the State clearly proved at least one count of the crime of conviction, with the issue being whether more than one count was proven. With the usual sufficiency issue, the question is whether the State proved the crime of conviction itself. We note *Troedel-Vance* because, as will be seen, *F.B.* relied on them when formulating the a-crime-was-committed test.

Several district court cases considered the problem of unpreserved sufficiency issue during this time period. However, although the courts generally concluded that *at least some* such issues can reviewed for fundamental error, there was no uniformity on: 1) the precise wording of the fundamental error test; 2) whether the test applied to all such issues; and 3) if the test didn't apply to all issues, why didn't it, *i.e.*, why do we draw that distinction? On this latter point, the cure-the-deficiency logic was the reason expressly

[25] *E.g.*, *Sanabria v. United States*, 437 U.S. 66, 69–70 (1978).

given in some cases and, possibly, implied in others; and no other possible reasons were expressly provided.

The first district court case to grant relief on an unpreserved sufficiency issue said "no error [is] more fundamental than the conviction ... in the absence of a *prima facie* showing of the essential elements of the crime charged."[26] Other cases used this same test.[27] Other tests for fundamental error were also used, including: "conviction of a crime that did not take place";[28] "the facts affirmatively proven ... do not constitute the charged offense;"[29] and "totally unsupported by evidence."[30]

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[26] *Dydek v. State*, 400 So. 2d 1255, 1258 (Fla. 2d DCA 1981). *Dydek* was a plea case; the sufficiency issue was based on the factual basis laid for the plea in the trial court.

[27] *E.g.*, *Brown v. State*, 652 So. 2d 877, 881 (Fla. 5th DCA 1995); *Valdes v. State*, 621 So. 2d 567, 568 (Fla. 3d DCA 1993).

[28] *Harris v. State*, 647 So. 2d 206, 208 (Fla. 2d DCA 1994); *Stanley v. State*, 626 So. 2d 1004, 1005 (Fla. 2d DCA 1993).

[29] *Griffin v. State*, 705 So. 2d 572, 574 (Fla. 4th DCA 1998).

[30] *Stanton v. State*, 746 So. 2d 1229, 1230 (Fla. 3d DCA1999).

Arguably, these tests seem to include *all* sufficiency issues. But some courts concluded that some unpreserved sufficiency issues cannot be reviewed for fundamental error. Three Third District cases expressly relied on the cure-the-deficiency logic to refuse to address an unpreserved sufficiency issue.[31] There is some ambiguity on this latter point in the other relevant cases here, from the Fourth District and the Second District.

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[31] *Pierre v. State*, 597 So. 2d 853, 855 (Fla. 3d DCA 1992) (refusing to address unpreserved issue regarding defendant's age in capital sexual battery case because, if the issue had been raised, "any error might have been cured by allowing the state to reopen its case and establish th[at] age"); *Johnson v. State*, 478 So. 2d 885, 886 (Fla. 3d DCA 1985) (refusing to address unpreserved issue regarding victim's age in capital sexual battery case because, if the issue had been raised, "the error ... might have been cured by allowing the state to re-open its case [to prove] the missing, technical element"); *Pinder*, 396 So. 2d at 273, n.3 (affirming aggravated assault conviction and refusing to address unpreserved issue regarding whether it was proven defendant used a firearm because "fundamental error may exist only when ... it clearly and affirmatively appears that the result could not have been affected by the failure to object").

But cf. the Third District case of *Valdes*, 621 So. 2d at 568 and n.1, in which the court said a "conviction in the absence of a *prima facie* showing of the essential elements the crime charged is fundamental error" and also indicated it is fundamental error if the evidence "failed to prove all of the elements" of the crime of conviction.

A Fourth District case distinguished between cases in which 1) "ambiguous evidence [fails to] prov[e] a *prima facie* case on a particular element of the crime charged" (preservation required); and 2) "the issue is whether the state's theory of culpability under the [relevant] statute was legally sustainable" (fundamental error).[32] The court did not explain the perceived distinction any further and this distinction has not been noted again in later cases.

Three Second District cases also recognized two types of unpreserved sufficiency issues. One case distinguished "a typical failure of proof case" (preservation required) from cases "where the defendant's conduct clearly did not constitute the crime [of conviction]" (fundamental error).[33] The second case distinguished "the usual failure of proof case" (preservation required) from cases

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[32] *Otero v. State*, 807 So. 2d 666, 667 (Fla. 4th DCA 2001) (citation omitted). *But cf. Griffin*, 705 So. 2d at 574, in which the Fourth District said fundamental error occurs when "the facts affirmatively proven … do not constitute the charged offense."

[33] *Hornsby v. State*, 680 So. 2d 598, 598 (Fla. 2d DCA 1996).

involving a "convict[ion] of a crime that never occurred" (fundamental error).[34] The third case distinguished "case[s where] the state's failure to prove the offense involves a technical matter that could have been resolved if the issue had been raised" (preservation required) from cases where "[i]t is clear that the state could not have proven an essential element [of the crime of conviction] because all of the evidence established that [the defendant committed only a lesser-included offense]" (fundamental error).[35]

These cases did not explain these perceived distinctions any further; nor did any later cases. In *Burrell,* the distinction seems to

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[34] *Nelson v. State*, 543 So. 2d 1308, 1309 (Fla. 2d DCA 1989).

