

IN THE SUPREME COURT OF FLORIDA

ROSALYN ANN  
SANDERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-1688

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, ROSALYN ANN SANDERS, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name. NOTE HOW REFER TO COUNSEL FOR AMICUS.

The record on appeal consists of four bound books. The symbol "T" will refer to the book entitled *Transcript of Record on Appeal*. The symbols "I" "II" and "III" will refer to each volume of the record on appeal. "IB" will designate the Initial Brief of Petitioner. "AB" will designate the Amicus Curiae Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

Upon retrial, ordered due to juror misconduct, Petitioner was convicted of 1) First Degree Murder and 2) Shooting into an Occupied Vehicle. (R.40,65; III.444-445). Petitioner was sentenced to life in prison without parole. (R.67-70; III.448-

449). The First District Court of Appeal affirmed Petitioner's conviction and sentence. In doing so, the First DCA certified inter-district conflict on the issue of whether challenges to the sufficiency of the evidence may be raised for the first time on appeal as fundamental error. Sanders v. State, 765 So.2d 778 (Fla. 1<sup>st</sup> DCA 2000).

#### **ISSUE I.**

On 1 February 1997, victim Felix Parker and friend Iris Crenshaw were walking down a street when Larry Moore drove up in his pick up truck. According to Iris, they paid Moore five dollars to drive them to 6<sup>th</sup> Avenue. (I.145-146,150). Iris sat in the middle of the cab and victim Parker sat on the passenger side. (I.153). Instead of going to 6<sup>th</sup> Avenue, however, Moore drove the two to Berwick Street and parked his truck. (I.151).

According to Moore, victim Parker wanted to buy cocaine. (II.203). Moore got out of the truck and met Petitioner and her middleman Myron Davis standing in the front yard of a house. (II.203). Petitioner attempted to sell a single, \$50 piece of crack cocaine. (II.202). She gave the piece to Larry Moore, who in turn walked back to the truck and showed it to victim Parker. Parker did not want the cocaine. Larry Moore came back to the truck with a second piece of crack cocaine, which Parker again rejected. Larry Moore then got into his truck and drove off. (I.151-152).

IRIS CRENSHAW testified that they then heard shots firing and both she and victim Parker turned around and looked out the rear

window. Iris saw Petitioner "standing up shooting the gun just like that." Iris heard four or five shots. (I.151-153). "[T]he window shattered and I looked up at Felix and he was like, he was like gagging and blood was coming out of his mouth." Larry then pushed Felix and Iris out of the truck and drove away. (I.153).

LARRY MOORE, the driver of the truck, testified that as he prepared to leave, Petitioner sent Myron Davis back with a second piece of cocaine, which victim Felix Parker did not want. (II.202,215). Moore stated that as he began to drive away, he heard gunshots. He then looked back, ducked down, and saw Petitioner pointing a gun at the truck. (II.203-204,219).

MYRON DAVIS, Petitioner's middleman, testified that he and Petitioner offered Moore crack cocaine: "I participated in the conversation because she [Petitioner] called me over to get what he had. If he didn't want it, you know - and we showed him something else and we stood there to watch him. After he didn't want it, he drove away." (II.242,244). Davis further testified:

Q: What happened as he started driving away?

A: Well, she started - we started calling them because she said that wasn't all her stuff ... So after then, she just pulled out a revolver and started shooting at the truck.

Q: Did she think that somebody had stolen her crack cocaine?

A: Yeah.

Q: Did she indicate to you that she thought somebody had stolen the crack?

A: [S]he didn't say stolen, she just said that ain't all of it, that ain't it. And I said, well, that's all you gave me and that's all he gave me, so you know. (II.244-246).

Davis testified that he and Petitioner then called out to the truck to stop. (II.257-258). The truck got about 10 to 15 feet away when Petitioner fired four or five times at the truck. (II.258, 245-246). Davis stated that it was minutes - four or five minutes maybe - from the time Petitioner indicated her belief that someone had stolen her crack to the time she fired the shots. (II.257). It was then seconds from the time Petitioner pulled out the gun to the time she fired it. Davis stated that Petitioner made no statement indicating that she was going to shoot. (II.259).

Immediately after the shooting, Petitioner ran behind the house and came back out without the gun. Petitioner ran down to where the victim lay in the street, yelling "somebody need to call the ambulance, somebody done shot this man." Petitioner then fled the scene, asking Moore to tell police that someone else had done the shooting. (II.246-247). Police subsequently recovered a .38 caliber Rossi revolver from behind the house. (II.248,274-275). Petitioner turned herself in 11 days after the shooting. (II.301).

OFFICER JOHN SANDERSON testified that he observed five bullet holes in the truck: "There were three bullet holes to the driver's side rear of the truck and there appeared to be a couple of other ones through the cab of the truck." (II.298).

OFFICER MIKE HALLMARK testified that the bullet slug he removed from the cab had gone through the back of the truck right below the rear glass. He stated that the .38 caliber Rossi revolver recovered from the scene was a five-shot revolver, and that there were five expended shells in the chamber. (II.275-277).

FIREARMS EXAMINER DONALD RAWLS testified that it takes from 3 pounds pressure (cocked) to 13 pounds pressure (uncocked) to pull the trigger. (II.286-287). He stated that the bullet jacket found in the vicinity of the victim's body was fired from the recovered pistol. (II.274-288).

MEDICAL EXAMINER STEVEN HAVARD testified that the victim "had a gunshot wound of entry in the left cheek area just behind the mouth. He had a gunshot wound of exit below the right ear in the upper neck. The carotid artery was transected, causing rapid death from blood loss." (I.181-182). Dr. Havard stated that the path of the bullet through Parker's neck was consistent with his looking over his left shoulder, and that the wound was consistent with a .38 caliber pistol. (I.189,193). Dr. Havard also testified that the lack of soot or stippling around the wound indicated that the gun was fired from more than five feet away. (I.187).

## **ISSUE II.**

Initially, the State notes that defense counsel Earl Overby represented Petitioner only on retrial; Elizabeth Broom represented Petitioner at the first trial. Both of these

attorneys were privately retained. Further, the State provides the following time-line:

WED	(June 2)	Docket Day
MON	(June 7)	Jury Selected & Sworn
THURS	(June 10)	Trial
FRI	(June 11)	Closing Arguments

On Monday, prior to jury selection, defense counsel Overby was informed that (a) missing State witness Myron Davis had been located, and (b) firearms expert Tom Simmons - who would be testifying that no useful prints were lifted from the gun - was unavailable but that the expert who prepared the original firearms report would testify in his stead. Defense counsel orally moved for a continuance, stating: "It gives the appearance, your Honor, we don't know who is going to be here on Thursday when we start this trial. We simply are placed at a disadvantage in not being able to prepare for trial." The motion was denied. (I.3-5). Petitioner then informed the court and defense counsel acknowledged that witnesses from the first trial were not subpoenaed. The court ordered that they be subpoenaed. (I.5-8).

On Thursday at trial, after the jury was sworn, Petitioner moved for a continuance on the belief that defense counsel was not prepared: "I don't feel that my attorney is ready to represent me as far as this trial right now. I haven't had time to read over anything and - as far as the transcripts of what the witnesses say for this time. And not only that, he - well

this is my life on the line as far as this trial, and he's not prepared." (I.90).

The trial court verified with defense counsel that all witnesses had been subpoenaed, then asked counsel if he was prepared to represent Petitioner. Defense counsel responded that Petitioner was correct in one respect: that he did not receive a copy of the original trial transcripts and was not able to provide her a copy until Monday morning. The court inquired: "You have had a chance to review the transcripts?" Counsel stated: "I have gone over them thoroughly, but due to my absence from the state, I was not able to meet with her." (I.90-91). Defense counsel stated he had read over the transcripts at least five times. (I.93).

