IN THE SUPREME COURT OF FLORIDA

RALPH MONROE, II.,

PETITIONER,

v.

STATE OF FLORIDA,

RESPONDENT.

Case No. SC14-2296

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, Ralph Monroe, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name. Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State

The record on appeal consists of four volumes. The first volume contains all pleadings filed with the clerk of court and will be referred to as "R. I.," followed by any appropriate page number. The second volume contains the transcript of Appellant's jury selection and will be referred to as "R. II.," followed by any appropriate page number. The third and fourth volumes contain the transcript of Appellant's jury trial held on July 24, 2012, and will be referred to as "R. III." And "R. IV.," respectively, followed by any appropriate page number. The record on appeal also contains four supplemental volumes, which will be referenced as "R. Supp.," and by appropriate volume and page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with: Count I: Sexual battery on a child under 12 years of age by a defendant 18 years of age or older; Count II: Lewd or lascivious molestation; Count III: Sexual battery on a child under 12 years of age by a defendant less than 18 years of age; and Count IV: Lewd or lascivious molestation. (R. I. 15).

Petitioner's case proceeded to jury trial on July 24, 2012, before the Honorable James C. Hankinson, on the charges concerning T.J. (R. III. & R. IV.). Sandra Grant ("Grant"), a teacher, specifically testified that, on May 25, 2011, T.J. told her he could not go into the bathroom because Petitioner would ask him how he uses the bathroom and to "play a game with it." (R. III. 25). T.J. seemed afraid when he told Grant the information. (R. III. 27).

T.J., the victim, testified Petitioner touched his penis and his buttocks, by placing his finger inside T.J.'s rectum. (R. III. 39). The following exchange took place:

THE STATE: Did this happen more than once?

T.J.: Just once.

THE STATE: Okay. The -- was this after Christmastime?

T.J.: Maybe. I don't know.

THE STATE: Okay. Do you remember -- do you know Ms. Grant?

T.J.: Yes.

THE STATE: She's now the principal?

T.J.: Yes.

THE STATE: Do you remember going and telling her about going into the bathroom?

T.J.: Yes.

THE STATE: Was it -- did it happen before then?

T.J.: Yes.

THE STATE: Did it happen after spring break?

T.J.: Maybe.

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

T.J.: Yes.

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

T.J.: Maybe after.

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

T.J.: No.

THE STATE: Okay. The -- was it after Christmas?

T.J.: No, I don't --

THE STATE: Do you remember exactly when it happened?

T.J.: Yes, sir.

THE STATE: Okay. Did you ever see him in the bathroom another time?

T.J.: No.

THE STATE: Okay. Do you remember going and talking to the other Terry, the old Terry, Mr. Thomas, the policeman? Do you remember talking to him?

T.J.: (Shakes head.) I don't know.

THE STATE: Okay. [T.J.], when you talked to the policeman did you tell him the truth?

T.J.: Yes.

(JT. 40-41).

In discussing timing with T.J., the following transpired between him and the officer in the recorded video:

THOMAS: Okay. All right. And did that happen -- did that happen on one day or did it happen any other times?

T.J.: It happened on other days.

THOMAS: Other days. So you've seen this guy before?

T.J.: (Nods head.)

THOMAS: Has he come in the bathroom with you before?

T.J.: Yes.

THOMAS: Okay. Did he do anything like that, that you just told me? Has he done anything like that before?

T.J.: Yes.

THOMAS: He has done the same thing?

T.J.: Yes.

(R. III. 59-60).

Thomas testified that Appellant's date of birth was February 27, 1993; Petitioner was 18 years old at the time of the disclosure in May. (R. III. 68). Thomas indicated that the victim had informed him there was one incident prior to the one disclosed in May, but it was "a long time before." (R. III. 68). T.J. identified Petitioner from a photo lineup. (R. III. 68-69). The recording between Petitioner and Thomas was published for the jury. (R. III.

72-94). Petitioner admitted to his actions. (R. III. 89-94).

At the close of the State's case, the trial judge asked defense counsel if she wanted to move for a judgment of acquittal; defense counsel responded that she did not. (R. III. 142). The State indicated to the trial court that they were essentially charging the offense in four different ways. (R. III. 144). The State then suggested the trial court make counts III and IV lesser includeds, as they were dependent upon the jury determining Petitioner's age at the time of the offense. (R. III. 146-148). During closing argument, defense counsel argued:

> With respect to issue -- the Element No. 3, that Mr. Monroe was 18 years or older, you can't speculate. You can't speculate that it's possible that he did this during the 23 days. If it's possible, then there's reasonable doubt. If it's possible that this occurred when he was 17 years old, the State has not proved its case. And I would submit to you that you must find the defendant to have been 17 years old -- age at the time.
>
> As I said, I'm not going to stand here and tell you that something didn't happen to this child. Something did. I believe that evidence has shown that he was molested, that Mr. Monroe touched him with his penis and with his – touched his penis and the back of his butt. But I submit to you there's no been -- there's not been any evidence that beyond and to the exclusion of all reasonable doubt there's been penetration and that Mr. Monroe was over the age of 18. And I would ask you to find him guilty of molestation on a child under the age of 12 by a person under the age of 18. Thank you.

(R. IV. 183-84).

