IN THE SUPREME COURT OF FLORIDA
Case No. SC17-576 (L.T. No. 3D14-1635)

STATE OF FLORIDA,

Petitioner,

vs.

EARVIN SMITH,

Respondent.

STATE OF FLORIDA'S INITIAL BRIEF ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

PAMELA JO BONDI
ATTORNEY GENERAL

JEFFREY R. GELDENS
Assistant Attorney General
Florida Bar No. 0673986
Office of the Attorney General
1 S.E. 3rd Avenue, #900
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (Fax)
Primary: CrimAppMia@myfloridalegal.com
Secondary: jeffrey.geldens@myfloridalegal.com
Counsel for Respondent, State of Florida

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STATEMENT OF THE CASE AND FACTS[1]

On March 13, 2013, the State charged Earvin Tyron Smith with 9 offenses. (R19). Although the crimes occurred in 1990 at victim E.H.'s home, the investigation was not fruitful until February 8, 2011 (R21). At that time, a DNA test of evidence collected by the Rape Treatment Center in 1990 yielded a match to Appellant Earvin Smith (*Id.*; *see also* R52-53 (stipulation regarding DNA match)). The State charged him with: kidnapping with a weapon (a firearm), with the intent to commit armed sexual battery on victim E.H. (Count 1); kidnapping, with a weapon (a firearm), as to E.H.'s minor child (R.T.) (Count 2); kidnapping, with a weapon (a firearm), as to E.H.'s minor child (R.T.) (Count 3); attempted armed robbery with a firearm as to victim E.H. (Count 4); armed burglary with intent to commit sexual battery and/or robbery (Count 5); aggravated assault with a firearm as to E.H. (Count 6); aggravated assault with a firearm as to E.H.'s minor child M.T. (Count 7); aggravated assault with a firearm as to E.H.'s minor child R.T. (Count 8); and armed sexual battery with a firearm (Count 9).

[1] After ordering merits briefing, this Court ordered the Third District's appeal file, which contains the record on appeal and the trial transcript. The record will be cited as R(page) based on the numbers at the bottom right of the record documents; the Supplement will be cited as SR(page) based on the numbering centered at the bottom of those pages; and the trial transcript will be cited as "Tr. at (page)", based on the pages on the top right of the transcript.

As relevant here, due to motions to dismiss and the prosecution's dismissal of certain charges, only Counts 5 and 9 went to the jury (with burglary as the lesser-included offense for Count 5 and sexual battery as the lesser-included offense for Count 9). *See* R85-86 (verdict form, finding guilt as to Counts 5 and 9). The information charged Count 5 as follows:

> And the aforesaid Assistant State Attorney, under oath, further information makes EARVIN TYRONE SMITH, on or about September 15, 1990, in the County and State aforesaid, did unlawfully enter or remain in a structure, to wit: a dwelling located at 617 NORTHWEST 7TH STREET, Miami Dade County, Florida, the property of E.H., without the consent of E.H. as owner or custodian, the same being occupied by E.H.; M.T. (MINOR); R.T. (MINOR); the defendant having an intent to commit an offense therein, to wit: SEXUAL BATTERY and/or robbery and during the commission of said offense, said defendant possessed a firearm or destructive device, in violation of s. 810.02(2)(b) and s. 775.087 and s. 777.011, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

(R14). The information listed the offense as a first-degree felony punishable by life (PBL). (R9). The information charged Count 9 as follows:

> And the aforesaid Assistant State Attorney, under oath, further information makes EARVIN TYRONE SMITH, on or about September 15, 1990, in the County and State aforesaid, did unlawfully and feloniously commit sexual battery upon E.H., a person over the age of twelve (12) years, by FORCING PENILE/VAGINAL INTERCOURSE, without said victim's consent, and during the course of the offense, said defendant used a or threatened to use a deadly weapon, to wit: A FIREARM, and during the commission of the offense, said defendant possessed a firearm or destructive device, in violation of s. 794.011(3) and 775.087, Fla. Stat., contrary to the form

> of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

(R18). The information labeled Count 9 as a life felony. (R9).

The jury heard the following facts regarding the offenses at trial. On or about September 15, 1990, E.H. was sleeping in her home and was awakened by a man who burglarized the residence and sexually battered her. At trial she recounted that she "was laying down sleeping and [she] got this poke on [her] side, [she] turned over, then that person poked [her] again and then [she] turned over" after which she "looked up and [she] saw someone wearing a gray ski mask with eyes cut out and the mouth cut out and [she] started screaming." (SR29). The man had a gun, which he pointed at her while demanding money. (R31). E.H. recalled "[h]e told me shut up or he would shoot me," after which he put the gun against her head. (SR30). Her children then entered the room, and she told them to flee to their room (SR31); but, when they did, the burglar followed them and they were subsequently confined in a room with E.H. while he forced her to have sex with him (SR47-50).

Investigators linked Mr. Smith to the victim through the DNA (R52-53; Tr. at 174-88), but Mr. Smith left no other physical evidence of his presence at the crime scene (SR69-73 (testimony regarding processing of the scene and the results)). So, the defense's trial strategy attacked the non-DNA links to the

burglary/sexual battery incident and proposed the DNA came from consensual sex. At trial the victim said she recognized Mr. Smith as having lived in her neighborhood in 1990 (SR39-41;SR54). But in 2011, when she made the identification to investigators, she knew from investigators that it related to the 1990 crime and that Mr. Smith had been arrested. (SR40; SR56). She also testified regarding her recollection of the 1990 crime, and the defense pressed her on the details of her narrative along with any contrasts or omissions from her 1990 statement to the police. (*See, e.g.*, SR31-34 (direct examination testimony regarding the incident); SR 48-51 (cross-examination regarding the sexual battery offense)). In her testimony, she admitted she could not recall whether the attacker ejaculated (Tr. at 265) and that she "didn't see" a condom on the masked attacker. (SR35). The jury also heard from the treating physician, who confirmed there were no bruises or abrasions on E.H. from the incident. (Tr. at 163-64), and that although there were bodily fluids suggesting sexual contact, the fluids did not manifest when the contact occurred. (Tr. at 165, 166-67).

The defense also challenged the reliability of E.H.'s 2011 identification, which occurred after the police discovered the DNA link. A law enforcement witness testified that someone named Johnny Nash was arrested around the time of the crime for his involvement in a shooting "[a]pproximately eight blocks away" during which he wore a mask, but that his fingerprints were not matched with the

crime scene. (S74-76). As to the charged crime, E.H. testified that the burglar wore a mask while he threatened her with a gun and sexually battered her (SR 29; SR44). Although E.H. testified that the mask prevented her from recognizing her attacker's face (SR39), Mr. Smith testified that back in 1990 he had gold teeth at, a distinctive feature. (Tr. at 206). To link to this detail, the defense elicited from E.H. on cross-examination that she could see "[t]he lip" of the attacker through the mask (SR44).

