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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

REPLY BRIEF OF PETITIONER ON THE MERITS

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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.

The State first argues that Petitioner's escape conviction is a qualifying offense for a VCC sentence. AB, pp. 13-22. This argument was not made in the brief the State filed in the district court. Online docket in #2D22-563, answer brief filed on 9-12-22, pp. 34-37. The only argument the State made there is the one rejected by the district court in *Pryor v. State*, 359 So. 3d 1216, 1222-23 (Fla. 2d DCA 2023).

The judgment the State introduced to prove this prior is ambiguous. It says the offense of conviction is a violation of "944.40/39.061." R-347. But the degree of the offense is listed as "third," which is the degree of the juvenile escape offense. R-347. In its brief, the State concedes Petitioner was 14 years old at this time. AB, pp. 15-16.

The State criticizes Petitioner for "not present[ing] evidence in the trial court [to clarify this point]." AB, p. 15. But the State bears the burden of proof (which is beyond reasonable doubt, because this is part of an element of the offense). Further, when defense counsel objected to "[t]he escape conviction being counted as it was an escape from a dentition facility," R-466, the trial prosecutor did not dispute this assertion. If there is reasonable ambiguity regarding this conviction, then the State failed to meet its burden of proving Petitioner qualifies for a VCC sentence.

The State also argues that juvenile escape convictions are qualifying offenses for VCC purposes. The State first relies on the language in the various juvenile escape statutes over the years, which assert a juvenile escape "constitutes escape within the intent and meaning of section 944.40 …." AB, pp. 16-18. But this language merely incorporates by reference into the juvenile statute the definitions, *etc.,* that apply to the adult statute; it does not "amend[]" or "broaden the scope of section 944.40 to include persons detained at juvenile facilities." *State v. J.R.M.*, 388 So. 2d 1227, 1228-29 (Fla. 1980) (indicating the two escape statutes are "separate, distinct, legislative enactments, each having its appointed sphere of action, and the alteration, change, or repeal of the one does not operate upon or affect the other"). Thus, a violation of the juvenile statute is not a violation of the adult statute and vice versa. "The applicable escape statute depends on the location of the defendant at the time of the [escape]." *State v. King*, 968 So. 2d 658, 658 (Fla. 4th DCA 2007).

The State also relies on section 790.235(2), which provides: "For purposes of this section, the previous felony *convictions necessary* [for a VCC sentence] may be … adjudications of delinquency for felonies committed as a juvenile." AB, p. 18 (emphasis added). But this section does not, for VCC purposes, convert convictions for juvenile escape into convictions for adult escape. Rather, it merely says juvenile adjudications *for a qualifying offense* can be considered for VCC purposes. Here, the relevant qualifying offense (or "conviction[] necessary," sec. 790.235(2)) is "Escape, as described in

s. 944.40." Sec. 775.084(1)(d)1.f., Fla. Stat. (2021). A juvenile-escape conviction/adjudication is not a qualifying offense.

Finally, even if the district court erred in concluding the evidence was insufficient, still, 1) the district court opinions directly conflict on the meaning of the a/any-crime test as applied in lesser-included-offense cases, and 2) there are other unresolved issues regarding that test (*e.g.,* unrelated and uncharged offenses). As discussed in the initial brief, for 50 years now, Florida courts have wrestled with this issue of unpreserved sufficiency issues in criminal cases. IB, pp. 25-58. Clarification from this Court is needed.

Turning to the merits of that issue, we begin by noting the three possible approaches to it:

> Full preservation; all sufficiency issues must be preserved
>
> No preservation; no sufficiency issues need to be preserved
>
> Limited preservation; only some sufficiency issues need to be preserved

Florida now uses a limited-preservation rule, the a/any-crime test. In the initial brief, Petitioner argued for a no-preservation rule, 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
>
> 3) there is no valid reason for Florida courts to require such issues to be preserved; and further
>
> 4) defense counsel's failure to [preserve a valid sufficiency issue] under Rule 3.380(c) will *always* amount to ineffective assistance of counsel ("IAC").

