IN THE

SUPREME COURT OF FLORIDA

RALPH MONROE, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC14-2296 Lower Tribunal No(s).: 1D12-3966 2011-CF-2983

INITIAL BRIEF OF THE PETITIONER

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the Case and Course of Proceedings Below.

Ralph Monroe (hereinafter "Petitioner Monroe") was charged in Leon County with one count of capital sexual battery[1] and one count of lewd or lascivious molestation.[2] (R-15).[3] For both counts, the State was required to prove that Petitioner Monroe was "18 years of age or older" at the time of the offenses. The offenses allegedly occurred between the fall of 2010 and the spring of 2011. At the time of the alleged offenses, Petitioner Monroe was a senior in high school and the alleged victim (T.J.)[4] was an elementary school student at Petitioner Monroe's school. The offenses allegedly occurred during a single episode in a bathroom at the school. Petitioner Monroe purportedly asked the alleged victim if he wanted to "play a game" and the alleged victim claimed that Petitioner Monroe proceeded to touch the alleged

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[1] *See* § 794.011(2)(a), Fla. Stat.

[2] *See* § 800.04(5)(b), Fla. Stat.

[3] References to the district court's record on appeal will be made by the designation "R" followed by the appropriate page number. References to the trial transcripts will be made by the designation "T" followed by the appropriate volume number and page number. References to the transcript of the jury selection proceeding will be made by the designation "JS" followed by the appropriate page number.

[4] Pursuant to Florida Rule of Judicial Administration 2.420(d)(1)(B)(xiii) and section 119.071(2)(h), Florida Statutes, only the initials of the alleged victim/child witnesses will be used in this brief.

victim's penis and digitally penetrate the alleged victim's anus. Notably, Petitioner Monroe turned eighteen years old on February 27, 2011 – and the alleged victim was *not* able to pinpoint whether the incident occurred before or after February 27, 2011.

At trial, Petitioner Monroe was represented by Barbara K. Hobbs, Esquire. The State was represented by Assistant State Attorney Jack Campbell. The Honorable James C. Hankinson presided over the trial.

The trial jury was selected on July 23, 2012. (JS-1). The trial was conducted on July 24, 2012. At the conclusion of the trial, the jury found Petitioner Monroe guilty as charged of capital sexual battery and lewd or lascivious molestation. (T2-196; R-58-59).

Petitioner Monroe was sentenced at the conclusion of the trial. For the capital sexual battery count, the trial court sentenced Petitioner Monroe to life imprisonment without the possibility of parole – the mandatory sentence. (T2-206; R-64). For the lewd and lascivious molestation count, the trial court sentenced Petitioner Monroe to forty years' imprisonment, with the sentence to run concurrently with the sentence for the capital sexual battery count. (T2-206; R-64).

On direct appeal to the First District Court of Appeal, Petitioner Monroe argued that the State's evidence at trial failed to establish the essential element that Petitioner Monroe was "18 years of age or older" at the time of the offenses. *See* §§

794.011(2)(a) & 800.04(5)(b), Fla. Stat. In its opinion, the district court agreed with Petitioner Monroe's argument. *See Monroe v. State*, 148 So. 3d 850, 857 (Fla. 1st DCA 2014) ("The evidence established that Monroe battered and molested the victim during Monroe's senior year of high school, but there was no evidentiary basis for determining whether the incident giving rise to the charges took place before or after Monroe's eighteenth birthday, which occurred during that school year."). However, because Petitioner Monroe's trial counsel failed to move for a judgment of acquittal, the district court concluded that this Court's decisions in *F.B. v. State*, 852 So. 2d 226 (Fla. 2003), and *Young v. State*, 141 So. 3d 161 (Fla. 2013), prohibited it from granting relief. At the conclusion of its opinion, the district court certified the following question to this Court:

> DO *F.B. V. STATE*, 852 So. 2d 226 (Fla. 2003), AND *YOUNG V. STATE*, 141 So. 3d 161 (Fla. 2013), 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?

Monroe, 148 So. 3d at 861. On December 17, 2014, the Court accepted jurisdiction in order to answer this certified question.

2. Statement of the Facts.

a. The State's Case in Chief.

Sandra Grant. Ms. Grant stated that in 2011, she was a fourth grade teacher

at the Florida Agricultural and Mechanical University Developmental Research School (hereinafter "FAMU DRS"). (T1-22-23). Ms. Grant testified that on May 25, 2011, she came into contact with T.J., who told her that he could not go into the bathroom or Petitioner Monroe would "bother" him. (T1-25).