[35] *Burrell v. State*, 601 So. 2d 628, 629 (Fla. 2d DCA 1992). Other Second District cases said "no error [is] more fundamental than the conviction ... in the absence of a *prima facie* showing of the essential elements of the crime [of conviction]," *Dydek*, 400 So. 2d at 1258, and it is fundamental error to "convict[] of a crime that did not take place." *Harris*, 647 So. 2d at 208; *Stanley*, 626 So. 2d at 1005. Another case indicated "it is fundamental error for the State to fail to prove an essential element of a crime." *M.C.M. v. State*, 754 So. 2d 844, 845 (Fla. 2d DCA 2000) (citation omitted).

be between cases in which 1) the evidence affirmatively proves that the crime of conviction *did not and could not* occur; and 2) the evidence fails to prove all the elements of the crime of conviction but we don't know whether the State could have proven the missing element(s) if the issue had been raised. If this is the distinction this court is drawing, then it relies on the cure-the-deficiency logic.[36]

This brings us to the conflict that led to this Court's *F.B.* decision. Two district courts reached opposing results in cases that addressed the same issue as in *Barber-Negron, i.e.,* an unpreserved issue regarding the value element in a grand theft case. One court followed *Negron* and held the value element is "an essential element

[36] *See Lowman v. Moore*, 744 So. 2d 1210, 1211 (Fla. 2d DCA 1999) (finding appellate counsel was ineffective for failing to raise valid unpreserved sufficiency issue and citing *Burrell* for the proposition that "[c]onvicting a defendant of a crime when an essential element of the crime has not been proven and could not have been proven is fundamental error").

of theft charges" and the failure to prove it was fundamental error.[37] The second court followed *Barber* and affirmed because, "had [the issue] been [raised,] the trial court could have allowed the state to reopen its case and prove the missing element."[38]

B. THIS COURT'S OPINION IN *F.B.*

The Court began by "approv[ing] the [district court's] holding that the insufficiency of the evidence to prove one element of a crime does not constitute fundamental error ...."[39] The Court then reaffirmed *Barber* and receded from *Negron.*[40] Explaining this conclusion, the Court first noted the preservation rule serves the following general purposes:

> It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it

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[37] *T.E.J. v. State*, 749 So. 2d 557, 558 (Fla. 2d DCA 2000), *disapproved*, *F.B.*, 852 So. 2d at 231.

[38] *F.B. v. State*, 816 So. 2d 699, 701 (Fla. 4th DCA 2002), *approved*, 852 So. 2d at 231.

[39] 852 So. 2d at 227.

[40] *Id.* at 229.

> 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.
>
> ... [I]t also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client's tactical advantage.[41]

The Court then said "the interests of justice are better served by applying [the preservation] rule to [sufficiency issues]" for two reasons:

> [First, 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 ....
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> [Second, t]he deferential standard of review appellate courts apply to [sufficiency] claims[, *i.e.*,] whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the [State], there is substantial, competent evidence to support the verdict[,] further supports our holding ....[42]

The Court then "[held] that, with two exceptions, a defendant must preserve a [sufficiency issue]."[43] The first exception, death

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[41] *Id.* (citation omitted).

[42] *Id.* at 230 (citations and internal quotation marks omitted).

[43] *Id.*

penalty cases, is irrelevant for present purposes. The second exception is the a-crime-was-committed test, *i.e.*, "when the evidence is insufficient to show that a crime was committed at all."[44] To "illustrate[]" this second exception, the Court cited the *Troedel* and *Vance* cases noted above, which the *F.B.* Court read as holding "a conviction imposed upon a crime totally unsupported by evidence [is] fundamental error."[45] Thus, the *F.B.* Court continued, it is fundamental error if "the evidence is totally insufficient as a matter of law to establish the commission of a crime ...."[46]

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[44] *Id.*

[45] *Id.* (quoting *Troedel*).

[46] *Id.* It is accurate to say that *Troedel-Vance* involved "crimes totally unsupported by evidence," where "the evidence is totally insufficient to establish the commission of a crime" and "the evidence is insufficient to show that a crime was committed," only in the sense that the legislature didn't intend for the facts proven in those cases to constitute *two* counts of the crime of conviction, as opposed to only one count. In both cases, the *evidence* was *factually* sufficient to prove two counts of the crimes of conviction. The problem in both cases was that the evidence wasn't *legally* sufficient to prove the second count*, but only because that wasn't what the legislature intended.* If the legislature had intended otherwise, the two

The Court then cited and quoted three fundamental error tests from the district court cases noted above: 1) "when the facts affirmatively proven do not constitute the charged offense as a matter of law"; 2) "conviction of a crime which did not take place"; and 3) "defendant's conduct did not constitute the crime of which he was convicted."[47] The Court concluded by "reaffirm[ing], with the two discrete exceptions explicated above, [that sufficiency] claims [must be preserved]."[48]

F.B. states several fundamental error tests for sufficiency issues, tests which may not necessarily be consistent with one another.[49] More recent cases from this Court (discussed below)

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convictions in both cases would have been *factually* supported by sufficient evidence.

[47] *Id.* at 231 (citations and internal quotation marks omitted).

[48] *Id.*

[49] *See* Sanders, *Doin' Time,* 27 St. Thomas L.R. at 109-10; Richard Sanders, *Evidence Sufficiency and Fundamental Error in Criminal Cases*, 79 Fla.B.J. 28, 29-31 (July/Aug. 2005) (identifying three types of sufficiency issues, positive-element-insufficiency,

indicate that the proper test from *F.B.* is the a-crime-was-committed test.

C. FROM *F.B.* TO *Monroe*

Between *F.B.* and *Monroe,* this Court applied the a-crime-was-committed test for fundamental error in three cases. Two of these cases do not address the usual sufficiency issue (*i.e.*, did the State prove the crime of conviction) and need not be discussed at length.[50]

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negative-element-insufficiency and identity-insufficiency, with the difference between the first two being whether the evidence affirmatively *dis*proves, as opposed to merely *fail*s to prove, the crime of conviction).

The simplest test for fundamental error in this context would seem to be something like "if the evidence fails to prove all elements of the crime of conviction beyond reasonable doubt." Or, more succinctly, "if the crime of conviction isn't proven."