The jury found: "The defendant, Ralph Monroe, is guilty of Sexual Battery On Child Under 12 Years of Age by Defendant 18 Years Of Age Or Older," as opposed to "The defendant, Ralph Monroe, is guilty of the lesser included offense of Sexual Battery On Child Under 12 Years Of Age By Defendant Less

than 18 Years of Age." (R. I. 58).

The First District Court of Appeal affirmed Petitioner's judgment and sentence after briefing and oral argument. *See Monroe v. State*, 148 So. 3d 850 (Fla. 1st DCA 2014). However, the First District held that it felt the State had failed to prove Petitioner was 18 years old at the time of the offense, but was bound by this Court's holdings in both *F.B. v. State*, 852 So. 2d 226, 230 (Fla. 2003), and *Young v. State*, 141 So. 3d 161 (Fla. 2013), to affirm because defense counsel had not preserved the issue for appellate review, and because the evidence indicated that a crime had been committed. *Id.* at 858-59. In doing so, the First District certified a question of great public importance because Petitioner is serving a mandatory life sentence:

> DO *F.B. V. STATE*, 852 So. 2d 226 (Fla. 2003), AND *YOUNG V. STATE*, 141 So. 3d 161 (Fla. 2013), REQUIRE PRESERVATION OF ANY EVIDENTIARY SUFFICIENCY WHERE THE STATE PROVED ONLY A LESSER INCLUDED OFFENSE AND THE SENTENCE REQUIRED FOR THE GREATER OFFENSE WOULD BE UNCONSTITUTIONAL AS APPLIED TO THE LESSER OFFENSE?

Id. at 861.

SUMMARY OF ARGUMENT

This Court should answer the First District Court of Appeal's certified question in the affirmative. This Court's precedent set forth in both *F.B. v. State*, 852 So. 2d 226 (Fla. 2003), and *Young v. State*, 141 So. 3d 161 (Fla. 2013), clearly establish that in order for an insufficiency of the evidence claim to be reviewed on direct appeal it must be preserved for appellate review, absent two exceptions which constitute fundamental error. In the instant case, a non-death case, the only exception that would apply is if there was no evidence of any offense, at all. This is clearly not the case as Petitioner concedes he committed a sexual battery.

The State asserts that this Court should remain steadfast in applying its precedent for three reasons. First, findings of fact are within the purview of the jury. Allowing review of all insufficiency claims would give rise to a risk that an appellate court may improperly reweigh the evidence, as opposed to only making a sufficiency determination, as in the instant case. Second, the failure to preserve a claim would promote sandbagging. A defense attorney will not want to move for a judgment of acquittal because they would be bound by their specific argument on appeal, or if they do not move for a judgment of acquittal, they would be getting essentially two bites of the apple if the jury verdict is adverse. Finally, because the failure to move for judgment of acquittal can be either tactical or pure negligence an appellant should raise the issue in a postconviction motion for a proper determination.

Petitioner urges in his Initial Brief that the question should also be answered affirmatively, and in doing so suggests that this Court "modify" the

standard set forth in *F.B.* by adopting the "plain error" standard set forth in Rule 52(b) of the Federal Rules of Criminal Procedure. However, it is the State's position that the standard already set forth in *F.B.* is analogous to the federal standard. Therefore, the State respectfully requests that this Court answer the certified question in the affirmative and affirm Petitioner's judgment and sentence.

ARGUMENT

ISSUE I: 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?

Standard of Review

The standard of review is *de novo*. *See Haygood v. State*, 109 So. 3d 735, 739 (Fla. 2013)("The certified question presented by the district court is solely a legal question. Thus, this Court's review is *de novo*.").

Merits

The First District's certified question, for which this Court accepted jurisdiction, is:

> 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 UNCONSITUTIONAL AS APPLIED TO THE LESSER OFFENSE?

Monroe, 148 So. 3d at 861.

The State argues that this question should be answered in the affirmative, for the reasons explained below. The State believes that Petitioner also answers the question affirmatively, considering the fact Petitioner asks this Court to "modify" its ruling in *F.B.* by adopting the federal "manifest miscarriage of justice" test. (IB. 13). Specifically, Petitioner advocates for this standard because "[i]n 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.'" (IB. 14)(Citing *United States v. Spinner*, 152 F.3d 950, 956 (D.C. Cir. 1998)). However, there is no need to change the standard, as this is the standard already articulated in *F.B.*

1. The preservation requirement, *F.B. v. State*, 852 So. 2d 226 (Fla. 2003), and *Young v. State*, 141 So. 3d 161 (Fla. 2013).

It is a well-established principle of appellate review and procedure that in order for an issue to be raised on appeal, it must be properly preserved below. This principle has been codified into § 924.051(b), Florida Statutes, which provides:

> "Preserved" means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.

This Court has explained preservation as being

> based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

However, there is one notable exception to this rule, fundamental error. Due to the high burden that one must meet to demonstrate fundamental error, this Court has held that it should only be found "in those rare cases wherein the interests of justice warrant reversal." *See Smith v. State*, 521 So. 2d

106, 108 (Fla. 1988); *see also Ray v. State*, 403 So. 2d 956 (Fla. 1981). This high standard is because "[f]undamental error has been defined as error that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process." *Sparks v. State*, 740 So. 2d 33, 35 (Fla. 1st DCA 1999); *see also Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994). In other words,

> "in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error."

F.B., 852 So. 2d at 229 (citing *Brown v. State*, 124 So. 2d 481, 848 (Fla. 1960)(holding that the alleged error "did not permeate or saturate the trial with such basic invalidity as to lead to a reversal regardless of a timely objection.").