Sherry Luke. Ms. Luke, a sergeant with the Florida A&M University Police Department, testified that she was informed about an allegation relating to child sexual abuse and she referred the matter to Terry Thomas with the Florida Department of Law Enforcement. (T1-31).

T.J. T.J., who was nine years old at the time of his testimony, claimed that when he was in the [redacted] at the FAMU DRS, he went to the bathroom on a particular day and Petitioner Monroe subsequently came into the bathroom and thereafter "touch[ed] [him] on the front and back." (T1-38).[5] T.J. further alleged that Petitioner Monroe asked him to "play a game" and T.J. stated that he responded "no." (T1-38).[6] During his testimony, T.J. was asked when the alleged incident occurred, *but he was not able to specify a time frame/date*:

> Q (by the prosecutor): [W]as this after Christmastime?
>
> A: Maybe. I don't know.

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[5] T.J. alleged that Petitioner Monroe inserted his finger in his anus. (T1-39-40).

[6] T.J. was unable to identify Petitioner Monroe in the courtroom. (T1-44).

. . . .

Q: Did it happen after spring break?

A: Maybe.

Q: Okay. Do you remember going to spring break on the beach?

A: Yes.

Q: Do you think it was before or after spring break?

A: Maybe after.

Q: Okay. And was it after the Easter bunny came and saw you?

A: No.

Q: Okay. The – was it after Christmas?

A: *No*, I don't –

Q: Do you remember exactly when it happened?

A: Yes, sir.

(T1-40-41) (emphasis added).

Terry Thomas. Mr. Thomas, an agent with the Florida Department of Law Enforcement, testified that he conducted an interview of T.J. on August 15, 2011. (T1-49). A video of the interview was played for the jury during Agent Thomas' testimony. (T1-52-66).

Agent Thomas stated that he conducted an interview of Petitioner Monroe on

October 12, 2011. (T1-70). Agent Thomas admitted that when he interviewed Petitioner Monroe, he did *not* inform Petitioner Monroe of his *Miranda*[7] rights (because Agent Thomas claimed that Petitioner Monroe was not in "custody" at the time of the interview – even though at the time of the interview Agent Thomas had already obtained a warrant for Petitioner Monroe's arrest). (T1-97-98). A tape of the interview was played for the jury during Agent Thomas' testimony. (T1-72-94). During the interview, Petitioner Monroe initially denied doing anything inappropriate to T.J. (T1-74-88), but he subsequently acknowledged that he touched T.J. in the bathroom at their school. (T1-90-91).

[redacted]. [redacted], the stepmother of J.T.,[8] stated that J.T. previously told her about an alleged incident where Petitioner Monroe approached J.T. in a school bathroom and asked J.T. if he wanted to "play a game" and Petitioner Monroe then asked if J.T. wanted "to keep [his] pants up or down," which caused J.T. to run away. (T1-110-12). [redacted] testified that after hearing J.T.'s allegation, she contacted school officials (who subsequently contacted law enforcement officials). (T1-113).

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[7] *Miranda v. Arizona*, 384 US. 436 (1966).

[8] The State's evidence relating to J.T. was *Williams* rule evidence. *See Williams v. State*, 110 So. 2d 654 (Fla. 1959).

J.T. J.T., who was nine years old at the time of his testimony, stated the following regarding an incident that allegedly occurred at his school:

> I was using the bathroom and then that – [Petitioner Monroe] had asked me if I wanted to play a game. And then he asked me if – do I keep my pants up or down.

(T1-116). J.T. testified that after hearing this, he ran from the bathroom. (T1-116). J.T. testified that he later told his mother about the alleged incident. (T1-116).

Terry Thomas (recalled). Agent Thomas testified that he conducted an interview of J.T. on December 22, 2011. (T1-118). A video of the interview was played for the jury during Agent Thomas' testimony. (T1-122-38)

At the conclusion of Agent Thomas' testimony, the State rested. (T1-141). The defense did not present any witnesses. (T2-162).

b. Verdict.

The trial court instructed the jury (T2-162–75, 187-90) and the parties gave their closing arguments. (T2-175-87). The jury found Petitioner Monroe guilty as charged of capital sexual battery and lewd or lascivious molestation. (T2-196; R-58-59).