[50] *Hampton v. State*, 103 So. 3d 98, 114 (Fla. 2012) (affirming first-degree murder conviction and rejecting unpreserved issue regarding the giving of a jury instruction on a sexual-battery felony-murder theory because the evidence was sufficient to support alternative theories of "premeditated murder or felony murder [based on] robbery or burglary"); *Insko v. State,* 969 So. 2d 992 (Fla. 2007) (concluding defendant waived the sufficiency issue by agreeing to a jury instruction that should not have been given and that resulted in conviction of an otherwise-inapplicable lesser included offense).

The third case did raise a straightforward sufficiency issue. In *Young v. State*, 141 So. 3d 161 (Fla. 2013), the Court addressed a conflict in the district courts regarding the meaning of "dwelling," as defined in the burglary statute. Young argued the State failed to prove the building he entered met that statutory definition. The Court said this unpreserved issue was not fundamental error because the evidence proved "Young committed a burglary of a structure[, which meant] that a crime was in fact committed ...."[51] Thus, as in *F.B.,* in *Young* the evidence proved a necessary lesser but the enhancing element needed to prove the greater crime of conviction may not have been proven.

As to the district court cases in this time period, several granted relief by finding it was IAC for trial counsel to fail to preserve a valid sufficiency issue.[52] Other cases used the a-crime-was-committed test

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[51] *Id.* at 165.

[52] *E.g.*, *Larry v. State*, 61 So. 3d 1205 (Fla. 5th DCA 2011); *Hicks v. State*, 41 So. 3d 327 (Fla. 2d DCA 2010).

to grant relief.[53] Still others granted relief by using some variant of the tests of either 1) "conviction in the absence of a prima facie showing of the essential elements of the crime;"[54] or 2) "the facts affirmatively proven do not constitute the charged offense."[55]

This brings us to the first district court case that conflicts with the present case. In *Hamilton v. State*, 71 So. 3d 247, 248 (Fla. 4th DCA 2011), the court quoted *F.B.* for the proposition that "an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime [is] fundamental error" and reduced an armed robbery conviction to one for simple robbery because the State failed to prove that Hamilton used a weapon. As in

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[53] *E.g., Alvarez v. State*, 963 So. 2d 757, 764, n.1 (Fla. 3d DCA 2007); *Crain v. State*, 79 So. 3d 118, 119, 122 (Fla. 1st DCA 2012); *Trock v. State*, 990 So. 2d 1195, 1197, n.2 (Fla. 5th DCA 2008).

[54] *Baldwin v. State*, 857 So. 2d 249, 252 (Fla. 2d DCA 2003); *Colbert v. State*, 49 So. 3d 819, 822–23 (Fla. 4th DCA 2010); *Watson v. State,* 974 So. 2d 1168 (Fla. 4th DCA 2008).

[55] *Cox v. State*, 1 So. 3d 1220, 1222 (Fla. 2d DCA 2009); *Bruce v. State*, 993 So. 2d 155, 156 (Fla. 1st DCA 2008); *Randall v. State*, 919 So. 2d 695, 697 (Fla. 4th DCA 2006).

the present case (and in *F.B.* and *Young*), the State proved Hamilton committed a lesser included offense but failed to prove the enhancing element needed to prove the greater crime of conviction. But the *Hamilton* court concluded this was fundamental error.

Other cases refused to address an unpreserved sufficiency issue. Some cases used the a-crime-was-committed test and did not address the unpreserved issue because the evidence proved a lesser-included offense.[56] One case did not address the unpreserved issue because "the failure to present evidence on a particular element ... is not fundamental error."[57]

The final case in this time period is *Monroe.* Convicted of capital sexual battery, Monroe raised on appeal the unpreserved issue that the State didn't prove he was over 18 when the crime occurred. The district court held this was not fundamental error because, even if Monroe was only 17, he still committed a sexual battery crime

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[56] *Goad v. State*, 887 So. 2d 415, 416 (Fla. 2d DCA 2004); *Jennings v. State*, 920 So. 2d 32, 33 (Fla. 2d DCA 2006).

[57] *Jean v. State*, 877 So. 2d 910, 911 (Fla. 4th DCA 2004).

(albeit one without a mandatory life sentence). The court said the a-crime-was-committed test

> require[s] a showing that the evidence could not support the conviction of any crime whatsoever before an evidentiary deficiency [constitutes] fundamental error. Only then will such a "complete failure of the evidence" rise to the level of fundamental error.[58]

The court certified a question:

> 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?[59]

D. THIS COURT'S OPINION IN *Monroe*

The Court first said *F.B.* "held that the State's failure to prove an element of a crime … does not constitute fundamental error."[60] Asserting "[the preservation] rule serves the interests of judicial

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[58] *Monroe v. State*, 148 So. 3d 850, 859 (Fla. 1st DCA 2014) (quoting *F.B.*), *remanded*, 191 So. 3d at 404.

[59] *Id.* at 861 (Fla. 1st DCA 2014), *remanded*, 191 So. 3d at 404. As to sentence issue, *see Graham v. Florida*, 530 U.S. 48 (2010).

[60] 191 So. 3d at 400.

economy and fairness by requiring errors to be addressed immediately and preventing attorneys from subsequently using an error to … 'sandbag' opposing counsel," the Court then said "unless the evidence was insufficient to show that *any crime had been committed,* [sufficiency issues] must be properly preserved."[61] After noting the definition of fundamental error, the Court continued:

> We have even more narrowly applied the fundamental error doctrine to [sufficiency issues because they] inherently question the conclusions of the fact-finder, a process that [appellate courts] are reluctant to undertake.… [W]hen an appellate court conducts a sufficiency review, it deferentially reviews all of the evidence in the record in the light most favorable to the government to determine whether a rational trier of fact could have reached the verdict.[62]

The Court answered the certified question with a yes, *i.e.,* preservation was required in that case.[63] But the Court went on to grant relief because trial counsel's failure to preserve this

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[61] *Id.* (emphasis added).

[62] *Id.* at 401-02 (citations omitted).

[63] *Id.* at 402.

defendant-age issue was IAC.[64]

Again, Petitioner assumes the *Monroe* any-crime-had-been-committed test is identical to the *F.B.* a-crime-was-committed test and he will call this combined test the a/any-crime test.

