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

REPLY BRIEF OF THE PETITIONER

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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.

In its Answer Brief, the State criticizes the opinion below, *see* Answer Brief at 16, and argues that there was sufficient evidence in the record to establish that Petitioner Monroe was an adult at the time of the incident. *See* Answer Brief at 16-17 ("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."). Contrary to the State's assertion – and as correctly found by the district court below – "there was *no evidentiary basis* for determining whether the incident giving rise to the charges took place before or after Monroe's eighteenth birthday . . . ." *Monroe v. State*, 148 So. 3d 850, 857 (Fla. 1st DCA 2014) (emphasis added).[1]

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[1] During his testimony, T.J. was asked when the 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.
>
> . . . .
>
> Q: Did it happen after spring break?

Next, the State argues that "[i]f defense counsel had moved for a judgment of acquittal on the failure to prove age, the prosecution could have moved to reopen the case." Answer Brief at 23. Contrary to the State's argument, it is clear from the record and the specific facts of the instant case that an attempt to "reopen the case" by the prosecution would not have accomplished anything. The prosecutor was on notice *prior to trial* that he would have difficulty establishing the date on which the offenses occurred. In fact, the prosecutor actually charged multiple counts for each

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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).

offense – one count alleging that Petitioner Monroe was an adult and another count alleging that Petitioner Monroe was a juvenile. (R-15). The trial transcript establishes that the prosecutor charged Petitioner Monroe in this manner because he realized it was going to be difficult to establish that the offenses occurred when Petitioner Monroe was an adult. (T1-146) (". . . I don't want a situation where if the State – where he's not guilty of anything because I can't prove whether he was 17 or 18 at the exact time when this alleged assault takes place."). It is clear from T.J.'s trial testimony that he was *not* able to specify a time frame/date and further questioning in this regard (i.e., if the State could have reopened its case) would not have brought any further clarification. (T1-40-41). As explained by the district court below, the deficiency in the State's proof at trial was not a "mere technical deficiency":

> 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).

The State also argues that preservation is required to prevent "sandbagging." Answer Brief at 17. The State further argues that defense counsel made a "strategic"

decision to forego moving for a judgment of acquittal in order to "prevent[] the State from attempting to better establish the date." Answer Brief at 21. As explained above, the district court correctly concluded that during its case in chief, "the State presented evidence intended to prove the element at issue on appeal *with no indication that it could have produced more*." *Monroe*, 148 So. 3d at 860 (emphasis added).[2] Thus, defense counsel's failure to move for a judgment of acquittal was clearly not "strategic." Moreover, the State's "sandbagging"/"strategy" argument was rejected by this Court in *State v. Stevens*, 694 So. 2d 731 (Fla. 1997). In *Stevens*, the Court held that a ground for a judgment of acquittal may be raised for *the 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 judgment of acquittal when it is of the opinion that the evidence is insufficient to warrant a conviction upon motion under the requirements

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[2] The fact that the State charged multiple counts for each offense – one count alleging that Petitioner Monroe was an adult and another count alleging that Petitioner Monroe was a juvenile – establishes that the State was aware pretrial that it was going to have difficulty proving that Petitioner Monroe was an adult at the time of the offenses. (R-15). Thus, defense counsel's failure to move for a judgment of acquittal did not "prevent[] the State from attempting to better establish the date," Answer Brief at 21 – the State could not "better establish the date" because T.J. could not remember the date.

of rule 3.380(c) will thus promote judicial economy.

Stevens, 694 So. 2d at 733 (footnote omitted). In *Stevens*, the Court concluded that the "interests of justice" outweigh any concerns regarding "sandbagging"[3] and "strategy."[4]

Next, the State argues that Petitioner Monroe should be precluded from raising this claim on direct appeal and should instead be required to raise this claim in a Florida Rule of Criminal Procedure 3.850 motion alleging that defense counsel was ineffective for failing to move for a judgment of acquittal. *See* Answer Brief at 19. Petitioner Monroe submits that when the record clearly establishes that the State failed to prove an essential element of an offense – as found by the district court in this case – the "interests of justice" will be furthered by allowing such a claim to be addressed on direct appeal. Of course, a criminal defendant has a right to counsel on direct appeal, but a criminal defendant has no constitutional or statutory right to

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[3] As explained above, no "sandbagging" occurred in the instant case because the State was aware pretrial that it would have difficulty proving that Petitioner Monroe was an adult at the time of offenses – which is why the State charged multiple counts for each offense.