D. SUMMARY OF ARGUMENT

It is a "manifest miscarriage of justice" to let a conviction stand where the prosecution failed to present sufficient evidence on an essential element of the crime. As found by the district court below, the record in the instant case is devoid of evidence of an essential element of the crimes (i.e., that Petitioner Monroe was "18 years of age or older" at the time of the offenses) and/or the evidence on this key element of the offenses is so tenuous that a conviction would be shocking. "[I]t is the imperative duty of a court to see that all the elements of [a] crime are proved, or at least that testimony is offered which justifies a jury in finding those elements." *Clyatt v. United States*, 197 U.S. 207, 222 (1905). Therefore, Petitioner Monroe requests the Court to modify the standard articulated in *F.B. v. State*, 852 So. 2d 226 (Fla. 2003), by adopting the federal "manifest miscarriage of justice" test utilized by *all* of the federal appellate courts. Pursuant to the "manifest miscarriage of justice" test, even if a sufficiency-of-the-evidence challenge is not preserved at the trial court level, an appellate court will nevertheless reverse a conviction if doing so is necessary to prevent a "manifest miscarriage of justice" (i.e., if the record is devoid of evidence of an essential element of the crime or if the evidence on a key element of the offense is so tenuous that a conviction would be shocking). If the "manifest miscarriage of justice" test is applied to the record in the instant case, then Petitioner Monroe is entitled to relief.

E. ARGUMENT AND CITATIONS OF AUTHORITY

It is a "manifest miscarriage of justice" to let a conviction stand where the prosecution failed to present sufficient evidence on an essential element of the crime.

1. Standard of Review.

Petitioner Monroe submits that whether it is a manifest miscarriage of justice to let a conviction stand where the prosecution failed to present sufficient evidence on an essential element of the crime is a pure question of law reviewed pursuant to the *de novo* standard of review. *See Special v. West Boca Medical Center*, 39 Fla. L. Weekly S676, S677 (Fla. Nov. 13, 2014) ("Because the certified question presents a pure question of law, our standard of review is *de novo*.").

2. Argument.

The State charged Petitioner Monroe with sexual battery pursuant to section 794.011(2)(a), Florida Statutes, and lewd or lascivious molestation pursuant to section 800.04(5)(b), Florida Statutes. For both offenses, the State was required to prove that at the time the offenses were committed, Petitioner Monroe was "18 years of age or older." *See* §§ 794.011(2)(a) & 800.04(5)(b), Fla. Stat. In its opinion, the First District Court of Appeal found that the State failed to present sufficient evidence to establish that Petitioner Monroe was "18 years of age or older" at the time of the offenses:

The evidence established that Monroe battered and molested the victim

> during Monroe's senior year of high school, *but there was no evidentiary basis for determining whether the incident giving rise to the charges took place before or after Monroe's eighteenth birthday, which occurred during that school year*. The State attempted to establish Monroe's age by questioning the victim about the timing of the incident, *but the victim could not be sure exactly when it happened*.

Monroe v. State, 148 So. 3d 850, 857 (Fla. 1st DCA 2014) (emphasis added).[9] However, because Petitioner Monroe's trial counsel failed to move for a judgment of acquittal, the district court concluded that this Court's decisions in *F.B. v. State*, 852 So. 2d 226 (Fla. 2003), and *Young v. State*, 141 So. 3d 161 (Fla. 2013), prohibited it from granting relief. The district court explained that *F.B.* identified only two exceptions to the preservation rule as applied to sufficiency-of-the-evidence challenges: (1) the Court's duty to independently review the sufficiency of the evidence in death penalty cases and (2) "when the evidence is insufficient to show

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[9] The district court added:

> In neither *Young* [*v. State*, 141 So. 3d 161 (Fla. 2013),] nor the instant case could any deficiency in the State's proof have been corrected merely by reopening the case. In both cases, the State presented evidence intended to prove the element at issue on appeal with no indication that it could have produced more. Therefore, we cannot say that any omission in either case was a mere technical deficiency in the proof.