Despite the First District's certified question specifically asking about this Court's holdings in *F.B.* and *Young*, Petitioner failed to explain either in his Initial Brief. Thus, a brief discussion of both is warranted. In doing so, the State expects that this certified question will be clearly answered:

Expounding on fundamental error in the context of sufficiency of the evidence claims, this Court, in *F.B.*, explicitly held at the onset: "we approve the Fourth District Court of Appeal's holding that the insufficiency of the evidence to prove one element of a crime **does not constitute fundamental error**, and therefore this **claim must first be raised in the trial court to be preserved for appellate review.**" 852 So. 2d at 227.

In reaching this holding, this Court explained that this rule dates back

to 1974, when in *State v. Barber*, 301 So. 2d 7, 8 (Fla. 1974), this Court explained:

> In [*Barber*], the respondents were convicted of two counts of breaking and entering with intent to commit grand larceny. As did the petitioner here, on appeal they alleged that the evidence was insufficient to sustain the conviction on the element of the value of the property stolen. The respondents contended that the State thus failed to present a prima facie case and that this constituted fundamental error. Citing a line of prior decisions, we rejected that argument and held that "**unless the issue of sufficiency of the evidence to sustain a verdict in a criminal case is first presented to the trial court by way of an appropriate motion, the issue is not reviewable on direct appeal from an adverse judgment.**" *Id.* at 9. **Because the issue was not preserved below, we held that it "was not open to appellate review.**" *Id.*

F.B., 852 So. 2d at 228 (emphasis added). This Court expressly rejected that a subsequent case, *Negron v. State*, 306 So. 2d 104 (Fla. 1974), provided for the opposite assumption that an unpreserved insufficiency of the evidence claim, based upon the exact same argument, did constitute fundamental error. *Id.*

In regards to insufficiency claims, this Court explained:

> As the foregoing discussion suggests, rarely will an error be deemed so fundamental, and the more general rule requiring a contemporaneous objection to preserve an issue for appellate review will usually apply. **We find that the interests of justice are better served by applying this general rule to challenges to the sufficiency of the evidence. 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.**

F.B., 852 So. 2d at 229-30 (internal citation omitted)(emphasis added). This Court explained that the importance of this rule is evidenced by the deferential standard of review employed in insufficiency of the evidence claims, namely that this standard of sufficiency differs from that of a weight of the evidence claim. *Id.* 230.

Therefore, in the interests of justice, this Court carved out two exceptions to the preservation rule for insufficiency of the evidence claims. *Id.* The first exception is death penalty cases, where review is automatic, and the second "occurs when the evidence is insufficient to show that a crime was committed at all." *Id.* Since this case is not a capital case resulting in the death penalty, only the second exception would be applicable. The rationale behind this exception is that "[s]uch complete failure of the evidence meets the requirements of fundamental error – i.e., an error that reaches to the foundation of the case and is equal to a denial of due process." *Id.* (citing *Stanton v. State*,746 So. 2d 1229, 1230 (Fla. 3d DCA 1999)). To support this rationale, this Court cited to *Griffin v. State*, 705 So. 2d 572, 574 (Fla. 4th DCA 1998), for the proposition 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." *Id.* at 231.

Likewise, this Court recently reiterated in *Young*, which dealt with a "boilerplate" motion:

> At the close of the State's case the defense moved for a judgment of acquittal, claiming that the State had not proven all of the elements needed for prima facie cases of burglary, robbery and carjacking. The defense did not elaborate on the basis for the motion in relation to the burglary and robbery charges, but went on to state that there was no evidence that the car was taken from the custody of the victim as required by the carjacking statute. In *Brooks v. State*, 762 So. 2d 879, 895 (Fla. 2000), this Court determined that **a "technical and pro-forma" motion which requests a judgment of acquittal without further argument is "totally inadequate to preserve a sufficiency of the evidence claim for appellate review." A defendant must preserve a claim of insufficiency of the evidence through a timely challenge in the trial court.** The motion or objection must be specific in order to

> preserve the claim for appellate review. A boilerplate objection or motion is inadequate.
>
> There are two exceptions to the requirement that a timely objection be made to the trial court: (1) where the defendant is sentenced to death; and (2) **where the evidence is insufficient to show that a crime was committed at all.** As to the second exception, if the defendant is convicted of a crime where the evidence does not demonstrate that a crime has been committed at all, this constitutes fundamental error, an error that "reaches to the foundation of the case and is equal to a denial of due process," and therefore need not be preserved at trial. Young claims that the fundamental error exception applies in this case. **However, the evidence presented suggests, at the least, that Young committed a burglary of a structure. It is a question of fact for the jury whether the structure qualifies as a dwelling. As the evidence indicates that a crime was in fact committed by Young, Young's conviction cannot be said to be fundamental error.** Therefore, any specific issue that Young would like to address on appeal must have been preserved at the trial level. **Because Young did not specifically argue at trial that the building was not a "dwelling," this claim was not properly preserved and has been waived.** Further, as explained below, addressing the merits of this claim, Young has not established that the trial court erred.

141 So. 3d at 165 (internal citations to *F.B.* omitted)(emphasis added).

2. The standard outlined by this Court in *F.B.*, and later reiterated in *Young*, clearly provide that the certified question must be answered in the affirmative.