The court then asked counsel if he received the depositions from the original case. Counsel stated: "Those I received well in advance." (I.91). The court then asked counsel if he received his discovery request for police transcripts of recorded witness statements. Counsel stated he received those Monday and had reviewed those as well, but not with Petitioner. Defense counsel noted that his preparation normally included going over transcripts with a defendant. (I.92). The court denied Petitioner's request for a continuance, stating that it was more concerned about *defense counsel's* preparedness. (I.91-94). Petitioner then requested permission to dismiss her attorney, which was denied. (I.94-95). The Court stated to Petitioner: "You've expressed concerns about Mr. Overby and he

has responded to that. And based upon his responses, particularly as it relates to the - his studies of the transcripts and depositions and discovery, it appears to the court he's prepared to go forward with the trial. You expressed concerns because he has not gone over those with you; and is that the only concern you have regarding Mr. Overby's representation of you at this point? Petitioner replied "Yes." The court concluded: "I find that Mr. Overby has prepared himself for the trial and has not acted ineffectively and is representing Ms. Sanders up to this point in time competently and effectively." (I.99).

#### SUMMARY OF ARGUMENT

##### **ISSUE I.**

Petitioner was convicted of First Degree Murder. On appeal, Petitioner alleges that the State presented legally insufficient evidence to support a finding of premeditation. The State disagrees.

First, this issue was not preserved, as Petitioner failed to move for judgement of acquittal. Second, Petitioner's claim of error does not constitute fundamental error, as the record is not "totally devoid" of evidence pointing to guilt. Furthermore, at the end of the State's case, the trial court specifically asked defense counsel if there were any motions. Counsel responded "No." Petitioner's failure to object, both on

his own and in response to the trial court's lead, supports the conclusion that sufficient evidence of premeditation existed and that fundamental error did not occur.

Third, on the merits, there was abundant evidence before the jury to justify a finding of premeditation. The State's case consisted primarily of direct testimony by three eye-witnesses. The State submitted evidence of motive, inadequate provocation, reflection on the part of Petitioner, a deadly weapon, the deliberate manner in which the homicide was committed, and the predictable, deadly nature of the wounds.

In total, this evidence was sufficient to establish premeditation, whether treating this case as a direct evidence case or a 'wholly-circumstantial' evidence case (there was sufficient evidence to conflict with Petitioner's theory at trial that Larry Moore did the shooting, and sufficient evidence to conflict with Petitioner's unpreserved theory on appeal that he lacked premeditation).

Lastly, in response to the arguments presented in the Amicus Curiae Brief, the State submits that appellate courts should not treat unpreserved sufficiency issues as "always" fundamental error. To relax the preservation rule and expand the doctrine of fundamental error is contrary to what has been a collective effort to minimize frivolous appeals, maximize judicial efficiency, and place the task of correcting most errors in the trial court.

**ISSUE II.**

The State submits that this issue is outside the scope of the certified conflict issue and should not be addressed. Nevertheless, on the merits, the trial court did not abuse its discretion in denying Petitioner's motion for continuance - made on the first day of trial after the jury was sworn. The record reflects that the trial judge extensively questioned defense counsel regarding his preparedness and assured itself that defense counsel was adequately prepared before denying the motion.

ARGUMENT

ISSUE I

SHOULD THIS COURT HOLD THAT CLAIMS OF LEGAL INSUFFICIENCY OF THE EVIDENCE ARE CLAIMS OF FUNDAMENTAL ERROR WHICH MUST BE ADDRESSED ON APPEAL, EVEN IF THERE HAVE BEEN NO MOTIONS FOR JUDGMENT OF ACQUITTAL FILED IN THE TRIAL COURT? ALTERNATIVELY PHRASED, SHOULD THIS COURT ELIMINATE THE REQUIREMENTS OF RULE 3.380 THAT THE PARTIES FILE MOTIONS FOR JUDGEMENT OF ACQUITTAL IF THEY BELIEVE IN GOOD FAITH THAT THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE CHARGES? (Restated)

Petitioner was convicted of First Degree Murder. On appeal, Petitioner alleged that the State presented legally insufficient evidence to support a finding of premeditation. The State disagrees. First, this issue was not preserved, as Petitioner failed to move for judgement of acquittal. Second, Petitioner's claim of error does not constitute fundamental error, as the record *is not* "totally devoid" of evidence pointing to guilt and the district court correctly refused to address the claim. Third, turning to the merits, there was abundant evidence before the jury to justify a finding of premeditation. This Court should thus affirm.

Additionally, Amicus asserts that appellate courts should treat unpreserved claims of insufficient evidence as "always" fundamental error, cognizable for the first time on appeal. The State disagrees. To relax the preservation rule and expand the doctrine of fundamental error is contrary to what has been a collective effort to minimize frivolous appeals, maximize judicial efficiency, and place the task of correcting most

errors in the trial court. The interaction between the preservation rule and the doctrine of fundamental error enables the appellate courts to balance the need for procedural regularity with the demands of fairness. Thus, this Court should reject Amicus' claim.

### ***Jurisdiction***

Jurisdiction vests in this Court pursuant to Art. V, sect. 3(b)(3), Fla. Const., on the basis of direct conflict between the decision of the First District Court of Appeal in this cause, reported as Sanders v. State, 765 So.2d 778 (Fla. 1<sup>st</sup> DCA 2000), and T.E.J. v. State, 749 So.2d 557 (Fla. 2<sup>nd</sup> DCA 2000); Stanton v. State, 746 So.2d 1229 (Fla. 3<sup>rd</sup> DCA 1999); and Brown v. State, 652 So.2d 877 (Fla. 5<sup>th</sup> DCA 1995).

### **ARGUMENT**

The State orders its response as follows: Section 1 will respond to the merits of the case below; Section 2 will address generally sufficiency of the evidence, the contemporaneous objection rule, and the doctrine of fundamental error. Section 3 will address the amicus curiae brief.

#### **I. SUFFICIENCY OF THE EVIDENCE - THE CASE BELOW**

##### ***Introduction***

Petitioner was convicted of First Degree Murder and sentenced to life in prison without parole. On appeal, Petitioner argued that the State presented insufficient evidence to support a finding of Premeditation, and thus the trial court should have, *sua sponte*, rendered a judgement of acquittal. The State

disagrees. First, the issue was not properly preserved nor was a showing of fundamental error made. The district court did not err in refusing to address this unpreserved claim. Second, this case consisted primarily of direct evidence amounting to competent substantial evidence upon which the jury could reasonably infer premeditation. Third, *assuming arguendo*, that the "wholly circumstantial" evidence rule applies, the State introduced evidence which conflicted with a theory of no premeditation. Accordingly, this Court should affirm.

#### ***Standard of Review***

The standard of review is *de novo*. State v. Williams, 742 So.2d 509 (Fla. 1<sup>st</sup> DCA 1999).

#### ***Preservation***

An appeal may not be taken from a judgement or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. § 924.051(b)(3), Fla. Stat. (2000). The State maintains that the issue is not preserved and does not constitute fundamental error. First, Petitioner did not challenge the sufficiency of the evidence at trial. (II.312,365,370). Further, at the end of the State's case, the trial judge asked defense counsel if there were any motions; counsel responded 'No.' (II.312). Second, applying this Court's definition of fundamental error regarding sufficiency issues, the record was not "totally devoid" of evidence on

premeditation. Thus, Petitioner's claim of insufficient evidence does not constitute fundamental error.

#### Assuming "Wholly-Circumstantial" Case

In order for an issue to be generally cognizable on appeal, the same specific legal argument presented on appeal must have been presented to the trial court. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Florida Rule of Criminal Procedure 3.380(b) requires that a motion for judgement of acquittal "fully set forth the grounds on which it is based." This requirement is of particular importance when examining sufficiency of the evidence under a "wholly-circumstantial" evidence case. The State, in order to survive a judgement of acquittal, must present competent evidence conflicting with the defendant's reasonable hypothesis of innocence.