IB, p. 15.

Thus, the lynchpin of Petitioner's argument is Rule 3.380(c), as interpreted in *Stevens.*

After noting that one purpose of the preservation rule is to prevent "sandbagging," the State responds to this lynchpin argument as follows:

> To the extent that rule 3.380(c) could be or is being *abused* to engage in *inappropriate* "tactical inaction," [citation omitted], that would be a reason to amend the

> rule to *prevent such abuse*. It does not, however, justify [a no-preservation rule].

AB, pp. 61-62 (emphasis added).

This Court believes Rule 3.380(c) "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."[1] The State does not explain how counsel's properly using that rule, as intended, is "inappropriate abuse" (which must be "prevented") that can be accurately described as "sandbagging" (with all its implications of nefarious, underhanded, even unethical, behavior).

Further, Petitioner's lynchpin argument is not limited to sufficiency issues that counsel "deliberately refrained from making at trial ...." AB, p. 62. The lynchpin argument also includes cases in which counsel unintentionally overlooks, or fails to properly preserve, a valid sufficiency issue. While there may be a legitimate reason for deliberately refraining from raising a known sufficiency issue during

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

trial (the State could cure-the-defect), there is *no* legitimate reason for failing to raise that issue under Rule 3.380(c). Counsel's failure to properly raise a valid sufficiency issue under Rule 3.380(c) both 1) clearly indicates counsel is *not* sandbagging, and 2) *always* constitutes IAC (which, if not remedied on appeal, must be remedied under Rule 3.850).[2]

Petitioner agrees that the existence of Rule 3.380(c) "justif[ies] dispensing altogether with the preservation requirement for [sufficiency issues]." AB, p. 62. The State makes no argument to the

[2] By definition, sandbagging counsel sees the sufficiency issue and intentionally fails to raise it during trial, presumably because of fear the State will cure-the-defect. But if counsel sees the issue, there is no valid reason for counsel not raising it under Rule 3.380(c). It makes no sense for sandbagging counsel to not use Rule 3.380(c) but rather to wait to raise the issue on appeal (as fundamental error), not only because of the lengthy time delay, but also because, under the current limited-preservation rule, raising the issue on appeal as fundamental error might not succeed (which will spoil the sandbagging attempt).

Thus, sandbagging counsel will raise the issue under Rule 3.380(c), which will either win the issue (if the motion is granted) or preserve it (if the motion is denied). If the issue is still unpreserved when it reaches the appellate court, it is, at the least, highly unlikely that sandbagging occurred.

contrary but rather argues that Rule 3.380(c) authorizes "abuse" that must be "prevented" by amending that rule. But even if amendment is a good idea, that is irrelevant to the issues raised here. With apologies to former Secretary of Defense Donald Rumsfeld, we decide cases on the basis of rules we have, not rules we wish we had.

The State makes other points in its brief. One point the State never addresses is the underlying logic and purpose of the current limited-preservation rule. Under the a/any-crime test, why is Sufficiency Issue FE considered to be fundamental error but Sufficiency Issue NFE is not? Put another way, does the reason why Sufficiency Issue NFE is *not* considered to be fundamental error also apply, with equal force, to Sufficiency Issue FE; and, if so, why do we distinguish the two?

While not addressing these issues, the State does offer several generic justifications for the current limited-preservation rule. None hold water.

The State proffers the deter-sandbagging/cure-the-defect justification--flip sides of the same coin--three times. AB, pp. 10, 57, 61. Again, Rule 3.380(c) undermines this justification. Further, how does this justify the current limited-preservation rule, *i.e.,* why do we wish to prevent sandbagging, and give the State a chance to cure-the-defect, with Issue NFE but not with Issue FE?[3]

The State also argues "it is always better"

> for errors to be corrected at the earliest opportunity. If the evidence is truly insufficient[,] then it is better for the administration of justice for the matter to be resolved early on in the trial court ….