It is the State's position that this Court meant what it said when it held that an insufficiency of the evidence claim must be properly preserved for appellate review, despite the resulting sentence. The State believes this rule is one of sound policy for many reasons, including: findings of fact are within the purview of the jury; preservation prevents sandbagging; and because an appellant still has a manner of recourse. The State will address each in turn:

a. Factual determinations are to be made by the jury

A fundamental principle in criminal law is that a defendant is presumed innocent until the State has proven, beyond a reasonable doubt, that the defendant committed the offense. Therefore, this Court was correct in holding that only a complete failure to prove any crime constitutes fundamental error, as opposed to one element, since it is within the purview of the jury to make that determination. As noted in *Young*, each element is a question of fact to be decided by the jury. 141 So. 3d at 165.

A motion for judgment of acquittal is the proper procedural method to be employed when attempting to test the sufficiency of the evidence before being submitted to the jury. This is true because there is a clear difference between a determination of the sufficiency of the evidence and the weight of the evidence:

> There is a **distinction between the "sufficiency of the evidence" standard, used in determining whether a judgment of acquittal is appropriate and the "weight of the evidence" standard used in evaluating a motion for new trial**. *Moore v. State*, 800 So. 2d 747 (Fla. 5th DCA 2001). **"Sufficiency of the evidence" is a test of whether the evidence presented is legally adequate to permit a verdict**. "Weight of the evidence" tests whether a greater amount of credible evidence supports one side of an issue or the other. *State v. Hart*, 632 So. 2d 134, 135 (Fla. 4th DCA 1994). In deciding a motion for new trial pursuant to Florida Rule of Criminal Procedure 3.600(b)[sic] on the ground that the verdict is contrary to the **weight of the evidence**, the trial court acts as a "safety valve" by granting a new trial where the evidence is **technically sufficient to prove the criminal charge** but the weight of the evidence does not appear to support the verdict. *Moore*, 800 So. 2d at 749. Thus, **the rule "enables the trial judge to weigh the evidence and to determine the credibility of witnesses so as to act, in effect, as an additional juror.**" *Uprevert v. State*, 507 So. 2d 162, 163 (Fla. 3d DCA 1987)(quoting *Tibbs v. State*, 397 So. 2d 1120, 1123 n. 9 (Fla. 1981)).

Geibel v. State, 817 So. 2d 1042, 1044 (Fla. 2d DCA 2002).

This distinction is important, because this Court has explained:

> As a general proposition, an **appellate court should not retry a case or reweigh conflicting evidence** submitted to a jury or other trial of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. **Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.**

Tibbs, 397 So. 2d at 1123. Therefore, the State would argue that this Court has already determined that preservation is absolutely necessary, despite the sentence, because as long as some competent and substantial evidence is presented as to each element, it becomes a question for the jury.

In reading the *Monroe* opinion, it is clear the First District did just what it was not supposed to do, reweigh the evidence. In fact, the loaded question clearly indicates the First District reweighed the evidence, determining the State only proved the non-capital offense and not the charge offense. In the *Monroe* opinion the First District explained: "The State attempted to establish Monroe's age by questioning the victim about the time of the incident, but the victim could not be sure exactly when it happened." *Monroe*, 148 So. 3d 850. By referring to the State's evidence as an "attempt" it means some evidence was brought forth, thus a jury question was created.

In fact, in this case the State produced evidence that Petitioner's birthday was February 27, 1993. (R. III. 68). The victim testified that the abused occurred before he told his teacher in May and that he believed it occurred after spring break, when he went to the beach. (R. III. 40-41). Although the victim was hesitant about the timeframe, there was sufficient

evidence for the jury to find the abuse occurred sometime in March or April, which was after the Petitioner's birthday.

b. Sandbagging tactics

Not only would review of all cases for the sufficiency of the evidence occur if there was no preservation requirement, but such requirement would encourage sandbagging tactics during trial. A defendant's failure to move for a judgment of acquittal is an indication that the defendant believed the evidence was sufficient for the jury to make a factual determination, or may even be tactical in nature, as will be discussed later. *See infra*, pgs. 19-25.

A court should strictly apply the principle of fundamental error in order to discourage parties from engaging in "sandbagging," or sometimes referred to as "gamesmanship." *See Thompson v. State*, 949 So. 2d 1169, 1179 n. 7 (Fla. 1st DCA 2007)("Sandbagging is defined as '[a] trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem.")(citing *Black's Law Dictionary* 1342 (7th ed. 1999)). In fact, this Court has held that the preservation requirement is necessary to prevent such conduct. Specifically, in *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1999), this Court explained [the contemporaneous objection rule] prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client." (quoting *Davis v. State*, 661 So. 2d 1193, 1197 (Fla. 1995)).

The State is cognizant that in the instant case Petitioner is not seeking a new trial, but instead is seeking to have his conviction for capital sexual

battery vacated and a judgment for the non-capital sexual battery imposed. (IB. 23). Furthermore, the State is also aware that when reviewing a sufficiency of the evidence claim, and upon determining the evidence was, in fact, insufficient, that an appellate court has the ability to remand the case to the trial court with instructions to enter a judgment for a lesser offense. *See* § 924.34, Fla. Stat., providing:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish guilt of a lesser statutory degree of the offense of a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.

Despite this fact, if preservation was not necessary for appellate review of an insufficiency of the evidence claim, it would promote counsel making tactical decisions that would let errors go undetected until taken on appeal.