At trial, Petitioner's hypothesis of innocence was that the driver of the truck, Larry Moore, killed the victim. In contrast, Petitioner's theory on appeal was that he lacked premeditation. Thus, the issue of premeditation is not preserved, because Petitioner did not raise this argument below. He did not argue that the case was "wholly circumstantial" at trial and the State did not have an opportunity to rebut Petitioner's hypothesis of innocence.

#### ***Lower Court Ruling***

The First District Court of Appeal affirmed as follows: "Rosalyn Ann Sanders appeals her conviction for first degree murder, arguing that the evidence was insufficient as a matter of law to establish premeditation[.] Appellant failed to preserve her insufficiency of the evidence issue, however, because she failed to file a motion for judgement of acquittal at trial raising this issue." Sanders v. State, 765 So.2d 778 (Fla. 1<sup>st</sup> DCA 2000).

### ***Merits***

Initially, the State acknowledges that when there is a "total lack of evidence" of guilt, it is appropriate to treat such an anomaly as fundamental error. Nonetheless, the State submits that no one attorney could be so inattentive at trial as to fail to notice when there is absolutely no evidence of guilt. It is doubtful that any jury would ever convict when the State's case is totally lacking in evidence. It is also doubtful that any trial court would allow a jury to convict based upon a complete lack of evidence.

It is almost a pro forma response to move for a judgement of acquittal at the end of the State's case if there is **any** basis for the motion; this is particularly so when, as in the instant case, the trial judge specifically asks counsel if there are any motions. Unless, as in the instant case, a motion for judgement of acquittal would be frivolous and trial counsel simply refuses to perform a frivolous or useless act. Indeed, given the facts in the case at bar, no one could seriously consider this to be

a case of "no evidence." There was abundant evidence before the jury to justify a finding of premeditation. Furthermore, Petitioner's failure to object, both on his own and in response to the trial judge's lead, supports the conclusion that sufficient evidence of premeditation existed and that fundamental error did not occur.

#### Premeditation

Premeditation is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act and need only exist for such time as will allow the accused to be conscious of the nature of the act about to be committed and the probable result of that act. Woods v. State, 733 So.2d 980, 985 (Fla. 1994). See Williams v. State, 437 So.2d 133, 134 (Fla. 1983) (premeditation may occur in "only a few seconds" and may occur "although the execution flowed closely upon formation of intent.").

Premeditation is seldom proved by direct evidence, absent a defendant's statement of intent or a confession. Thus, premeditation may be established by circumstantial evidence, including "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulty between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Woods v. State, 733 So.2d 980, 985 (Fla. 1999); Holton v. State, 573 So.2d 284, 289 (Fla. 1990).

The issue of premeditation is a question of fact for the jury and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. Assay v. State, 580 So.2d 610, 612 (Fla. 1991). Moreover, a jury is not required to believe the defendant's version of the facts where the State has produced evidence that conflicts with the defendant's reasonable hypothesis of innocence. Washington v. State, 737 So.2d 1208, 1215 (Fla. 1999).

#### Evidence Adduced

The State asserts that the following evidence in the State's case-in-chief was sufficient to establish premeditation, whether treating this as a direct evidence case or a wholly-circumstantial case (there was sufficient evidence conflicting with Petitioner's theory at trial that Larry Moore did the shooting, and sufficient evidence to conflict with Petitioner's unpreserved theory on appeal that he lacked premeditation).

##### (1) **Motive**

While motive is not an essential element of homicide, where, as here, the proof of a crime rests on circumstantial evidence, "motive may become ... important." Norton v. State, 709 So.2d 87, 92 (Fla. 1997), citing Daniels v. State, 108 So.2d 755, 759 (Fla. 1959). Myron Davis testified that Petitioner thought that somebody in that truck had stolen her crack cocaine. She told Davis "that ain't all of it, that ain't it," started calling out to the truck, and when the truck didn't

stop, Petitioner pulled out the revolver and started shooting. (II.244-246).

(2) **Inadequate Provocation**

Myron Davis stated that he tried to make Petitioner realize that nothing was stolen: Q: Did she think that somebody had stolen her crack cocaine? A: Yeah... And I said, **well, that's all you gave me and that's all he gave me, so you know.** (II.245-246). Further, Larry Moore testified that Petitioner gave him a single, \$50 piece of crack cocaine. (II.202). That's it. This was not a major drug transaction. There was no briefcase of cocaine, just a single crack rock. Moreover, Florida law does not permit the use of deadly force to retrieve property, particularly a piece of crack cocaine. <sup>1</sup> Chestnut v. State, 516 So.2d 1144 (Fla. 5th DCA 1987); Falco v. State, 407 So.2d 203 (Fla. 1981).

Petitioner argues that there is no evidence of premeditation, because "she could have been seeking to frighten the occupants, or simply venting her anger at being robbed." (IB.15). However, Petitioner did not assert this theory at trial, and therefore it is irrelevant to the issue of whether the State met its threshold burden. Furthermore, "the fact that one has acted on emotions does not foreclose premeditation" and anger or rage -

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<sup>1</sup>Florida law permits the use of deadly force in self-defense, in defense of others, to prevent the commission of a felony in a dwelling, and in defense of property other than a dwelling to prevent imminent commission of a 'forcible felony'. § 776.012, 776.031, 782.02, Fla. Stat. (1997).

"emotions - may explain, rather than eliminate, the fact of premeditation." Conover v. State, 692 So.2d 312, 313 (Fla. 5th DCA 1997).

Even entertaining Petitioner's claim that she intended to frighten thieves, the State's evidence was inconsistent with such theory. The State's evidence showed that Petitioner aimed her gun directly at the truck, not in the air or at a tire - more commonly seen when one intends to frighten. Further, Petitioner's aim was so good that two bullets ended up inside the cab of the truck, just below the rear glass window, predictably hitting one of the persons inside the truck - hitting them in a vital organ. In addition, Petitioner did not fire just one or two shots, which would have been sufficient to get most people's attention. Rather, she chose to empty all five bullets.

**(3) Time to Reflect**

Petitioner engaged in reflection *before* ever pulling out the gun. She discussed with her middleman Davis: "That ain't all of it, that ain't all of it!" and he responded "That's all you gave me and that's all he gave me so come on." They both then took time to call out to the truck. (II.2442-46). Petitioner waited for the truck to get 10'-15' away, then took time to physically pull out her gun. (II.258,245-246). Davis testified that it was minutes from the time Petitioner indicated her belief that someone stole her crack until the time she fired the gun. (II.257).

The State submits that Petitioner also had time to reflect *after* pulling out the gun. Davis stated it was seconds from the time she pulled out the gun until the time she fired. (II.259). Further, Petitioner emptied the revolver of all five shots. (II.275-277, 298). Thus she had time to reflect between each pull of the trigger, which required 3 to 13 pounds of pressure. (II.286-287). (4) **Deadly Weapon**

Petitioner used a medium caliber, ".38 special" revolver which holds five bullets. (II.285). Firearms expert Donald Rawls testified that it takes from 3 pounds of pressure (cocked) to 13 pounds of pressure (uncocked) to pull the trigger. (II.286-287). Officer Hallmark testified that all five shells were fired. (II.275-276). Given the deadly nature of firearms generally, and the fact that Petitioner fired all five bullets (I.152,II.246), the State contends that such evidence supported the jury's finding of premeditation.

(5) **Manner In Which Homicide Committed**

Petitioner chose to empty her revolver and all five bullets hit the truck. (II.227). The State notes that a single shot can support a finding of premeditation. Peterka v. State, 640 So.2d 59 (Fla. 1994). Also, the evidence showed that Petitioner did not aim her gun at a tire or shoot in the air; she aimed directly at the truck. (II.219). Three bullets hit the rear driver's side of the truck. Two bullets entered the cab of the truck, just below the rear glass. One of those bullets lodged in the rear seat (II.277), and another predictably hit the

victim in the face. (I.181). The State asserts that the fact of Petitioner emptying her revolver of all 5 bullets, and the fact that she aimed into the cab of the truck, aided the jury's finding of premeditation.