E. FROM *Monroe* TO *Steiger*

All cases in this group are from the district courts. We begin with the second case that conflicts with the present case.

In *Castillo v. State*, 217 So. 3d 1110 (Fla. 3d DCA 2017), the trial court reclassified a conviction for second-degree murder from a first-degree felony to a life felony based on Castillo's possession of a firearm. Using the a/any-crime test, the district court held this was fundamental error because the State failed to prove Castillo actually possessed a firearm (as is required for reclassification). As in *F.B.*, and in the present case, and in *Hamilton* (the first conflict case), in *Castillo* the State proved a lesser included offense but didn't prove the enhancing element needed to prove the greater crime of

[64] *Id.* at 403–04 (emphasis added).

conviction.

Several other district courts found fundamental error occurred in cases that all had similar generic facts that distinguishes them from *Castillo, Hamilton* and *F.B.* In these cases, the defendant was convicted of multiple offenses and the conviction being challenged on appeal did not have an available lesser-included option.

In *Morris v. State*, 264 So. 3d 1036 (Fla. 2d DCA 2019), the defendant was convicted of two drug offenses and a third count of possession of a conveyance used for trafficking. The court affirmed the first two convictions but held the State failed to prove the conveyance crime. Citing the a/any-crime test, the court also quoted fundamental error tests of "the State failed to prove an essential element of the crime" and “the facts affirmatively proven do not constitute the charged offense."[65] The court also noted that “there is no lesser included charge to the conveyance offense, which further supports the conclusion that evidence was ‘insufficient to

[65] *Id.* at 1038-39 (citations omitted).

show that a crime was committed at all."'[66]

Similarly, in *Graham v. State*, 338 So. 3d 1 (Fla. 4th DCA 2022), the court affirmed one drug conviction but found a second conviction for possessing a counterfeit substance was fundamental error. The court quoted *F.B.* for the proposition that "a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error" but also said fundamental error is shown by "failure to prove the charged offense," "the state's evidence does not establish that a charged crime has occurred" and "the facts affirmatively proven … do not constitute the charged offense."[67]

And in *Edwards v. State*, 254 So. 3d 1195, 1196, n.1 (Fla. 5th DCA 2018), the court affirmed one conviction (for an unstated offense) and found a second conviction for leaving-scene-of-accident was fundamental error because "the evidence is totally insufficient as a matter of law to establish the commission of [that second]

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[66] *Id.* at 1039 (quoting *F.B.*).

[67] *Id.* at 3 (citations omitted).

crime" and this "complete failure of the evidence meets the requirements of fundamental error" (quoting *F.B.*).

Other cases in this group simply relied on the a/any-crime test to find fundamental error occurred, even though the evidence proved the defendants also committed unrelated crimes.[68]

The inference in these multi-conviction cases is that the a/any-crime test applies only to lesser-included offenses and not to, literally, any crime whatsoever. But in *Bybee v. State*, 295 So. 3d 1229 (Fla. 2d DCA 2020), the court expressly concluded that the a/any-crime test bars consideration of an unpreserved sufficiency issue if the evidence proves an unrelated crime. Bybee was convicted of several offenses, including kidnapping, exploitation of an elderly person and identity theft. Although finding the evidence was insufficient to prove kidnapping, the court refused to find that was fundamental error, asserting:

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[68] *L.A.T. v. State,* 299 So. 3d 565, 567 (Fla. 5th DCA 2020); *Mendez v. State*, 271 So. 3d 1093, 1098-99 (Fla. 3d DCA 2019); *C.T.T. v. State,* 249 So. 3d 1320, 1321 (Fla. 1st DCA 2018); *George v. State*, 208 So. 3d 838, 839 (Fla. 5th DCA 2017).

> [Although there is some] uncertainty over the meaning of "any crime" [as used in *Monroe*,] "read together," *Monroe* and other supreme court cases "stand for the proposition that the fundamental error exception does not permit appellate review of unpreserved [sufficiency issues] unless the evidence failed to establish the commission of **any** crime … whatsoever[."] Bybee, who [was convicted of the other two crimes,] failed to establish that he did not commit *any* crime.[69]

The *Bybee* court went on to grant relief on grounds of IAC.

Bybee expressly says the a/any-crime test includes unrelated crimes. *Bybee* quoted and followed *H.R.*, which went even further and said the a/any-crime test also includes uncharged crimes.

H.R. was found to have committed the delinquent acts of illegally activating a fire alarm and resisting an officer without violence. He challenged the latter finding on appeal, arguing the officer did not have probable cause to detain him (which meant his resistance was lawful). Agreeing with this argument and finding it "plain that [the State] failed to establish one of the essential elements of the [resisting] crime," the court nonetheless refused to

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[69] *Id.* at 1232 (quoting *H.R. v. State*, 298 So. 3d 1217 (Fla. 3d DCA 2020), discussed below).

grant relief on this issue.[70]

Explaining this refusal, the court first noted *F.B.* had

> engendered some uncertainty over whether this [a-crime-was-committed test] 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). The reason for this uncertainty stems, at least in part, from the concluding language in *F.B.*[71]

Here, the court quoted the passage from *F.B.* quoted above, in which this Court quoted several fundamental error tests for sufficiency issues.[72] The *H.R.* court then said *Young* and *Monroe* "clarifie[d] any uncertainty and [held] that this fundamental error exception applies only where the evidence fails to establish *any* crime was committed," which means "the evidence could not support the conviction *of any crime whatsoever* before [a sufficiency

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[70] *Id.* at 1220.

[71] *Id.* at 1221-22.