For example, in the instant case, defense counsel was specifically asked if she wanted to move for a judgment of acquittal and indicated that she did not. (R. III. 142). If preservation was not required defense counsel could specifically take a position at trial and then be allowed to complain about it on appeal if it was adverse. For instance, by moving for a judgment of acquittal the argument has to be specific enough to apprise the trial court of what the State had not proven, but if there was no preservation requirement defense counsel would not make a specific argument because they would then be locked into that argument on appeal, as opposed to getting a de facto sufficiency of the evidence review. This principle would be contrary to any well established preservation or waiver rule put forth. Thus, it would be

improper.

c. *Unexhausted appellate remedy*

Moreover, if trial counsel expressly declined to move for a judgment of acquittal, it was most likely a strategic decision, not an attempt to sandbag. However, if the failure to move for a judgment of acquittal was negligence on part of trial counsel, then an appellant has a manner of recourse by seeking an ineffective assistance of counsel claim in a motion filed pursuant to Florida Rule of Criminal Procedure 3.850, as a claim of ineffective assistance of counsel is only cognizable on direct appeal when it is clear from the face of the record. *See Conger v. State*, 933 So. 2d 686, 687 (Fla. 5th DCA 2006)("Ineffective assistance of counsel claims are not cognizable on direct appeal unless the ineffectiveness is apparent on the face of the record.")(citing *Barber v. State*, 901 So. 2d 364 (Fla. 5th DCA 2005)).

Therefore, if an appellant truly believes counsel was negligent, he can seek relief by filing a proper postconviction motion. By doing so, an appellant would be claiming ineffective assistance of trial counsel and must establish both deficiency and prejudice. *See Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999)(Generally, the decision of ineffectiveness is a two-prong analysis: (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudiced thereby.)(citing *Strickland v. Washington*, 466 U.S. 668 (1984)). This Court stated in *Rose v. State*, 675 So. 2d 567, 569 (Fla. 1996):

> As to the first, prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." As

> to the second prong, the defendant must establish that, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The First District recognized that this remedy is still available when it explained in a footnote:

> Monroe did not raise ineffective assistance of counsel on the face of the record, and we would be reticent to find it under these circumstances. Finding ineffective assistance of counsel on the face of the record due to the failure to raise the insufficiency of the evidence to support a conviction before the trial court would be tantamount to holding that such an issue need not be preserved, contrary to the holding in *F.B.*

Monroe, 148 So. 3d at 860 n. 3.

The State is not indicating that trial counsel in the instant case acted negligently by not moving for a judgment of acquittal, as the State thinks the record demonstrates otherwise. The State is merely pointing out that an appellant should not be entitled to automatic review and/or reversal, when there is still another phase of appellate review to be had, and especially where the failure to object was strategic in nature. Assuming the decision was strategic, an appellant would then essentially be getting two bites of the apple.

As to the instant case, because there has not been a claim of ineffective assistance of counsel resulting in a hearing, the State cannot say with definite certainty that trial counsel's actions were strategic; however, the implications of the record support a conclusion that defense counsel was acting reasonably. The State disagrees with the First District's characterization that there was essentially no evidence presented that Petitioner was 18 years old at the time of the offense, but would insist that

the evidence would more appropriately be characterized as "weak," at the very least. The record indicates, as well as does the *Monroe* opinion itself, that the State did present some testimony to try and prove Petitioner was 18 years old at the time of the offense. However, the child victim was unable to pinpoint a certain date. (R. III. 40-41; *Monroe*, 148 So. 3d at 857.).

When reviewing defense counsel's actions, it is clear that she felt the evidence was insufficient to prove Petitioner was 18 years old at the time because she did not attempt to ask any questions to try and clear up the child victim's confusion between Christmastime and Spring Break when she cross-examined him. (R. III. 42). Further, when specifically asked if she wanted to move for a judgment of acquittal, she declined. (R. III. 142). Specifically declining to make a motion for judgment of acquittal, rather than making an insufficient motion, indicates deliberate thought-out action rather than negligence. Finally, and most importantly, defense counsel's closing argument clearly illustrates she was aware that the evidence was weak and argued the State did not meet its burden in proving Petitioner was 18 years old at the time, as she told the jury just that and asked that they convict him of the non-capital offense. (R. IV 183-84).

The State would argue this was sound trial strategy on the part of defense counsel, as it prevented the State from attempting to better establish the date. A trial court has the discretion to allow the State to reopen its case to produce sufficient evidence, if it has not already been presented. *See Donaldson v. State*, 722 So. 2d 177, 181 (Fla. 1998)("The decision to reopen a case lies within the discretion of the trial court and will not be disturbed

on appellate review absent an abuse of discretion.")(citing *Delgado v. State*, 573 So. 2d 83, 86 (Fla. 2d DCA 1990); *see also Louisey v. State*, 667 So. 2d 972, 974 (Fla. 4th DCA 1996)("Although the decision to allow a case to be reopened involves sound judicial discretion not usually interfered with on the appellate level. . ."); *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002)("For example, failure to move for a judgment of acquittal when the State has not proved an essential element of its case, when it is clear that the State could not reopen its case to prove that essential element, amounts to ineffective assistance of counsel that may sometimes be adequately assessed from the record on direct appeal.").