(6) **Nature of Wounds**

Felix Parker was shot in his left cheek with an exit wound on the right side of his neck. Parker's carotid artery was transected and Parker died quickly from blood loss. (I.181-182). From the nature of these wounds, the evidence indicated that the shots were fired at or near vital areas of the body. The State contends that such wounds are also strong evidence of premeditation.

In total, the above evidence clearly provided a jury question on the issue of premeditation. And, the State submits that it is readily apparent why defense counsel did not move for a judgment of acquittal.

Summary

First, this issue was not preserved. Second, Petitioner's claim does not constitute fundamental error, as the record is not "totally devoid" of evidence pointing to guilt. Third, there was abundant evidence before the jury to justify a finding of premeditation. This Court should thus affirm.

**II. SUFFICIENCY OF THE EVIDENCE, CONTEMPORANEOUS OBJECTION  
RULE,  
DOCTRINE OF FUNDAMENTAL ERROR**

A. **SUFFICIENCY OF THE EVIDENCE.** Sufficiency is a test of adequacy. Sufficient evidence is "such evidence in character, weight, or amount, as will legally justify the judicial or official action demanded." Tibbs v. State, 397 So.2d 1120 (Fla. 1981). In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Burks v. United States, 437 U.S. 1, 16 N.10 (1978). Conversely, where the State presents a prima facie case for jury consideration, the evidence is deemed sufficient and will survive a motion for judgement of acquittal.

The test of sufficiency on appeal is whether, viewing all evidence and reasonable inferences therefrom in a light most favorable to the State, competent and substantial evidence existed upon which the trier of fact could have reasonably concluded that the defendant committed the crime charged. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). Competent, substantial evidence is tantamount to legally sufficient evidence, and the appellate court will assess the record evidence for its sufficiency only, not its weight.<sup>2</sup> Banks v. State, 732 So.2d 1065, 1067 (Fla. 1999).

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<sup>2</sup>It is important to distinguish legal sufficiency of the evidence from weight of the evidence. Weight is a somewhat more subjective concept. The "weight of the evidence" is the "balance or preponderance of evidence." It is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981).

In a wholly circumstantial evidence case, a special test of the sufficiency of the evidence exists. The State's evidence is sufficient, as a matter of law, if the State offers evidence inconsistent with the defendant's reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1989)(State presented sufficient evidence that was inconsistent with defendant's hypothesis of innocence, in prosecution for first degree murder, to permit submission of circumstantial evidence case to jury); Lord v. State, 667 So.2d 817 (Fla. 1<sup>st</sup> DCA 1005)("if the State does not offer evidence which is inconsistent with the defendant's hypothesis ... the state's evidence would be as a matter of law "insufficient to warrant a conviction.").

It is important to note that sufficiency issues are not derived entirely from information reflected on the pages of a record. Sufficiency of the evidence involves credibility and demeanor of witnesses, flow of evidence, context of evidence, impact of visual aids, and the drawing of reasonable inferences - all of which must be left to the jury. In a wholly-circumstantial evidence case, sufficiency of the evidence also includes the reasonableness of the suggested hypotheses of innocence.

#### **B. CONTEMPORANEOUS OBJECTION RULE**

There exist a few long-standing propositions. In general, an appellate court may review only those questions properly presented to the trial court. Mariani v. Schleman, 94 So.2d 829

(Fla.1957). Proper presentation requires a contemporaneous objection. An objection must be timely and "sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Castor v. State, 365 So.2d 701 (Fla.1978); Jackson v. State, 451 So.2d 458, 461 (Fla. 1984)(same); Fla. R. Crim. P. 3.380(b); § 924.051(1)(b). These objectives are accomplished when the record shows clearly and unambiguously that a request was made for a specific relief and that the trial court clearly understood the request and just as clearly denied the request. State v. Heathcoat, 442 So.2d 955,956 (Fla. 1983).

The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. Appellate review requires a trial motion to afford the trial court an "opportunity of error" before it is subject to review. Barber v. State, 301 So.2d 7, 9 (Fla. 1974). Further, a contemporaneous objection provides the trial court with an opportunity to correct any error at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually. Castor v. State, 365 So.2d at 701, 703 (Fla. 1978). Additionally, a contemporaneous objection enables the record to be made with respect to the claim when the recollections of witnesses are freshest, not years later. It also enables the judge who observed the demeanor of those witnesses to make factual determinations necessary to properly

decide the issue. State v. Jones, 204 So.2d 515 (Fla. 1967). Lastly, the contemporaneous objection rule prohibits counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide defendant with a second trial if the first trial decision is adverse. State v. Rhoden, 448 So.2d 1013, 1016(Fla. 1984).

In the context of a challenge to the sufficiency of the evidence, such issue is properly presented to the trial court via a motion for judgement of acquittal. Barber v. State, 301 So.2d 7,9 (Fla. 1974)("As we have previously stated, unless the issue of sufficiency of the evidence to sustain a verdict in a criminal case is first presented to the trial court by way of an appropriate motion, the issue is not reviewable on direct appeal from an adverse judgement.")(emphasis supplied). Rule 3.380 authorizes a motion for judgment of acquittal during trial or post-trial within 10 days of the jury verdict. See, Fla. R. Crim. P. 3.380; State v. Stevens, 694 So.2d 731 (Fla. 1997)(holding that a ground for judgment of acquittal may be raised for the first time in a post-trial motion pursuant to 3.380(c)). There are no provisions of law authorizing motions for judgement of acquittal on appeal.

C. **FUNDAMENTAL ERROR**

Florida

This Court has described fundamental error in various terminology. See e.g., Randall v. State, 25 Fla. L. Weekly S317 (Fla. 2000) ("For an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process."); Sochor v. State, 619 So.2d 285 (Fla.1993) (Fundamental error occurs in cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. The error must amount to a denial of due process.); Sanford v. Rubin, 237 So.2d 134 (Fla. 1970) (Fundamental error which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action.); State v. Delva, 575 So.2d 643 (Fla. 1991) ("[v]erdict of guilt could not have been obtained without the assistance of the alleged error."); Hamilton v. State, 88 So.2d 606, 607 (Fla. 1956) ("[A] wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."); White v. State, 446 So.2d 1031, 1034 (Fla. 1984) ("We do not find this error to be of the magnitude that would have prevented the jury from reaching a fair and impartial verdict so as to render the error fundamental.")

Fundamental error - as defined within the context of sufficiency of the evidence claims - occurs where a conviction is "totally" unsupported by the evidence. Troedel v. State, 462

So.2d 392, 399 (Fla. 1984)("Appellant's challenges to his convictions and sentences do not include the argument that he was improperly convicted of two separate counts of burglary when there was in fact only one commission of this statutory offense. However, we reach this issue anyway because we believe that a conviction imposed upon a crime **totally unsupported by the evidence** constitutes fundamental error."; Vance v. State, 472 So.2d 734, 735 (Fla. 1985)(same). See also, Negron v. State, 306 So.2d 104 (Fla. 1974)(finding fundamental error where there was **no evidence** establishing the value of the stolen property at time of theft).

It appears that this Court's approach to fundamental error regarding sufficiency issues parallels the approach taken by the federal courts.

#### Federal System

Under Rule 52(b) of the Federal Rules of Criminal Procedure, plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.<sup>3</sup> To be *noticed* under this rule, an error must be "plain" or "obvious" and must have affected the outcome of the District Court proceedings.

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<sup>3</sup> To preserve a challenge to the sufficiency of the evidence and avoid the burden of showing plain error, a defendant in Federal court must have moved for a judgement of acquittal at the close of all the evidence or in a post-trial motion. Fed. R. Crim. P. Rule 29(a,c); United States v. Allen, 127 F.3d 260 (2<sup>nd</sup> Cir. 1997).