AB, p. 58 (citations omitted).

The State does not explain how this justifies the current limited-

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[3] Even if we limit the a/any-crime test to lesser-included-proven cases, why would we assume that 1) in lesser-included-proven cases, sandbagging may have occurred and the State should be given a chance to cure-the-defect; but, 2) in no-lesser-proven cases, sandbagging didn't occur and the State couldn't have cured-the-defect? Suppose the defendant is convicted of a crime that requires proof that the victim was a minor; and no crime would occur if the victim wasn't a minor; but the State didn't prove the victim's age (which means no crime was proven). How would we know whether sandbagging occurred here, and whether the State could have cured this defect (which might require merely asking the victim her birthday, a question the prosecutor simply forgot to ask)?

preservation rule, *i.e.,* why should Issue FE be resolved on appeal (even though it wasn't resolved in the trial court) but Issue NFE should be not resolved on appeal (because it wasn't resolved in the trial court)? And if the goal is to resolve sufficiency issues as quickly as possible, how does refusing to address the issue on appeal promote that goal? The State's position seems to be, because the issue wasn't resolved in the trial court, we won't not resolve on appeal either, so it will take even longer (and cost taxpayers even more) to resolve (in post-conviction proceedings).

The State next argues the preservation requirement

> improves the ability of appellate courts to review the issue. The trial attorneys and trial judge [are] 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. [Citations omitted]. 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 [proven].

AB, p. 59.

The State does not explain why this justifies the current limited-preservation rule, *i.e.,* why this logic applies only to Issue NFE (an issue appellate participants cannot "identify" without "assistance" from trial participants) but not to Issue FE (an issue for which no such "identify assistance" is needed).

In fact, appellate participants are quite capable of identifying sufficiency issues (and relevant portions of the record) on their own, without assistance from trial participants. Indeed, it is the *appellant's* lawyer who initially identifies the sufficiency issue (and the relevant record portions) in the initial brief. The State and the court then proceed on that basis, *regardless of whether the issue was preserved.* Again, a preservation motion adds nothing to either the portions of the record that must be reviewed, or the applicable substantive law that must be applied, to decide a sufficiency issue.

The State next argues that, if Petitioner's suggested no-preservation rule were adopted,

> a defendant would [be] entitled to relief under the competent, substantial evidence standard that is currently

> applied only to preserved sufficiency challenges, [and] such claims would be subject to the same standard of review regardless of whether they were [preserved].

AB, p. 51.

The State does not explain how this logic justifies the current limited-preservation rule, or why it applies to Issue NFE but not to Issue FE. Nor does the State explain what is wrong with "subjecting all sufficiency issues to the same standard of review." The State seems to assume that appellate courts use some different standard when reviewing preserved versus unpreserved sufficiency issues. The State does not identify what that different standard is or explain how it works in practice. Either the evidence is sufficient or it is not; again, the existence of acquittal motions adds nothing to the standard or method of review.

Perhaps trying to explain this perceived difference in the standard of review, the State cites one of this Court's definitions of fundamental error and argues:

> 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." [Citation omitted]. 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.

AB, p. 57.

This does not explain why we would use a different standard of review for a sufficiency issue depending on whether it was preserved. It is true that "***a*** verdict of guilty" could be obtained in cases where the State proved a lesser offense but not the greater offense of conviction. But the error here is, precisely, that the State did not prove "the same crime that the jury found." The State seems to think this is a minor matter. It is not; by definition, the potential sentence for the greater (unproven) offense will always be harsher than the one for the lesser (proven) offense.

Further, the State is here citing only one of the definitions for fundamental error that this Court has approved over the years. This Court has also defined fundamental error as an error that

> 1) "goes to the foundation of the case or the merits of

the cause of action”;

2) “is equivalent to a denial of due process”;

3) “[is] basic to the judicial decision under review”; or

4) “where the interests of justice present a compelling demand for its application.”[4]

Surely, convictions based on insufficient evidence are matters that go to the foundation of the case, deny due process, are basic to the decision under review, and present a compelling demand in the interests of justice.