Monroe, 148 So. 3d at 860 (footnote omitted).

that a crime was committed at all." *F.B.*, 852 So. 2d at 230.[10] Because the district court concluded that there was evidence that Petitioner Monroe committed *a crime* (i.e., sexual offenses at a time when he was seventeen years old) – albeit not the crimes he was charged with and convicted of (sexual offenses at a time when he was eighteen years old) – the district court concluded that application of the Court's *F.B.* standard required that Petitioner Monroe's convictions be affirmed:

> Applying this principle to the instant case, we must base our decision on the fact that there is competent, substantial evidence that Monroe committed a crime, even if not the crime reflected by the verdict. The evidence was legally sufficient to show that Monroe committed sexual battery and lewd or lascivious molestation at least as a juvenile, even if not as an adult. As the evidence indicates that Monroe did in fact commit a crime, his convictions cannot be said to be

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[10] The district court recognized that "some decisions citing *F.B.* appear to have construed the second exception as holding that fundamental error occurs where there is a complete failure of proof that the crime for which the defendant was convicted, as opposed to simply any crime, occurred." *Monroe*, 148 So. 3d at 858 (citing *Crain v. State*, 79 So. 3d 118, 122 (Fla. 1st DCA 2012) (finding fundamental error in the defendant's conviction for driving on a suspended or revoked license where he never had a license at all, and remanding for an adjudication of guilt as to the lesser crime of driving without a valid driver's license, which was proven); *Hamilton v. State*, 71 So. 3d 247 (Fla. 4th DCA 2011) (reversing a conviction for robbery with a weapon due to fundamental error in the State's reliance on a toy gun as its proof of the defendant's use of a weapon); *Rodriguez v. State*, 964 So. 2d 833 (Fla. 2d DCA 2007) (holding reversal was required "[b]ecause the State's proof did not establish the crimes for which [the defendant] was convicted"); *De La Hoz v. State*, 997 So. 2d 1198, 1202 (Fla. 3d DCA 2008) (observing that the Second and Fourth Districts have interpreted *F.B.* as recognizing fundamental error when the evidence is "legally insufficient to prove the offense of which the defendant was convicted, but is legally sufficient to prove lesser included offense")).

> fundamental error under Florida Supreme Court precedent. *Young*, 141 So. 3d at 165; *F.B.*, 852 So. 2d at 230-31.

Monroe, 148 So. 3d at 859. However, the district court recognized that because the State failed to present sufficient evidence that the offenses occurred when Petitioner Monroe was an adult, his mandatory life-without-parole sentence violates the Eighth Amendment to the United States Constitution and *Graham v. Florida*, 560 U.S. 48, 74 (2010):

> Applying *F.B.* to the instant case gives us pause because Monroe's failure to preserve the issue resulted in a monumental disparity between the sentence the court was required to impose under the verdict for capital sexual battery and the sentence the court could have imposed under a verdict supported by competent, substantial evidence. The difference between preservation and silence in this case meant the difference between a mandatory sentence of life without parole and the availability of a term of years. Under *Graham v. Florida*, 560 U.S. 48, 74 (2010), a mandatory sentence of life without parole for a nonhomicide offense is unconstitutional when imposed against a juvenile offender. Therefore, the State's failure to prove that Monroe was an adult at the time of his offenses has constitutional significance.

Monroe, 148 So. 3d at 861.[11] Accordingly, the district court certified the following

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[11] A conviction for a sexual battery offense committed against a victim less than twelve years of age by a person eighteen years of age or older is a capital felony that *requires* the imposition of life imprisonment without the possibility of parole. *See* § 794.011(2)(a), Fla. Stat. In contrast, a conviction for a sexual battery offense committed against a victim less than twelve years of age by a person less than eighteen years of age is only a life felony (i.e., a defendant is sentenced pursuant to the Criminal Punishment Code and the trial court has discretion to impose a sentence of less than life imprisonment). *See* § 794.011(2)(b), Fla. Stat. Thus, there is a substantial difference in penalties based on whether a defendant was eighteen years

question to this Court:

> The Florida Supreme Court has not yet been asked to apply *F.B.* in a case where the defendant was convicted of one crime, the State proved only a crime charged as a lesser included offense, and the disparity between the sentencing options available for the proven crime and the crime reflected by the verdict is vast and carries constitutional implications. Given the concerns this case raises and the applicability of *F.B.* to any criminal case involving an unpreserved challenge to the sufficiency of the evidence, we certify the following question of great public importance to the Florida Supreme Court:
>
> > DO *F.B. V. STATE*, 852 So. 2d 226 (Fla. 2003), AND *YOUNG V. STATE*, 141 So. 3d 161 (Fla. 2013), 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?

Monroe, 148 So. 3d at 861. For the reasons expressed below, Petitioner Monroe submits that it is a "manifest miscarriage of justice" to let a conviction stand where the prosecution failed to present sufficient evidence on an essential element of the crime. Petitioner Monroe requests the Court to modify the *F.B.* standard by adopting

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of age or less at the time of the alleged offense.