"When reviewing sufficiency-of-the-evidence challenges for plain error, a Court of Appeals will reverse only to prevent a manifest miscarriage of justice, which will exist only if record is **devoid of evidence** pointing to guilt, or because evidence on key element of offense was so tenuous that **conviction would be shocking.**" United States v. Spinner, 152 F.3d 950, 956 (D.C. Cir. 1998). See, United States v. Pena-Lora, 225 F.3d 17 (1<sup>st</sup> Cir. 2000)("Total lack of evidence that man whom hostage-taking victim saw carrying firearms was defendant constituted plain error."); United States v. Meadows, 91 F.3d 851 n.6 (7<sup>th</sup> Cir. 1996)("a **complete lack of any evidence** of one of the essential elements of a crime is not only insufficient evidence, but too little evidence to avoid a manifest miscarriage of justice."); Beckett v. United States, 379 F.3d 863, 874 (9<sup>th</sup> Cir. 1967)(finding plain error despite defendant's waiver of sufficiency challenge where there is "**no proof whatsoever**" of one of the essential elements of the charged offense."); United States v. Zolicoffer, 869 F.2d 771, 775 (3<sup>rd</sup> Cir. 1989)(finding plain error where "the record is absolutely **barren of any evidence**" on an essential element of the crime.).

Conversely, when there is "some" evidence, the evidence is legally sufficient to send the case to the jury. United States v. Talley, 188 F.3d 510 (6<sup>th</sup> Cir 1999). "Some" evidence means there is no error; and if there is no error, there certainly cannot be fundamental error.

**D. RELATIONSHIP BETWEEN PRESERVATION & FUNDAMENTAL ERROR**

The legislative and judicial efforts to reform the criminal appeals process over the last several years have been necessary and productive. It is worth emphasizing that the intent and the goals of this collective effort have been to minimize frivolous appeals, to maximize the efficiency of the appellate system, and to place the task of correcting most errors in the lap of the trial court.

The critical statutory amendment affecting an appellate court's jurisdiction and scope of review is contained in the Criminal Appeals Reform Act, section 924.051(3), which states: "an appeal may not be taken from a judgement or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error."

Accordingly, the State submits that the obligation rests upon the courts to recognize and maintain a middle-ground which will secure to the defendant on trial the rights afforded him by law without sacrificing the protection to society. Stated differently, the trial court must maintain a balance through the continued use of both the preservation rule and the doctrine of fundamental error. Petitioner argues that the doctrine of fundamental error should be expanded to encompass all unpreserved claims of insufficient evidence. However, this would eliminate the doctrine of fundamental error from the context of sufficiency issues, thereby disturbing the balance

between the need for procedural regularity and the demands of fairness. As Justice Cardozo explained in Snyder v. Commonwealth of Mass., 54 S.Ct. 330, 338 (1934), "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. **We are to keep the balance** true." (Emphasis added).

As noted prior, the preservation rule serves two important policies. One, in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error, and if appropriate, correct it. Two, a defendant should not be permitted to forego making an objection with the strategy of enhancing the defendant's chance of acquittal and then, if that strategy fails, claiming on appeal that the Court should reverse.

To serve these policies, this Court has held that preservation rules apply to every claim, even constitutional questions. Indeed, with regards to sentencing errors, this Court recently provided that there is no sentencing error that is fundamental for purposes of the new act. See, Maddox v. State, 760 So.2d 89 (Fla. 2000)(all sentencing errors occurring after November 16, 1999 barred if not raised at trial or in 3.800 motion).

The United States Supreme Court has wisely stated, in regards to preservation:

The contemporaneous objection rule is by no means peculiar to Florida and deserves greater respect than Petitioner gives it. Both for the fact that it is employed by a coordinate jurisdiction within the

federal system and for the many interests which it serves in its own right.

Failure to require compliance with the contemporaneous objection rule tends to detract from the perception of the trial of a criminal case as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury.

To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourage those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous objection rule surely falls within this classification.

Wainright v. Sykes, 97 S.Ct. 2497, 2508 (U.S. Fla. 1977).

The State urges that rules of procedure are essential to the administration of justice. Adherence to the preservation rule has a salutary effect of making a trial on the merits the "main event" rather than a "tryout" on the road to the appellate court. If a criminal defendant thinks that an action of the trial court is about to deprive him of his rights and afford him an unfair trial, there is every reason for his following procedure in making known his objection.

The State recognizes that there is a certain point at which an evidentiary insufficiency is so obvious and fundamental - where the record is "devoid of evidence" pointing to guilt. Only at this point should the courts embrace fundamental error. As this Court has stated, "the Appellate court should exercise

its discretion under the doctrine of fundamental error very guardedly." Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). See also, Castor v. State, 365 So.2d 701, 704 (Fla. 1978)("[t]he doctrine of fundamental error is to remain a limited exception to the requirement that a trial judge must be given an opportunity to correct his own errors.").

Enlargement of the concept of fundamental error to include all unpreserved sufficiency issues will contribute nothing to the administration of justice. Moreover, the State argues that an important function of an attorney in a trial is to assist the court. It is the judge's responsibility to supervise the trial. If counsel performs his duty and promptly calls attention to possible insufficiencies in the evidence which he considers prejudicial, the court can examine the issue and if necessary take corrective measures.

The State wishes to stress that corrective measures include the opportunity for the State to reopen its case and present any additional evidence necessary to survive the judgement of acquittal. Pitts v. State, 185 So.2d 164 (Fla. 1966)(ordinarily the question of allowing the reopening of cases is one involving sound judicial discretion which will rarely be interfered with at the appellate level); Fitzhugh v. State, 698 So.2d 571 (Fla. 1<sup>st</sup> DCA 1997)(rejecting Fitzhugh's claim that the trial court erred in *sua sponte* reopening the State's case in order to entertain additional evidence on the new substantive offense); United States v. Rouse, 111 F.3d 561 (8<sup>th</sup> Cir. 1997)("The trial

court has broad discretion to allow the prosecution to reopen its case to establish an element of an offense after the defendant has moved for judgment of acquittal." ). This remedy and the preservation requirement are particularly important in the context of "wholly-circumstantial" evidence cases. In this context, legally sufficient evidence means the State has presented evidence inconsistent with defendant's reasonable hypothesis of innocence. Thus, the defendant must assert a hypothesis of innocence for the State to rebut. Moreover, this hypothesis of innocence must be the same hypothesis raised on appeal. Otherwise, the appellate court cannot engage in an adequate review. The prosecutor will have an eye to the defendant's hypothesis of innocence in preparation and presentation of his case. The prosecutor cannot fashion his case and the evidence to address every conceivable hypothesis of innocence that the defendant could possibly raise. Unless the requirement of preservation is strictly followed, a defendant can engage in sandbagging by asserting one hypothesis at trial, then claiming on appeal that the prosecutor failed to rebut his different theory on appeal (as occurred in the case at bar).

To conclude, the general rule that claims not raised before the trial court may not be raised on appeal applies to every claim unless a defendant can demonstrate that exceptional circumstance of fundamental error. The fundamental error exception applies primarily to those rare procedural anomalies where the State's case is "totally devoid" of evidence pointing

to guilt. The interaction between the preservation rule and the doctrine of fundamental error enables the appellate court to balance the need for procedural regularity with the demands of fairness.

Further, the preservation requirement is firmly entrenched in the appellate system and rules continue to be adopted and amended to promote its goals. Thus, Petitioner's claim that we should relax the preservation rule and expand the doctrine of fundamental error is contrary to what has been a collective effort to minimize frivolous appeals, maximize judicial efficiency, and place the task of correcting most errors in the circuit court.

### III. **AMICUS CURIAE**

Amicus alleges that unpreserved challenges to the sufficiency of the evidence should "always" be treated as fundamental error cognizable on direct appeal. Amicus argues that a conviction based on legally insufficient evidence is a denial of due process and the quintessential example of fundamental error; therefore, appellate courts should always treat unpreserved sufficiency issues as fundamental error. (AB.6-7). The State disagrees.