The defense also added Mr. Smith's testimony at trial, during which he denied that he had ever been to the victim's home (Tr. at 206). He explained the DNA connection by recalling that in 1990 he sold drugs to E.H., who would sometimes pay for drugs with sex. (Tr. a 208-09). He testified that sex was accepted as payment "when [women customers] didn't have money" and that he had "consensual sex with [E.H.] . . . a few times" without using a condom. (Tr. at 210-11). He denied that: he burglarized her home; used a gun to threaten her; demanded sex at gunpoint; or forced his penis into her vagina. (Tr. at 211-12).

After Mr. Smith's testimony, the jury heard rebuttal testimony. E.H.'s son testified that he had never seen his mother use or purchase drugs (Tr. at 225-26). E.H. testified that at the time of Mr. Smith's offenses she worked in a government job where she was regularly drug tested and never tested positive. (Tr. at 229-31).

She further denied Mr. Smith's claim that he was her drug dealer and she paid him for drugs with sex. (Tr. at 232-33).

The jury returned a verdict finding Mr. Smith: 1) guilty as charged on Count 5, armed burglary (designated as Count 1, due to the absence of the other charges), with a finding he possessed a firearm and the structure entered was a dwelling; and 2) guilty as charged on Count 9 (designated as Count 2), sexual battery, with a finding he possessed a firearm and a finding the sexual battery was committed with penetration. (R85-86).

The sexual battery charge was not subject to a statute of limitations. But on appeal, Mr. Smith contended the charge of armed burglary was barred by the statute of limitations, and argued the error was fundamental (since he did not move to dismiss on that charge, unlike others). The Third District agreed, and reversed the conviction of armed burglary; the sexual battery conviction, an offense subject to no statute of limitations, was affirmed. *Smith v. State*, 211 So. 3d 176 (Fla. 3d DCA 2016). The Third District also certified a question of great public importance:

> Must a defendant, who claims that the offense as charged in the information is barred by the statute of limitations, raise the issue in the trial court in order to preserve the issue for direct appeal?

Smith v. State, 211 So. 3d 176, 187 (Fla. 3d DCA 2016).

The State timely filed a notice to invoke this Court's jurisdiction, invoking the certified public question and alleging a conflict of decisions. After briefing on the conflict issue, this Court accepted jurisdiction based on the certified question and ordered briefing on the merits. This is the State's initial brief on the merits.

STANDARD OF REVIEW

The Third District's conclusion turned on the scope of its appellate jurisdiction (the Third District concluded it could reach the claim of error, even though it wasn't preserved in the trial court); that is a question of law. Consequently, in this Court, "[t]he issue presented is a pure question of law subject to de novo review." *State v. Otte*, 887 So. 2d 1186, 1188 (Fla. 2004); *see also Taylor v. State*, 140 So. 3d 526, 527 (Fla. 2014) (noting that the question on review was a question of law, subject to de novo review).

SUMMARY OF THE ARGUMENT

This Court should enforce the preservation requirement as to the statute of limitations defense in this case. Preservation ensures that errors are resolved early, and in the forum most conducive to their resolution – the trial court, and, if incorrectly resolved, in the appellate court with all the necessary factual development from the presentation below. Preservation also ensures fairness and efficiency, since the parties present their best positions where fact-finding happens: the trial court.

Except in rare cases, the statute of limitations, which can be waived, is not a fundamental error that requires dispensing with the requirement for preservation. Only an improper waiver is fundamental error. If the trial court already has jurisdiction to try the defendant on one charge, it is not fundamental error for trial to have proceeded on another charge for which the statute of limitations defense was waived.

In *State v. Tucker*, this court set the procedure for determining whether the statute of limitations was properly waived. This Court recognized that exposure to an otherwise-barred offense might benefit the defendant in a specific case (as it did here). The statute of limitations is an affirmative defense, and when the defendant challenges whether the statute bars prosecution, the State bears the burden to **prove** it does not. Proof is a factual question resolved in the trial court, not on appeal. Thus, where the defendant fails to challenge the State's case in the trial court, and the record manifests a reason for his inaction, the appellate court does not have the facts necessary to conclude error was fundamental. If *Tucker* is satisfied, any defect from the conviction can be cured via the mechanism for determining whether the strategy was consistent with the defendant's right to competent counsel: collateral review.

The defendant bears the burden to demonstrate fundamental error, and here the Third District did not impose that burden. Errors that are "fundamental" and

can be corrected on appeal without preservation at trial are only those that vitiated the fairness of the proceeding below. This Court has repeatedly concluded that whether an error is fundamental requires assessing the facts of the case (to determine whether the proceeding below was made unfair by the error, despite the failure to object and the fairness concerns underlying preservation).

Even if an error as to the statute of limitations is manifest on the face of the record, it is not "fundamental" in all cases; a court must assess whether the error made the proceeding unfair. A case might be the rare case where ineffective assistance of counsel can be corrected on direct appeal; or, the record might manifest an inadequate waiver for failure to satisfy the *Tucker* requirements. As to either, the *already available* facts in the record would permit appellate review. Neither situation would require looking beyond the record, unlike this case, where the record suggests strategic waiver. As a rule, the *Tucker* inquiry suffices; since strategy involves probing the facts of the attorney-client relationship, requiring further disclosure in the trial court would deprive the defendant of such strategy. Challenges to counsel's work at trial belong in collateral proceedings. Rather than utilizing this framework, which follows from current Florida law, the Third District incorrectly concluded the armed burglary conviction in this case was fundamental error and reversed. This Court should quash the Third District's Opinion, and remand to reinstate Mr. Smith's conviction.

ARGUMENT

I. A DEFENDANT MUST RAISE THE STATUTE OF LIMITATIONS IN THE TRIAL COURT TO PRESERVE THE ISSUE FOR DIRECT APPEAL; ONLY FUNDAMENTAL ERROR CAN WARRANT REVERSAL ON DIRECT APPEAL.

A. The preservation requirement furthers judicial economy in the trial court and facilitates appellate review without requiring courts to second-guess the record as it exists.

"[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). This court has explained the reason for the preservation requirement as follows:

> The requirement of a contemporaneous objection is 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).