In fact, in *F.B.*, this Court specifically cited to *Johnson v. State*, 478 So. 2d 885, 886 (Fla. 3d DCA 1985), to illustrate that the interest of justice is best served by enforcing the preservation requirement and finding fundamental error in only those rare occurrences requiring such a finding. *F.B.*, 852 So. 2d at 230. In *Johnson*, at issue was the age of the victim. 478 So. 2d at 886. Specifically, the Third District explained:

> First, the defendant contends that the trial court erred in denying the defendant's motion for judgment of acquittal as to the sexual battery count **on the ground that the state failed to establish that the victim was eleven years of age or younger as required** by Section 794.011(2), Florida Statutes (1983). Specifically, it is urged that no witness testified below and no documentary proof was adduced as to the **age of the victim, which proof is an essential element of the crime. We conclude that the point has not been properly preserved for appellate review**. Although the defense counsel moved for a judgment of acquittal at trial, he employed a **general "boilerplate" motion** in which he asserted, without explanation or argument, that the state had failed to prove a "prima facie case" of the crime charged in the indictment, which counsel then tracked as to each element, including age. In so doing, counsel failed to comply with Fla. R. Crim. P. 3.380(b)

> which requires that the motion for judgment of acquittal "must *fully* set forth the grounds upon which it is based." (e.s.) **Had counsel complied with the rule and specifically brought the ground now urged to the trial court's attention, the error, if any, might have been cured by allowing the state to re-open its case and supply the missing, technical element of age**. Under these circumstances, then, the defendant may not now raise the point urged herein for the first time on appeal.

Id. at 886 (internal citations omitted)(italics provided)(bold and underline added).

In the instant case, the victim was clearly nervous and hesitant about the dates, but was able to narrow the timeframe to sometime after spring break but prior to Easter. (R. III. 40-41). If defense counsel had moved for a judgment of acquittal on the failure to prove age, the prosecution could have moved to reopen the case. Because the victim believed the abuse occurred after spring break, the State could have called the victim's teacher to testify to the dates spring break occurred. The State could have also recalled the child. However, the victim told the officer that the abuse occurred on more than one occasion so there is a possibility that evidence could have come out in more detail; it is very likely defense counsel would have wanted the jury to hear about additional acts of sexual abuse.

Not only could defense counsel be acting in a way to prevent the State from reopening its case, but by defense counsel contesting the evidence presented of Petitioner's age in her closing argument, she could have been doing her best to make sure the jury came back with only the lesser offense since the evidence presented was so strong in demonstrating a sexual battery did occur. This is not fundamental error. The State would cite to *Ray v.*

State, 403 So. 2d 956 (Fla. 1981), to exemplify this position. In *Ray*, the defendant argued fundamental error occurred when he was convicted of a crime for which he was not charged, but which was submitted to the jury as a lesser included offense, but really was not a lesser-included offense. *Id*. at 958. After a thorough explanation of the rules of preservation, and after finding no waiver occurred, this Court explained:

> We hold, therefore, that it is **not fundamental error to convict a defendant** under an erroneous lesser included charge when he had an **opportunity to object to the charge and failed to do so if**: 1) the improperly charge offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or **relied on that charge as evidence by argument to the jury or other affirmative action**. Failure to timely object precludes relief from such a conviction. These conditions have not been met in the instant case, and the district court opinion is quashed.

Id. 960-61 (footnote omitted)(emphasis added); *see also Joyner v. State*, 41 So. 3d 306, 307 (Fla. 1st DCA 2010)(finding the error was not fundamental because defense counsel "specifically agreed to that instruction at the charging conference and incorporated the instruction into his closing argument to the jury").

In a case like the one at bar, where defense counsel is given an opportunity to move for acquittal, but declines to do so, and then argues the evidence was insufficient to prove the greater charged offense during closing argument, it cannot be deemed fundamental error. Defense counsel in the instant case made a strategic decision and then made use of it later in her closing argument.

Thus, it appears from the record that defense counsel acted reasonably; however, if she did not, then Petitioner will be entitled to relief. This

determination, however, can only be made after a proper postconviction motion is filed and an evidentiary hearing is held. The State would even note that Petitioner's argument, in and of itself, supports a finding that his trial counsel acted reasonably because it appears his argument is not necessarily that the evidence was insufficient, but that the age element was not proven beyond a reasonable doubt, as he concedes a non-capital sexual battery was proven. For the reasons discussed above, the State urges that this Court must answer the certified question in the affirmative and remain steadfast in applying the holdings of both *F.B.* and *Young*. Thus, Petitioner's suggestion that this Court adopt the federal standard is not warranted, as explained below:

3. The Federal "Plain Error" Standard.

The State would first like to make clear what the federal standard is that Petitioner is advocating should be used to "modify" *F.B.* In his Initial Brief, Petitioner seems to use the terms "manifest miscarriage of justice"[1] and

[1] The Federal "plain error" standard is applied in review of appeals from Federal Circuit Court. In Federal Habeas cases, a standard referred to as the "manifest miscarriage of justice" is employed. In order to prove a manifest miscarriage of justice for purposes of Federal Habeas relief, the United States Supreme Court has held that a defendant must prove actual innocence. *See Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001)("If a petitioner cannot show cause, he may still survive a procedural bar by proving that the failure to hear the merits of his claim would endorse a fundamental miscarriage of justice. This exception is exceedingly narrow in scope, as it