[72] *Id.* at 1222, quoting *F.B.* 852 So. 2d at 230-31.

issue] constitute[s] fundamental error."[73] The court concluded that, "[b]ecause the evidence in this case supported a determination that H.R. committed [an] assault, we hold that no fundamental error occurred."[74]

H.R. was neither charged with, nor found by the trial court to have committed, an assault. Although the district court did not identify the factual basis for its conclusion that an assault occurred, it did note earlier in the opinion that, when the officer tried to arrest H.R. for the fire-alarm offense, he "began fighting with the officer, flailing his arms, trying to get away, and telling the officer that he was not going to jail."[75] Presumably, this is the assault the court referenced.

No other district court cases have expressly addressed the issue of whether the a/any-crime test includes unrelated or

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[73] *Id.* at 1223.

[74] *Id.* at 1224.

[75] *Id.* at 1219.

uncharged crimes.

Several district court cases in this group granted relief on unpreserved sufficiency issues on IAC grounds.[76] However, the First District both questioned the basic validity of this theory and said it doesn't apply "unless it was clear the State could not have cured any insufficiency by reopening the case and presenting additional evidence."[77] This brings us to *Steiger*.

F. *Steiger* TO PRESENT

Steiger resolved a conflict "concerning whether appellate courts may address [an] unpreserved [IAC claim] on direct appeal."[78] This Court held "[section 924.051(3)] prohibits raising an unpreserved claim of error on direct appeal absent a showing of fundamental error [and] precludes appellate review of unpreserved

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[76] *E.g.*, *Twigg v. State*, 254 So. 3d 464 (Fla. 4th DCA 2018), *Barnes v. State*, 218 So. 3d 500 (Fla. 5th DCA 2017); *Lesovsky v. State*, 198 So. 3d 988 (Fla. 4th DCA 2016).

[77] *Stephens v. State*, 302 So. 3d 416, 418 (Fla. 1st DCA 2019); *see also Sorey v. State*, 252 So. 3d 853 (Fla. 1st DCA 2018).

[78] 328 So. 3d at 928.

[IAC] claims."[79]

The IAC claim in *Steiger* concerned, not a sufficiency issue, but possible errors made by counsel during the trial.[80] Two post-*Steiger* district court cases granted relief on unpreserved sufficiency issues in direct appeals.

In *T.E.B. v. State*, 338 So. 3d 290 (Fla. 4th DCA 2022)--the third case that conflicts with the present case--, the defendant was found to have committed two delinquent acts of felony battery, with the "felony" element being based on a prior "conviction" for battery that was actually not a proper qualifying prior conviction. Reducing the findings to ones for simple battery, the district court reasoned as follows:

> 1) "[*Steiger*] held [an IAC claim] cannot be raised on direct appeal absent a showing of fundamental error";
>
> 2) a pre-*Steiger* district court case "found that trial

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[79] *Id.*

[80] *Steiger v. State*, 301 So. 3d 485, 489 (Fla. 1st DCA 2020), *approved*, 328 So. 3d at 926.

> counsel was ineffective for failing to object to the sufficiency of the state's evidence of prior convictions [that] served as a predicate for convicting the defendant of a felony";
>
> 3) as in that prior case, "[t]here was no plausible justification or strategic reason for trial counsel's [failure] to challenge the sufficiency of the state's evidence of [T.E.B.'s] prior convictions, and [T.E.B.] suffered prejudice"; and thus
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> 4) "it was fundamental error to convict of a greater crime where there was no proof of underlying elements."[81]

As in the present case, in *T.E.B.,* the State proved a lesser included offense but failed to prove the enhancing element (a prior conviction) needed to prove the greater offense. But, in conflict with the present case, the *T.E.B.* court found this was fundamental error.

In the second case here, *Patlan v. State*, 336 So. 3d 812, 813 (Fla. 2d DCA 2022), the defendant pled no contest to the crime of failing to register as a sexual predator, even though he had "never been designated a sexual predator." The court reversed because

[81] *Id.* at 294-95.

"the error is clear: Patlan pleaded no contest to an offense he did not commit."[82]

The court first noted that Rule 3.172(a) requires trial judges to "determine that ... a factual basis for the plea exists" before accepting the plea; but, in Patlan's case, defense counsel simply "stipulated to a[n unstated] factual basis."[83] The court said this means "counsel was ineffective by failing to object to the erroneous charge, and that this resulted in fundamental error."[84] The court then cited *Steiger* as "holding [IAC] claims may only be raised on direct appeal in the context of a fundamental error argument" and concluded:

> Where the record affirmatively demonstrates that a defendant pleaded guilty ... to a crime he did not commit, fundamental error occurs. [Citing *Dydek*, 400 So. 2d at 1255]. "Notwithstanding defense counsel's stipulation to a factual basis, [Patlan] could not have been convicted of

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[82] *Id.*

[83] *Id.* at 814.

[84] *Id.*

> [the offense], and the trial court erred in accepting [his] plea to this charge." *Id.* at 1257-58....[85]

These latter two cases seem to conclude that, with at least some sufficiency issues, unpreserved IAC claims can be reviewed for fundamental error; or, perhaps, that the IAC claim *is itself* a form a fundamental error.[86] Either way, as to sufficiency issues, the precise relationship between unpreserved IAC claims and fundamental error claims (which *Steiger* didn't directly address) seems to be an open question.

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[85] *Id.*

[86] *See,* Richard Sanders, *Steiger v. State and the Future of Unpreserved IAC Claims on Direct Appeal,* 34 The Florida Defender 20, 27-28 (Summer 2022) (noting that, although fundamental error is defined in general terms, there are several reoccurring fact patterns that are always, or at least usually, recognized as being fundamental error--*e.g.,* conviction of non-existent crime; facially invalidity of applicable statute; some jury-instruction and double-jeopardy errors; *etc.*—and suggesting IAC claims based on a failure to preserve a valid sufficiency issue may also be a recurring type of fundamental error).