The contemporaneous objection (preservation) requirement is the "important principle that [on appeal] the defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection." *Goodwin v. State*, 751 So. 2d 537, 544 (Fla. 1999). "To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent

review on appeal." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). Preservation thus furthers the important objective of notice. *See, e.g.*, *State v. Wiley*, 210 So. 3d 658, 660 (Fla. 2017) (concluding "[t]he State's timely opposition to Wiley's downward departure during the same proceeding in which the sentence was imposed fairly apprised the trial court of the State's objection as to the legal grounds asserted" even though the State did not renew its objection after the trial judge imposed the sentence); *Williams v. State*, 414 So. 2d 509, 511–12 (Fla. 1982) (concluding that although counsel did not specifically cite to the ex post facto prohibition when objecting, "notice of a challenge against the retroactive application of the statute was clearly given" where counsel raised concern about whether the statute's effective date prevented its application, and concluding "magic words are not needed to make a proper objection.").

B. Fundamental error, which permits assertion of an unpreserved claim of error on appeal, is a limited exception.

Under Florida law, "[f]undamental error is the sole exception to the preservation requirement." *Farina v. State*, 937 So. 2d 612, 629 (Fla. 2006). "Errors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental." *Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008).

As to when an error is fundamental, "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." *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960). This Court subsequently clarified that "[f]undamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action" and cautioned that in such cases "[t]he Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970).

In *Ray v. State*, this Court confirmed this limitation:

> This Court has previously **refused to adopt an absolute rule** that would allow a defendant to object for the first time on appeal. **We refuse to do so in this instance as well**. Fundamental error has been defined as error which goes to the foundation of the case or goes to the merits of the cause of action. The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error very guardedly. We agree with Judge Hubbart's observation that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application.
> **An accused, as is required of the state, must comply with established rules of procedure designed to assure both fairness and reliability in the ascertainment of guilt and innocence. The failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicia**l.

Ray v. State, 403 So. 2d 956, 960 (Fla. 1981) (emphasis added, citations and quotation marks omitted). Thus, the governing authority requires enforcement of the preservation requirement, unless the facts of the case show that enforcing the requirement would make the trial process fundamentally unfair.

C. The preservation requirement applies to raising the statute of limitations on direct appeal; absent fundamental error, it cannot be raised.

1. Waiver of the statute of limitations involves a strategic choice.

This Court has recognized that strategic waiver regarding the statute of limitations is permissible. *See, e.g.*, *Eaddy v. State*, 638 So. 2d 22, 24 (Fla. 1994). For example, in *Tucker v. State*, this Court addressed whether a defense lawyer's request for barred lesser-included offenses was enough to show a valid waiver:

> The statute of limitations defense is an absolute protection against prosecution or conviction. Before allowing a defendant to divest himself of this protection, the court must be satisfied that the defendant himself, personally and not merely through his attorney, appreciates the nature of the right he is renouncing and is aware of the potential consequences of his decision. We agree with the state's position that an effective waiver may only be made after a determination on the record that the waiver was knowingly, intelligently and voluntarily made; the waiver was made for the defendant's benefit and after consultation with counsel; and the waiver does not handicap the defense or contravene any of the public policy reasons motivating the enactment of the statute.

Tucker v. State, 459 So. 2d 306, 309 (Fla. 1984). Further, the application of the statute to the charges is an issue that can be waived via actions in the trial court.

See Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993) (noting that requesting a jury instruction regarding the statute of limitations is "a defensive matter that must be raised at trial").

Here, the record, including: the successful dismissal of some charges; the sentencing benefit of including the charge if the jury chose a jury pardon option; and the trial court's inquiry regarding Mr. Smith's satisfaction with counsel (Tr. at 195-96), would meet the initial burden required to show the choice was valid. Mr. Smith's actions manifested the trial was fair; on this record, the Third District erred in concluding it was not. Since Mr. Smith received the benefit of the waiver, further development regarding the waiver (an alleged error in making it) must occur in the trial court on collateral review (where the attorney-client relationship is examined).

2. Allowing assertion for the first time on appeal would give incentive to double-dipping strategy and prevent correction in the trial court.

Mr. Smith's view of the law would allow defendants to deprive the State of the opportunity to correct errors in the information via an amendment to the charging document in the trial court, and would prevent review of such attempted corrections by the appellate court. *See, e.g.*, *State v. Anderson*, 537 So. 2d 1373, 1375 (Fla. 1989) (confirming "the state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of

prejudice to the substantial rights of the defendant."); *Hope v. State*, 588 So. 2d 255, 257 (Fla. 5th DCA 1991) (stating "[t]he fact that the allegations are legally insufficient and would be subject to dismissal upon motion does not render the information void so that the circuit court cannot permit an amendment to cure the defect.").

Amendment is a recognized method of curing errors in the charging document or changing the State's case; truly fundamental (jurisdictional) errors can be cured in the trial court via dismissal, and an erroneous dismissal can also be cured early via appeal. *See, e.g.*, *State v. Clements*, 903 So. 2d 919, 922 (Fla. 2005) (stating "[b]ecause the trial court in this case concluded that the mid-trial filing of the second amended information would prejudice the defendant, that information never took effect" and [i]nstead, the first amended information charging sexual activity, on which trial commenced and on which Anderson was convicted, remained in effect", quashing reversal, and directing consideration on remand whether the trial evidence supported the conviction on the information that was in effect); *Williams v. State*, 182 So. 3d 11, 14–15 (Fla. 3d DCA 2015), (stating "[h]ad Williams' counsel [challenged the information], however, the State could have amended the information or supplied the particulars to support sufficient charges"); *Jean v. State*, 11 So. 3d 421, 421–22 (Fla. 4th DCA 2009) (allowing an amendment "[a]t the start of trial, just after jury selection" which

"name[d] . . . an additional victim in the robbery count" because the other named victim would not be available to testify at trial); *State v. Mulvaney*, 200 So. 3d 93, 96 (Fla. 5th DCA 2015) (concluding the trial court improperly struck an amended information "[b]ecause Appellee did not object to the amended information or seek a continuance" and thus the court "d[id] not need to determine whether adding the charge of reckless driving causing serious injury to the original charge of driving while under the influence causing serious injury would necessarily cause prejudice to him."); *Holland v. State*, 210 So. 3d 238, 240 (Fla. 1st DCA 2017) (addressing a plea reserving the right to appeal denial of a speedy-trial discharge, and concluding "we would still affirm because Appellant failed to allege or establish any specific prejudice resulting from this change [to the charging information].").