"plain error" interchangeably; the State will refer to this standard as "plain error," as it is titled in the Federal Rules. The standard Petitioner is advocating that this Court should adopt is Rule 52(b) of the Federal Rules of Criminal Procedure, which provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

This rule has been explained:

> Under Rule 52(b) of the Federal Rules of Criminal Procedure, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To be "noticed" under this rule, an error must be "plain" (or, in other words, "obvious") and "must have affected the outcome of the District Court proceedings." *United States v. Clarke*, 24 F.3d 257, 266 (D.C. Cir. 1994)(quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). **When reviewing a sufficiency-of-the-evidence challenge for plain error, we reverse only to prevent a "manifest miscarriage of justice."** *United States v. Jackson*, 824 F.2d 21, 26 (D.C. Cir. 1987)(quoting *United States v. Baber*, 447 F.3d 1267, 1270 n. 8 (D.C. Cir. 1971)). **Such a miscarriage would exist "only if the record is devoid of evidence pointing to guilt, or . . . because the evidence on a key element of the offense was so tenuous that a conviction would be shocking**." *United States v. Parker*, 133 F.3d 322, 328 (5th Cir. 1998)(citations omitted); *accord United States v. Wright*, 63 F.3d 1067, 1074 (11th Cir. 1967)(finding a manifest miscarriage of justice where "there is no proof of one of the essential elements" of the crime charged).

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concerns a petitioner's "actual" innocence rather than his "legal" innocence." (citing *Calderon v. Thompson*, 523 U.S. 538, 539, 118 S. Ct. 1489, 1502-03, 140 L. Ed. 2d 728 (1998)); *see also Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808 (1995).

United States v. Spinner, 152 F.3d 950, 956 (D.C. Cir. 1998)(emphasis added). "A plain error is a **highly prejudicial error** affecting substantial rights." *United State v. Giese*, 597 F.2d 1170, 1199 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). As noted, plain error is only "invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process." *United States v. Smith*, 962 F.2d 923, 935 (9th Cir. 1992).

In his Initial Brief, Petitioner relies heavily upon the Eleventh Circuit's decision in *United States v. Fries*, 725 F.3d 1286, 1288 (11th Cir. 2013), where the defendant was charged and convicted of transferring a firearm to an out-of-state resident when neither he nor the buyer were a licensed firearms dealer. In *Fries*, the Eleventh Circuit reviewed the unpreserved insufficiency of the evidence claim explaining that the burden the defendant must carry was even higher due to the unpreserved nature of the claim; thus, reversal would only be warranted with a showing of a manifest miscarriage of justice. *Id.* at 1291 (quoting *United States v. Greer*, 440 F.3d 1267, 1271 (11th Cir. 2006). In discussing the standard, the Eleventh Circuit pointed out that in order for a manifest miscarriage of justice to occur: "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." *Id.* (quoting *United State v. Milkintas*, 470 F.3d 1339, 1343 (11th Cir. 2006) (internal quotation marks omitted)).

In evaluating Fries' claim, the Court explained:

> Because Fries failed to move for acquittal at trial, **we comb the entire record** and will affirm so long as we **find some paucity of evidence** that could have supported the jury's finding that the person to whom Fries sold a firearm -- Visnovske -- did not possess [a federal firearms license] at the time of the transfer.

Id. at 1293 (citing *Greer*, 440 F.3d at 1271)(internal citations omitted))(emphasis added). The Eleventh Circuit rejected the government's harmlessness argument, noting it did nothing to cure any notable key defect, which is that "it failed to offer **any evidence** of an essential element of the crime for which Fries stands convicted." *Id.* at 1294 (emphasis added). Thus, because the government failed to prove that Fries sold the firearm to someone who did not possess a firearm license, the key element which actually made the sale of the firearm a criminal act, Fries' judgment was reversed with instructions for the court to enter a judgment of acquittal. *Id.*

Along with *Fries,* Petitioner cites a myriad of Federal circuit court cases in a string cite. (IB. 15-17). All of the cited cases appear to hold, uniformly, that the standard of review for a preserved sufficiency of the evidence claim is different than one employed under a "plain error" analysis. In fact, in *United States v. Meadows*, 91 F.3d 851, 854 (7th Cir. 1996), the Seventh Circuit explained: "In reviewing a sufficiency of the evidence challenge that has been preserved below, the question is whether 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979))(emphasis supplied). However, for unpreserved errors, the Seventh Circuit explained the "plain error" rule

applies and that they must review the error for a "manifest miscarriage of justice." *Id.* at 854-55.

The State would note that it appears the "plain error" standard appears to be similar to that articulated in *F.B.*, in that the standard is higher than that of a preserved claim and that there essentially needs to be a complete lack of any evidence that any crime occurred at all. Specifically, the cases cited to by Petitioner seem to demonstrate, as noted, that a "manifest miscarriage of justice" would only occur if there was absolutely no evidence, when viewed in the light most favorable to the government, presented to support the conviction. This standard appears to be analogous to the second exception set out in *F.B.*, as a "manifest miscarriage of justice" "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." *Id.* (quoting *Milkintas*, 470 F.3d at 1343.