Even using the definition the State cites, if the evidence is insufficient to prove a single element, then “a verdict of guilty [*of the offense of conviction*] could not have been obtained without the assistance of the alleged error [*of failing to prove an element of that offense*].” True, the italicized language is not found in the cases from this Court that use this definition. But that omission is probably explained by the fact that the Court was simply citing a general definition for fundamental error, to be used for all types of issues,

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[4] *F.B.,* 852 So. 2d at 229 (citations omitted).

rather than a rule specifically designed for sufficiency issues.[5]

Regardless of what general definition we use for fundamental error, when we apply that definition to unpreserved sufficiency issues, how would the analysis differ from the analysis we use when the issue was preserved? In all cases, we should ask the same question: Did the State present sufficient evidence to prove every

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[5] This "verdict could not have been obtained" definition for fundamental error was quoted in *F.B.*, along with the other four definitions quoted above. 852 So. 2d at 229. The *F.B.* Court then cited *Troedel v. State,* 462 So. 2d 392 (Fla.1984) and *Vance v. State,* 472 So. 2d 734 (Fla.1985) for the proposition that sufficiency issues constitute fundamental error only if "the evidence is insufficient to show that a crime was committed at all." *Id.* at 230. The problem with relying on *Troedel* and *Vance* at this point was discussed in IB, pp. 32-34, 42.

The *F.B.* Court concluded that "[s]uch complete failure of the evidence [as occurred in *Troedel* and *Vance*] 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." *Id.* at 230–31. The Court did not explain why a conviction in the lesser-included-offense scenario—the State proved a lesser offense but failed to prove the element needed for the greater offense of conviction--is not also "an error that reaches to the foundation of the case and is equal to a denial of due process." *Id.*

In any event, the Court did *not* say that, with sufficiency issues, the *only* applicable definition for fundamental error is this "verdict could not have been obtained" definition.

element of the crime of conviction beyond reasonable doubt? If not, error occurred; and it is the same error, whether preserved or not.

The State also addresses the potential IAC issue here, asserting:

> **[1]** [Trial counsel] may have had reasons for not [moving for an acquittal] that are not apparent [in the record]. An aspect of the offense … **[a]** might not have been in dispute, or **[b]** could have been easily supplied by the State if the issue had been raised …. **[2]** 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. **[3]** In some cases, there may be gaps or errors in the record on appeal.
>
> **[4]** [T]rial 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, … the better practice is to affirm the conviction without prejudice to the defendant's right to raise the matter in a postconviction [IAC] claim, thereby giving trial counsel "an opportunity to explain their actions …."

AB, pp. 60-61 (citation omitted).

The State does not explain why how logic justifies the current limited-preservation rule, or why it applies to Issue NFE but not to Issue FE. There are other problems with this logic.

As to point **[1]** and possible valid "reasons" why trial counsel would not move for an acquittal "that are not apparent in the record," the State suggests two such reasons. First (**[a]**), "an aspect of the case might not have been in dispute." But if this is true, then the evidence was sufficient on this "aspect" and counsel's failure to raise the issue would not be error. Second (**[b]**), the State again invokes the cure-the-defect logic but, again, does not suggest any possible valid reason why counsel wouldn't use Rule 3.380(c).

As to point **[2]**, in suggesting there may be "a statute or case law that was not known to or discovered by appellate counsel," the State seems to suggest trial counsel did not raise the sufficiency issue because it has no merit, for a reason that trial counsel recognized but appellate counsel overlooked. But, again, if the sufficiency issue has no merit, then failing to preserve it is not error.

As to point **[3]**, it is not clear what the State means by "gaps or errors in the record" or why this would be a basis for addressing Issue FE but not Issue NFE. Further, any "gaps or errors" can be addressed using Rule 9.200(f).