Similarly, a conviction for a lewd or lascivious molestation offense committed against a victim less than twelve years of age by a person eighteen years of age or older is a life felony. *See* § 800.04(5)(b), Fla. Stat. In contrast, a conviction for a lewd or lascivious molestation offense committed against a victim less than twelve years of age by a person less than eighteen years of age is only a second-degree felony. *See* § 800.04(5)(c)1., Fla. Stat.

the federal "manifest miscarriage of justice" test.

In *In re Winship*, 397 U.S. 358, 364 (1970), the United States Supreme Court stated that "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." (emphasis added). *See* U.S. Const. amends. V and XIV. In *United States v. Vuitch*, 402 U.S. 62, 72 n.7 (1961), the United States Supreme Court explained that "a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt." Finally, in *Clyatt v. United States*, 197 U.S. 207, 222 (1905), the United States Supreme Court held that "it is the imperative duty of a court to see that *all the elements* of [a] crime are proved, or at least that testimony is offered which justifies a jury in finding those elements." (emphasis added).

In light of these principles, *all of the federal appellate courts* recognize that even if a sufficiency-of-the-evidence challenge is not preserved at the trial court level, an appellate court will nevertheless reverse a conviction if doing so is necessary to prevent a "manifest miscarriage of justice."[12] *See United States v. Spinner*, 152 F.3d

[12] "Miscarriage of justice" has a general meaning of "[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted *despite a lack of evidence on an essential element of the crime*." Black's Law Dictionary (10th ed. 2014) (emphasis added).

950, 956 (D.C. Cir. 1998) (finding plain error despite unpreserved sufficiency challenge, since "[i]t would be a manifest miscarriage of justice to let a conviction stand [where] the government failed to present any evidence on an essential element of the crime"); *United States v. Dawlett*, 787 F.2d 771, 775 (1st Cir. 1986) ("It is the imperative duty of a court to see that all the elements of a crime are proved, or at least that testimony is offered which justifies a jury finding those elements. In this instance the insufficiency of the evidence mandates reversal since plain error has been committed in an area so vital to the defendant. Surely our concept of justice is violated when a man is convicted of a crime he did not commit. Such is the case here. Even if the issue was not properly raised and preserved at trial, the government was not prejudiced by the lack of notice; no facts that the prosecution could offer would have justified a conviction under [18 U.S.C.] § 1512(a)(1)."") (citation omitted); *United States v. Kaplan*, 586 F.2d 980, 982 n.4 (2d Cir. 1978) ("Although trial counsel for Kaplan did not move for a judgment of acquittal under [Federal Rule of Criminal Procedure] 29, failure by the Government to adduce sufficient evidence to warrant submission to the jury is a defect affecting substantial rights which we may notice under [Federal Rule of Criminal Procedure] 52(b)."); *United States v. Zolicoffer*, 869 F.2d 771, 774 (3d Cir. 1989) ("[T]he failure to prove one of the essential elements of a crime is the type of fundamental error which may be noticed

by an appellate court notwithstanding the defendant's failure to raise it in the district court") (citation omitted); *Lockhart v. United States*, 183 F.2d 265, 265-66 (4th Cir. 1950) ("In the District Court, no motion for judgment of acquittal was made under Rule 29, Federal Rules of Criminal Procedure, nor were any objections made to the judge's charge to the jury. We may, however, notice manifest error and, to prevent serious injustice, we may consider whether there was sufficient evidence to take the case to the jury."); *United States v. Musquiz*, 445 F.2d 963, 966 (5th Cir. 1971) ("[W]e discovered after examining the Record in this case that there was also lacking from the Government's case any evidence of the kind required to establish an essential element of the crime of passing counterfeit bills – namely, guilty knowledge that the bills were counterfeit. We notice this error on our own motion, as we think we are required to do when the error is so obvious that failure to notice it would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.' *United States v. Atkinson*, 297 U.S. 157, 160 (1936), quoted in *Silber v. United States*, 370 U.S. 717, 718 (1962)."); *United States v. McBride*, 362 F.3d 360 (6th Cir. 2004) (same); *United States v. Meadows*, 91 F.3d 851, 855 n.6 (7th Cir. 1996) ("[A] complete lack of any evidence of one of the essential elements of a crime is not only insufficient evidence, but too little evidence to avoid a manifest miscarriage of justice."); *United States v. Calhoun*, 721 F.3d 596 (8th Cir. 2013) (same); *Beckett v.*