Initially, the State acknowledges that where a conviction is totally unsupported by evidence of guilt, the evidence would certainly be "legally insufficient" and would constitute fundamental error. However, the State stresses from the outset

that the entire posture of Amicus' argument is premised on the "hypothetical" situation that all challenges to the sufficiency of the evidence are valid challenges resting upon fundamental error. In fact, valid fundamental error claims are an anomaly. Whereas claims of legal insufficiency by motion for judgement of acquittal are commonplace.

Indeed, Amicus repeatedly acknowledges that valid claims of fundamental error are rare, stating: "Trial courts will have additional work in those rare cases where the issue succeeds on direct appeal." (AB.3); "Serious, unpreserved sufficiency issues are rare." (AB.3,14); "Extra judicial labor will be needed only in those rare cases in which there is an unpreserved sufficiency issue that merits serious consideration." (AB.10); "[i]n those rare cases where the issue [of fundamental error] arises." (AB.10).

In short, Petitioner is attempting to take an unrealistic hypothetical and have this Court transform the entire appellate process based upon that hypothetical. Petitioner attempts to blur the very real distinction between the rare, valid case of fundamental error and the countless cases of invalid and unpreserved *claims* of error. Petitioner then argues to this Court that, regardless of which is the case, an appellate court should always engage in a comprehensive **de novo** review. The State urges this Court to keep in mind the real and sizeable distinction between what is and is not fundamental error and to

address Amicus' claims based not on his hypothetical but on the criminal justice system as it operates in fact.

The State suggests that the amicus brief - consisting of 50 pages with 36 often lengthy footnotes - is unduly and unnecessarily voluminous - as evidenced by this Court's order that the original 60 page Amicus brief be reduced to conform to page requirements. Further, the State suggests that the amicus brief tends to obscure the legal issue. Accordingly, in view of page and time constraints, the State will only address the following particulars.

**CLAIM 1. THERE IS NO CLEAR TEST OF FUNDAMENTAL ERROR**

Petitioner argues that the courts have been unable to formulate a coherent test of fundamental error. That the apparent distinction between cases treated as fundamental error and those that are not is whether the State could have possibly "cured the defect" had the issue been raised at trial. The State disagrees. First, while the districts may hold conflicting views on this particular case, Florida and United States Supreme Court case law - which is binding on all districts - is well-settled as to what constitutes fundamental error. To reiterate, fundamental error, as it applies here, exists where the record is "devoid" of evidence pointing to guilt. By contrast, when there is "some" evidence, there is no

error, thus no fundamental error, and the issue becomes one for the jury.

**CLAIM 2.** SUFFICIENCY OF THE EVIDENCE CLAIMS ARE PURE ISSUES OF LAW, ANALOGOUS TO SENTENCING ISSUES, TO WHICH THE CONTEMPORANEOUS OBJECTION RULE DOES NOT APPLY, THUS RENDERING THE CONTEMPORANEOUS OBJECTION RULE MEANINGLESS

Petitioner argues that the contemporaneous objection rule does not apply to pure issues of law, because any error can easily be corrected independent of the verdict. (AB.5-6). Petitioner then implies that sufficiency of the evidence issues are pure issues of law analogous to sentencing issues; thus the contemporaneous objection requirement should not apply. Petitioner is wrong.

First, the Contemporaneous Objection Rule applies to both factual and legal issues, as most recently demonstrated in Maddox v State, 760 So.2d 89 (2000). Under Maddox "sentencing errors occurring after the effective date of amended rule 3.800(b), [November 16, 1999] even fundamental ones, are barred if not raised at trial or in post-trial proceedings pursuant to rule 3.800." Capre v. State, Case No. 5D00-502 (Fla. 5<sup>th</sup> DCA October 20, 2000). Thus, all sentencing issues are subject to the requirements of preservation. Even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. State v. Clark, 363 So.2d 331, 333 (Fla. 1978).

Second, legal sufficiency of the evidence claims are not pure issues of law. To the contrary, sufficiency issues tend to be fact intensive. And even then, this factual information is also a function of witness demeanor and credibility, flow of the evidence, context in which evidence is presented, and the drawing of justifiable inferences by the jury.

Third, Amicus notes that the need to correct sentencing errors quickly and easily led to the creation of Rule 3.800(b). Amicus argues that these same concerns are present regarding evidence sufficiency issues and "perhaps the applicable rules should be amended to provide an equivalent of rule 3.800 (b) for evidence sufficiency issues." (AB.6, FN 2). The State submits that there already exists a functional equivalent in Rule 3.380(c). In State v. Stevens, 694 So.2d 731 (Fla. 1997), this Court held that under 3.380(c), a ground for judgement of acquittal may be raised for the first time in a post-trial motion, within 10 days of the verdict. The Court stated: "[t]his will further the interests of justice in Florida. Our interpretation of the rule provides a procedural mechanism through which a substantive error can be corrected within the time allowed for this motion. Empowering a trial court with the ability to enter a judgment of acquittal ... upon motion under the requirements of rule 3.380(c) will thus promote judicial economy."

Like Rule 3.800(b), Rule 3.380(c) allows a defendant to raise an issue of error (insufficiency of the evidence) for the first time post-trial. This affords the defendant an opportunity to

preserve the issue for appeal and affords the trial court an opportunity to cure any error.

**CLAIM 3. NOT TREATING UNPRESERVED SUFFICIENCY ISSUES AS  
"ALWAYS" FUNDAMENTAL ERROR IS UNFAIR**

Amicus contends that the appellate courts should *always* treat insufficient evidence claims as fundamental error, because to do otherwise would be unfair. In support, Amicus alleges the following. First, Amicus asserts that if claims of insufficient evidence are not always deemed fundamental error cognizable for the first time on appeal, this will lead to a specter of defendants sitting in prison for crimes they didn't commit. (AB.2). However, this contradicts Petitioner's repeated assertions that convictions based on legally insufficient evidence are rare. Moreover, the correct remedy for innocence is proof beyond a reasonable doubt, the assistance of counsel, and a motion for judgement of acquittal.

Second, Amicus argues that if the appellate courts do not address the issue as blanket fundamental, defense attorneys will stop raising them in their briefs and will not inform defendants of the possible sufficiency issues. Amicus asserts that this is unfair because defendants will end up having no knowledge of possible issues. (AB.8-9). The State disagrees.

Once again, Amicus premises his concerns on the rare occurrence of a *valid* insufficient evidence claim. Amicus assumes that if no issue was raised by defense counsel, there

must have been a valid issue overlooked by counsel. The State suggests that Amicus avoids the obvious: that there was no valid issue to raise. Amicus seems to suggest that a defendant has a right to raise an unpreserved, meritless claim. The only "possible issue" which defense counsel should be informing his client of is a *valid* insufficient evidence claim - which Petitioner acknowledges is rare. If there exists no valid sufficiency issue, there is nothing to inform defendant of. Counsel cannot be required to inform a defendant of a sufficiency issue which is without merit. Freeman v. State 761 So.2d 1055 (Fla. 2000)("Appellate counsel cannot be ineffective for failing to raise an issue which is without merit.").

**CLAIM 4. RULE 3.850 IS AN INEFFECTIVE AND UNFAIR REMEDY**

Amicus alleges that Rule 3.850 is not a "reliable alternative for raising the issue [of insufficiency of the evidence.]" (AB.9). This argument is misplaced. Rule 3.850 is not intended to be a vehicle for raising insufficiency of the evidence claims. Smith v. State, 445 So.2d 323 (Fla. 1983)("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."); Teffeteller v. Dugger, 734 So.2d 1009, 1016 (Fla. 1999)("Proceedings under rule 3.850 are not to be used as a second appeal.").<sup>4</sup>

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<sup>4</sup>The total absence of evidence on a statutory element, not asserted by trial counsel, would be grounds for a claim of

Amicus first asserts that the remedy is inadequate because not all defendants are aware of this post-conviction remedy nor are they capable of using it. (AB.9, AB.9 FN 6). This is a misplaced argument for post-conviction counsel. Moreover, the sheer volume of post-conviction pleadings filed suggests that defendants are more than aware of its availability. Further, while there is no right to collateral counsel, a defendant may seek appointment of counsel and such request is usually granted if warranted. Second, Amicus asserts that the rule is unfair because "defendants will have to comply with all the procedural requirements of Rule 3.850; further there is a two year time limit." (AB.9 FN6). The notion that Rule 3.850 is unfair simply by virtue of having to comply with basic filing requirements is untenable.