As to point **[4]**, the assumption here seems to be that trial counsel should be given a chance to "explain their actions" before fundamental error is found. This raises the interesting issue of the interlocking relationship between fundamental error and unpreserved IAC claims.

In rare cases, this Court has concluded that an issue that would otherwise be fundamental error will not be so considered because counsel waived/invited that error. *E.g., Armstrong v. State,* 579 So.2d 734 (Fla. 1991) (concluding counsel waived/invited a jury-instruction issue that would have been fundamental error, because counsel made a legitimate tactical decision to request the otherwise-erroneous instruction). But in most cases finding fundamental error, there is no inquiry into counsel's reason for failing to preserve the issue. Arguably, this is an implicit concession that, with errors so basic and damaging as to be called fundamental, there is no possible legitimate reason for counsel's failure to preserve the issue. In effect, a finding that fundamental error occurred in a criminal case is, in essence, a finding that IAC occurred. Several Florida cases implicitly support this conclusion.[6]

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[6] See discussion at IB, p. 57 and n. 86. *See also Monroe v. State,* 191 So. 3d 395, 402, n.5 (Fla. 2016) (noting the "high correlation between errors that may be corrected as fundamental error and errors that may be corrected as [IAC] on direct appeal"); *Lowe v. State,* 2 So. 3d 21, 38 (Fla. 2008) (noting a finding on direct appeal that no fundamental error occurred means the defendant in post-conviction proceedings "fail[ed] to demonstrate that counsel's failure ... resulted in prejudice sufficient to [prove IAC]"), *accord, Chandler v. State,* 848 So. 2d 1031, 1046 (Fla. 2003); *Downs v. Moore*, 801 So. 2d 906, 917 (Fla. 2001) (Wells, C.J., concurring) (noting a fundamental error is one "so serious that the trial judge should have *sua sponte* ... correct[ed] it" and it "logically follows [that] counsel who did not object to such an egregious error must be [ineffective])."

Similar statements regarding the interlock and overlap between fundamental error and IAC are found in district court cases. *E.g., Guarscio v. State*, 64 So. 3d 146, 148-49 (Fla. 2d DCA 2011); *Corzo v. State*, 806 So. 2d 642, 645, n.2 (Fla. 2d DCA 2002); *Ross v. State*, 726 So. 317, 319 (Fla. 2d DCA 1998).

Other district court cases conclude, on direct appeal, that IAC occurred when counsel erroneously waived (by inviting) an error that otherwise would have been fundamental. *Morgan v. State*, 146 So. 3d 508 (Fla. 1st DCA 2014); *Garcia v. State*, 143 So. 3d 1105 (Fla. 2d DCA 2014); *Johnson v. State*, 133 So. 3d 602 (Fla. 1st DCA 2014), *disapproved on other grounds, State v. Tuttle*, 177 So. 3d 1246 (Fla. 2015); *Hill v. State*, 114 So. 3d 1071 (Fla. 1st DCA 2013); *Berdecia v.*

Thus, if the State is suggesting there is significant interlock and overlap between fundamental error claims and unpreserved IAC claims (especially in this context), Petitioner heartily agrees. Petitioner believes such IAC claims are in fact a recurring form of fundamental error, *i.e.,* fundamental error occurred because the defendant was denied effective assistance of counsel when counsel failed to properly preserve a valid sufficiency issue.

In sum, nothing in the State's brief explains why, under the a/any-crime test, some unpreserved sufficiency issues are considered to be fundamental error while others are not. Addressing Petitioner's lynchpin argument based on Rule 3.380(c) and *Stevens*, the State's only response is, not to contest or rebut the merits of Petitioner's argument, but rather to call the legitimate (and intended) use of that rule "sandbagging" and "inappropriate abuse" that must be "prevented" through a rule amendment. AB, p. 62.

Petitioner further relies on the argument in the initial brief.

State, 971 So. 2d 846 (Fla. 3d DCA 2007). In other words, the "invitation" proves the deficient performance.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on February 9th, 2024.

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Respectfully submitted,
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