United States, 379 F.2d 863, 864 (9th Cir. 1967) (finding plain error despite defendant's waiver of sufficiency challenge where "there was no proof of one of the essential elements [of the charged offense]"); *United States v. Santistevan*, 39 F.3d 250, 256-57 (10th Cir. 1994) ("[W]e believe the prosecution's failure to prove an essential element of the crimes charged beyond a reasonable doubt in this case offends our most fundamental sense of due process. *See In re Winship*, 397 U.S. 358, 364 (1970). Accordingly, it is appropriate for us to exercise our power to raise the sufficiency of the evidence *sua sponte* as plain error."); *United States v. Hamblin*, 911 F.2d 551, 558 (11th Cir. 1990) (applying the "manifest miscarriage of justice" standard and holding that "[a]fter an extensive review of the record from the district court, we find that the evidence presented by the government was insufficient to sustain Hamblin's section [18 U.S.C. §] 924(c) conviction for the September 24 robbery (Count Two)").[13]

In support of his argument, Petitioner Monroe relies on the Eleventh Circuit Court of Appeals' decision in *United States v. Fries*, 725 F.3d 1286 (11th Cir. 2013). In *Fries*, the Eleventh Circuit reversed the defendant's conviction for transferring a

[13] The federal appellate courts refer to the standard in question as both the "manifest miscarriage of justice" standard and the "plain error"/Federal Rule of Criminal Procedure 52(b) standard.

firearm to an out-of-state resident[14] – despite the fact that the defendant failed to preserve his sufficiency-of-the-evidence challenge in the trial court. The Eleventh Circuit explained that when a defendant fails to preserve a sufficiency-of-the-evidence challenge in the trial court, the "manifest miscarriage of justice" standard applies:

> We begin with Fries's argument that insufficient evidence supports his conviction for violating 18 U.S.C. § 922(a)(5). Ordinarily, we review *de novo* whether sufficient evidence supports a conviction, viewing the evidence and taking all reasonable inferences in favor of the jury's verdict. *United States v. Farley*, 607 F.3d 1294, 1333 (11th Cir. 2010). But where a defendant does not move for acquittal or otherwise preserve an argument regarding the sufficiency of the evidence in the court below, the defendant "must shoulder a somewhat heavier burden: we will reverse the conviction only where doing so is necessary to prevent a manifest miscarriage of justice." *United States v. Greer*, 440 F.3d 1267, 1271 (11th Cir. 2006). *This standard requires us to find either that the record is devoid of evidence of an essential element of the crime or "that the evidence on a key element of the offense is so tenuous that a conviction would be shocking.*" [*United States v.*] *Milkintas*, 470 F.3d [1339,] 1343 [(11th Cir. 2006)] (internal quotation marks omitted); *see United States v. Wright*, 63 F.3d 1067, 1072 (11th Cir. 1995).

Fries, 725 F.3d at 1290-91 (emphasis added) (footnotes omitted). After concluding that the Government failed to present sufficient evidence as to an essential element of the offense (that the transferee of the firearm was not a licensed firearms dealer), the Eleventh Circuit reversed the defendant's conviction:

> In light of the government's concession that the record contains

[14] *See* 18 U.S.C. § 922(a)(5).

no other evidence on this front, the record is completely bereft of any evidence that Visnovske was, as a matter of objective fact, unlicensed at the time of sale. That being so, our inquiry is at its end – Fries's conviction cannot stand: "To uphold a conviction, in the absence of any evidence as to an essential element, would be a miscarriage of justice." *United States v. Tapia*, 761 F.2d 1488, 1492 (11th Cir. 1985) (internal quotation marks omitted); *see Wright*, 63 F.3d at 1074 ("Under the manifest miscarriage of justice standard, reversal is required only if the record is devoid of evidence pointing to [the defendant's] guilt or the evidence of a key element is so tenuous that a conviction would be shocking."); *Hamblin*, 911 F.2d at 558 ("The record is otherwise devoid of evidence to support the jury's verdict, and intuition cannot substitute for admissible evidence when a defendant is on trial.").