III. THE TWO REMAINING QUESTIONS

As this summary shows, Florida courts have struggled with the problem of unpreserved sufficiency issues in direct criminal appeals. Two basic questions still remain: 1) Why aren't *all* unpreserved sufficiency issues reviewed for fundamental error; and 2) if only some sufficiency issues may qualify as fundamental error, how do we distinguish the two types of cases, *i.e.*, how do we define the a/any-crime test and apply it in practice?

As to the first question, Petitioner argues that *all* unpreserved sufficiency issues should be reviewed for fundamental error. And this renders the second question moot.

A. WHY IS PRESERVATION OF SUFFICIENCY ISSUES REQUIRED AT ALL?

The *F.B.* court gave two reasons for adopting the limited a-crime-was-committed test: 1) "The deferential standard of review appellate courts apply to [sufficiency issues]"; and 2) requiring preservation means that any "technical deficiency in proof may be readily addressed[,] thus allowing the State to correct the error, if

indeed it is correctable ...."[87] The *Monroe* Court noted that the preservation rule "serves the interests of judicial economy and fairness by requiring errors to be addressed immediately and preventing attorneys from subsequently using an error to … 'sandbag' opposing counsel," and further:

> We have even more narrowly applied the fundamental error doctrine to [sufficiency issues because they] inherently question the conclusions of the fact-finder, a process that [appellate courts] are reluctant to undertake.... [W]hen an appellate court conducts a sufficiency review, it deferentially reviews all of the evidence in the record in the light most favorable to the government to determine whether a rational trier of fact could have reached the verdict.[88]

Respectfully, none of this explains or justifies the a/any-crime test.

As to the deferential standard of review, neither *F.B.* nor *Monroe* explained why this justifies reviewing only some unpreserved sufficiency issues for fundamental error. That standard is deferential

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[87] *F.B.*, 852 So. 2d at 230.

[88] 191 So. 3d at 401-02.

to the State, to affirming convictions; even preserved sufficiency issues rarely succeed. Sufficiency issues raise pure questions of law. The record is read in a light most favorable to the State; all evidentiary inferences and conflicts are resolved in the State's favor; and the question is whether, after this is done, there is substantial competent evidence in the record to prove all elements of the crime of conviction.[89] The portions of the record that must be reviewed to address sufficiency issues do not include any acquittal motions; such motions are not evidence and they are irrelevant to the sufficiency issue itself.

The same deferential standard of review should be used regardless of whether any acquittal motion was made. Indeed, if the deferential standard of review requires that sufficiency issues be preserved, why are *any* unpreserved sufficiency issues (under the a/any-crime test) reviewed for fundamental error?

To further illustrate the point, consider a hypothetical. Suppose

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[89] *Id.*

the appellate rules were amended to allow appellate counsel to make an acquittal motion on appeal that raised a sufficiency issue for the first time (which, in essence, is what counsel does when raising an unpreserved sufficiency issue). What standard of review would appellate courts use to decide that motion? Would that standard differ from the one appellate courts now use, either for fundamental error or for preserved sufficiency issues (and are different standards now used in these two contexts)? Would that standard differ from the standard trial courts now use for acquittal motions? True, appellate courts deal with a cold record while trial courts see live testimony; but why is this relevant? In both contexts, again, light-most-favorable, all-conflicts-and-inferences, *etc.* Actually seeing the testimony live neither adds nor subtracts anything from the applicable equation, from the deferential standard of review. Whether the appellate court is reviewing the trial court's ruling on a preserved sufficiency issue, or reviewing the actual evidence in the record (as with fundamental error or in the rule-change hypothetical), *the part*

of the record that the court reviews is the same. To review the trial court's ruling on an acquittal motion, the appellate court must review, in exactly the same way, exactly the same *trial evidence* that it must review to determine if fundamental error occurred (or to determine if a hypothetical appellate acquittal motion must be granted).[90]

Thus, the deferential standard of review does not explain or justify a preservation requirement for *any* sufficiency issues, much less a requirement for *some* sufficiency issues but not others. We must look to the purposes of the preservation rule itself to find a possible justification for the a/any-crime test.

This brings us to the cure-the-deficiency logic. As discussed above, this is the reason given in the pre-*F.B.* district court cases to justify a preservation requirement for sufficiency issues. The *F.B.* Court said preservation was required so the State would have the

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[90] *See McCoy v. People*, 442 P.3d 379, 384 (Col. 2019) ("appellate courts should review unpreserved sufficiency claims *de novo* (*i.e.*, in the same manner as if the claims were preserved)").

chance to cure any "technical deficiency in proof" before the case concluded.[91] The Court did not define "technical deficiency" but the inference here is that some sufficiency issues are "non-technical" and the two types of issues are treated differently for fundamental error purposes. The Court did not explain the difference or why these two types of sufficiency issues should treated differently. But the reasoning here seems to rely on the cure-the-deficiency logic.

The *Monroe* Court noted the preservation rule "serves the interests of judicial economy and fairness by requiring errors to be addressed immediately and preventing attorneys from subsequently using an error to … 'sandbag' opposing counsel."[92] The Court did not amplify this reasoning any further but, again, the reference to sandbagging seems to invoke the cure-the-deficiency logic.

Thus, it seems the only possibly valid reason (in the abstract) for requiring *any* sufficiency issues to be preserved is the cure-the-

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[91] *F.B.*, 852 So. 2d at 230.

[92] 191 So. 3d at 401-02.

deficiency logic. But this reasoning collapses in light of Rule 3.380(c) as interpreted by *State v. Stevens,* 694 So. 2d 731 (Fla. 1997). No Florida judicial opinion has expressly considered this argument.