Third, Amicus asserts that the rule is an inadequate remedy because the trial court is unlikely to recognize a valid claim, for it will be lost among the "endless pile of pro se nonsense." (AB.9, FN6). The State suggests that a *valid* insufficient evidence claim - by its nature apparent on first impression from a record "totally devoid" of evidence - will certainly be recognizable and in fact will stand out amongst the pile. Further, the State submits that, despite the "endless pile of pro se nonsense," the trial courts adhere to their responsibility under the rules of reviewing each case

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ineffective assistance of trial counsel under Rule 3.850.

individually on the merits. There is simply no basis in this record or in the common experience of legal practitioners that trial court judges are neglecting their duties. If they are, appeals are available. Fourth, Amicus asserts that "relief should be automatic, if the sufficiency issue has merit." Thus, the issue should simply be reviewed on direct appeal. (AB.12). Again, Petitioner bases his argument on the rare occurrence of "IF" the sufficiency issue has merit.

In sum, Amicus' fairness arguments are premised on the assumption that the usual scenario involves an unpreserved, but *valid* claim. The reality, however, is that the unpreserved valid claim is an anomaly which cannot serve as the basis for a system of rules designed to promote judicial efficiency in an ever increasing pool of frivolous pleadings. Unlike appellate courts, trial courts are *set up* to specifically handle the volume of post-conviction pleadings. See, *Fla. R. App. P.* 9.140(i). Thus, there is nothing to be gained by transferring the "endless pile of pro se nonsense" to direct appeal in the appellate courts.

**CLAIM 5. TREATING CLAIMS AS "ALWAYS" FUNDAMENTAL ERROR WILL PROMOTE JUDICIAL ECONOMY**

Amicus asserts that since sufficiency issues tend to be relatively simple, judicial economy is best served by recognizing a blanket fundamental error rule. Amicus argues that unpreserved valid sufficiency issues can be addressed quickly

and easily, and that appellate courts can address sufficiency issues as easily as trial courts. (AB.10, AB.10 FN7, AB.18). The State disagrees.

To begin, the issue is not how easy it is for the courts to address the "unpreserved *valid* sufficiency issue." Rather, the issue is how easy it is for a district court of appeal to address all unpreserved sufficiency issues - whether they are valid or not. This is what Amicus proposes. The State submits that judicial economy is not served by addressing all unpreserved insufficiency claims as fundamental error when fundamental error is an isolated, rare occurrence. Furthermore, it is the trial court that is in the best position to accurately and efficiently address sufficiency issues. As noted prior, such issues involve witness demeanor and credibility, the context within which the evidence is presented, the flow of evidence, the impact of visual aids, the reasonable inferences to be drawn, and the cumulative effect of the evidence, i.e., should the case be taken from the jury. These factors are not easily conveyed on the pages of a record on appeal. In short, not only is the trial court in the best position to address sufficiency issues, but preserving the issue in the trial court develops a record that allows for *intelligent* review on appeal.

Amicus also argues that if the district courts do not treat all unpreserved sufficiency issues as fundamental error on direct appeal, the trial court's work load will increase by

virtue of the increase in post-conviction motions. (AB.10). There is no evidence that this is true. Even if it were true, transferring work from trial to appellate courts is an untenable policy.

Amicus argues that without a blanket fundamental error policy, the district court's workload will increase. Specifically, appellate counsel will have to ask the appellate court to relinquish jurisdiction before filing the initial brief, so that the trial court can address the ineffective assistance of counsel claim. Petitioner's assertion is contrary to the rules of procedure. There are no provisions for this and creating such rules would be exceedingly unwise.

Amicus further argues that "If appellate counsel ... believes there is an issue of [in]effective assistance of counsel in ... the trial court, that issue should immediately be presented to the appellate court ... so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary and duplicitous proceedings." quoting Combs v. State, 403 So.2d 418, 422 (Fla. 1981). The State submits that Petitioner misquotes and misrepresents the holding of Combs in order to distort the actual rules of criminal procedure.

Combs was convicted of first degree murder and sentenced to death. Because it is a death penalty case, the *complete* quote of the opinion states:

Section 921.142(5) requires that 'the judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court ... after

certification by the sentencing court of the entire record ...” We construe that terminology to require a full record review for trial error and a determination of the sufficiency of the evidence, as well as the appropriateness of the death sentence. If appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel in either the trial or sentencing phase before the trial court, the issue should be immediately presented to the appellate court that has jurisdiction of the proceedings so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary and duplicitious proceedings.”

Thus, contrary to Amicus’ representation, there is no requirement that in order to pursue an ineffective assistance claim, an appellate court must relinquish jurisdiction during a pending appeal. Such a procedure applies only in death penalty cases pursuant to 921.141(4), Florida Statutes and Rule of Appellate Procedure 9.140(h). See, Brown v. State, 721 So.2d 274, 277 (1998)( “Although Brown does not contest the sufficiency of the evidence for his conviction of first degree murder, we must, nevertheless, make an independent determination that the evidence is adequate. See, § 921.141(4), Fla. Stat. (1997), R. App .P. 9.140(h)” ); Brooks v. State, 762 So.2d 879 (Fla. 2000)(“We find that the purely technical and pro-forma boilerplate motions for judgment of acquittal offered by Brooks were inadequate to preserve a sufficiency of the evidence claim for appellate review. Nevertheless, we will proceed to make an independent determination of whether the evidence presented at trial was sufficient to support Brooks’ first-degree murder conviction. See, e.g., § 921.141(4), Fla. Stat. (1999); Fla. R.

App. P. 9.140(h)"). Bluntly, the State urges that this suggestion that non-capital procedure should adopt capital procedure, which requires 10 to 20 years to infinity to reach finality should be rejected as absurd.

Amicus argues that a defendant is thus left with only three options: 1) proceeding with an appeal with the sufficiency issue unaddressed, 2) dismissing the appeal and filing a 3.850 motion to challenge effectiveness of counsel, or 3) filing a motion to relinquish. (AB.12). Amicus fails to list the one obvious and correct procedural option afforded a defendant: proceed with an appeal, and pursue post-conviction relief thereafter, thereby providing for direct appeal of other meritorious issues yet still affording the defendant the opportunity to seek post-conviction relief via an ineffective assistance of counsel claim.

**CLAIM 6. UNPRESERVED SUFFICIENCY ISSUES MAY BE REVIEWED UNDER RULE OF APPELLATE PROCEDURE 9.140(H).**

Rule 9.140(h) provides:

The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. **In death penalty cases**, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

Amicus seeks to draw in Rule 9.140(h) as a basis for treating all unpreserved sufficiency issues as fundamental error. First,

Amicus attempts to cloud what are clear procedural rules by suggesting that Rule 9.140(h) is unclear in regards to the sentence regarding death penalty cases. (AB.23-24). The State submits that the rule is clear: it provides for automatic review of the sufficiency of the evidence **only** in death penalty cases. See, Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981) ("With respect to the special mention of capital cases in the second sentence of the rule [9.140(h)] we take that sentence to mean no more than that an additional review requirement is imposed when insufficiency of the evidence is not specifically raised on appeal namely, that the reviewing court shall consider sufficiency anyhow and, if warranted, reverse the conviction. The consequences of that action would be to bar retrial under double jeopardy clause."