[4] As acknowledged by the State in its brief, defense counsel argued in closing that the State had failed to establish that Petitioner Monroe was an adult at the time of the offenses. *See* Answer Brief at 21 (citing T2-183-84). Clearly defense counsel's failure to move for a judgment of acquittal during the trial was not "strategic" – otherwise, defense counsel would have moved for a judgment of acquittal after the trial pursuant to rule 3.380(c).

counsel in a postconviction proceeding. Similar to the Court's reasoning in *Stevens*, it will promote "judicial economy" if such a manifest injustice can be brought to an appellate court's attention – through counsel – on direct appeal rather than risking that a *pro se* litigant will have the wherewithal to properly raise a timely postconviction motion asserting the claim.[5]

The State also contends that the age element of the two statutes in question is not a "key element." Answer Brief at 32. Contrary to the State's contention, the State's failure to present sufficient evidence establishing that Petitioner Monroe was an adult at the time of the offenses means that Petitioner Monroe's mandatory life-without-parole sentence violates the Eighth Amendment to the United States Constitution and *Graham v. Florida*, 560 U.S. 48 (2010). As explained by the district court below:

> Applying *F.B.* [*v. State*, 852 So. 2d 226 (Fla. 2003),] 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

[5] Undersigned counsel contends that this "right to counsel" concern is one of the reasons that the Court rejected the Criminal Court Steering Committee's proposal to eliminate Florida Rule of Criminal Procedure 3.170(*l*). *See In re Amendments to the Fla. Rules of Criminal Procedure & the Fla. Rules of Appellate Procedure*, 132 So. 3d 734, 736-37 (Fla. 2013).

> 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.[6]

For all of the reasons set forth in the Initial Brief, Petitioner Monroe continues to assert 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 the federal "manifest miscarriage of justice" test. As explained in the Initial Brief, *all of the federal appellate courts* recognize that even if a sufficiency-of-the-evidence

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[6] 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 of age or less at the time of the 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.

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." In *United States v. Fries*, 725 F.3d 1286, 1291 (11th Cir. 2013), the Eleventh Circuit Court of Appeals held that pursuant to the "manifest miscarriage of justice" standard, even if defense counsel fails to move for a judgment of acquittal, an appellate court will grant relief if "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." (citations omitted).[7] If this "manifest

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[7] In its brief, the State asserts that the federal "manifest miscarriage of justice" standard is "similar to that articulated in *F.B.* . . ." Answer Brief at 29. Contrary to the State's assertion, under the federal "manifest miscarriage of justice" standard, an appellate court will grant relief if the prosecution failed to prove a particular *element* of an offense. *See Fries*, 725 F.3d at 1291 ("[An appellate court will grant relief pursuant to the 'manifest miscarriage of justice' standard if] 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.") (emphasis added) (citations omitted). In contrast, as explained by the district court below, pursuant to the *F.B*. standard, a defendant can only seek review of an unpreserved sufficiency of the evidence claim if the prosecution's evidence was insufficient to show that *a crime was committed at all* (i.e., a defendant cannot seek review if the prosecution's evidence was insufficient to establish an essential element of the crime charged):

> 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 fundamental error

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"[8] 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."[9]

In *Fries*, the Eleventh Circuit explained that

> [i]n 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*. *Cf. In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the

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> 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.

[8] *United States v. Vuitch*, 402 U.S. 62, 72 n.7 (1961).

[9] *Clyatt v. United States*, 197 U.S. 207, 222 (1905).

> 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.").

Fries, 725 F.3d at 1293-94 (emphasis added) (some citations omitted). These "considerations of due process" are magnified in the instant case 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.

Finally, Petitioner Monroe notes that Florida courts have recognized that "fundamental error" exists in at least two other contexts. First, this Court has found "fundamental error" and reversed for a new trial due to an erroneous jury instruction – *even though defense counsel failed to object to the jury instruction*. *See, e.g., State v. Montgomery*, 39 So. 3d 252, 260 (Fla. 2010) ("Moreover, we conclude that the use of the standard jury instruction on manslaughter constituted fundamental, reversible error in Montgomery's case and requires that Montgomery receive a new trial."). Second, other courts have found "fundamental error" and reversed for a new trial due to prosecutorial misconduct during closing arguments – *even though defense counsel failed to object to the improper arguments*. *See, e.g.*, *Brinson v. State*, 153 So. 3d 972 (Fla. 5th DCA 2015); *Pacifico v. State*, 642 So. 2d 1178 (Fla. 1st DCA 1994). While Petitioner Monroe does not dispute that an erroneous jury instruction or prosecutorial

misconduct amounts to fundamental error, Petitioner Monroe submits that *nothing can be more fundamental* than the failure of the prosecution to prove an essential element of a crime – especially when the insufficient evidence means the difference between a mandatory life-without-parole sentence and a term of years sentence.

Accordingly, for the reasons set forth above and contained in the Initial Brief, Petitioner Monroe requests the Court to modify the *F.B.* standard by adopting the federal "manifest miscarriage of justice" standard. Petitioner Monroe respectfully suggests that the adoption of the "manifest miscarriage of justice" standard is necessary to comply with *Winship* and constitutional due process principles. The adoption of the "manifest miscarriage of justice" standard 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. After applying the "manifest miscarriage of justice" standard to the record in the 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 conviction and his conviction pursuant to section 800.04(5)(b), Florida Statutes, and to enter a judgment of conviction pursuant to section 794.011(2)(b), Florida Statutes, and section 800.04(5)(c)1., Florida Statutes. *See* § 924.34, Fla. Stat. ("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 or 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.").

D. 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).

E. CERTIFICATE OF SERVICE

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

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Respectfully submitted,

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F. CERTIFICATE OF COMPLIANCE

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

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