B. RULE 3.380(c) AND *Stevens*

Rule 3.380(c) allows acquittal motions to "be made or renewed within 10 days after the reception of a verdict and the jury is discharged …." *Stevens* answered a certified question and concluded: "A GROUND FOR JUDGMENT OF ACQUITTAL [CAN] BE ASSERTED FOR THE FIRST TIME IN A POST-TRIAL MOTION PURSUANT TO RULE 3.380(c)."[93]

Stevens was convicted of auto theft based on his violation of the terms of a long-term lease. In his Rule 3.380(c) motion, he argued for the first time that "the State failed to prove that the creditor had complied with the requirements of section 812.014(3)[,] under which there is no violation of the theft statute when there is a lease for one

[93] 694 So. 2d at 732.

year or longer unless a written demand for the property is made."[94] This Court said allowing this sufficiency issue to be initially raised post-verdict "further[s] the interests of justice" and "promote[s] judicial economy" by "provid[ing] a procedural mechanism through which a substantive error can be corrected."[95]

The State could not reopen its case to prove the missing element after Stevens filed the Rule 3.380(c) motion. The issue in *Stevens* seems to be a prime example of the kind of "technical deficiency in proof"[96] that the State may have been able to cure if the issue is raised during trial. Yet the *Stevens* Court seemed untroubled by this, giving no indication that it felt that the post-verdict raising of this issue might be construed as trial counsel "allowing errors ... to go unchallenged and later using the error to a client's tactical

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[94] *Id.*

[95] *Id.* at 733 (footnote omitted).

[96] *F.B.*, 852 So. 2d at 230.

advantage."[97]

The State can no more cure-the-deficiency when a sufficiency issue is first raised on appeal than it can when it is first raised under Rule 3.380(c). Why allow the issue to be initially raised at one stage but not the other? True, Rule 3.380(c) expressly allows this and there is no equivalent appellate rule. But section 924.051(3) allows unpreserved issues to be raised as fundamental error; and under the a/any-crime test, *some* unpreserved sufficiency issues can be raised on appeal even though no appellate rule expressly allows that.

There is no reason to treat the two contexts differently. As long as Rule 3.380(c) allows post-verdict acquittal motions, the a/any-crime test cannot be justified by the cure-the-deficiency logic. Further, trial counsel's failure to raise a meritorious sufficiency issue under that rule will *always* be IAC; what reasonable tactical or strategic reason could possibly justify that failure? Thus, if the sufficiency issue has merit but relief is not granted on appeal, it will

[97] *Id.* at 229 (citation omitted).

have to be granted in a post-conviction proceeding.

The *Stevens* court said allowing post-verdict acquittal motions "further[s] the interests of justice" and "promote[s] judicial economy."[98] These same interests are served by reviewing all sufficiency issues for fundamental error. Presumably, when *Stevens* speaks of "promoting judicial economy," it means a trial court's granting of a post-verdict motion would eliminate the need for an appeal. But this eliminates the need for a defense appeal only if the motion resolves the whole case; other convictions (if any), sufficiently supported by evidence, will still be appealed. And even if granting the Rule 3.380(c) motion eliminates the need for a defense appeal, the State can appeal the granting of that motion.[99]

If *Stevens* means that justice and judicial economy are best served by resolving sufficiency issues as soon as possible, then *all* such issues should be reviewed for fundamental error. Neither justice

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[98] 694 So. 2d at 733.

[99] §924.07(1)(j), Fla. Stat, (2023).

nor judicial economy has an interest in affirming, on non-preservation grounds, convictions based on insufficient evidence, only to see the issue reemerge (as an IAC claim) in post-conviction proceedings. In this sense, requiring preservation for sufficiency issues is inefficient and actually hinders the goal of judicial economy.

In sum, Rule 3.380(c), as interpreted by *Stevens*, forecloses any argument that a preservation rule for sufficiency issues serves any valid cure-the-deficiency purpose. And the other interests served by the preservation rule also do not justify the a/any-crime test, at least as long as current law remains unchanged.

As to preventing unnecessary appeals and retrials, there will never be a retrial with a sufficiency issue in a criminal case; double jeopardy principles forbid that.[100] As for eliminating unnecessary appeals, imposing the preservation rule will not affect the number of State appeals; the only time the State can appeal a sufficiency issue is if the trial court grants a Rule 3.380(c) motion. As to whether

[100] *Burks v. United States*, 437 U.S. 1 (1978).

requiring preservation will cut down the need for defense appeals, again, defense appeals will be eliminated only if the sufficiency issue resolves the whole case.

Nor does the a/any-crime test prevent counsel's "allowing errors ... to go unchallenged and later using the error to a client's tactical advantage."[101] *Rule 3.380(c) expressly allows exactly this*, *i.e.,* defense counsel can intentionally not raise a known sufficiency issue during trial and then, if a conviction is obtained, raise in under Rule 3.380(c). The *Stevens* court said, not only is this is not improper, it "further[s] the interests of justice" and "promote[s] judicial economy" because it "provides a procedural mechanism through which a substantive error can be corrected ...."[102] Or, as the *F.B.* court might say, Rule 3.380(c) *promotes* the same interests as the preservation rule because it allows a court "to cure early that which must be cured

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[101] *F.B.,* 852 So. 2d at 229.

[102] *Stevens,* 694 So. 2d at 733.

eventually."[103] The defense gains no tactical advantage from deliberately not raising a sufficiency issue under Rule 3.380(c) and then trying to get appellate relief as fundamental error; and the defendant is the only one who might suffer in the interim. Thus, requiring sufficiency issues to be preserved does not help prevent improper sandbagging.

Nor is the preservation rule needed to keep trial courts in their proper role as neutral arbiters. Under Rule 3.380(a), trial courts can grant an acquittal even if no one asks for it. We cannot say the preservation rule is needed to keep-judges-neutral if they already have the power to *sua sponte* rule on the issue that we are saying must to be preserved in order to keep-judges-neutral.[104]

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[103] *F.B.*, 852 So. 2d at 229.

[104] To the extent the preservation rule is designed to give trial courts the chance to initially rule on issues, there is less need to strictly enforce that rule with regard to decisions that trial courts must, or may, make even if no one asks. Indeed, given Rule 3.380(a), an unpreserved sufficiency issue could be raised on appeal without invoking either fundamental error or IAC by framing it as "the trial court abused its discretion by failing to *sua sponte*

In sum, the justifications for the preservation rule do not apply in this context, and imposing that rule is inefficient, in that it prevents the immediate correction (on direct appeal) of something that must (or at least should) be corrected eventually (in post-conviction proceedings).