In contrast, Florida law disfavors late challenges to the charging document and reserves permitting such challenges to a narrow set of cases. *See Sawyer v. State*, 113 So. 736, 743 (Fla. 1927) (noting the obligation to object to defects in a charging document, and noting that "[t]his constitutional guaranty does not mean that the indictment or information must be absolutely perfect and free from objections in all respects" because "[t]here are many imperfections or irregularities in procedure which the accused may waive" and only jurisdictional defects warrant overriding an apparent waiver on appeal); *see also Carbajal v. State*, 75 So. 3d 258, 264 (Fla. 2011) (rejecting a claim that the information failed to confer

jurisdiction when signed by the allegedly wrong prosecutor, because such a defect did not affect jurisdiction, and concluding the defendant "has failed to show that the judgment is void" because "[h]e has failed to establish either that the circuit court lacked jurisdiction to enter the judgment or that the OSP's lack of jurisdiction rendered the judgment void" and thus "Carbajal's claim concerning the OSP's jurisdiction is a claim that he should have raised long ago."); *Foley v. State*, 937 So. 2d 235 (Fla. 3d DCA 2006) (concluding "[t]he appellant claims the trial court lacked subject matter jurisdiction because the State did not file an amended information after orally amending the information. We affirm the trial court's denial of the 3.800 motion.").

Consequently, where the circuit court has jurisdiction to hear the case (via a valid charging document, and valid charges), the burden to challenge the *scope* of such jurisdiction remains with the defendant. This requirement allows the State to address the challenge with the necessary facts or changes in the trial court. *See, e.g.*, *Gray v. State*, 803 So. 2d 755, 756 (Fla. 2d DCA 2001) (stating "A charging document must show on its face that prosecution was commenced within the statute of limitations. If it does not, then the State must allege facts to show that the statute of limitations was tolled."). The defendant can choose to waive certain defects for his benefit in the overall case. But the defendant should not be able to

do so while depriving the State of the opportunity to correct the issue in the trial court.

Here, the Third District viewed the question too narrowly when it reversed, because even if the error is alleged as fundamental, the facts of the case determine whether it supports reversal on appeal. *See e.g.*, *Johnson v. State*, 969 So. 2d 938, 952–53 (Fla. 2007)(noting that "Although he did not object below, Johnson now argues that in substituting a count of robbery filed by information for the grand theft count charged by indictment, the State invalidated the entire indictment and deprived the trial court of jurisdiction to try him on any of the counts charged" and concluding "[t]his claim is without merit" where the State amended the charges by adding a non-capital charge via an information while traveling under the indictment for the capital charge that included a dismissed non-capital charge); *Tingley v. State*, 549 So. 2d 649, 651 (Fla. 1989) (rejecting the claim that the failure to charge the specific dates of the offense warranted reversal because "[a]lthough time is an important part of a charging document, it is not a substantive element of this offense" and "[i]t is extremely important to note that, under our present rules, Tingley was afforded a full range of discovery, and thus was neither surprised nor hampered in his defense.").

Because the trial court had jurisdiction to try Mr. Smith on the sexual battery charge, the Third District viewed governing precedent too narrowly when it concluded it was required to reverse the conviction.

Adopting a different rule would be contrary to the purpose of preservation (fairness, judicial economy, and clarity of presentation in adverse litigation) and the purpose of fundamental error (correcting errors that vitiate the fairness of the proceeding). As Judge Emas noted in his concurring opinion, this case illustrates the reason preservation should be enforced as to the statute of limitations claim:

> . . . .had Smith filed a motion to dismiss this charge as barred by the statute of limitations, the State could validly have amended the information to charge the very same burglary, but as a life felony (a crime for which there is no statute of limitations, see section 775.15(1)), Florida Statutes (1990)) given that Smith had committed a sexual battery during the burglary (the other offense charged in the information, which the jury found Smith guilty of).
>
> The State could have alleged, pursuant to section 810.02(2)(a), rather than (2)(b)), that Smith committed a burglary and that, in the course of the burglary, Smith made an assault or battery upon the victim . . . . by amending the information to charge the offense as a burglary with an assault or battery, rather than as an armed burglary, the State could then have included in the information a separate allegation that, during the commission of the burglary with an assault or battery, Smith possessed a firearm, providing a basis to reclassify the burglary offense from a first-degree felony to a life felony, pursuant to section 775.087(1)(a), Florida Statutes (1990) . . . . This amended charge (burglary with an assault or battery, reclassified to a life felony by possession of a firearm) would not be time-barred, because a life felony is not subject to a statute of limitations and "may be commenced at any time." § 775.15(1), Fla. Stat. (1990).
>
> Of course, if a defendant is not required to raise the statute of limitations below, the State is never afforded the opportunity to

> amend the information to charge a crime that has a longer, or, in this case, no statute of limitations. It may well have been a strategic decision on the part of the defense not to move to dismiss the burglary offense as time-barred, knowing that, by doing so, the State would have had the opportunity to amend the charge to overcome any asserted statute of limitations bar.

Smith v. State, 211 So. 3d 176, 202–03 (Fla. 3d DCA 2016) (Emas, J., concurring); *see also Cartagena v. State*, 125 So. 3d 919, 923 (Fla. 4th DCA 2013) (stating "where the defendant has asserted the statute of limitations to prevent prosecution of some charged crimes arising out of the same criminal episode to avoid prosecution for those crimes, he cannot then assert the statute of limitations to secure the possibility of reducing his punishment as to [other charges].").

D. Strategic decisions which allow a defendant to gamble and lose are not fundamental error.

Allowing the defendant to ignore the statute of limitations, lose at trial, and then raise it on direct appeal keeps trial errors from correction at the earliest opportunity. In cases, like this one, where the record manifests an apparent benefit for the defendant in doing so, there is no fundamental error in finding a prima facie waiver and requiring review via a collateral challenge. *See, e.g.*, *Bradley v. State*, 3 So. 3d 1168, 1171 (Fla. 2009)(concluding that "Bradley's plea agreement and the ensuing factual stipulation reflects that he understood the nature and consequences of his plea, negating any notion that he was misled or prejudiced" and "a defendant's plea may constitute an express waiver of a defective charging

document when he stipulates to facts which include any missing element and voluntarily pleads to a sentence that incorporates the missing element."); *accord* *Martinez v. State*, 211 So. 3d 989, 992–93 (Fla. 2017)(addressing a claim on *collateral review* and concluding that "we approve the Fourth District's decision to affirm the denial of Martinez's motion to correct illegal sentence on the basis that the alleged defect in the charging document in this case does not result in an illegal sentence subject to correction under rule 3.800(a).").

Thus, allowing assertion of the statute of limitations for the first time on appeal is both inconsistent with the law of fundamental error (since in some instances a fair proceeding involves strategy of waiver) and with the reasons for the preservation requirement (furthering judicial economy, early exposure of errors, and fairness in the process by preventing sandbagging). Especially as to strategic decisions, preservation is significant, because assessing strategic decisions generally involves factual development, and when there is no preservation, the trial court and the State have not had the opportunity for such development.[2] Consequently, this Court should reverse the Third District and

[2] *See, e.g.*, *Pace v. State*, 854 So. 2d 167, 174 (Fla. 2003) (assessing a factual determination regarding counsel's strategy); *Gore v. State*, 846 So. 2d 461, 468 (Fla. 2003) (reviewing the trial court's factual findings regarding an assertion counsel should have moved for a change of venue due to an alleged "media blitz" and concluding the facts showed counsel's decision was valid and strategic).

reinstate Mr. Smith's conviction of armed burglary in this case. A different rule loses the benefits of preservation and prevents the assertion of strategy by casting doubt on potentially valid strategy.

1. Here, the parties knew of the statute of limitations' effects on the charges; there were dismissal motions on the other charges.

In the Third District, Mr. Smith argued that the offense of armed burglary was barred by the statute of limitations. But, although he raised the limitations issue on other counts, the armed burglary count was not challenged before or during trial. Before trial, he moved to dismiss three of the charged counts because they were barred by the statute of limitations (R23; R163); the state nolle prossed these counts (*Id; see also* R15-17). The armed burglary count went to trial without objection from the defense.

At trial, the time bar to the armed burglary count was not raised in the motions that followed each side's presentation of evidence. At the close of the State's case-in-chief, the defense moved for dismissal of additional counts, which the trial court granted (R9; Tr. at 191-93). During the argument on these counts, the trial court noted the dismissal on limitations grounds was directed to those counts "*not* the sexual batter[y] or armed burglary charge." (Tr. at 191) (emphasis added). Following the ruling on those challenges, the defense argued a motion for judgment of acquittal, during which the defense challenged the sufficiency of the

evidence to prove armed burglary and armed sexual battery (Tr. at 193-94); the trial court denied the motion (Tr. at 195). The trial judge also noted Mr. Smith's satisfaction with counsel's motions that narrowed the charges. (Tr. at 195-96). After the defense's case, Mr. Smith again moved for judgment of acquittal; he did not raise the limitations issue (Tr. at 219). After the State's rebuttal case, the trial court confirmed the parties were done presenting evidence; no one raised the limitations issue (Tr. at 236-37).

There was no objection to closing arguments or jury instructions regarding the armed burglary charge; the defense did not raise the limitations issue before allowing the jury to consider the charge. In their closings, both sides discussed with the jury the armed burglary charge. (Tr. at 238-250; Tr. at 266-67). After closing arguments, the trial judge read instructions on the armed burglary charge, among other agreed-upon instructions. (Tr. at 275-76). The trial court confirmed after the jury instructions that neither the State nor the defense wanted to add anything before the jury retired to deliberate. (Tr. at 286).

There was no objection to the armed burglary charge before or after the verdict was read. The trial judge asked if there was "anything we need to address before we bring in the jury", and the defense responded there was nothing. (Tr. at 287). The clerk published the verdict, and the jury was polled to confirm. (Tr. at 288-90). After the jury was discharged, the trial court ordered a pre-sentence

investigation (PSI) and asked if there was "anything else we need to do before we recess for the evening." (Tr. at 291). The defense said "No, Judge." (*Id.*).

2. The record, as it existed at the time of direct appeal, manifested a potential strategic reason for not challenging *this charge* (in contrast to the others that were subject to motions and argument).

The alleged error in omitting a challenge to the armed burglary charge does not, on its face, cast doubt on the fairness of the proceeding. Waiver of the armed burglary charge could be advantageous because the armed burglary charge would allow the defense to use the testimony, that Mr. Smith received sex in exchange for drugs, to its advantage. The DNA linked him to sex with E.H.; he claimed consent because she traded sex for crack. He denied ever being present in her home for such sex (and thus disclaimed the burglary), and there was no physical evidence of his presence in the home. On the date of the crime, E.H. was examined, and the treating physician stated the evidence of sexual contact could not be pinned to a specific date.

The evidence of Mr. Smith's DNA in the victim prevented credible attacks upon the victim's assertion that sexual contact occurred. Without the armed burglary charge, the only reason for the masked invader's attack would be to coerce sex, and the jury would be assessing whether the DNA came from coerced sex. But with the armed burglary charge, even if the DNA convinced the jury E.H. paid her drug dealer with sex, there was still a possibility that someone else

(because Smith could use drugs, not a gun, to get sex) might have been the perpetrator. The armed burglary count charged intent to commit a robbery and/or sexual battery (R14); the sex-for-drugs narrative would challenge that narrative directly because Mr. Smith testified he had sex with women who couldn't pay him. He would have no incentive to rob or burglarize someone who did not have cash to pay for her drug habit. He also testified he did not know where E.H. lived and that their meetings occurred at his regular corner for selling drugs.

In addition, the presence of the armed burglary charge, a lesser charge to the armed sexual battery life felony, would permit an "all or nothing" approach in closing argument while preserving the possibility of a split verdict should the jury only partially accept the defense narrative of consensual sex for drugs. In closing arguments, the defense told the jury to acquit based on reasonable doubt rather than choose any lesser offenses. (Tr. at 266). The defense's strategy in closing argument was to cast reasonable doubt on the victim's account (See, e.g., 263-265 (attacking the details of E.H.'s account)). The defense also reminded the jury of the investigating detective's testimony that Johnny Nash had committed a crime in the neighborhood with a gun while masked around the time of this crime, yet he was not pursued as a suspect. (Tr. at 260). The defense further argued that the victim's account regarding "whether the rapist ejaculated in her" was not reliable. (Tr. at 265).

But, with the armed burglary charge, the defense had a "lesser" offense, in terms of sentence exposure. By leaving the armed burglary charge to be tried with the armed sexual battery charge (which could not be dismissed as time-barred), the defense could pursue a full-denial strategy but retain the possibility the jury might convict of one charge and not the other. The jury's rejection of reasonable doubt or the Johnny Nash possibility might still provide for exposure to a less severe sentence, which the defense, but not the jury, would know. If, for example, the jury believed the defense's claim that the DNA link was from consensual sex – even if it rejected the claim there was no burglary (perhaps concluding that there was consensual sex for drugs after the burglary ended, or at some other time before or after the burglary) – the jury could acquit on the armed sexual battery (the life felony) and convict on the burglary charge.

Thus, as with a lesser-included offense strategy, leaving the armed burglary charge expanded the defense's strategic options in attacking the State's case. The defense's attacks here on the details of the offense, and the victim's recollection, were not confined to a credibility contest regarding the reasons for the DNA link; the focus was shifted to the victim's recollection of the masked burglar's actions. And with this approach the armed burglary charge provided an "even if" contingency without asking the jury to address lesser included offenses, in case the

jury believed there was sex-for-drugs at some other date (negating the sexual battery) while rejecting the claim he was uninvolved in the burglary.

E. The Third District erred because the statute of limitations is subject to proof at trial, and the defendant can waive the right to such proof as part of his trial strategy; it is not fundamental error when a known risk (conviction of that charge) materializes.

1. The Third District erred in concluding existing authority required reversing the conviction; cases where the statute was a jurisdictional bar involved proof of facts in the trial court, or undisputed facts

"The bringing of charges within the limitation period is a factual matter which the State must prove just as it must prove all other elements of the offense." *Crews v. State*, 183 So. 3d 329, 331 (Fla. 2015). Thus, although the statute of limitations can preclude conviction of the offense, the question of whether it applies to bar conviction in a specific case is a *factual* matter. The Third District, however, concluded that the cases discussing the State's failure to prove this element at trial permitted assertion on appeal; they did not, as in *Crews* (which involved a Rule 3.190(c)(4) motion in the trial court), this Court's earlier cases address the State's burden in relation to preserved, not fundamental error.

a. ***State v. King*: review of the defendant's claim of a barred prosecution in the trial court, a preserved claim of error**.

In *State v. King*, the issue was when the statute of limitations began; the defendant had raised funds for a campaign, and never used them for the intended purpose:

> The defendant contended that the prosecution was barred by the two year statute of limitations since the information was filed more than two years subsequent to the date of taking the money between March 1968 and September 1968. The prosecution countered that the crime was committed in March 1970, when demand by Wolfson was made for repayment.

State v. King, 282 So. 2d 162, 164 (Fla. 1973). The issue was raised *in the trial court* as follows:

> In the instant case, the trial judge found that the taking was complete when the six months ran during which the monies were to be turned over to Garrison. This finding is amply supported by Florida criminal law precedent.

King, 282 So. 2d at 165. The Court noted the issue's significance at trial, when stating "a most significant **burden of proof** is placed upon the State in order to proceed **once the jurisdiction of the Court is questioned through the raising of the Statute of Limitations**." *King*, 282 So. 2d at 164 (emphasis added). And, that statement acknowledged the State's burden was triggered by a claim *in the trial court*. But, the Third District noted that "the precise contours established by this line of supreme court cases have not been entirely clear", *see Smith*, 211 So. 3d at 186, even though *King* was not a source of ambiguity because it involved preserved error thus and did not reach the question of waiver.

b. *Horton v. Mayo*: the trial court's resolution of a factual issue regarding the statute of limitations was challenged.

In *Horton v. Mayo*, this Court noted the rule that a motion to quash was required to challenge defects in the charging document. The defendant had not done so. The Third District noted "the Court had no reason to reach the question of whether the defendant should have been required to raise this issue in the trial court", *see Smith*, 211 So. 3d at 186, but overlooked that in *Horton*, at trial, there was a *finding* regarding the date of the offense.

The posture of *Horton* is significant, because this Court did not establish a rule regarding fundamental error, and instead noted the question was for direct appeal for review of the following *preserved objections*:

> This record also shows that **counsel for defendant**, petitioner here, was well aware of the burden resting upon the State in this regard, and **interposed various objections** to the legal admissibility of the evidence offered by the State to prove when and how the prosecution was begun, and made this one of the grounds of his motion for directed verdict. **The trial court reached the conclusion that there was sufficient legal evidence on the subject to submit the case to the jury, in connection with the testimony as to the actual commission of the substantive offense charged, and overruled defendant's motion for directed verdict**, but he charged the jury that the warrant must have been issued and placed in the hands of a proper officer for execution 'within two years of the date the crime is alleged to have happened.'

Horton v. Mayo, 15 So. 2d 327, 329 (Fla. 1943).

Thus, the *Horton* Court recognized that the offense must have been committed within the statutory period, but did not address whether an unpreserved objection, raised on appeal, could warrant reversal. The *Horton* Court's discussion of the trial court record on limitations supports the State's position here, since this Court addressed the factual findings:

> We cannot here review the various rulings made by the trial judge on the trial which resulted in petitioner's conviction as habeas corpus cannot be used as a substitute for writ of error or appeal. Respondent made this transcript by reference a part of his return for the purpose of showing, in addition to the return and exhibits thereto, that this prosecution was actually begun well within two years after the crime was committed, and we think this purpose has been achieved

Horton, 15 So. 2d at 329.

c. *Mitchell*: Appellate review of a preserved claim of error.

The *Mitchell* case did not involve fundamental error, because this Court was reviewing preserved error on appeal when addressing whether the trial court erred in denying a motion to quash the indictment that invoked the statute of limitations. In *Mitchell*, this Court reviewed on direct appeal:

> The accused filed two **motions to quash** the indictment. The first motion stated the following grounds:
> '1. Because the supposed or alleged shooting or killing in said indictment mentioned was, as a matter of fact, **done more than two years prior to the date of the filing and finding of said indictment and is barred by the Statute of Limitations**
> . . . .

Mitchell v. State, 25 So. 2d 73, 74 (Fla. 1946) (e.s.). Further, the *Mitchell* court noted that "[a]t the trial, the undisputed and uncontradicted testimony was to the effect that the altercation in which Louis Roundtree was killed occurred on the 7th day of September, 1942" and thus there was no need to resolve a dispute of fact to address whether the trial court was correct in applying the law. *Mitchell*, 25 So. 2d at 74 (Fla. 1946). The *Mitchell* case, consequently, does not mandate reversal for fundamental error in all cases involving the statute of limitations.

d. *Nelson*: preserved error, addressed via appellate review of denial of a motion in the trial court addressing evidence.

In *Nelson*, this Court reversed on statute of limitations grounds based upon the evidence presented at trial. There was no occasion to address whether the asserted defense could be waived. The Court stated:

> The counsel for the prisoner then moved to arrest the judgment and for a discharge of the prisoner, upon the following grounds:
> 1st. That the facts shown in the case do not make a case of murder in the third degree, but shows either justifiable homicide, or manslaughter in some of the degrees.
> 2d. That the verdict of the jury shows that the defendant committed an offence not punishable by death, and is entitled to his discharge under the statute of limitations.
> **On the argument of the motion the court declined to grant the same, and the counsel for the prisoner duly excepted**.

Nelson v. State, 17 Fla. 195, 196 (1879) (e.s). The *Nelson* court reversed because "the indictment charges that [the offense] was committed more than four years before prosecution, **and the evidence**, according to the bill of exceptions before us,

shows that it was committed on or about the time as alleged in the indictment" and thus the offense was barred as a basis for conviction. *Nelson*, 17 Fla. at 197. (e.s.) The *Nelson* case also shows the statute of limitations' application is based on the facts elicited in the trial court and cannot be raised for the first time on appeal.

2. In cases like this, because waiver is possible, the statute is not "jurisdictional"; case-by-case review is necessary, and absent undisputed facts the claim must be raised first in the trial court.

The Third District erred in reversing, because preservation is the rule and only the limited exception (fundamental error) could justify reversing the conviction of the armed burglary offense. The Third District combined the questions of whether an error (conviction of a barred offense) *can be* fundamental error with whether it *is* fundamental error in a specific case (when the facts of the case show it vitiated the proceeding's fairness). In doing so, the Third District strayed from the framework for establishing fundamental error.

This Court has recognized that even fundamental error cannot be enforced categorically. *See, e.g., Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991) (noting fundamental error was waived as to a jury instruction, because "[a]ny other holding would allow a defendant to **intentionally inject error** into the trial and then await the outcome **with the expectation that if he is found guilty the conviction will be automatically reversed**.") (emphasis added). For example,

when addressing a claim there was fundamental error regarding the long form instruction on excusable homicide, this Court stated:

> The issue before the district court of appeal with respect to the first question was whether it was fundamental error not to give the long-form instruction on excusable homicide when there was evidence to support that defense. In this respect, we agree with the district court when it said that to **hold fundamental error occurred because of the failure to give the long-form instruction on excusable homicide when it was not requested "would place an unrealistically severe burden upon trial judges concerning a matter which should properly be within the province and responsibility of defense counsel as a matter of trial tactics and strategy.**

State v. Smith, 573 So. 2d 306, 310 (Fla. 1990) (emphasis added, quotation marks and citation omitted). In *Smith*, this Court rejected an absolute rule, and instead concluded the issue was within the realm of trial strategy. This Court should do the same in this case.

Here, because the state's burden to prove jurisdiction to prosecute (by showing that the statute has not lapsed) springs from a challenge by the defendant, it cannot be an absolute requirement in every case. Thus, although it *can be* fundamental error, the burden rests on the defendant to lay a record for such error – via a facial error or by raising it in the trial court. Otherwise, it cannot be asserted on appeal for the first time. For example, in this case there is no fundamental error; there is no inherent jurisdictional problem, since the sexual battery charge indisputably gave the trial court jurisdiction to try Mr. Smith.

This court should not adopt a rule allowing a defendant who fails to preserve the limitations argument, to gain a benefit at trial, to then gain a second benefit by raising it as fundamental error on appeal when he loses.

II. BECAUSE THE WAIVER WAS NOT FACIALLY INVALID, THE THIRD DISTRICT ERRED IN FINDING FUNDAMENTAL ERROR HERE; SEPARATE COLLATERAL (NOT DIRECT) REVIEW BASED UPON DEVELOPMENT OF THE FACTUAL RECORD IN THE TRIAL COURT IS THE MEANS FOR ASSESSING THE CLAIM.

A. Under Florida law, the statute of limitations may be waived as a matter of strategy.

In *Tucker v. State*, this Court recognized that a defendant can waive the statute of limitations to gain a benefit; in *Tucker* it was the possibility of conviction of a lesser-included offense. *Tucker v. State*, 459 So. 2d 306, 309 (Fla. 1984). The District Courts of Appeal have followed this rule and rejected claims that the statute of limitations cannot be waived. *See, e.g.*, *Mathis v. State*, 204 So. 3d 104 (Fla. 1st DCA 2016) (stating, in response to Mathis' *direct appeal* claim that counsel was ineffective for failure to move to dismiss charges based on the statute of limitations, that "[i]n this case, it is at least conceivable that Mathis's attorney strategically chose risking convictions on the lesser counts (notwithstanding any viable defense) to increase the chances of an acquittal on the most serious charge."); *Morris v. State*, 909 So. 2d 428, 431 (Fla. 5th DCA 2005)(enforcing the preservation requirement for a statute of limitations defense); *State v. Robbins*, 780

So. 2d 89, 91 (Fla. 2d DCA 2000) (stating "[w]e have found no case holding that the statute-of-limitations defense cannot be waived.")

B. Matters of strategy relate to the attorney client relationship, and thus, should not be addressed on direct appeal without the necessary development of facts.

1. The *Tucker* requirement provides an adequate threshold; once it is satisfied, there is no further remedy on direct appeal.

In *Tucker*, while acknowledging the waiver option available to a defendant, this Court concluded the waiver must be voluntary, because the statute of limitations is an absolute bar to prosecution for an offense. *Id.* And, as an additional protection, this Court said the waiver must be made personally, not through an attorney. *Id*. As relevant here, once that threshold determination is made, the inquiry on direct appeal should end; if the record reveals on its face that the waiver was voluntary, then the appeals court should exclude, on direct appeal, raising the statute as a bar.

If, however, the record reveals that waiver was not voluntary (*e.g.*, there was no colloquy, or it was insufficient), or that despite a waiver statement it *could not be* voluntary (such as where the *only* charge is barred), then the appeals court can address the question and determine a remedy. Thus, the already-existent *Tucker* "satisfaction" requirement – the trial court's conclusion the defendant is proceeding voluntarily despite a possible limitations defense – is a threshold

determination. If the threshold is satisfied, a defendant cannot raise the statute of limitations claim as a basis for reversal. Such a rule is consistent with fundamental error analysis: the proceeding was not unfair because the waiver was voluntary or conferred a benefit upon the defendant (as it did here).

2. This requirement is consistent with Florida law: waiver is a valid trial strategy.

Under Florida law, a defendant can waive, for strategic reasons, errors in the trial process. For example, in *Gonzalez v. State*, 136 So. 3d 1125, 1147–48 (Fla. 2014), this Court addressed a claim that the failure to advise the jury of a read-back was fundamental error; on appeal, Gonzalez contended it was error, even though counsel had agreed that the jury should rely on their memory. After reviewing the authority, and agreeing it was error (but invited by counsel's response), this Court rejected a claim of reversible fundamental error, "[d]ue to the possibility of this strategic gamesmanship" from counsel inviting the error and later raising the claim of error after losing at trial. *See Gonzalez*, 136 So. 3d at 1148.

Moreover, where there is no apparent prejudice, this Court has recognized that waiver of a right need not result in fundamental error. In *State v. Smith*, 573 So. 2d 306, 310 (Fla. 1990), this Court concluded, as to the excusable homicide instruction, that "[t]he failure to give the long-form instruction when it was not requested did not constitute fundamental error."

