IN THE SUPREME COURT OF FLORIDA

ERIC MARCELL YOUNG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC11-2151
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

SUMMARY OF THE ARGUMENT

Point I. The opinion of the District Court of Appeal, Fifth District, in affirming the defendant's conviction for burglary of a dwelling, certified conflict with *Munoz v. State*, 937 So.2d 686 (Fla. 2nd DCA 2006), a case virtually identical to this case wherein the Second District Court of Appeal had reduced the conviction to burglary of a structure. The trial court here erroneously adjudicated the defendant guilty of burglary of a dwelling, when the building had been gutted, was undergoing extensive renovation, and, in its current state, was thus not suitable for occupancy. Under the correct analysis in *Munoz*, the defendant can only be found guilty of burglary of a structure. The error is fundamental, as the district

court agreed, ruling on the merits of the claim.

Point II. The trial erred in denying the motion for judgment of acquittal on the carjacking charge, where the defendant allegedly obtained the property, including truck keys, by force from the victim inside a building, and later took the vehicle from outside, out of the presence of the victim. Under this factual scenario, the defendant can only be found guilty of grand theft for taking the truck.

ARGUMENT

POINT I.

THE DEFENDANT WAS ERRONEOUSLY ADJUDICATED GUILTY OF BURGLARY OF A DWELLING, WHEN THE BUILDING HAD BEEN GUTTED, WAS UNDERGOING EXTENSIVE RENOVATION, AND, IN ITS CURRENT STATE, WAS THUS NOT SUITABLE FOR OCCUPANCY.

The evidence presented to the trial court was insufficient here to convict the defendant of burglary of a dwelling, only of the lesser offense of burglary of a structure. While the defense attorney did not make a specific motion for judgment on this ground, the district court was asked to find the error to be either fundamental error, or ineffective assistance of counsel apparent on the face of the record, and reverse. It is fundamental error for a defendant to be convicted of an offense that did not take place. *See Atkins v. State*, 959 So.2d 1267, 1268 (Fla. 5th DCA 2007); *Nixon v. State*, 10 So.3d 212, 213 (Fla. 2nd DCA 2009)*; Harris v. State*, 647 So.2d 206, 208 (Fla. 1st DCA 1994) ("Conviction of a crime which did not take place is a fundamental error, which the appellate court should correct even when no timely objection or motion for acquittal was made below.").[1]

[1] *See also Michael v. State*, 51 So.3d 574 (Fla. 5th DCA 2010), wherein this Court deemed the same issue preserved despite the apparent lack of a specific motion for judgement of

The state claims here, as it did in the Fifth District Court of Appeal, that the issue was not preserved for appeal and is not fundamental. (Answer Brief, pp. 3-4) The Fifth District rejected the state's argument and, instead, ruled on the merits of the issue. Furthermore, the lead case cited by the State for its argument of a non-fundamental error, *F.B. v. State*, 852 So. 2d 226 (Fla. 2003), despite its ruling in that case, supports the issue here that the error is fundamental. In *F.B.*, this Court applied "the more general rule requiring a contemporaneous objection," finding that the interests of justice are better served by applying the general rule, since "any 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 . . . by allowing the state to re-open its case and supply the missing, technical element . . . ." *F. B. v. State*, *supra* at 229-230. However, this Court, citing with approval a long line of cases, continued to recognize that "a conviction is *fundamentally erroneous* when the facts affirmatively proven by the State simply do not constitute ***the*** *charged offense as a matter of law*." *F.B. v. State*, 852 So.2d 230-231 (emphasis added), *citing Griffin v. State*, 705 So.2d 572, 574 (Fla. 4th DCA 1998); *Harris v. State*, 647 So. 2d at 208 (reversing conviction and stating that "[c]onviction of a crime which did not take place is a fundamental

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acquittal on this ground.

error, which the appellate court should correct even when no timely objection or motion for acquittal was made below"); and *Nelson v. State*, 543 So. 2d 1308, 1309 (Fla. 2nd DCA 1989) (reversing conviction as fundamental error because defendant's conduct did not constitute the crime of which he was convicted).

In the instant case, the rationale for applying the general rule of preservation does not apply since, here, the state's evidence presented below affirmatively showed that the burglarized building was not a dwelling in its current state; there was no additional evidence that could be provided by allowing the state to re-open its case to supply a missing *technical* element. "A conviction is fundamentally erroneous when the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law." *Griffin v. State*, 705 So. 2d 572, 574-575 (Fla. 4th DCA 1998). *See also Nelson v. State*, *supra* at 1308-1309 (distinguishing the "usual failure of proof case" – which, as the court acknowledged, must be raised in a motion for judgment of acquittal – and the circumstance where the evidence affirmatively shows that the defendant's conduct "did not constitute" the charged offense); *Brown v. State*, 652 So.2d 877, 881 (Fla. 5th DCA 1995) (where there was no evidence of "an essential element of the offense," "the State failed to make a prima facie case and funamental fairness has required this court to address the appeal even absent specific objection below"); *Hornsby v. State*, 680 So. 2d

598 (Fla. 2nd DCA 1996) (finding fundamental error "where the defendant's conduct clearly did not constitute the crime for which he was convicted"). Similarly, in *Burrell v. State*, 601 So. 2d 628 (Fla. 2nd DCA 1992), the court noted that the case was not one in which the State's failure to prove the offense was a technical matter that could have been resolved below if raised, but rather it was clear that the State could not prove an essential element because the facts did not support it.

Here, too, the State's failure to prove the building was a dwelling was not a technical matter that could have been resolved below if raised, but rather it is clear that the State cannot prove this essential element because the facts simply do not support it. As argued in the Petitioner's Initial Brief on the Merits, the *Munoz* court[2] decided the issue correctly and it should be followed here. Due to extensive renovations to the house in question, the property no longer met the definition of a dwelling under the burglary statute. This Court should quash the decision of the Fifth District and rule that the defendant's conviction for burglary of a dwelling must be reduced to burglary of a structure. The sentences for it and the remaining counts must also be vacated and remanded for recalculation under the sentencing guidelines, and resentencing.

[2] *Munoz v. State*, 937 So.2d 686 (Fla. 2nd DCA 2006).

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the Initial Brief on the Merits, the petitioner requests that this Honorable Court quash the decision of the District Court of Appeal, Fifth District, reverse the judgments and sentences, and remand with instructions to reduce the offenses to burglary of a structure (Point I) and grand theft (Point II), and for resentencing.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Blvd, Fifth Floor, Daytona Beach, Florida, 32118; and mailed to Mr. Eric Young, Inmate # X70905, Hamilton Annex, 11419 S.W. County Road 249, Jasper, FL 32052, this 23rd day of July, 2012.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER