DOIN' TIME FOR AN UNPROVEN CRIME: THE PROBLEM OF UNPRESERVED EVIDENCE SUFFICIENCY ISSUES IN CRIMINAL APPEALS

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Ralph Monroe was convicted of capital sexual battery and lewd and lascivious molestation. To prove those offenses as charged, the State had to prove Monroe was over 18 when they occurred.[1] This is a crucial element, for punishment purposes, particularly as to the sexual battery; whether Monroe was over or under 18 means the difference between a mandatory life sentence and a term of years that could be much lower.[2]

The trial evidence proved Monroe "molested the victim during Monroe's senior year of high school, but there was no evidentiary basis for determining whether" that occurred after Monroe turned 18.[3] "[I]t was obvious the defense was not conceding that Monroe was 18" when the crime occurred; but defense counsel did not raise this evidence-sufficiency issue in a motion for judgment of acquittal.[4] The district court refused to address the merits of the unpreserved issue and affirmed the convictions for the two over-18 offenses.[5]

The court recognized that some valid-but-unpreserved evidence-sufficiency issues can be remedied on direct appeal as fundamental error.[6] But the court read *F.B. v. State*, 852 So. 2d 226 (Fla. 2003)—the leading case on point, discussed in section III.C. below—to mean that fundamental error occurs only when "the evidence is insufficient to show that a crime was

1. FLA. STAT. § 794.011(2) (2014); § 800.04(5)(b).

2. *See* FLA. STAT. § 775.082(1) (2014); § 775.082(3); § 794.011(2)(a); § 794.011(2)(b); § 800.04(5)(b)–(c). An over-18 defendant who commits a sexual battery on an under-12 victim commits a capital felony that has a mandatory sentence of life imprisonment without parole. § 775.082(1); § 794.011(2)(a). An under-18 defendant who commits a sexual battery on an under-12 victim commits a life felony; the applicable statute permits, but does not require, a life sentence. § 775.082(3); § 794.011(2)(b). With the molestation offense, the offender-age element marks the difference between a life felony and a second-degree felony. § 800.04(5)(b)–(c).

3. Monroe v. State, 148 So. 3d 850, 857 (Fla. Dist. Ct. App. 2014), *pet. for rev. pending*, Monroe v. State, No. SC14–2296 (Fla. Dec. 17, 2014).

4. *Id.*

5. *See Id.* at 861.

6. *Id.* at 858–59.

committed at all,"[7] which the *Monroe* court interpreted to mean that a court cannot grant relief on a valid-but-unpreserved sufficiency issue unless "the evidence could not support the conviction of *any crime whatsoever*."[8] That test was not met here because the evidence proved that Monroe "committed [the two offenses] . . . at least as a juvenile, even if not as an adult."[9]

The court also said it could not address this issue under the heading of ineffective assistance of counsel ("IAOC"), based on counsel's failure to preserve the sufficiency issue. Monroe did not raise this issue on appeal and, even if he had, "[f]inding [IAOC] due to the failure to raise the [sufficiency issue] would be tantamount to holding that such an issue need not be preserved, contrary to the holding in *F.B.*"[10] The court certified a question to the Florida Supreme Court:

> DO[ES] F.B. . . . 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?[11]

This article does not address this precise question but rather more generally considers how Florida appellate courts should handle the recurring problem of unpreserved evidence-sufficiency issues in direct appeals in criminal cases.[12]

Monroe found *F.B.* to be controlling. The precise meaning of *F.B.* is unclear. But *Monroe* may be accurately interpreting it. Current Florida law may be as follows: If the State proves the defendant committed *any crime whatsoever*, then an appellate court cannot address *any* unpreserved evidence sufficiency issue, even if it is undisputed that the State not only did not prove, *but could never prove*, the crime of conviction. Thus, even if it was undisputed that Monroe was under 18 (or the victim was over 12; or both) when the crime occurred, the court must affirm if counsel did not preserve the

7. *Id.* (quoting F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003)).
8. *Id.* at 859 (emphasis added).
9. *Monroe*, 148 So. 3d at 859.
10. *Id.* at 860 n.3.
11. *Id.* at 861. *See generally* Graham v. Florida, 560 U.S. 48 (2010). The constitutional concern was based on *Graham*, which held that it is cruel and unusual punishment to impose a life-without-parole sentence on a juvenile for a nonhomicide offense. *Graham*, 560 U.S. at 48.
12. *See* discussion *infra* Part III. In this article, "criminal defendants" and "criminal cases" includes juveniles found to have committed delinquent acts. *Id. F.B.* was a juvenile case. *Id.* Nothing in that case, or in any of the other juvenile cases cited in this article, indicates that courts feel that the rules that apply to the issues discussed here should be any different for juvenile cases. *Id.* For present purposes, the author adopts that same assumption. *Id.*

age issue.[13] Indeed, if *Monroe's* reading of *F.B.* is correct, then even if it was undisputed that *no sexual battery occurred*, an appellate court would have to affirm (if that issue was unpreserved) if the victim testified that Monroe gave him a beer or a puff of marijuana. Under the any-crime-whatsoever test in *Monroe*, this would prove that a-crime-was-committed, and that would prevent the court from addressing *any* unpreserved sufficiency issues.

It is not clear whether *F.B.* can be read so broadly. This will be discussed in section IV.B. below. But it is clear that, under *F.B.*, some valid-but-unpreserved sufficiency issues can be remedied as fundamental error but others cannot.

This article argues that, regardless of how we interpret *F.B.*, its reasoning is flawed to the extent that it bars some valid-but-unpreserved sufficiency issues from being corrected as fundamental error. The Florida Supreme Court should recede from *F.B.* and recognize that, at least as long as Florida Rule of Criminal Procedure 3.380(c)[14] continues to exist in its present form, *no* sufficiency issues need to be preserved in criminal cases.

This conclusion is based on the following logic: The preservation rule serves several general purposes, but the only real reason to require sufficiency issues to be preserved in criminal cases is to give the State a chance to cure any evidence deficiencies before the case is submitted to the jury. But, as the Florida Supreme Court held in *State v. Stevens*,[15] under Rule 3.380(c) sufficiency issues can be initially raised post-verdict, when it is too late to cure-the-deficiency. There is no excuse for defense counsel's failure to raise a valid sufficiency issue under Rule 3.380(c). Thus, this failure will always constitute IAOC.

Given this, *all* sufficiency issues should be addressed on direct appeal. Failure to do so is inefficient because it does not resolve the issue but rather merely channels it to post-conviction proceedings, where it will reappear as an IAOC claim (which, if the unpreserved issue has merit, should be

13. *See generally* Insko v. State, 969 So. 3d 992 (Fla. 2007); *see also* discussion *infra* note 85 (discussing *Insko's* procedural posture). Those who think the parade-of-horribles example is unrealistic, that no jury would ever convict if the crucial age element was undisputed in this fashion, should read *Insko*, which is discussed in footnote 85 below. *See infra* note 85. A jury convicted the 33-year-old *Insko* of a sexual offense that requires proof that the offender was under 18. *Insko*, 969 So. 3d at 1002. Further, even if the evidence was, rather than undisputed, only disputed-but-still-legally-insufficient to prove the required age element (as may be the case in *Monroe*), the defendant is still doing a mandatory life sentence even though the State did not prove, beyond reasonable doubt, the age element that justifies that sentence. *Id.*

14. FLA. R. CRIM. P. 3.380(c). Rule 3.380(c) provides in pertinent part: "If the jury returns a verdict of guilty . . . , the defendant's motion [for judgment of acquittal] may be made . . . within 10 days after the reception of a verdict and the jury is discharged . . . ." *Id.*

15. State v. Stevens, 694 So. 2d 731, 733 (Fla. 1997); *see discussion infra* section IV.B.

automatically granted). This is also unfair because the defendant generally will have to raise the issue *pro se* in a post-conviction motion, often while remaining incarcerated for a crime the State did not prove.

Sections I and II of the article lay out the general principles of the preservation rule and its fundamental-error exception. Section III discusses the Florida cases that have wrestled with the problem of unpreserved sufficiency issues in criminal cases. The problem in the cases—seen in *F.B.* and in the pre-*F.B.* district court cases—is that Florida courts do not say that *all* valid-but-unpreserved sufficiency issues should be remedied as fundamental error. This means there will be some cases where the evidence in the record fails to establish all the elements of the crime of conviction but the court will affirm because the issue was not preserved. This raises two questions: How we distinguish these two classes of cases; and why do we draw this distinction?

Section IV addresses these two unanswered questions in *F.B.* First, assuming the a-crime-was-committed test is the proper test for fundamental error, how do we apply this test in practice? Does a-crime include, as *Monroe* said, any-crime-whatsoever? If not, what does it include? As to why we draw the distinction, the only possibly viable reason given in *F.B.* is the cure-the-deficiency logic. But, as just noted, this is not a valid reason as long as Rule 3.380(c) allows sufficiency issues to be initially raised post-verdict. No Florida court has addressed this latter argument.

Further, the a-crime-was-committed test is not related to the cure-the-deficiency logic that is said to justify it. Whether the evidence proved that *a[nother]*-crime-was-committed tells us nothing about whether, as to the *crime of conviction*, the State could have cured-the-deficiency if the unpreserved sufficiency issue had been raised during trial.

Section IV also summarizes the Florida cases that have recognized that some unpreserved issues in criminal appeals—including sufficiency issues—can be addressed as IAOC claims on direct appeal. This body of case law raises a third unanswered question: If trial counsel's failure to raise a valid sufficiency issue under Rule 3.380(c) constitutes clear IAOC that can be remedied on direct appeal, why do we even bother with this fundamental error analysis?

Section V briefly summarizes the case law from other jurisdictions. Even without a provision like Rule 3.380(c), the overwhelming majority of other jurisdictions allow unpreserved sufficiency issues to be raised on direct appeal. The article concludes that there is no reason to use the *F.B.* fundamental error analysis. A valid-but-unpreserved sufficiency issue will always be fundamental error because the failure to preserve the issue violated

the defendant's fundamental right to effective assistance of counsel. The Florida Supreme Court should recede from *F.B.* and allow all unpreserved sufficiency issues in criminal cases to be addressed on direct appeal.

I. THE PRESERVATION RULE

Under Florida Statute section 924.051(3), an issue cannot be raised in a criminal appeal unless it "is properly preserved or, if not properly preserved, would constitute fundamental error."[16] "'Preserved' means that [the] issue . . . was timely raised before, and ruled on by, the trial court, and that the issue . . . was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."[17] The legislature "deferred to the judicially created definition of 'fundamental error.'"[18]

The preservation rule promotes several general interests: 1) Discouraging "sandbagging," *i.e.*, deliberately allowing error to occur so that it might later be used to get appellate relief from an unfavorable trial outcome; 2) promoting judicial economy and order by encouraging the correction of errors at the earliest opportunity, which eliminates the need for appeals and retrials; 3) keeping trial judges in their proper role as neutral arbiters, a role that might be compromised if judges are encouraged to correct *sua sponte* unobjected-to errors; and 4) alerting opposing parties to problems with their proof and giving them a chance to cure the evidence deficiency before the case goes to the jury.[19] As will be seen, Florida courts cite the cure-the-deficiency interest to justify the preservation rule for sufficiency issues in criminal cases.

The preservation rule is a procedural rule designed to achieve certain practical results. One Florida district court said the rule's "real purpose:"

> [A]pplies during a jury trial to assure correct rulings . . . on questions relating to the admissibility of evidence and [jury] instructions . . . . [J]udicial errors in those instances cannot be effectively corrected after the jury renders a verdict . . . . There is no need to apply the rule strictly to pure rulings of law which can be corrected independent of a jury verdict.[20]

16. FLA. STAT. § 924.051(3) (2014).
17. FLA. STAT. §924.051(1)(b) (2014).
18. Maddox v. State, 760 So. 2d 89, 95 (Fla. 2000).
19. *See* Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1016–17, 1026 (Fla. 2000); State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984), *receded from on other grounds in* Maddox, 760 So. 2d at 100; Pinder v. State, 396 So. 2d 272, 273 (Fla. Dist. Ct. App. 1981); *see also* Porter v. State, 356 So. 2d 1268, 1270–71 (Fla. Dist. Ct. App. 1978) (Hubbart, J., dissenting).
20. Williams v. State, 516 So. 2d 975, 976 (Fla. Dist. Ct. App. 1987).

Evidence sufficiency issues seem to be a prime example of "pure rulings of law which can be corrected independent of a jury verdict," which undermines any argument that strict compliance with the preservation rule is required for sufficiency issues. Further, the preservation rule evolved over many years to apply in *all* appeals, *all* issues, and *all* parties. But criminal defendants, and their sufficiency issues, are unique for three reasons.

First, criminal defendants have constitutional rights that other litigants do not, three of which are significant here: 1) the right to effective assistance of counsel;[21] 2) the due process right to require the State to prove every element of the charged offense beyond reasonable doubt;[22] and 3) the double jeopardy right not to be retried if the State fails to prove its case.[23]

Second, at least for indigent criminal defendants (as most are), appeals—particularly after jury convictions—are almost automatic and, for the most part, are publicly financed and essentially cost free for defendants. Collateral relief is also more readily available and more often used; and here too the costs are borne mostly by the public. Society has significant interests in criminal appeals that it does not have in other appeals.

Finally, the consequences of losing in the trial court are qualitatively different for criminal defendants, which make their sufficiency issues all the more compelling.

We cannot reflexively apply the preservation rule to criminal defense appeals without regard for these differences.

II. FUNDAMENTAL ERROR

Florida courts have always recognized exceptions to the preservation rule, which have historically been called fundamental error. Such errors are considered to be so serious that they must be corrected on appeal even though they were not preserved. Examples include whether the trial court had subject matter jurisdiction[24] and whether the applicable statute is facially valid.[25]

Fundamental error can also occur in cases where the error could have been corrected if it had been raised in the trial court and the purposes of the preservation rule would be served by adhering to that rule. Trying to formulate a general rule to identify such errors is difficult. Many types of errors *may* qualify as being fundamental; but whether the error in a particular case qualifies depends heavily on the facts of the case.

21. Strickland v. Washington, 466 U.S. 668, 686 (1984).
22. *In Re* Winship, 397 U.S. 358, 361(1970).
23. Burks v. United States, 437 U.S. 1, 11(1978).
24. *See, e.g.*, Parker v. Dekle, 46 Fla. 452, 454 (Fla. 1903).
25. *See, e.g.*, Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982).

Over the years, the Florida Supreme Court has defined fundamental error as one that 1) "goes to the foundation of the case or the merits of the cause of action;"[26] or 2) "amount[s] to a denial of due process"[27] (although "not all errors of constitutional dimension are fundamental");[28] or 3) "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the . . . error."[29] More recently, the court said fundamental error is recognized, "not to protect the interests of [the litigant], but rather to protect the interests of justice itself."[30] Given "the overarching concern that a litigant receive a fair trial and that our system operate so as to deserve public trust and confidence," an error is fundamental if it "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial."[31]

The subjectivity in these definitions has led some district court judges to acknowledge that Florida courts have "struggled to define [fundamental error] in a way that is both sufficiently comprehensive and sufficiently exclusive"[32] or that "would be predictive as compared to descriptive."[33] They concede they have had only "modest success" in this endeavor.[34] One judge lamented: "I know the supreme court's definition of fundamental error; it's the practical application that gives me headaches. I yearn for an understandable standard."[35]

Courts cannot be criticized for failing to formulate a better definition. The basic problem here is that fundamental error is not a preexisting "thing" with an objectively discernable substantive content. Rather, it is the conclusion we state when we grant appellate relief on an unpreserved issue. "We are reversing because fundamental error occurred" tells us nothing about why we are reversing except that the winning issue was not preserved.

Thus, fundamental error is "difficult to explain . . . [and][i]t is probable that [the term] is used to describe more than one concept."[36] But regardless of how we define it, the concept of fundamental error

26. State v. Smith, 240 So. 2d 807, 810 (Fla. 1970).
27. Castor v. State, 365 So. 2d 701, 704, n.7 (Fla. 1978).
28. Clark v. State, 336 So. 2d 468, 472 (Fla. Dist. Ct. App. 1976), *aff'd*, 363 So. 2d 331, 335 (Fla. 1978).
29. State v. Delva, 575 So. 2d 643, 644–45 (Fla. 1991).
30. Maddox v. State, 760 So. 2d 89, 98 (Fla. 2000).
31. Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1026, 1030. (Fla. 2000).
32. Bain v. State, 730 So. 2d 296, 304 (Fla. Dist. Ct. App. 1999).
33. Denson v. State, 711 So. 2d 1225, 1229 (Fla. Dist. Ct. App. 1998).
34. Berube v. State, 149 So. 3d 1165, 1171, n.7 (Fla. Dist. Ct. App. 2014).
35. Ward v. State, 765 So. 2d 299, 302 (Fla. Dist. Ct. App. 2000) (Harris, J., concurring specially).
36. Judge v. State, 596 So. 2d 73, 79, n.3 (Fla. Dist. Ct. App. 1991).

distinguishes prejudicial—and—preserved error from prejudicial—but—unpreserved error. It is easier to get relief from the former than the latter. This means there will be cases where it is clear that prejudicial error occurred, but courts will not grant relief only because the issue was not preserved.[37] Exactly how one is to draw these lines is unclear.[38]

In light of these line-drawing problems, some recent district court cases have begun analyzing the problem of unpreserved issues in criminal defense appeals under the heading of IAOC. Unpreserved issues should be addressed on appeal, the emerging rule may be, if it is clear from the record that 1) an error occurred, and 2) there is no conceivable legitimate reason for defense counsel's allowing the error to occur. If the record permits an appellate court to answer these two questions with a yes, then the court should address the merits and determine whether the error was harmful.[39] This will be discussed in section IV.C. below.

III. EVIDENCE SUFFICIENCY AND FUNDAMENTAL ERROR

However we define fundamental error, a conviction based on insufficient evidence seems to be the quintessential example. "[T]he 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."[40] Thus, a conviction on insufficient evidence seems to "amount to a denial of due process;"[41] at the least, "a verdict of guilty could not have been obtained"[42] if the error had not occurred. But Florida courts have not always viewed the matter so simply.

Florida courts began wrestling with the problem of unpreserved

37. *See Berube*, 149 So. 3d at 1168 (noting that "harmfulness is the first prong of the fundamental error analysis" but a defendant's establishing harmfulness will not in itself prove that fundamental error occurred).

38. *See Ward*, 765 So. 2d at 302–03; *see also* Henry v. State, 743 So. 2d 52, 54–55 (Fla. Dist. Ct. App. 1999) (Harris, J., concurring specially); Hugh v. State, 751 So. 2d 718, 719–21 (Fla. Dist. Ct. App. 2000) (Harris, J., concurring and concurring specially); Jenkins v. State, 747 So. 2d 997, 999–1000 (Fla. Dist. Ct. App. 1999) (Harris, J., dissenting); Woodbury v. State, 730 So. 2d 354, 357–58 (Fla. Dist. Ct. App. 1999) (Antoon, J., concurring specially). We need not explore this subject in depth here. *See, e.g.*, *Ward*, 765 So. 2d at 1168. On the general topic of preservation and harmfulness, the author recommends five opinions from Judge Charles Harris of the Fifth District Court of Appeal that, in the author's opinion, have not received the attention they deserve. *Id.*; *Henry*, 743 So. 2d at 54–55; *Hugh*, 751 So. 2d at 719–21; *Jenkins*, 747 So. 2d at 999–1000; *Woodbury*, 730 So. 2d at 357–58.

39. *See generally* Richard Sanders, *Unpreserved Issues in Criminal Defense Appeals*, 76 FLA. B.J. 51, 51 (2002).

40. In re Winship, 397 U.S. 358, 364 (1970).

41. Castor v. State, 365 So. 2d 701, 704, n.7 (1978).

42. State v. Delva, 575 So. 2d 643, 645 (Fla. 1991).

sufficiency issues in the two cases that eventually caused the conflict in the district courts that the *F.B.* court had to resolve: *State v. Barber*, 301 So. 2d 7 (Fla. 1974) and *Negron v. State*, 306 So. 2d 104 (Fla. 1974).[43] We need not consider the pre-*Barber* cases; nothing said in those cases is relevant here.

A. BARBER AND NEGRON

Barber and Negron were both convicted of grand larceny and, in both cases, the State failed to prove the statutorily required value of the stolen property. The Florida Supreme Court seemed to reach conflicting conclusions in the two cases.

The *Barber* court held it was not fundamental error to convict without proof of the value element. The court said sufficiency issues in criminal cases must be preserved, and unpreserved sufficiency issues cannot be raised by framing them as either (1) an IAOC claim, because the trial court had not ruled on that claim; or (2) fundamental error, because "[t]o accept this contention would be to disregard entirely the [preservation rule]."[44]

Five months later, the *Negron* court took jurisdiction to resolve a conflict in the district courts on a speedy trial issue. After resolving that conflict, the court went on to agree with the defendants' claim that "fundamental error" occurred because they were convicted of grand larceny, but the State failed to prove the required value element.[45] The court did not note *Barber*.

B. FROM BARBER AND NEGRON TO F.B.

1. Florida Supreme Court Cases

Ten years after *Barber*, the Florida Supreme Court recognized fundamental error for sufficiency issues in *Troedel v. State*, 462 So. 2d 392 (Fla. 1984) and *Vance v. State*, 472 So. 2d 734 (Fla. 1985). Based on a single entry into a home, Troedel was convicted of two counts of burglary, one for armed burglary and the other for burglary with an assault. Vance was convicted of two counts of improper exhibition of a firearm under a statute that outlawed such exhibitions "in the presence of one or more persons;[46] the

43. *See* F.B. v. State, 852 So. 2d 226, 227–29 (Fla. 2003). *Negron* was overruled in part on other grounds in *Butterworth v. Fluellen*, 389 So. 2d 968 (Fla. 1980), and receded from "to the extent it conflicts with *Barber*" in *F.B.* *Id.* at 229.

44. State v. Barber, 301 So. 2d 7, 9–10 (Fla. 1974) (citations omitted).

45. *Negron*, 306 So. 2d at 107–08.

46. FLA. STAT. § 790.10 (2013).

two convictions were based on the fact that he simultaneously exhibited a firearm to two people.

The court concluded the second convictions in both cases were improper. Troedel entered the home only once and "proof of both enhancement factors can[not] transform one instance of unlawful entry from one crime into two crimes."[47] Vance's "exhibition of the firearm in the presence of two persons . . . violated the statute only one time."[48] Although the issue was not preserved in either case, the court said it could grant relief because "'a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error.'"[49] Neither case cited *Barber*.

The issue in *Troedel-Vance* is not the usual sufficiency issue (as in *Barber-Negron*). The *Troedel-Vance* issue concerns the branch of double jeopardy jurisprudence called the "unit of prosecution," which is "'the aspect of criminal activity that the Legislature intended to punish.'"[50] The issue here is: Did the legislature intend that the proven facts constitute a single violation of the statute or multiple violations? It is a double jeopardy violation if multiple convictions are obtained on facts that the legislature intended to be a single unit of prosecution.[51]

In cases like *Troedel-Vance*, the State clearly proved that a crime occurred. The issue is whether more than one count of that crime was proven. Only one count was proven in both cases because the unit-of-prosecution in *Troedel* is the entry (regardless of whether the entrant is armed or how many assaults are committed inside); and the unit-of-prosecution in *Vance* is the exhibition of the firearm (regardless of the number of viewers). With the usual sufficiency issue, the question is whether the State proved that even one count was committed. We note *Troedel-Vance* because, as will be seen, *F.B.* relied on them when formulating its fundamental error test for unpreserved sufficiency issues.

2. District Court Cases

The Florida Supreme Court did not address the problem of unpreserved sufficiency issues again until *F.B.* in 2002. Many district court cases considered the problem during this time. Several of these cases followed the lead of the first district court case to grant relief on an unpreserved sufficiency

47. Troedel v. State, 462 So. 2d 392, 399 (Fla. 1984).
48. Vance v. State, 472 So. 2d 734, 735 (Fla. 1985).
49. *Vance*, 472 So. 2d at 735 (quoting *Troedel*, 462 So. 2d at 399).
50. Mauldin v. State, 9 So. 3d 25, 28 (Fla. Dist. Ct. App. 2009) (quoting McKnight v. State, 906 So. 2d 368, 371 (Fla. Dist. Ct. App. 2005)).
51. *E.g.*, Sanabria v. United States, 437 U.S. 66, 69–70 (1978).

issue, which held that "no error [is] more fundamental than the conviction . . . in the absence of a prima facie showing of the essential elements of the crime charged."[52] This test seems to say that *all* valid-but-unpreserved sufficiency issues constitute fundamental error (unless there is such a thing as a *non*-essential element of the crime).

Other cases use the same basic test.[53] Other tests were also used, including: "[c]onviction of a crime that did not take place";[54] "the facts affirmatively proven . . . do not constitute the charged offense;"[55] and "lack of any proof to support the charge."[56] These tests also seem to include all sufficiency issues. The strongest statement of this position is in *Williams v. State*, 516 So. 2d 975 (Fla. Dist. Ct. App. 1987), which both 1) held that fundamental error occurred because "[t]he facts are totally insufficient to [prove the charged robbery];" and 2) rejected the State's argument that Williams should be required to seek relief under Rule 3.850:

> [Williams] is entitled to immediate relief from a wrongful conviction which should not be made to depend on his ability to prove [IAOC] . . . . If a defendant himself cannot by express agreement confer authority on a trial court to impose an illegal sentence that cannot be corrected on appeal . . . why should a defense counsel be able to confer, by oversight, ignorance, neglect, or insufficient argument, authority on a trial court to impose an illegal conviction that cannot be corrected on appeal? The substance in this case is: Did a robbery occur? Did the defendant do it or did he aid the robber? The answer to both questions is 'no.' Elementary justice in criminal cases is for a defendant to be found guilty of crimes he committed and not guilty of crimes he did not commit. Regardless of the procedural technicalities that the criminal justice system imposes upon itself, that system has but one product- justice- and it is unjust for a defendant to be in prison for a crime that never occurred . . . . [B]eing convicted of a crime that never occurred is error of such fundamental nature as is correctable on

52. Dydek v. State, 400 So. 2d 1255, 1258 (Fla. Dist. Ct. App. 1981).

53. *See, e.g.*, K.A.N. v. State, 582 So. 2d 57, 59 (Fla. Dist. Ct. App. 1991); Brown v. State, 652 So. 2d 877, 881 (Fla. Dist. Ct. App. 1995); Burke v. State, 672 So. 2d 829, 831 (Fla. Dist. Ct. App. 1995); Valdes v. State, 621 So. 2d 567, 568 (Fla. Dist. Ct. App. 1993).

54. Harris v. State, 647 So. 2d 206, 208 (Fla. Dist. Ct. App. 1994); *see also* Stanley v. State, 626 So. 2d 1004, 1005 (Fla. Dist. Ct. App. 1993); T.M.M. v. State, 560 So. 2d 805, 807 (Fla. Dist. Ct. App. 1990).

55. Griffin v. State, 705 So. 2d 572, 574 (Fla. Dist. Ct. App. 1998).

56. O'Connor v. State, 590 So. 2d 1018, 1019 (Fla. Dist. Ct. App. 1991).

appeal . . . 'in the interest of justice . . . .'[57]

However, a few district court cases said that some valid-but-unpreserved sufficiency issues do not constitute fundamental error. One court granted relief but drew a distinction between

> cases in which ambiguous evidence . . . fall[s] short in proving a prima facie case on a particular element of the crime charged, where the [preservation rule applies; and cases in which] . . . the issue is whether the state's theory of culpability under the [applicable] statute was legally sustainable. If not, it would amount to fundamental error to permit a . . . conviction to stand . . . .[58]

The court did not explain this perceived distinction any further. It seems to be one between "factual" insufficiency and "legal" insufficiency, between the State's mere failure to produce sufficient evidence to prove an element and the State's advancing an erroneous legal theory, *i.e.*, the facts proven do not constitute the charged offense.

This distinction is illusory. *Any* sufficiency challenge ultimately comes down to a claim that the proven facts do not, as a matter of law, prove the offense of conviction. To determine sufficiency, "ambiguous evidence" is always interpreted in a light most favorable to the State,[59] and the issue is always whether "the state's theory of culpability under the [relevant] statute was legally sustainable,"[60] *i.e.*, do the proven facts establish all the elements of the offense.

Even if there is some valid distinction here, why would a legal-insufficiency claim should be treated differently from a factual-insufficiency claim? Either way, the defendant was convicted of a crime the State did not prove.

Three Second District cases also recognized two types of valid-but-unpreserved sufficiency issues, one being fundamental error and the other not. One case distinguished "a typical failure of proof case" (preservation required) from cases "where the defendant's conduct clearly did not constitute the crime [of conviction]" (fundamental error).[61] The second case distinguished "the usual failure of proof case" (preservation required) from cases involving a "convict[ion] of a crime that never occurred" (fundamental

57. Williams v. State, 516 So. 2d 975, 977–78 (Fla. Dist. Ct. App. 1987).
58. Otero v. State, 807 So. 2d 666, 667 (Fla. Dist. Ct. App. 2001) (citation omitted).
59. *See* F.B. v. State, 852 So. 2d 226, 230 (Fla. Dist. Ct. App. 2003).
60. Otero v. State, 807 So. 2d 666, 667 (Fla. Dist. Ct. App. 2001).
61. Hornsby v. State, 680 So. 2d 598, 598 (Fla. Dist. Ct. App. 1996).

error).[62] The third case distinguished "case[s where] the state's failure to prove the offense involves a technical matter that could have been resolved if the issue had been raised in [the trial court]" (preservation required) from cases where "[i]t is clear that the state could not have proven an essential element [of the crime] because all of the evidence established that [defendant committed a different crime]" (fundamental error).[63]

These cases did not explain what was meant by the "typical [or 'usual'] failure of proof case," or by "a technical matter that could have been resolved had the issue been raised." The perceived distinction may be between cases in which: 1) the evidence affirmatively proves that the crime of conviction did *not* occur (*e.g.*, the State must prove the defendant was over 18 when the crime occurred but the evidence proves she was under 18); and 2) the evidence fails to prove all the elements but we do not know whether the State had available evidence to prove the missing element(s), which it would have produced had the issue been raised.

If this is the distinction these cases are articulating, then they rely on the cure-the-deficiency basis of the preservation rule. Fundamental error occurs only if it is clear that the State could not have cured-the-deficiency if the sufficiency issue had been raised. And the only way we can know that for sure is if the evidence affirmatively shows that the State could not have proven the offense even if the unpreserved issue had been raised.

Three Third District cases expressly relied on the cure-the-deficiency logic when refusing to address unpreserved sufficiency issues.[64] One case affirmed a capital sexual battery conviction and refused to address an unpreserved issue regarding the victim's age because, if the issue had been raised, "the error . . . might have been cured by allowing the state to re-open its case [to prove] the missing, technical element of age.[65]" Another said "fundamental error may exist only when . . . it clearly and affirmatively appears that the result could not have been affected by the failure to object."[66] However, other Third District cases held that fundamental error occurs if "the State failed to prove all of the elements . . ."[67] or if the conviction was "totally

62. Nelson v. State, 543 So. 2d 1308, 1309 (Fla. Dist. Ct. App. 1989) (citation omitted).

63. Burrell v. State, 601 So. 2d 628, 629 (Fla. Dist. Ct. App. 1992).

64. Johnson v. State, 478 So. 2d 885, 886 (Fla. Dist. Ct. App. 1985); Pierre v. State, 597 So. 2d 853, 855 (Fla. Dist. Ct. App. 1992); Pinder v. State, 396 So. 2d 272, 273, n.3 (Fla. Dist. Ct. App. 1981).

65. *Johnson*, 478 So. 2d at 886. The court did not say why it felt this age element was a "technical" one. *Id.*

66. *Pinder*, 396 So. 2d at 273, n.3. This case seems to expressly state the rule that the Second District cases may have implicitly adopted. *Id.* at 272.

67. Valdes v. State, 621 So. 2d 567, 568 (Fla. Dist. Ct. App. 1993).

unsupported by evidence . . . ."[68] These latter two cases seem inconsistent with the first three cases.

The cure-the-deficiency logic, while valid in the abstract, is invalid as a practical matter as long as Rule 3.380(c) allows sufficiency issues to be initially raised post-verdict. None of these district court cases considered this issue, although most of them came out before *Stevens* came out (in 1997).[69]

This brings us to the conflict that led to the Florida Supreme Court's *F.B.* decision. Two district courts reached opposing results in cases that addressed the same issue as in *Barber-Negron*. The first court followed *Negron* and held that value is "an essential element of theft charges" and the failure to prove it "was fundamental error."[70] The second court followed *Barber* and affirmed because, "had [the issue] been [raised,] . . . the trial court could have allowed the state to reopen its case and prove the missing element."[71]

C. THE *F.B.* OPINION

In *F.B.*, the Florida Supreme Court began by "approv[ing] the [district court's] holding that the insufficiency of the evidence to prove one element of a crime does not constitute fundamental error . . . ."[72] After "reaffirm[ing] *Barber* . . . and reced[ing] from *Negron*,"[73] the court said the preservation rule serves the following purposes:

> 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.
>
> . . . [I]t also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client's tactical advantage.[74]

68. Stanton v. State, 746 So. 2d 1229, 1230 (Fla. Dist. Ct. App. 1999) (quoting Troedel v. State, 462 So. 2d 392, 399 (Fla. 1984)).

69. *See generally* State v. Stevens, 694 So. 2d 731, 732.(Fla. 1997).

70. T.E.J. v. State, 749 So. 2d 557, 558 (Fla. Dist. Ct. App. 2000), *disapproved*, F.B. v. State, 852 So. 2d 226, 231 (Fla. 2003).

71. F.B. v. State, 816 So. 2d 699, 701 (Fla. Dist. Ct. App. 2002) (citation omitted), *approved*, *F.B.*, 852 So. 2d at 231.

72. *F.B.*, 852 So. 2d at 227. The district court did not expressly announce any such holding. *F.B.,* 816 So. 2d at 701.

73. *Id.* at 229. The court reasoned: 1) *Barber* squarely addressed the issue of whether the conviction constituted fundamental error; 2) although *Negron* "tacitly rests on the assumption that the . . . insufficien[cy] . . . claim constituted fundamental error, the Court did not address that issue;" and 3) "this Court does not intentionally overrule itself *sub silentio*." *Id.* at 228 (citation omitted).

74. *Id.* at 229 (quoting Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

"The sole exception to the [preservation] rule applies where the error is fundamental."[75] As to sufficiency issues, the court said "the interests of justice are better served by applying [the preservation] rule to [these issues]" for two reasons:

> [First, a]ny 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 . . . .
>
> [Second, t]he deferential standard of review appellate courts apply to [sufficiency] claims . . . -*i.e.*, 'whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the [State], there is substantial, competent evidence to support the verdict . . . '-further supports our holding . . . .[76]

The court then "[held] that, with two exceptions, a defendant must preserve a [sufficiency issue]."[77] The first exception was death penalty cases.[78] The second exception occurs "when the evidence is insufficient to show that a crime was committed at all."[79] To "illustrate[]" the second exception, the court cited the *Troedel* and *Vance* cases noted above, which the *F.B.* court read as holding "a conviction imposed upon a crime totally unsupported by evidence [is] fundamental error."[80] Thus, the *F.B.* court continued, it is fundamental error if "the evidence is totally insufficient as a matter of law to establish the commission of a crime . . . ."[81]

The court then cited and quoted three fundamental error tests from district court cases: 1) "when the facts affirmatively proven . . . simply do not constitute the charged offense as a matter of law"; 2) "[c]onviction of a crime which did not take place"; and 3) "defendant's conduct did not constitute the crime of which he was convicted."[82] The court concluded by "reaffirm[ing], with the two discrete exceptions explicated above, the longstanding rule that [sufficiency] claims [must be preserved] . . . ."[83]

F.B. states, or quotes, six fundamental error tests for sufficiency issues.[84]

75. *Id.*

76. *Id.* at 230 (citations and internal quotation marks omitted).

77. *Id.*

78. F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003); FLA. R. APP. P. 9.142(5). "On direct appeal in death penalty cases, whether or not insufficiency of the evidence . . . is an issue presented for review, the court shall review th[at] issue[.]" FLA. R. APP. P. 9.142(5).

79. *F.B.*, 852 So. 2d at 230.

80. *Id.* (quoting Troedel v. State, 462 So. 2d 392, 399 (Fla. 1984)) (citing Vance v. State, 472 So. 2d 734, 735 (Fla. 1985)).

81. *Id.*

82. *Id.* at 231 (citations and internal quotation marks omitted) (brackets added by court).

83. *Id.*

84. *Id.* at 227, 230–31. The tests are: 1) "[T]he insufficiency of the evidence to prove one element of a crime does not constitute fundamental error;" 2) "the evidence is insufficient to show that

Some of the tests conflict with others. For instance, a defendant may be convicted-of-a-crime-totally-unsupported-by-evidence (or of a crime-which-did-not-take-place); but that does not necessarily mean that the-evidence-is-totally-insufficient-to-establish-the-commission-of-a-crime. Suppose Defendant is convicted of aggravated battery, on the theory that she intentionally ran the victim over with her car. That crime may be totally-unsupported-by-evidence but that same evidence could also prove that a[nother]-crime-was-committed, *e.g.*, reckless driving.

Similarly, doesn't the-insufficiency-of-the-evidence-to-prove-one-element mean, by definition, that the defendant's-conduct-did-not-constitute-the-crime-of-which-he-was-convicted? Certainly, the *proven* conduct did-not-constitute-the-crime-of-which-he-was-convicted. We need not consider these problems. As discussed in next section, more recent cases from the Florida Supreme Court indicate that the proper test for fundamental error is #2 in footnote 84 above: "the evidence is insufficient to show that a crime was committed at all."

D. THE POST-F.B. CASE LAW

1. Florida Supreme Court Cases

Three Florida Supreme Court cases have applied the *F.B.* fundamental error test. The first case, *Insko v. State,* 969 So. 2d 992 (Fla. 2007), has unusual facts that do not present the more common sufficiency issue. The court read *F.B.* as meaning fundamental error "occurs when the evidence is insufficient to show that a crime was committed at all"; and Insko's case did not qualify because "the evidence [proved] . . . a crime was committed."[85]

a crime was committed at all" (or "totally insufficient . . . to establish the commission of a crime"); 3) "a conviction imposed upon a crime totally unsupported by evidence;" 4) "the facts affirmatively proven . . . simply do not constitute the charged offense as a matter of law;" 5) "conviction of a crime which did not take place;" and 6) "defendant's conduct did not constitute the crime of which he was convicted." *Id.* (citations and internal quotations omitted).

85. Insko v. State, 969 So. 2d 992, 1002 (Fla. 2007). Charged with a sex offense that required proof that the offender was over 18, the 33-year-old Insko agreed to an instruction on the lesser offense that occurs when the offender is under 18. The jury convicted Insko of that lesser offense. The district court reversed on an evidentiary issue and, on remand, Insko moved to dismiss, arguing the State could not prove the under-18 element (and he could not be retried on the greater offense because he had been acquitted of that offense). The motion to dismiss was denied, Insko entered a plea and reserved the right to appeal the denial of that motion, and that was affirmed on direct appeal. Upholding that affirmance, the Florida Supreme Court held that Insko had waived the right to challenge the age element of the lesser offense when he agreed to the jury instruction, and the State's inability to prove that Insko was under 18 was not fundamental error because the evidence "[proved] that a crime was committed." *Id.*

In the second case, *Hampton v. State*, 103 So. 3d 98 (Fla. 2012), the only crime of conviction was first-degree murder. Hampton argued on appeal that the evidence failed to prove a sexual battery and thus the trial court erred in instructing the jury that it could convict of felony murder based on a sexual battery theory. Again asserting fundamental error occurs only when the evidence fails to prove "that a crime was committed at all," the court held this unpreserved issue was not fundamental error because the evidence *did* prove "a crime was committed, . . . *i.e.*, premeditated murder or felony murder [based on] . . . robbery or burglary."[86]

Finally, in *Young v. State*, 141 So. 3d 161 (Fla. 2013), the court addressed a conflict in the district courts regarding the meaning of "dwelling," as defined in the burglary statute. Young argued that the building he entered did not meet the definition. The court said the issue was not preserved and it was not fundamental error because the evidence proved "Young committed a burglary of a structure . . . [, which meant] that a crime was in fact committed . . . ."[87]

Thus, it seems that the proper test for fundamental error is whether the evidence proved that a-crime-was-committed-at-all. The unresolved problems with this test will be discussed after we review the district court cases.

2. District Court Cases

Many of the post-*F.B.* district court cases used the a-crime-was-committed test to grant relief.[88] Other cases grant relief by using some variation of the tests of either 1) conviction "in the absence of a prima facie showing of the essential elements of the crime;"[89] or 2) "the facts affirmatively proven . . . simply do not constitute the charged offense."[90]

Seven cases denied relief. Three addressed the merits of the unpreserved

86. Hampton v. State, 103 So. 3d 98, 114 (Fla. 2012) (emphasis added). The court went on to reject the argument on the merits. *Id.*

87. Young v. State, 141 So. 3d 161, 165 (Fla. 2013). The court went on the address the merits. *Id.*

88. *See* Alvarez v. State, 963 So. 2d 757, 764, n.1 (Fla. Dist. Ct. App. 2007); Crain v. State, 79 So. 3d 118, 119, 122 (Fla. Dist. Ct. App. 2012); Hamilton v. State, 71 So. 3d 247, 247–48 (Fla. Dist. Ct. App. 2011); S.K.W. v. State, 112 So. 3d 775, 776, n.1 (Fla. Dist. Ct. App. 2013); Trock v. State, 990 So. 2d 1195, 1197, n.2 (Fla. Dist. Ct. App. 2008).

89. *See* Baldwin v. State, 857 So. 2d 249, 252 (Fla. Dist. Ct. App. 2003) (quoting F.B. v. State, 852 So. 2d 226 (Fla. 2003); *see also* Colbert v. State, 49 So. 3d 819, 822–23 (Fla. Dist. Ct. App. 2010); Watson v. State, 974 So. 2d 1168 (Fla. Dist. Ct. App. 2008).

90. Cox v. State, 1 So. 3d 1220, 1222 (Fla. Dist. Ct. App. 2009); *see also* Bruce v. State, 993 So. 2d 155, 156 (Fla. Dist. Ct. App. 2008); Randall v. State, 919 So. 2d 695, 697 (Fla. Dist. Ct. App. 2006) (quoting Griffin v. State, 705 So. 2d 572, 574 (Fla. Dist. Ct. App. 1998).

issues and concluded the evidence was sufficient to prove the crime of conviction.[91] Four cases refused to address the unpreserved issue. Two of these cases used the a-crime-was-committed test and did not address the unpreserved issue because the evidence proved a lesser-included offense.[92] The third case did not address the unpreserved issue because "the failure to present evidence on a particular element . . . is not fundamental error."[93]

None of these cases tried to ascertain the precise meaning of *F.B.* None cited *Insko*, *Hampton*, or *Young.* But all of them came out before *Young* and all but three came out before *Hampton.*[94] Many of them came out after *Insko* but, given the odd facts in that case, it is understandable that these courts did not view *Insko* as particularly relevant to the ultimate meaning of *F.B.*

The final case here is *Monroe*, cited at the beginning of this article. This is the first post-*Young* case and the first district court case to try to identify the precise fundamental error test approved by *F.B.* As noted above, the *Monroe* court refused to address the unpreserved issue because it read *F.B.* as adopting the a-crime-was-committed test; and, because Monroe *had* committed a-crime, the merits of his unpreserved issue could not be addressed.[95]

Monroe does seem to read *F.B.* (in light of *Young, et al.*), correctly, at least to the extent that the proper test is the a-crime-was-committed test. But it is not clear that the Florida Supreme Court intended a-crime to mean, as the *Monroe* court concluded, "any crime whatsoever."[96] In *Young*, *et al.*, the supreme court did not amplify the meaning of the test.

Thus, we are left with the two basic questions we started with: 1) If only some valid-but-unpreserved sufficiency issues qualify as fundamental error, how do we distinguish the two classes of issues, *i.e.*, how do we apply this a-crime-was-committed test in practice; and 2) why do we not consider *all* unpreserved sufficiency issues to be fundamental error? We may add a third question that was noted but not resolved in *Monroe*: Can we avoid the problems with this fundamental error test by reframing the issue as an IAOC claim?

91. *See* Matheny v. State, 15 So. 3d 658, 659–60 (Fla. Dist. Ct. App. 2009); Tate v. State, 136 So. 3d 624, 630 (Fla. Dist. Ct. App. 2013).

92. Goad v. State, 887 So. 2d 415, 416 (Fla. Dist. Ct. App. 2004); Jennings v. State, 920 So. 2d 32, 33 (Fla. Dist. Ct. App. 2006).

93. Jean v. State, 877 So. 2d 910, 911 (Fla. Dist. Ct. App. 2004).

94. *See* Garcia v. State, 114 So. 3d 424 (Fla. Dist. Ct. App. 2013); Lawshea v. State, 99 So. 3d 603, 606–07 (Fla. Dist. Ct. App. 2012); Tate, 136 So. 3d at 626.

95. Monroe v. State, 148 So. 3d 850, 859–60.(Fla. Dist. Ct. App. 2014).

96. *Id.* at 859.

IV. THE THREE UNANSWERED QUESTIONS

A. WHAT IS THE TEST FOR FUNDAMENTAL ERROR?

To determine the meaning of the a-crime-was-committed test, we begin with the context in *F.B.* from which it emerged. The court announced the test after holding the preservation rule has two exceptions, the first being death penalty cases and the other being "when the evidence is insufficient to show that a crime was committed at all."[97] Immediately after stating this test, the court said the test "is illustrated" by *Troedel-Vance*, noted above.[98]

But *Troedel-Vance* addresses a unit-of-prosecution issue that is quite different from the basic sufficiency issue. The problem in *Troedel-Vance* wasn't that the-evidence-was-insufficient-to-show-that-a-crime-was-committed; it was that Troedel and Vance were convicted of two counts of the same crime based on evidence that the legislature intended to be one crime. In citing *Troedel-Vance* as "illustrating" the test it adopted, did *F.B.* mean that only unit-of-prosecution sufficiency issues qualify as fundamental error? The court did not consider this possibility in *Young*, *Hampton*, or *Insko*. None of these cases raised a unit-of-prosecution issue.

Assuming the fundamental error test is not limited to unit-of-prosecution issues, further questions arise. Under the a-crime-was-committed test, what qualifies as a-crime? The Florida Supreme Court cases provide little guidance. The a-crime in *F.B.* and *Young* was a necessary-lesser-included offense. The a-crime in *Insko* was that Insko molested the child, regardless of Insko's age at the time.[99] The a-crime in *Hampton* was that there were alternative ways of proving first-degree murder, even if the evidence failed to prove one of the felony-murder options. Hampton did not challenge the sufficiency of the evidence to prove the crime of conviction; rather, his issue is actually a jury instruction issue.

A-crime cannot mean the crime of conviction. If it did, then all valid-but-unpreserved sufficiency issues would constitute fundamental error,

97. F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003).

98. *Id.*

99. *See generally* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §§ 11.1, 11.10(c) (2015), *available at* http://www.floridasupremecourt.org/jury_instructions/chapters/entireversion/onlinejurryinstructions.pdf. It is not clear whether, strictly speaking, a defendant-under-18 sexual offense is a lesser-included offense of a defendant-over-18 offense. It may be more accurate to say that the two offenses are mutually exclusive; proving one offense disproves the other. The standard jury instructions do not address the issue; they simply tell trial courts to give an over-18 or under-18 instruction "as applicable." §§ 11.1, 11.10(c).

because the court would have to address the merits of the unpreserved issue in order to determine whether a-crime-was-committed. Similarly, nothing in this test indicates that a-crime is limited to lesser-included offenses; *Hampton* and *Insko* were not lesser-included-offense cases. So is the *Monroe* court correct that a-crime means any-crime-whatsoever?[100] Without regard to whether that crime was charged or is a proper lesser-included offense of a charged crime? Without regard to whether the proving (or disproving) of that uncharged crime was relevant to any issue actually raised during the trial? This would be a very broad definition that would generate many questions about its application.

Is a-crime limited to acts that carry criminal penalties under Florida law? Are federal offenses included (regardless of whether there is an analogous Florida crime)? What about local ordinance violations, civil traffic infractions?

Suppose, after committing a crime in Florida, the Defendant flees to Georgia and, when local police try to arrest him, he resists, thus committing a Georgia crime. This evidence is admitted in the Florida trial as consciousness-of-guilt evidence.[101] Would this Georgia crime qualify as a-crime for these purposes? What about "[s]imilar fact evidence of [uncharged] crimes . . . admi[tted] . . . to prove . . . motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"?[102] If such evidence qualifies as a-crime, what if the appellate court later concludes it was error to admit the evidence? The evidence of this uncharged a-crime is in the appellate record, even if erroneously admitted; does this evidence prevent the court from addressing the unpreserved sufficiency issue?

Suppose the Defendant is charged with two crimes and the evidence is legally sufficient to prove Crime A but the jury acquits of that offense. Is Crime A still a valid a-crime that bars a court from addressing an unpreserved issue regarding Crime B? The evidence *was* "[]sufficient to show that [Crime A] was committed . . . ."[103]

This exposes another problem. How is the appellate court to determine whether the evidence was "sufficient" to prove a-crime-was-committed? By using the usual standard of review that applies to sufficiency challenges to crimes of conviction? If so, then it does not matter whether the jury acquitted

100. *Monroe*, 148 So. 3d at 859.

101. *See, e.g.*, Thomas v. State, 748 So. 2d 970, 982 (Fla. 1999) (holding evidence of defendant's "flight, concealment, or resistance to lawful arrest" may be admitted to show consciousness of guilt, even if that occurs some time after the charged crime).

102. FLA. STAT. § 90.404(2)(a) (2014).

103. F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003).

as long as sufficient evidence (which the jury seems to have disbelieved) was introduced.[104]

What if testimony of an uncharged a-crime comes out unexpectedly in the heat of the trial: an officer testifies that he checked on his in-car computer and learned that Defendant's driver's license was suspended; a jailhouse snitch testifies that Defendant smuggled contraband into their cell; a child molestation victim testifies that Defendant gave her drugs two days before the charged crime occurred. The defense objection is sustained, there is no motion to strike, and the trial goes on without further mention of this uncharged a-crime. But this "evidence" is now in the record and it is "sufficient" to prove that a-crime-was-committed; are all unpreserved sufficiency issues now unreviewable?

We might try to slow this runaway train by asking, when we say the-evidence-is-sufficient-to-show-a-crime-was-committed, what is meant by "the evidence"? Does this refer only to what was needed to prove the crime of conviction that is being challenged with the unpreserved sufficiency issue? Let's see how that might work.

Consider first cases like *F.B., Young,* and *Insko*. A single defendant acting alone commits a single crime and the unpreserved sufficiency issue is an either/or issue: The evidence clearly proves *a* crime, and the only question is whether it is Crime A or Crime B. In such cases, the a-crime-was-committed test is easy to apply. The unpreserved sufficiency issue cannot be addressed because "the evidence" proves that either-one-or-the-other-crime-was-committed.

Distinguished from this scenario is one in which a single defendant acting alone is convicted of a single crime and the unpreserved sufficiency issue, if successful, will establish that no crime occurred at all. In this situation, the unpreserved issue can always be addressed on the merits (assuming the evidence proves no uncharged crime).

As an example, consider a conviction for felon-in-possession-of-a-firearm. On appeal Defendant raises the unpreserved issue that the State did not prove he was a convicted felon. If the evidence failed to prove this, then all the State proved was that he possessed a firearm, which is lawful. To determine whether it can address this unpreserved issue, the court must first

104. *See id.*; *Monroe*, 148 So. 3d at 859. The *F.B.* court announced a test of "the evidence is *insufficient to show* that a crime was committed . . . ." *F.B.*, 852 So. 2d at 230 (emphasis added). The *Monroe* court interpret this to mean "the evidence could not *support the conviction* of any crime whatsoever." *Monroe*, 148 So. 3d at 859 (emphasis added). But, depending on definitions, it may take less evidence to "show" that a crime was committed than to "support a conviction." *Id.*

determine whether the evidence proved that a-crime-was-committed-at-all.

To do this, it would make no sense for the court to determine whether the evidence was legally sufficient to prove felon-in-possession. This would amount to deciding the merits of the unpreserved issue, and doing so for the purpose of deciding whether the court can even address the merits of the unpreserved issue. Thus, to answer the preliminary question of whether a-crime-was-committed, the court must determine whether the evidence proved that a-crime-was-committed even if the unpreserved issue has merit. This seems to mean that we assume the unpreserved issue has merit and then ask whether the remaining evidence proved that a[nother]-crime-was-committed.[105] If the remaining evidence does not prove another crime, then we can address the merits of the unpreserved issue. In our felon-in-possession example, we assume the State did not prove Defendant was a felon and, because the evidence proves no other crime, we can now turn to the merits of the unpreserved issue.

Now suppose that, at Defendant's trial, the arresting officer testifies that she found the firearm hidden under the front seat of the car Defendant was driving. On cross-examination, defense counsel begins to ask about how the firearm was found, apparently seeking to establish whether it was "securely encased," as that term is used with regard to the offense of carrying a concealed firearm ("CCF"); it is legal to carry a securely-encased concealed firearm.[106] The State objects, arguing (correctly) that Defendant is not charged with CCF and whether the firearm was securely encased is irrelevant to the felon-in-possession charge. The objection is sustained and the secure-encasement issue is left unresolved. But when Defendant raises on appeal the unpreserved sufficiency issue as to the felon-in-possession conviction, the State argues that the court cannot address it because the evidence proved that a-crime-was-committed: a CCF charge, proven by the fact that the firearm was hidden under the front seat.

The unfairness here is obvious but, as the record stands, the CCF charge *is* proven, which means a-crime-*was*-committed and the court cannot address the unpreserved felon-in-possession sufficiency issue.

The same analysis would apply even if there was no attempt to raise this secure-encasement issue and all we know is that the firearm was under the seat. The secure-encasement issue was irrelevant to the felon-in-possession charge; no reason for defense counsel to address the point during trial. But is

105. *See generally F.B.*, 852 So. 2d 226; Insko v. State, 969 So. 2d 992 (Fla. 2007); Young v. State, 141 So. 3d 161 (Fla. 2013). This is what the courts implicitly did in the either/or cases. *F.B.*, 852 So. 2d 226; *Insko*, 969 So. 2d 992; *Young*, 141 So. 3d 161.

106. FLA. STAT. § 790.25(3)(l) (2014).

it fair to reject the unpreserved sufficiency challenge to the offense of conviction because the evidence, at least preliminarily, establishes another crime that was not charged; and whether that other crime actually occurred was not a relevant issue in the trial court; and had it been relevant, the defendant might have been able to prove that this uncharged offense did not occur (or at least cast reasonable doubt on its occurrence)? If we require defendants to preserve sufficiency issues in order to give the State a chance to cure-the-deficiency in the trial court, shouldn't defendants be given the opportunity to disprove the commission of such uncharged crimes?

We begin to see the problems with trying to determine what "evidence" must be considered when making the preliminary inquiry into whether the-evidence-proved-a-crime-was-committed. To prove the felon-in-possession offense, the State had to prove there was a firearm. In Defendant's case, it proved that with evidence that a firearm was found under the car seat. Of course, the State did not *need* the under-the-seat portion of that testimony in order to prove a firearm was in the car; the officer could simply testify that she found a firearm in the car, without saying where. But isn't the precise location of the firearm, particularly in relation to Defendant's location in the car, relevant to the issue of whether Defendant possessed it? Even though the under-the-seat testimony is not strictly *needed* to prove the felon-in-possession offense, and even though it may prove the uncharged CCF crime, wouldn't it be admissible as "inextricably intertwined" evidence?[107] If so, is "the evidence" now sufficient to prove that a-(CCF)-crime-was-committed, which means the unpreserved felon-in-possession sufficiency issue cannot be addressed? Or do we say that the under-the-seat portion of the testimony, even though admissible, is not needed to prove the *elements* of the felon-in-possession charge and thus cannot be considered when we determine whether a-crime-was-committed. But Defendant's *possession* of the firearm *is* an element of the felon-in-possession offense; and isn't the under-the-seat evidence, if not *necessary-to-prove*, at least *relevant* to the possession element?

Or should we say that the under-the-seat testimony is irrelevant to the unpreserved issue regarding the felon-in-possession charge (*i.e.*, Defendant-is-convicted-felon) and therefore should not be considered when determining whether the evidence proved that a-crime-was-committed? But couldn't the State argue that the under-the-seat testimony *is* relevant to the unpreserved

107. Ballard v. State, 66 So. 3d 912, 918 (Fla. 2011). "[C]ollateral crimes evidence is [admissible as being] 'inextricably intertwined' if the evidence is necessary to (1) adequately describe the deed; (2) provide an intelligent account of the crime(s) charged; (3) establish the entire context out of which the charged crime(s) arose; or (4) adequately describe the events leading up to the charged crime(s)." *Id.*

Defendant-is-felon issue? The fact that the firearm was hidden shows consciousness of guilt; as a convicted felon, Defendant knows he cannot possess a firearm and so he hid it under the seat. The under-the-seat testimony is not *sufficient* to prove the element at issue in the unpreserved sufficiency argument, but it is arguably relevant to that issue. And, if it is relevant, is it then part of the "evidence" we must consider to determine whether the evidence proved that a-crime-was-committed?

Thus far we have considered the single-defendant-single-crime scenario. What happens if a single defendant commits several crimes over some time in different locations? Consider the following: As officers approach Defendant's home, they see her out front smoking marijuana. Seeing the officers, she throws the marijuana down (thus dispossessing herself of it) and runs to her car. As she pulls off, her car brushes an officer on the leg (which the State charges as an aggravated battery). She drives away and, when she is stopped, the officers find a firearm under the seat (which the State charges as CCF). A jury convicts of all three charges.

On appeal she concedes the evidence is sufficient to prove the marijuana charge and raises two unpreserved sufficiency issues, arguing the evidence is insufficient to prove 1) the aggravated battery because it did not prove she intentionally hit the officer with her car; and 2) the CCF charge because it did not prove the firearm was concealed. To determine whether we can address the unpreserved issues, do we say "the evidence"—the entire body of proof introduced at trial—proved the marijuana charge, and that means a-crime-was-committed, and thus no unpreserved issues can be addressed? Defendant no longer possessed the marijuana when the other two crimes occurred, that crime was over before the other two crimes even began; is this relevant to the equation? Do we look only at the evidence *needed* to prove each offense to determine whether the marijuana charge is relevant to the issue of whether she can raise an unpreserved sufficiency issue? The State does not *need* to prove marijuana possession to prove the other charges. Thus, do we say that, as to the other two charges the marijuana evidence is not part of "the evidence" we need to review to determine whether a-crime-was-committed?

But, while marijuana possession is not *an element* of the other offenses, it is arguably relevant to proving the aggravated battery charge. The marijuana evidence proves her motive, the State says, to intentionally run the officer over and flee. But even under this theory, is the marijuana evidence relevant to the CCF charge?

We could go on like this. We could consider cases where the charged crimes cover many months and many acts and include many co-perpetrators. But the point already established is this: If we do not adopt the unlimited any-

crime-whatsoever test used in *Monroe*; if we try to limit the a-crime-was-committed test, so that only *some* proven a-crimes may be used to bar consideration of an unpreserved sufficiency issue; on what basis do we draw the limiting lines?

Perhaps we should look to the justifications that were given for the limited fundamental error test announced in *F.B.* Why do we consider some valid-but-unpreserved sufficiency issues to be fundamental error but not others? Do those justifications explain the a-crime-was-committed test? Or can they at least provide some guidance on how we interpret the a-crime-was-committed test?

Spoiler alert: The answer to the latter two questions is no.

B. WHY IS PRESERVATION OF SUFFICIENCY ISSUES REQUIRED AT ALL?

The *F.B.* court gave two reasons for adopting a limited fundamental error test: 1) "The deferential standard of review appellate courts apply to [sufficiency claims]"; and 2) requiring preservation means that any "technical deficiency in proof may be readily addressed . . . thus allowing the State to correct the error, if indeed it is correctable . . . ."[108] The a-crime-was-committed test is unrelated to either reason. The fact that a-(*different*)-crime-was-committed tells us nothing about whether the State could have cured-the-deficiency had the sufficiency issue (as to the *charged* crime) been raised at trial. Beyond this, neither reason justifies a limited fundamental error test, no matter how it is phrased.

The court did not explain why the-deferential-standard-of-review is relevant here. That standard is deferential to the State, to affirming convictions; even preserved sufficiency issues rarely succeed. Sufficiency issues raise pure questions of law. The record is read in a light most favorable to the State; all evidentiary inferences and conflicts are resolved in the State's favor.[109] The portions of the record that must be reviewed to answer sufficiency questions do not include any portions of the record where acquittal motions were made. Such motions are not evidence.

The same deferential-standard-of-review should be used regardless of any acquittal motion. Indeed, the question here is whether appellate courts should address the merits of unpreserved issues and we do not even consider the standard of review until we decide we will address the merits of the issue.

The deferential-standard-of-review does not explain the preservation

108. *F.B.*, 852 So. 2d at 230
109. *Id.*

requirement for sufficiency issues. We must look to the purposes of the preservation rule itself to justify the line drawn in *F.B.*

We come now to the cure-the-deficiency logic. This is the reason given in the pre-*F.B.* district court cases to justify the preservation requirement for sufficiency issues.[110] The *F.B.* court said preservation was required so the State would have the chance to cure any "technical deficiency in proof" before the case was submitted to the jury.[111] The court did not define "technical deficiency." The implication here is that some evidence deficiencies are "non-technical" and the two types of deficiencies are treated differently for fundamental error purposes. The court did not explain the difference or why these two types of deficiencies should receive disparate treatment.

But the-cure-the-deficiency logic collapses in light of *Stevens'* interpretation of Rule 3.380(c) to allow sufficiency issues to be initially raised post-verdict.[112] Stevens was convicted of auto theft when he violated the terms of a long-term lease. In his Rule 3.380(c) motion, he argued for the first time that "the State failed to prove that the creditor had complied with the requirements of section 812.014(3), . . . under which there is no violation of the theft statute when there is a lease for one year or longer unless a written demand for the property is made."[113] The Florida Supreme Court said Rule 3.380(c) allows sufficiency issues to be initially raised post-verdict, and this "further[s] the interests of justice" and "promote[s] judicial economy" by "provid[ing] a procedural mechanism through which a substantive error can be corrected."[114]

The State could not reopen its case to prove the missing element after Stevens filed the Rule 3.380(c) motion. The issue in *Stevens* seems to be a prime example of a "technical deficiency in proof"[115] that the State may be able to cure if the issue is raised during trial. Yet the *Stevens* court was untroubled by this, giving no indication that it felt that the post-verdict raising of this issue might be construed as counsel "allowing errors . . . to go

110. F.B. v. State, 816 So. 2d 699, 701 (Fla. Dist. Ct. App. 2002*)*; Johnson v. State, 478 So. 2d 885, 886 (Fla. Dist. Ct. App. 1985); Pierre v. State, 597 So. 2d 853, 855 (Fla. Dist. Ct. App. 1992); Pinder v. State, 396 So. 2d 272, 272–73 (Fla. Dist. Ct. App. 1981); *see also* Burrell v. State, 601 So. 2d 628, 629 (Fla. Dist. Ct. App. 1992); Hornsby v. State, 680 So. 2d 598, 598 (Fla. Dist. Ct. App. 1996); Nelson v. State, 543 So. 2d 1308, 1309 (Fla. Dist. Ct. App. 1989). Recall that three Second District cases seem to implicitly adopt this rationale. *Burrell*, 601 So. 2d at 629; *Hornsby* 680 So. 2d at 598; *Nelson*, 543 So. 2d at 1309.

111. *F.B.*, 852 So. 2d at 230.

112. State v. Stevens, 694 So. 2d 731, 733 (Fla. 1997).

113. *Id.*at 732.

114. *Id.* at 733 (footnote omitted).

115. F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003).

unchallenged and later using the error to a client's tactical advantage," which was a tactic the *F.B.* court condemned.[116]

The State can no more cure-the-deficiency when the issue is first raised on appeal than it can when it is first raised under Rule 3.380(c). So why allow the issue to be initially raised at one stage but not the other? True, Rule 3.380(c) expressly allows this and there is no equivalent appellate rule; but so what? We are trying to decide whether we should treat differently these two contexts. The fact that there is an express trial court rule is no reason to reject the same rule in the appellate court. The *F.B.* court held that some unpreserved sufficiency issues can be raised on appeal even though no appellate rule expressly allows that.

There is no reason to treat the two contexts differently. As long as Rule 3.380(c) allows post-verdict acquittal motions, trial counsel's failure to raise a meritorious sufficiency issue under that rule will be IAOC. If relief is not granted on appeal, it will have to be granted in a post-conviction proceeding. This will be discussed in the next section.

The *Stevens* court said allowing post-verdict acquittal motions "further[s] the interests of justice" and "promote[s] judicial economy."[117] These same interests are served by recognizing such issues as fundamental error. Presumably, when *Stevens* talks of "promot[ing] judicial economy," it means that a trial court's granting of a post-verdict motion would eliminate the need for an appeal. But this eliminates the need for a defense appeal only if the motion resolves the whole case; other convictions, sufficiently supported by evidence, will still be appealed. Even if granting the Rule 3.380(c) motion eliminates the need for a defense appeal, the State can appeal the granting of the motion.[118]

If *Stevens* means that justice and judicial economy are best served by resolving sufficiency issues as soon as possible, then such issues should be addressed as fundamental error. Neither justice nor judicial economy has an interest in affirming, on non-preservation grounds, convictions based on insufficient evidence, only to see the issue reemerge (as an IAOC claim) in post-conviction proceedings.[119] Requiring preservation for sufficiency issues actually hinders the goal of judicial economy. In sum, Rule 3.380(c), as

116. *Id.* at 229 (citation omitted).

117. *Stevens,* 694 So. 2d at 733.

118. FLA. STAT. § 924.07(1)(j) (2014).

119. *See* A.P.R. v. State, 894 So. 2d 282, 286 (Fla. Dist. Ct. App. 2005). "[A] two-part analysis may be necessary to determine whether we may review [a sufficiency issue that the State claims was not preserved]: first, we must analyze the argument below to determine whether it is the same argument presented to us; and second, if it is not, we must determine whether the error . . . is fundamental." *Id.*

interpreted by *Stevens*, forecloses any argument that a preservation rule for sufficiency issues serves any valid cure-the-deficiency purpose. The other interests served by the preservation rule also do not justify the limited fundamental error test adopted by *F.B.*, at least as long as Rule 3.380(c) remains unchanged.

As to preventing unnecessary appeals and retrials, there will never be a retrial with a sufficiency issue in a criminal case. If the issue succeeds, double jeopardy principles forbid a retrial.[120] As for eliminating unnecessary appeals, imposing the preservation rule will not affect the number of State appeals. The only time the State can appeal a sufficiency issue is if the trial court grants a Rule 3.380(c) motion, *i.e.*, if the issue is preserved (albeit by the defense). As to whether requiring preservation will cut down the need for defense appeals, again, defense appeals will be eliminated only if the sufficiency issue resolves the whole case.

Nor does the preservation rule prevent counsel's "allowing errors . . . to go unchallenged and later using the error to a client's tactical advantage."[121] *Rule 3.380(c) expressly allows this type of "sandbagging*." And the *Stevens* court said this is not improper; indeed, it "further[s] the interests of justice" and "promote[s] judicial economy" because it "provides a procedural mechanism through which a substantive error can be corrected . . . ."[122] Or, as the *F.B.* court might say, Rule 3.380(c) *promotes* the same interests as the preservation rule because it allows a court "to cure early that which must be cured eventually."[123] The defense gains no tactical advantage from deliberately not raising a sufficiency issue under Rule 3.380(c) and then trying to get appellate relief as fundamental error; and the defendant is the only one who might suffer in the interim. Thus, requiring sufficiency issues to be preserved does not help prevent improper "sandbagging."

Nor is the preservation rule needed to keep trial courts in their proper role as neutral arbiters. Trial courts can always grant an acquittal even if neither party moves for it, under Rule 3.380(a): "If, at the close of evidence . . . , the court is of the opinion that the evidence is insufficient . . . , it may . . . enter a judgment of acquittal."[124] We cannot say the preservation rule is needed to keep-judges-neutral if they already have authority to *sua sponte* rule on the issue that we are saying must to be preserved in order to keep-judges-neutral. This language in Rule 3.380(a) also indicates that unpreserved

120. Burks v. United States, 437 U.S. 1, 18 (1978).
121. *F.B.,* 852 So. 2d at 229.
122. *Stevens,* 694 So. 2d at 733.
123. *F.B.*, 852 So. 2d at 229 (quoting Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).
124. FLA. R. CRIM. P. 3.380(a).

sufficiency issues could be raised on direct appeal without resort to fundamental error. The issue could be framed as "the trial court abused its discretion by failing to grant an acquittal *sua sponte*."

In sum, the justifications that undergird the preservation rule do not apply in this context. And we have not even noted the potential unfairness of that rule in this context.

Consider the dilemmas for defendants created by a limited fundamental error test. Suppose the only viable issue on direct appeal is an unpreserved sufficiency issue. The defendant will have to choose between continuing with the appeal (hoping to convince the appellate court to address the unpreserved issue) or dismiss the appeal and go directly to a Rule 3.850 motion based on IAOC. But what if it is not clear whether the issue was preserved? If the defendant dismisses the appeal and files the Rule 3.850 motion, he runs the risk of then losing that motion because the courts will eventually decide that the issue *was* preserved and thus there was no IAOC. Rule 3.850 "does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal . . . ."[125] Thus, if the issue was preserved, it must be raised on appeal and cannot be raised under Rule 3.850. If Defendant guesses wrong and dismisses the appeal because he thinks the issue was unpreserved but the courts later conclude it was, then he is trapped by his failure to predict how the court would eventfully rule on the preservation issue.

What if there is more than one viable issue on appeal? Defendant must then decide whether he wants to go forward with the appeal, which, even if the court refuses to address the unpreserved sufficiency issue, could still result in his getting a new trial on another issue; or dismiss the appeal, give up the possibility of winning any new-trial issues, and try to get immediate relief on the unpreserved sufficiency issue.

What if he is convicted of two charges, one a life felony, one a third-degree felony, and he has a good unpreserved sufficiency issue as to the life felony? If successful on that issue, he will eliminate the life sentence he is serving on that count and be left with the five-year sentence on the other count. But if he wins the life felony sufficiency issue, he can also get the five-year sentence reconsidered, perhaps even reduced to a time-served-by-that-point disposition. This might be, say, about twenty months, if he wins on direct appeal or after dismissing the appeal and going directly to Rule 3.850. But he may fully serve the five-year sentence if he needs to go through the (unsuccessful) direct appeal and then file the Rule 3.850 motion (which may

125. FLA. R. CRIM. P. 3.850(c)(7).

also have to be appealed) before getting relief on the unpreserved sufficiency issue on the life felony. So again, the dilemma: Go forward with the direct appeal or dismiss and go directly to Rule 3.850 and the IAOC claim as to the life felony (which would mean giving up any challenges to the second count; and what if he has a good *preserved* sufficiency issue on that count?).

Does any of this seem even remotely fair?

If the evidence is insufficient, then the defendant was convicted of an unproven crime. Unless an appeal bond is granted—and that will probably cost something—he will likely suffer some type of constraint (possibly prison) between the time the sentence is imposed and the time the improper conviction is remedied. And he is the only one so constrained; the State suffers no direct loss regardless of the ultimate outcome.

Further, the defendant, the only trial participant who is *not* expected to know what evidence is needed to prove an offense, will generally have to remedy the error herself. She will have to learn how to prepare a Rule 3.850 motion and, assuming she can do that (not merely a formal assumption, given the education and mental health of many defendants), she will find her motion sitting in a pile of such motions on the trial court's desk, awaiting resolution.

And how does the criminal justice system benefit if defendants must languish under restraint (at taxpayer's expense) for a longer time, and must initiate post-conviction proceedings (which may include another appeal) before the mandatory remedy is granted? The specter of innocent people spending longer time in prison because of procedural quirks in the system is not likely to engender public confidence in that system (which has already been damaged by the fact of an erroneous conviction in the first place).

Of course, all this assumes the unpreserved sufficiency issue has merit. Perhaps the *F.B.* court was concerned that a blanket fundamental error rule will encourage the raising of more unpreserved issues, thus increasing appellate courts' workloads. Such concerns are unfounded, particularly if we have a rule that recognizes fundamental error in some circumstances.

Appeals from criminal convictions, especially after trials, are essentially automatic already. Sufficiency issues are not raised that often; extra judicial labor would be needed only in those rare cases where there is a serious sufficiency issue that was not preserved. In those rare cases, appellate counsel on direct appeal will probably argue 1) the issue was preserved, and 2) if not, the issue is one of fundamental error under *F.B.* As one district court noted, "a two-part analysis may be necessary to determine whether we may review [a possibly unpreserved sufficiency issue]: first, we must analyze the argument below to determine whether it is the same argument presented to us; and second, if it is not, we must determine whether the error sought to be

corrected is fundamental."[126] In addressing these issues, the appellate court will probably form at least a preliminary opinion of the merits of the sufficiency issue; we have to know what *kind* of insufficiency we are dealing with to determine whether it falls within the *F.B.* exception. Given all this, judicial economy is best served by recognizing a blanket fundamental error rule in this context.

In sum, there is no reason for requiring preservation in this context and every reason not to.

C. CAN UNPRESERVED SUFFICIENCY ISSUES BE RAISED AS IAOC CLAIMS?

Until now, we have assumed that defense counsel's failure to raise a valid sufficiency issue under Rule 3.380(c) will always be IAOC. We now see if that assumption is warranted. The *Monroe* court did not consider whether it could grant relief on the basis of IAOC because Monroe did not raise the issue and, in any event, allowing this "would be tantamount to holding that such an issue need not be preserved, contrary to the holding in *F.B.*"[127] *Monroe* did not note *Barber*, which held that an unpreserved sufficiency issue could not be addressed on direct appeal as an IAOC claim if the trial court did not rule on that issue.[128] But the law has changed significantly since *Barber*, in three ways.

First, when *Barber* was decided, the remedy for successfully raising a sufficiency issue on appeal was a new trial.[129] Thus, concern for the improper "sandbagging" strategy may have been behind *Barber*'s reasoning. But in 1978 it was established that double jeopardy principles bar a retrial if a court finds the evidence insufficient as a matter of law.[130] This change in the law may undermine the reasoning of *Barber*.

Second, it has now been established that a sufficiency claim can be initially raised post-verdict under Rule 3.380(c).[131] Rule 3.380(c) was in effect when *Barber* was decided but it was first promulgated in December of

126. A.P.R. v. State, 894 So. 2d 282, 286 (Fla. Dist. Ct. App. 2005).

127. Monroe v. State, 148 So. 3d 850, 860, n.3 (Fla. Dist. Ct. App. 2014).

128. *See* State v. Barber, 301 So. 2d 7, 9 (Fla. 1974).

129. *See, e.g.*, Cordell v. State, 25 So. 2d 885, 887 (Fla. 1946).

130. *See* Burks v. United States, 437 U.S. 1, 11 (1978); Greene v. Massey, 437 U.S. 19, 24 (1978); Tibbs v. State, 397 So. 2d 1120, 1125–26 (Fla. 1981). Before 1978, Florida courts did not distinguish between "evidentiary sufficiency" and "evidentiary weight" and they simply granted a new trial if they felt either ground was established. *See Tibbs*, 397 So. 2d at 1125–26. *Tibbs* held that Florida appellate courts could no longer grant new trials on "weight" grounds; only trial courts could do that. *Id.* at 1125-26.

131. State v. Stevens, 694 So. 2d 731, 733 (Fla. 1997).

1972 and it became effective on February 1, 1973.[132] It is unlikely that the *Barber* court considered the possible effect of that then-new rule on the case it was deciding; certainly, it did not expressly do so.

Third, and most significant, both the Florida Supreme Court and the United States Supreme Court have now acknowledged that an unpreserved IAOC claim may be raised on direct appeal if "the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue."[133] Indeed, the latter court said there may be cases "when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*."[134] Defense counsel's failure to raise a valid sufficiency issue under Rule 3.380(c) would necessarily constitute IAOC plain on the face of the record.

IAOC claims have two components: deficient performance ("whether counsel's assistance was reasonable considering all the circumstances") and prejudice ("there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different").[135] As to deficient performance, counsel's decisions are reasonable if "based on a proper exercise of judgment based on an adequate knowledge of the facts and . . . correct legal grounds."[136] "It is well established . . . that 'a tactical or strategic decision is unreasonable if it is based on a failure to understand the law.'"[137]

Unpreserved IAOC claims can be raised on direct appeal if "the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable."[138] The Florida Supreme Court has found IAOC plain-on-the-face in only one case, a death penalty case in which trial counsel had a serious and obvious conflict of interest.[139] The district courts have become increasingly receptive to addressing on direct appeal unpreserved issues (of all types) under the IAOC heading.[140]

132. In re Fla. Rules of Crim. Procedure, 272 So. 2d 65, 65, 115 (Fla. 1972).

133. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987); *see also* Massaro v. United States, 538 U.S. 500, 508–09 (2003).

134. *Massaro*, 538 U.S. at 508.

135. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

136. United States v. Cronic, 839 F.2d 1401, 1404 (10th Cir. 1988).

137. Butler v. State, 84 So. 3d 419, 421 (Fla. Dist. Ct. App. 2012) (citations omitted).

138. Corzo v. State, 806 So. 2d 642, 645 (Fla. Dist. Ct. App. 2002). *Accord* Eure v. State, 764 So. 2d 798, 801 (Fla Dist. Ct. App. 2000); Rios v. State, 730 So. 2d 831, 832 (Fla. Dist. Ct. App.1999).

139. *See* Foster v. State, 387 So. 2d 344, 345–46 (Fla. 1980). Counsel represented both Foster and a co-defendant who entered a plea and testified for the State. *Id.* at 344–45.

140. *See* Antunes-Salgado v. State, 987 So. 2d 222, 224–29 (Fla. Dist. Ct. App. 2008) (allowing damaging hearsay statements into evidence); Capiro v. State, 97 So. 3d 298, 301 (Fla. Dist. Ct. App. 2012) (failing to request an instruction on the only defense); *Eure*, 764 So. 2d at

With sufficiency issues, it may be reasonable for counsel to forgo moving for an acquittal during trial because counsel does not wish to alert the State to the hole in its proof and give it a chance to plug it. But if the evidence is insufficient, there is no conceivable reason for counsel's failure to file a Rule 3.380(c) motion. The State cannot cure-the-deficiency at that point. There is no downside risk to filing such a motion. Failing to file that motion is, plainly, deficient performance. The prejudice that failure causes is equally plain. If the sufficiency issue has merit, counsel's failure to file the motion means the trial court will not grant relief and, even if that court would have denied the motion, at least the issue is now preserved, for the appellate court to grant relief.

In sum, if it is clear from the record that the State failed to prove its case, it is IAOC-plain-on-the-face-of-the-record if counsel failed to raise the sufficiency issue under Rule 3.380(c).

Three of the five Florida district courts have granted relief on unpreserved sufficiency issues by holding the failure to preserve was IAOC plain on the face of the record.[141] Indeed, if we wish to discourage the "sandbagging" strategy with evidence sufficiency issues, it is better to remedy unpreserved issues under the heading of IAOC. Counsel thinking of engaging in such a strategy might think again if they know that, if relief is granted on the unpreserved issue, the fault to be expressly placed on counsel's head.

V. UNPRESERVED EVIDENCE SUFFICIENCY ISSUES IN OTHER JURISDICTIONS

Five courts in other jurisdictions have recognized that the failure to properly preserve a valid sufficiency issue constitutes IOAC that can be remedied on direct appeal.[142] Other courts acknowledge that the failure to

801 (failing to object to improper remarks in closing argument); Rodriquez v. State, 761 So. 2d 381, 383 (Fla. Dist. Ct. App. 2000) (failing to object to the State's improper impeachment of defendant regarding his prior record).

141. *See* Gordon v. State, 126 So. 3d 292, 294–96 (Fla. Dist. Ct. App. 2011); Guarscio v. State, 64 So. 3d 146, 148–49 (Fla. Dist. Ct. App. 2011); Hicks v. State, 41 So. 3d 327, 331 (Fla. Dist. Ct. App. 2010); Kramer v. State, 15 So. 3d 790, 792 (Fla. Dist. Ct. App. 2009); Larry v. State, 61 So. 3d 1205, 1207–09 (Fla. Dist. Ct. App. 2011). These cases do not note Rule 3.380(c), but nonetheless find counsel's failure to raise a valid sufficiency issue to be IAOC-plain-on-the-face-of-the-record. *See Gordon*, 126 So. 3d at 294–96; *Guarscio*, 64 So. 3d at 148–49; *Hicks*, 41 So. 3d at 331; *Kramer*, 15 So. 3d at 792; *Larry*, 61 So. 3d at 1207–09. Putting Rule 3.380(c) in the mix only makes an unassailable argument even stronger. *See Gordon*, 126 So. 3d at 294–96; *Guarscio*, 64 So. 3d at 148–49; *Hicks*, 41 So. 3d at 331; *Kramer*, 15 So. 3d at 792; *Larry*, 61 So. 3d at 1207–09.

142. *See* State v. Westeen, 591 N.W.2d 203, 210–11 (Iowa 1999); Testerman v. State, 907 A.2d 294, 305–06 (Md. Ct. Spec. App. 2006); Holland v. State, 656 So. 2d 1192, 1197–98 (Miss. 1995); State v. Denis, 678 N.E.2d 996, 998 (Ohio Ct. App. 1996); State v. Lopez, 27 P.3d 237, 238, 241 (Wash. Ct. App. 2001).

address a valid-but-unpreserved sufficiency claim on direct appeal will only result in additional judicial labor at the post-conviction level, where the sufficiency issue will reappear as an IAOC claim.[143]

This problem does not even arise in many states, because they either do not require sufficiency issues to be preserved at all or, if they do, they recognize such a broad exception to that rule (generally a "plain error" exception) that the practical effect is the same, *i.e.*, sufficiency issues need not be preserved. Collecting the cases and interpreting its own applicable statute as "allow[ing] an accused to raise a challenge to the sufficiency of the evidence for the first time on appeal as a matter of right," in 2004 the Wisconsin Supreme Court asserted that "it is manifestly unjust for an appellate court to apply the waiver rule to a challenge to the sufficiency of the evidence" for three reasons.[144]

First, when an accused challenges the sufficiency of the evidence, he or she is arguing that the State has not carried its burden of proving the commission of a crime . . . . Such a claim presents a very serious issue in the administration of justice. If the claim can be proved but is deemed waived, a person whom the State has not proved guilty . . . would remain incarcerated.[145]

Here, the court summarized the cases from other jurisdictions, noting that: 1) Several courts agreed with the *Hayes* court "that the potential miscarriage of justice resulting from a conviction based on insufficient evidence is so great as to justify review even when the issue was not [preserved];" and 2) other courts say sufficiency challenges are *always* preserved (even if not raised at trial) because, "by merely entering the plea of not guilty, the defendant has asked for a judgment of acquittal and has challenged the sufficiency of the evidence by implicitly asserting that the State does not have enough evidence to meet its burden of proof."[146] The "general sense from the cases," the *Hayes* court concluded, is that

> because a challenge to the sufficiency of the evidence goes to the heart of a determination of guilt . . ., courts will find a way to address the challenge on its merits. The need to protect the integrity of a finding of guilt is such that courts hesitate to treat the issue as waived. The waiver doctrine is muted because it limits the right of an accused to

143. People v. Heywood, 2014 WL 3955201, at * 2 (Colo. App. 2014); People v. Lacallo, 338 P.3d 442, 456–57 (Colo. App. 2014); State v. Ashley, 889 P.2d 723, 729 (Idaho Ct. App. 1994); State v. Lyles, 517 A.2d 761, 768–69 (Md. 1986); State v. McAdams, 594 A.2d 1273, 1278–79 (N.H. 1991); State v. Hayes, 681 N.W.2d 203, 228–29 (Wis. 2004).

144. *Hayes*, 681 N.W.2d at 212, 214.

145. *Id.* at 212.

146. *Id.* at 212–13.

> have the State prove its case . . . and because the waiver doctrine is imported from civil actions without fully considering the accusatorial system of criminal justice.
>
> These courts conclude that a challenge to the sufficiency of the evidence is of sufficient import that an accused should be entitled to raise it on appeal as of right even when the challenge was not raised during trial.[147]

The second reason why sufficiency issues need not be preserved is that, although "it is preferable to give the State an opportunity" to cure-the-deficiency during trial,

> the possibility of 'sandbagging' is minimal. After an accused has been . . . convicted, he or she has the burden to prove that no reasonable jury could have come to the conclusion that it did. This burden is heavy . . . . It is therefore unlikely that an accused . . . will try to sandbag the State . . . rather than make the proper . . . motions during trial.
>
> Furthermore . . . persons facing incarceration have little reason to delay in making a motion to dismiss because they will be waiting in prison while an appeal is being litigated. These factors will limit 'sandbagging.'[148]

Finally, "because . . . an [IAOC] claim, which would require proof of essentially the same issues, could be brought in cases like these, prosecutorial and court resources will not be subject to greater taxation as a result of our decision."[149] The court concluded:

> The criminal justice system is designed . . . to punish only those who have committed crimes. If a conviction is not supported by sufficient evidence, it is incumbent upon the legal system to make certain that the conviction is overturned. The guilty should be punished, but those whose guilt has not been proved . . . should not be punished. A challenge to the sufficiency of evidence is different from other types of challenge . . . . This difference justifies allowing a challenge to the sufficiency of the evidence to be raised on appeal as a matter of right despite the fact that [it] was not [preserved]. . . .[150]

Similar cases from other states are collected in the footnote.[151] Although

147. *Id.* at 213–14.
148. *Id.* at 214.
149. *Id.*
150. State v. Hayes, 681 N.W.2d 203, 214 (Wis. 2004).
151. State v. Stroud, 103 P.3d 912, 914, n.2 (Ariz. 2005) ("It is [a] fundamental error to convict a person for a crime when the evidence does not support a conviction.") (citation omitted); People v. Lacallo, 338 P.3d 442, 445 (Colo. App. 2014) ("in Colorado sufficiency of the evidence may be raised for the first time on appeal.") (citing Morse v. People, 452 P.2d 3, 5 (Colo. 1969)); State

the United States Supreme Court has not addressed this problem in recent years, two older cases granted relief on unpreserved sufficiency issues because "a plain error has been committed in a matter so vital to the defendant."[152] The federal circuit courts all agree that unpreserved sufficiency issues can be addressed as plain error, although there is some disagreement on the precise rules to be applied.[153]

v. Otto, 717 A.2d 775, 784 (Conn. App. 1998) (addressing an unpreserved sufficiency claim because it was "of constitutional magnitude alleging the violation of a fundamental right . . . and the record is adequate to permit review."); State v. Faught, 908 P.2d 566, 570 (Idaho 1995) ("a criminal defendant need not move for a directed verdict . . . in order to preserve . . . the issue of whether there was sufficient evidence . . . to convict."); People v. Foster, 547 N.E.2d 478, 483 (Ill. App. Ct. 1989) ("a challenge to the sufficiency of the evidence is an exception to the waiver rule and may be raised for the first time on appeal.") (citing People v. Enoch, 522 N.E.2d 1124 (Ill. 1988)); Mftari v. State, 537 N.E.2d 469, 474 (Ind. 1989) ("sufficiency of evidence may be raised for the first time on appeal."); State v. Thacker, 150 So. 3d 296, 297 (La. 2014) ("When the state's case is devoid of evidence of an essential element of the charged offense, the conviction and sentence must be set aside 'regardless of how the error is brought to the attention of the reviewing court.'") (quoting State v. Raymo, 419 So. 2d 858, 861 (La. 1982); State v. Goyette, 407 A.2d 1104, 1109 (Me. 1979) ("If the evidence was such that under no circumstances could the defendant be found guilty of having violated [the applicable statute], then [the] conviction . . . would rise to the level of an obvious serious prejudicial error depriving him of his fundamental right to a fair trial."); Commonwealth v. McGovern, 494 N.E.2d 1298, 1301 (Mass. 1986) ("findings based on legally insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice."); People v. Wolfe, 489 N.W.2d 748, 751, n.6 (Mich. 1992) ("the failure to [preserve the issue] does not preclude appellate review of the question whether sufficient evidence was presented to support the conviction."); State v. Fosdick, 776 S.W.2d 54, 56 (Mo. Ct. App. 1989) ("If the evidence presented . . . is not sufficient to sustain the conviction, plain error affecting defendant's substantial rights is involved resulting in manifest injustice."); State v. Doe, 583 P.2d 464, 466 (N.M. 1978) ("Although sufficiency of the evidence was not challenged in the lower court nor raised on appeal, the Court of Appeals may clearly consider such a question if . . . the innocence of the defendant appears indisputable, or if the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand."); State v. Booher, 290 S.E.2d 561, 566 (N.C. 1982) ("when this Court firmly concludes . . . that the evidence is insufficient to sustain a criminal conviction, even on a legal theory different from that argued, it will not hesitate to reverse the conviction, *sua sponte*, in order to 'prevent manifest injustice to a party.'") (citation omitted); State v. Hitz, 766 P.2d 373, 376 (Or. 1988) (addressing unpreserved sufficiency issue because "[e]fficient procedures are instruments for, not obstacles to, deciding the merits, particularly when the alternative is a criminal conviction that lacks a basis in law or in fact. The state was not ambushed or misled or denied an opportunity to meet defendant's argument in this case."); Moff v. State, 131 S.W.3d 485, 488 (Tex. Crim. App. 2004) ("If a defendant challenges the legal sufficiency of the evidence to support his conviction on direct appeal, the appellate court always has a duty to address that issue, regardless of whether it was raised in the trial court.") (footnote omitted); State v. Alvarez, 904 P.2d 754, 759 (Wash. 1995) ("'[S]ufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal.'") (citation omitted). *See* State v. McAdams, 594 A.2d 1273, 1275–76 (N.H. 1991) (listing collections of cases on point).

152. Clyatt v. United States, 197 U.S. 207, 222 (1905); *see also* Wiborg et al. v. United States, 163 U.S. 632, 658 (1896).

153. *See* United States v. Delgado, 672 F.3d 320 (5th Cir. 2012).

VI. CONCLUSION

Faced with a valid-but-unpreserved sufficiency claim, a Florida appellate court should "address[] the . . . claim on direct appeal 'to avoid the legal churning which would be required if we made the parties and the lower court do the long way what we ourselves should do the short.'"[154] As the Florida Supreme Court said in the context of fundamental sentencing errors,

> [Failing to address such issues] would neither advance judicial efficiency nor further the interests of justice . . . . [F]ailure to review certain serious sentencing errors would undermine the fairness of the judicial process, . . . rigid adherence to the contemporaneous objection rule [does not] always serve the goal of judicial [economy].
>
> Even assuming the availability of postconviction relief[,] . . . if a goal . . . is efficiency, we are hard-pressed to conclude that shifting to defendants the burden of filing postconviction motions, and to trial courts the burden of processing these additional motions, advances the overall goal of judicial efficiency.
>
> Another potential problem . . . [is] defendants . . . will not necessarily be afforded counsel during collateral proceedings.[155]

The logic in *Maddox* is even more compelling as applied to sufficiency issues. With sentencing issues the validity of the underlying conviction is assumed. The sufficiency issue is the foundation that must be firmly established before we even get to a sentencing issue. Nothing goes to the "the foundation of the case or . . . the merits of the cause of action,"[156] more than the issue of evidence sufficiency, and nothing "amount[s] to a denial of due process"[157] more than ineffective assistance of counsel.

As long as Rule 3.380(c) allows sufficiency issues to be initially raised post-verdict, there is no valid reason to require these issues to be preserved in the trial court.[158] The Florida Supreme Court should adopt this rule and recede from *F.B.*

154. Eure v. State, 764 So. 2d 798, 802 (Fla. Dist. Ct. App. 2000) (quoting Mizell v. State, 716 So. 2d 829, 830 (Fla. Dist. Ct. App. 1998)).

155. Maddox v. State, 760 So. 2d 89, 98 (Fla. 2000).

156. State v. Smith, 240 So. 2d 807, 810 (Fla. 1970).

157. Castor v. State, 365 So. 2d 701, 704, n.7 (Fla. 1978) (citing State v. Smith, 240 So. 2d 807 (Fla. 1970)).

158. *See* Richard J. Sanders, *Evidence Sufficiency and Fundamental Error in Criminal Cases*, 79 FLA. B. J. 28, 34–36 (July/Aug. 2005) (discussing the possibility of modifying Rule 3.380(c) to better handle this problem).