Second, Amicus suggests that rule 9.140(h), namely the "interest of justice" language, may provide a means under which an appellate court may entertain all unpreserved sufficiency issues as fundamental error. (AB.23-24). The State suggests that this argument has already been considered and rejected by this Court. In Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981), this Court stated in regards to Rule 9.140(h): "This rule, or one of its predecessors, has often been used by appellate courts to correct fundamental injustices, unrelated to evidentiary shortcomings, which occurred at trial. Retrial in these circumstances, is neither foreclosed, nor compelled, by double jeopardy principles." Similarly, in State v. Barber,

301 So.2d 7 (Fla. 1974), this Court rejected the idea that unpreserved sufficiency issues could be reviewable via the "interests of justice" remedy. Barber contended that appellate review of his unpreserved claim of insufficient evidence was proper under F.A.R. 3.7(i) (a predecessor to 9.140) which provides that, in the interests of justice, the appellate court may notice fundamental error apparent in the record even if it has not been made the subject of an assignment of error. This Court rejected the argument, reiterating that "sufficiency of the evidence must be raised by appropriate motion in order to be reviewable on direct appeal." In short, this Court has rejected the use of Rule 9.140(h) to review unpreserved sufficiency of the evidence issues.

**CLAIM 7. THE RULE OF PRESERVATION CANNOT BE RECONCILED WITH THE DOCTRINE OF FUNDAMENTAL ERROR**

Amicus goes into a lengthy discussion on the history of Florida Supreme Court case law in addressing sufficiency of the evidence claims. (AB.24-36). The State suggests that the analysis is irrelevant at best and confusing at most. Amicus concludes by saying that the Barber line of cases (unless a challenge to the sufficiency of the evidence is first presented to the trial court, the issue is waived) cannot be reconciled with the Troedel and Vance line of cases (fundamental error exists only when the conviction is "totally unsupported" by the evidence.) (AB.33-34). The State submits that Amicus

needlessly complicates the issue, in order to avoid recognizing well-settled existing law: that the doctrine of fundamental error is simply an extremely limited exception to the preservation requirement designed to avoid a manifest miscarriage of justice in those rare cases when a conviction is based on a "total lack of evidence."

#### Summary

Appellate courts should not treat unpreserved sufficiency issues as "always" fundamental error. To relax the preservation rule and expand the doctrine of fundamental error is contrary to what has been a collective effort to minimize frivolous appeals, maximize judicial efficiency, and place the task of correcting most errors in the circuit court.

#### ISSUE II

SHOULD THIS COURT ENTERTAIN THIS ISSUE WHEN IT IS OUTSIDE THE SCOPE OF THE CERTIFIED CONFLICT ISSUE? IF SO, DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING PETITIONER'S MOTION FOR CONTINUANCE MADE ON THE FIRST DAY OF TRIAL, AFTER THE JURY WAS SWORN, IN ORDER TO RETAIN DIFFERENT COUNSEL? (Restated)

On appeal, the First District summarily affirmed as follows: "We find no abuse of discretion in the trial court, after finding that defense counsel was prepared to go forward, refusing to grant a continuance." Sanders v. State, 765 So.2d 778 (Fla. 1<sup>st</sup> DCA 2000).

The State recognizes that this Court has discretion to entertain this issue. Trushin v. State, 425 So.2d 1126, 1130

(Fla. 1982)("Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case."). Nevertheless, the State asks this Court to exercise its discretion *not* to entertain this issue. See, Fox v. State, 759 So.2d 680, FN1 (Fla. 2000)("We decline to address the additional issue raised by Fox - which is clearly outside the scope of the certified conflict issue."); Williams v. State, 759 So.2d 680, FN1 (Fla. 2000)(declining to address Williams' collateral claim "which is clearly outside the scope of the certified conflict issue.").

The State submits that this claim is outside the scope of the certified conflict issue, and that Petitioner is simply seeking a second, **de novo** review on the merits. The State submits the following abbreviated argument in support of its position that the trial court did not abuse its discretion.

Petitioner moved for a continuance and first expressed an interest to replace her attorney on the day of trial, *after* the jury was sworn. Petitioner stated: "I don't feel that my attorney is ready to represent me as far as this trial right now. I haven't had time to read over anything and - as far as the transcripts of what the witnesses say for this time. And not only that, he - well, this is my life on the line as far as this trial, and he's not prepared." (emphasis added) (I.90). Petitioner told the court that her only concern regarding defense counsel's preparedness was that he had not reviewed transcripts with her. (I.99).

First, Petitioner's motion was untimely. Petitioner waited until the day of trial - after the jury was sworn and jeopardy attached. Petitioner was present on the day of jury selection, yet never expressed a desire to discharge her attorney. The State submits that the proper time for such motion, at the very latest, is prior to jury selection.

Second, defense counsel had adequate time to prepare. There was a one year interim between the first and second trial. Further, while defense counsel acknowledged that he had not reviewed transcripts with Petitioner, counsel otherwise stated to the court that he had gone over the transcripts of the original trial "thoroughly" and had read them at least five times. Counsel also stated that he had received the depositions from the original trial "well in advance." Finally, counsel stated that he had received requested discovery regarding police transcripts and had reviewed those as well. (I.90-93). The Court thus concluded: "I find that Mr. Overby has prepared himself for the trial and has not acted ineffectively and is representing Ms. Sanders up to this point in time competently and effectively." (I.99).

Third, this case was not complex. This was a routine drug deal gone bad. The State's case was a fairly simple murder case consisting of testimony from three eyewitnesses, two investigators, a firearms expert and the medical examiner. In addition, the witnesses and testimony on both sides was essentially the same as the first trial. Fourth, the trial

court made an extensive inquiry into Petitioner's complaint. The court addressed individually defense counsel's preparedness regarding depositions, transcripts, and discovery. The court scrutinized defense counsel's performance throughout trial, noting at the end: "[A]s I was watching very closely to see whether or not I should have any concerns about your performance, and I will say on the record that I thought you did an admirable job representing your client in this case." (III.448).

Fifth, Petitioner has not alleged any prejudice. Petitioner did not express any dissatisfaction with defense counsel during trial or at sentencing, nor did Petitioner file a motion for new trial. Moreover, Petitioner does not allege prejudice on appeal.

In view of the above, the State asserts that the trial court did not abuse its discretion in adhering to the scheduled date of trial, given that Petitioner waited until the eleventh hour to request her motion for continuance and new counsel - remaining silent both before and thereafter.

The right to counsel cannot be manipulated so as to obstruct the orderly procedure in courts or to interfere with the fair administration of justice, and "judges must be vigilant that requests for appointment of a new attorney on eve of trial should not become a vehicle for achieving delay." Bowman v. United States, 409 F.2d 225, 226 (5<sup>th</sup> Cir. 1969). Furthermore, the trial court extensively questioned defense counsel regarding

his preparation and assured itself that defense counsel was adequately prepared before denying the motion for continuance. Thus, the court did not abuse its discretion. Furman v. State, 429 So.2d 763, 764 (Fla. 1983)(where lower court assured itself that defense counsel was adequately prepared before denying motion for continuance, it did not abuse its discretion in doing so).

#### Summary

The State submits that this issue is outside the scope of the certified conflict issue. Nevertheless, on the merits, the trial court did not abuse its discretion in denying Petitioner's motion for continuance made on the first day of trial after the jury was sworn. The record reflects that the trial judge extensively questioned defense counsel regarding his preparedness and assured itself that defense counsel was adequately prepared before denying the motion.

#### CONCLUSION

The conflict in decisions should be resolved by approving the district court's decision below on the authority of Barber and Tibbs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to **Steven A. Been**, Assistant Public Defender, Leon County Courthouse, 301 S. Monroe Street, Suite 401, Tallahassee, Florida 32301, AND **Richard J. Sanders**, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831, this 20 day of December, 2000.

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Karen M. Holland  
Attorney for the State of Florida

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