Appellant relies upon *United States v. Zolicoffer*, 869 F.2d 771, 774 (3d Cir. 1989), and *United States v. Musquiz*, 445 F.2d 963, 966 (5th Cir. 1971) to illustrate the specific standard Petitioner is asking this Court to adopt,[2]

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[2] The State is not asserting that the rest of the cases cited-to by Petitioner in his brief do not equally support his position, but due to the number of cases, the State has narrowed this discussion down to just two cases

that a conviction should not stand if there is no evidence presented, as it applies to each individual element, as opposed to the offense as a whole. Although Petitioner argues for an element-by-element approach, a close reading of the cases indicates that the federal standard does not allow review for a deficiency of the evidence on any element. Instead, it allows for review as it applies to a key element of the offense and even that evidence must be so tenuous, that a conviction would be shocking. In other words, there must not be evidence of an offense, at all.

For example, in *Zolicoffer*, although the Court affirmed several of numerous convictions involving the distribution of cocaine, the defendant argued the government failed to present sufficient evidence to prove that he engaged in interstate travel, for purposes of 18 U.S.C. § 1952(a)(2), where it must be proven that "he performed or attempted to perform acts 'to promote, manage, and carry on and facilitate the promotion, management and carrying on of' the unlawful narcotics distribution business as alleged in the indictment . . ." 869 F.2d at 774. The circuit court explained:

> As is clear from the statute, there must be some action taken after the travel to establish a violation of this section. As we stated in *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979), 'there are three elements of proof of a Travel Act violation: (1) interstate travel or use of an interstate facility (2) with intent

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that it feels best support his argument.

> to promote an unlawful activity and (3) a **subsequent overt act** in furtherance of the unlawful activity."

Id. (citations omitted)(emphasis added).

The federal court found that the government failed to present **any** evidence that the defendant acted, or attempted to do an overt act to further the unlawful activity because he was apprehended as soon as he got off the plane at the airport. *Id.* at 775. The Court suspected Zolicoffer was meeting another person to receive $37,000. *Id.* However, because he was arrested so soon after leaving the airplane, the government presented no evidence an overt act in furtherance of the unlawful activity in the second state. In fact, the opinion indicated the evidence was so lacking that the government did not even present evidence Zolicoffer walked in the direction of the suspected meeting spot. *Id.* Because logic dictates that when charging and convicting a person of a crime that is "interstate" in nature, that they would have to further the crime in a second state, which the statute quoted above provides. Therefore, because the government failed to prove that any act was taken to commit illegal activity in the second state, the interstate Travel Act conviction could not be upheld. Therefore, without that essential element, there was no offense at all.

In *Musquiz*, the federal court reversed based upon the government's failure to present **any** evidence of the essential element of knowledge in the offense of passing counterfeit bills. 445 F.2d at 966. The circuit court noted that it was a longstanding rule of law that merely passing counterfeit money alone was insufficient to prove that one had the requisite guilty knowledge. *Id.* Therefore, the circuit court, on its own volition, reversed the conviction.

Again, as noted, this is a logical conclusion as the goal of a counterfeiter is to create currency that looks indistinguishable from the original to be unknowingly passed off and therefore, counterfeit money that is successfully passed off could wind up in the hands of any innocent individual, who having no intention of wrongdoing, unknowingly passes the money along when engaging in commerce. Thus, the knowledge element is almost the heart and soul of the offense of passing counterfeit bills. Without knowledge, no offense has been proven, at all.

The State does acknowledge that this Court has held that age of the defendant is an element in a lewd or lascivious molestation case, as opposed to being a sentencing factor. *See Insko v. State*, 969 So. 2d 992, 1001 (Fla. 2007). However, the State urges that in applying both the federal standard, and the analogous rule articulated in *F.B.*, the result would be the same. Because Petitioner was convicted of sexual battery, the State would agree that had the State failed to prove a key element, i.e., he touched the child in an inappropriate manner, then the judgment should be reversed. Instead, the age element was not a key element to the offense because without it, there is still evidence that a crime occurred. Second, even if age was considered an key element, the federal standard indicates the evidence must be so "tenuous" that a conviction would be "shocking." Here, there was **some** evidence presented to support the finding that Petitioner was 18 years old; thus, no manifest miscarriage of justice.

Finally, the State would note, akin to the strategy argument presented above, the Federal Circuit Court will refrain from applying the "plain error"

standard when there is a basis to conclude that defense counsel failed to object based upon strategic considerations. *See e.g., United States v. Bayless*, 201 F.3d 116, 128(2d Cir. 2000)("As a result, where there is **no possibility of strategic manipulation**, a serious error, even if relatively subtle, can be 'plain error.'"). Thus, just like the instant case did not constitute fundamental error under *F.B.*, it similarly would not have constituted "plain error."

As discussed above, the federal standard seems to be akin to that already articulated in *F.B.* and any modification to the rule would promote sandbagging and is further unnecessary because there is already an appellate remedy in place in State court. Also, the State would insist that a very narrow third exception to the rule stated in *F.B.*, to provide for a more favorable outcome to Petitioner in the instant case, would also be unnecessary, as the State believes this is not an issue that would come up frequently, but instead would only promote an ultimate holding that preservation is not required in an insufficiency of the evidence claim. Therefore, the State would respectfully request that this Court answer the certified question in the affirmative, as well as affirm Petitioner's judgment and sentence.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Court answer the certified question in the affirmative and remain steadfast in applying its holdings in *F.B.* and *Young.*

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by ELECTRONIC MAIL on April 30, 2015: MICHAEL UFFERMAN, Esq., at ufferman@uffermanlaw.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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