The unfairness to defendants that results from enforcing the preservation rule in this context is too obvious to require detailed discussion.[105] And how does the criminal justice system itself benefit if defendants must languish under restraint (at taxpayer's expense) for a longer time, and must initiate post-conviction proceedings (which may include another appeal), before the mandatory remedy is granted? The specter of innocent people spending longer time in prison because of procedural quirks in the system is not likely to

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grant an acquittal under Rule 3.380(a)." As one federal court said after defining plain error, "[i]n the context of sufficiency of the evidence, the [plain] error is the failure of the [trial] court 'of its own motion' to order a judgment of acquittal when the evidence is insufficient." *United States v. Meadows*, 91 F.3d 851, 855 (7th Cir. 1996).

[105] *See* Sanders, *Doin' Time,* 27 St. Thomas L.R. at 123-25.

engender public confidence in that system (which has already been damaged by the fact of an erroneous conviction in the first place).

Of course, all this assumes the unpreserved sufficiency issue has merit. Perhaps the *F.B.* court was concerned that a blanket fundamental error rule will encourage the raising of more unpreserved issues, thus increasing appellate courts' workloads. Such concerns are unfounded, particularly if we have a rule that recognizes fundamental error in some circumstances.

Appeals from criminal convictions, especially after trials, are essentially automatic already. Sufficiency issues are not raised all that often; extra judicial labor would be needed only in those rare cases where there is a serious sufficiency issue that was not preserved. In those rare cases, appellate counsel will probably argue 1) the issue was preserved, and 2) if not, the issue is one of fundamental error under the a/any-crime test. In addressing these issues, the appellate court will probably form at least a preliminary opinion of the merits of the sufficiency issue; we have to know what

kind of insufficiency we are dealing with to determine whether it falls within the a/any-crime exception.

Further, sufficiency issues are often relatively simple and involve well-settled legal rules. Finally, in many cases, Florida appellate courts first say the issue wasn't preserved and then go on to address (and reject) the merits anyway.[106] Given all this, judicial economy is best served by recognizing a blanket fundamental error rule in this context.

In sum, there is no good reason for requiring sufficiency issues to be preserved and every reason not to.

C. WHAT DOES THE A/ANY-CRIME TEST MEAN?

If *all* unpreserved sufficiency issues should be reviewed for fundamental error, then the meaning of the a/any-crime test is moot. If we are going to continue using this test, then we should recognize

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[106] *E.g., Young v. State*, 141 So. 3d 161, 165 (Fla. 2013); *Allen v. State*, 301 So. 3d 1072 (Fla. 1st DCA 2020). Although the undersigned did not compile a full tally, he believes the majority (or at least many) of the Florida cases cited above that said an unpreserved sufficiency issue didn't qualify as fundamental error went on to reject it on the merits anyway.

that its only justification is the cure-the-deficiency logic and it should be limited to situations in which it's not clear whether the State could cured the deficiency if the issue had been raised. This means the test would not include unrelated and uncharged crimes; rather, it would be limited to lesser-included offenses.

Finally, if this Court upholds the a/any-crime test, it might consider a rule change that allows this issue of could-deficiency-have-been-cured to be raised during the direct appeal with a remand to the trial court, similar to how Rule 3.800(b) is now used for sentencing issues.

IV. CONCLUSION

Faced with an unpreserved sufficiency issue, Florida courts should "address[] the … claim on direct appeal 'to avoid the legal churning which would be required if we made the parties and the lower court do the long way what we ourselves should do the

short.'"[107] As this Court said in the context of serious unpreserved sentencing errors, failing to address such issues

> would neither advance judicial efficiency nor further the interests of justice [and] would undermine the fairness of the judicial process[. R]igid adherence to the [preservation] rule [does not] always serve the goal of judicial [economy].
>
> Even assuming the availability of postconviction relief[,] if a goal . . . is efficiency, we are hard-pressed to conclude that shifting to defendants the burden of filing postconviction motions, and to trial courts the burden of processing these additional motions, advances the overall goal of judicial efficiency.
>
> Another potential problem [is] defendants . . . will not necessarily be afforded counsel during collateral proceedings.[108]

The logic in *Maddox* is even more compelling as applied to sufficiency issues. Nothing goes to the "the foundation of the case or ... the merits of the cause of action"[109] more than a sufficiency issue, and failing to address such issues "so damage[s] the fairness of the trial that the public's interest in our system of justice requires a

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[107] *Eure v. State*, 764 So. 2d 798, 802 (Fla. 2d DCA 2000) (citation omitted).

[108] *Maddox*, 760 So. 2d at 98.

[109] *Smith*, 240 So. 2d at 810.

[correction]."[110]

In sum, 1) federal due process requires that unpreserved sufficiency issues be reviewed for fundamental error; and 2) as a matter of State law, as long as Rule 3.380(c) allows sufficiency issues to be initially raised post-verdict, there is no valid reason to require these issues to be preserved in the trial court. This Court should adopt this flat rule and recede from *F.B.* and its progeny to the extent they are inconsistent with it.[111]

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[110] *Murphy*, 766 So. 2d at 1026, 1030.

[111] As to how other courts handle the problem of unpreserved sufficiency issues, see cases collected in *Campbell v. United States*, 163 A.3d 790, 794, n.3 (D.C. 2017); *State v. Crawford*, 972 N.W.2d 189, 200–01 (Iowa 2022); Sanders, *Doin' Time,* 27 St. Thomas L.R. at 129-30.

CONCLUSION

This Court should recede from *F.B.* and its progeny and hold that all unpreserved sufficiency issues are reviewable on direct appeal for fundamental error.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on September 21st, 2023.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Bookman Old 14-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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