The District Courts of Appeal have similarly analyzed the issue in relation to whether trial strategy might explain the failure to object or inviting the purported fundamental error. *See, e.g.*, *Louidor v. State*, 162 So. 3d 305, 311 (Fla. 3d DCA 2015)(stating "We need not reach the issue of whether the admission of the objectionable evidence constituted fundamental error in this case, however, because we conclude that the error was invited by the defense"); *Chambers v. State*, 975 So. 2d 444, 449 (Fla. 2d DCA 2007) (acknowledging that, as to permitting trial on a lesser offense not covered by the charging document "a defendant may see a benefit in ignoring or inviting such an error, concluding that although a jury may not be inclined to acquit him of any wrongdoing, they may be inclined to disagree that the charge is as serious as alleged by the State."); *see also Frasilus v. State*, 46 So. 3d 1028, 1032 (Fla. 5th DCA 2010)(noting that although a defendant might have a right to request the jury be advised of the availability of a read-back, "a defendant's failure to request a read-back in such a circumstance might well be strategic."); *Weber v. State*, 602 So. 2d 1316, 1318-19 (Fla. 5th DCA 1992) (rejecting a claim of fundamental error as to conviction of a time-barred offense where the defense failed to object to an instruction on the offense, which was a lesser included, but time-barred offense)

C. The Third District erred by concluding the question of waiver could be addressed without the necessary facts from the trial court.

1. If the record does not reveal an involuntary waiver, challenges to that waiver require factual development in an ineffective assistance of counsel proceeding.

Tucker imposes a requirement that the defense waiver be voluntary, and not through counsel. If the face of the record satisfies *Tucker*'s concerns, then further review requires assessing the attorney-client relationship (to determine if the decision was involuntary due to deficient advice). That relates to ineffective assistance of counsel, and "with rare exception ineffective assistance of counsel claims are not cognizable on direct appeal." *Gore v. State*, 784 So. 2d 418, 437 (Fla. 2001) (rejecting a claim of ineffective assistance of counsel which was asserted on direct appeal). "A claim of ineffective assistance of counsel may be raised on direct appeal only where the ineffectiveness is apparent on the face of the record." *Gore*, 784 So. 2d at 437-38; *Desire v. State*, 928 So. 2d 1256 (Fla. 3d DCA 2006) (applying the rule).

Like fundamental error, an ineffective assistance claim can address the rare case warranting a direct appeal remedy. "[I]n the rare case, where **both prongs** of *Strickland*—the error and the prejudice—are manifest in the record, an appellate court may address an ineffective assistance claim." *Smith v. State*, 998 So. 2d 516, 523 (Fla. 2008) (emphasis added) (concluding the claims were not manifest on the

face of the record). "In other words, an appellate court will consider such a claim only if it is obvious from the record that counsel was ineffective, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable." *Fox v. State*, 104 So. 3d 371, 372 (Fla. 1st DCA 2012) (quoting *Dailey v. State*, 46 So.3d 647, 647 (Fla. 1st DCA 2010)).

A dispute of fact, such as the one in this case, forecloses reversing on direct appeal. Under Florida law, where "[t]rial counsel's decision . .. could have been a strategic one", because the claim raises "a factual question that cannot be determined solely on the basis of the trial record" it is appropriate to reject the claim on direct appeal. *Johnson v. State*, 942 So. 2d 415, 416 (Fla. 2d DCA 2006); *Caison v. State*, 695 So. 2d 872 (Fla. 3d DCA 1997) (rejecting a claim of ineffective assistance on direct appeal because the factual issues could not be addressed based on the appeal record).

2. A collateral proceeding is the proper method to raise error in this context; since the trial court had jurisdiction to try on one charge, allowing the other charge to remain could have been strategic.

Here, the decision to move for dismissal on certain charges (and Mr. Smith's apparent agreement to that course) was based upon reasons that could be strategic. Requiring an on-the-record explanation in the trial court would reveal that strategy (and forego the benefit, since the State could amend in response). Allowing silence and a claim of error on appeal would damage the value of preservation and

damage judicial economy. Thus, unless the error is clear (counsel could have no strategy, or such strategy could never do anything but prejudice Mr. Smith), review of the waiver on direct appeal would be inconsistent with Florida law.

"An appellate court initially reviewing a conviction will only grant relief for ineffective assistance of counsel where the ineffectiveness of counsel is apparent from the face of the record before the appellate court *and* a waste of judicial resources would result from remanding the matter to the lower court for further litigation." *Monroe v. State*, 191 So. 3d 395, 403 (Fla. 2016). As to preservation, "[t]he failure to properly preserve an otherwise clear error *may* constitute ineffective assistance of counsel cognizable on direct appeal." *Monroe v. State*, 191 So. 3d 395, 403 (Fla. 2016). In *Monroe*, for example, this Court concluded counsel's decision was "patently unreasonable"; thus, it did not require additional fact-finding in the trial court, since it exposed the defendant to a more severe sentence and provided no benefit for such risk. *Id.*

But here, the record reveals that there may have been a strategic reason for selectively moving to dismiss. Consequently, "the interests of justice do not require review of counsel's claimed inadequacy in this case, since Cr.P.R. 3.850 provides a means by which this issue may properly be resolved in a correct procedural setting in the trial court where evidence may be taken." *State v. Barber*, 301 So. 2d 7, 9 (Fla. 1974). The Third District erred; the remedy it gave Mr. Smith

required facts that are not present on the face of this record. As a result, the conviction on the armed burglary charge should be reinstated.

CONCLUSION

The Third District erred because it reversed based on a statute of limitations issue as fundamental error, even though the record did not support fundamental error at this stage. This Court permits waiver of the statute of limitations, and where, as here, the face of the record suggests a valid waiver, reversal based on the statute of limitations is not available on direct appeal. Here, the record reflects tactics consistent with a waiver of the limitations defense to the armed burglary charge, including a tangible benefit to trial strategy. This Court should reverse the Third District and reinstate Mr. Smith's conviction of armed burglary.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL
/s/ Jeffrey R. Geldens
JEFFREY R. GELDENS
Assistant Attorney General
Florida Bar No. 0673986
Attorney for Respondent, State of Florida
Office of the Attorney General
1 S.E. 3rd Avenue, #900
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (Fax)
Primary: CrimAppMia@myfloridalegal.com
Secondary: jeffrey.geldens@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing State of Florida's Initial Brief on the Merits was emailed to appellatedefender@pdmiami.com, and SLerner@pdmiami.com, this 13thday of July, 2017.

/s/ Jeffrey R. Geldens
JEFFREY R. GELDENS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief was typed using Times New Roman 14 point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Jeffrey R. Geldens
JEFFREY R. GELDENS
Assistant Attorney General