The government next argues that any error in not submitting evidence of Visnovske's licensure status was harmless because, had Fries objected at trial, the government could have proved Visnovske was unlicensed. But on appeal, we are confined to the record before us. And our searching review of the record in this case simply reveals no evidence whatsoever that Visnovske – the person to whom Fries allegedly sold a firearm – did not possess a license at the time of the sale. *In every criminal case, the government must be put to its proof, and though the failure to make a contemporaneous objection or motion at trial may affect our standard of review, permitting a conviction to stand where not a whit of evidence supports an essential element of the crime charged would do great damage to the considerations of due process that serve as a fundamental bulwark of our criminal justice system*. The government's harmlessness argument therefore does little to cure the key defect in this case, which is that it failed to offer any evidence of an essential element of the crime for which Fries stands convicted.

It is no answer to say that the particular element at issue here – the licensure status of the transferee for purposes of § 922(a)(5) – is unimportant or somehow a technicality: our charge as arbiters of the law does not turn upon the potential for intrigue presented by the particular plot or cast of characters of a given case. Even where the defendant fails to move for acquittal and our review of the record is at its most charitable, in the end the responsibility to provide some scintilla of

> evidence regarding each element of a crime falls squarely on the government. Because the government failed to make that minimal showing, Fries's conviction must fall.

Id. at 1293-94 (some citations omitted).

If the "manifest miscarriage of justice" standard is applied to the record in the instant case, then Petitioner Monroe is entitled to relief. As found by the district court below, the record is devoid of evidence of an essential element of the crimes (i.e., that Petitioner Monroe was "18 years of age or older" at the time of the offenses) and/or the evidence on this key element of the offenses is so tenuous that a conviction would be shocking. As stated by the United States Supreme Court, "a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt"[15] and "it is the imperative duty of a court to see that all the elements of [a] crime are proved, or at least that testimony is offered which justifies a jury in finding those elements."[16] And as stated by the Eleventh Circuit, "permitting a conviction to stand where not a whit of evidence supports an essential element of the crime charged would do great damage to the considerations of due process that serve as a fundamental bulwark of our criminal

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[15] *Vuitch*, 402 U.S. at 72 n.7.

[16] *Clyatt*, 197 U.S. at 222.

justice system."[17] These principles are magnified given that Petitioner Monroe is now serving a mandatory sentence of life imprisonment without the possibility of parole – a sentence that is unconstitutional for a juvenile offender convicted of a nonhomicide offense.

Accordingly, for the reasons set forth above, Petitioner Monroe requests the Court to modify the *F.B.* standard by adopting the federal "manifest miscarriage of justice" test. Petitioner Monroe respectfully suggests that the adoption of the "manifest miscarriage of justice" test is necessary to comply with *Winship* and constitutional due process principles. The adoption of the "manifest miscarriage of justice" test will also "further the interests of justice in Florida" and promote judicial economy by allowing appellate courts to vacate improper convictions for which the prosecution failed to present sufficient evidence on an essential element of the crime.[18] After applying the "manifest miscarriage of justice" test to the record in the

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[17] *Fries*, 725 F.3d at 1294.

[18] In *State v. Stevens*, 694 So. 2d 731 (Fla. 1997), the Court held that a ground for a judgment of acquittal may be raised for first time in post-trial motion filed pursuant to Florida Rule of Criminal Procedure 3.380(c). In reaching this result, the Court explained that

> our conclusion will further the interests of justice in Florida. Our interpretation of the rule provides a procedural mechanism through which a substantive error can be corrected within the time allowed for this motion. Empowering a trial court with the ability to enter a

instant case, the district court's decision should be quashed and this case should be remanded to the district court to vacate Petitioner Monroe's capital sexual battery and section 800.04(5)(b) convictions and to enter a judgment of conviction pursuant to section 794.011(2)(b) and section 800.04(5)(c)1.

> judgment of acquittal when it is of the opinion that the evidence is insufficient to warrant a conviction upon motion under the requirements of rule 3.380(c) will thus promote judicial economy.

Stevens, 694 So. 2d at 733 (footnote omitted).

F. CONCLUSION

The appropriate remedy is to quash the district court's decision and to remand this case to the district court with directions that the district court vacate Petitioner Monroe's capital sexual battery and section 800.04(5)(b) convictions and enter a judgment of conviction pursuant to section 794.011(2)(b) and section 800.04(5)(c)1. (and to remand this case to the trial court so that Petitioner Monroe can be resentenced for these lesser offenses).

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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by email delivery this 18th day of February, 2015.

Respectfully submitted,

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of the Petitioner complies with the type-font limitation.

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