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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE AND FACTS

The First District has certified a conflict in the district courts regarding whether unpreserved evidence sufficiency issues in criminal cases can be considered on direct appeal as fundamental error. Sanders v. State, 25 Fla. Law Weekly D1660 (Fla. 1st DCA July 12, 2000). Since this brief addresses the question in general terms, no statement of facts will be included here.

SUMMARY OF THE ARGUMENT

Unpreserved evidence sufficiency issues should always be considered as fundamental error.

In the Florida cases, sufficiency issues are considered fundamental error in some cases but not in others. The cases rarely discuss why this is so. In those cases that have, the crucial question seems to be this: Could the state possibly have cured the evidence deficiency if the issue had been raised at trial? If the answer is no, fundamental error will be found; if yes, the contemporaneous objection rule applies.

This distinction, while valid in the abstract, is meaningless as a practical matter. Rule 3.380(c) allows sufficiency issues to be initially raised in posttrial motions, when it is too late for the state to cure the defect. Thus, since an objection to evidence sufficiency is considered timely even though made when it is too late to cure the defect, it cannot be said that a timely objection is required for "cure the defect" purposes.

Further, this distinction is difficult to apply in practice. If the record contains no evidence to prove a particular fact, appellate courts have no basis for determining whether the state had evidence available

to prove that fact. As the cases discussed in section IV show, Florida courts have been unable to formulate a coherent test for deciding when fundamental error will be found under this "cure the defect" logic.

Recognizing such issues as fundamental error is the fairest and most efficient way to handle the problem. Failure to recognize fundamental error will lead to the specter of defendants sitting in prison for crimes the state did not prove they committed, with either no knowledge of the possible sufficiency issue or limited ability to raise it themselves in postconviction proceedings (proceedings which are cumbersome and untimely). The injustice of such a system will erode public confidence in the judicial system.

Recognizing fundamental error will not undermine the policy objectives of the contemporaneous objection rule. That rule serves three purposes: promoting judicial economy (by allowing trial courts to correct errors immediately, thus preventing appeals and retrials); keeping trial judges in their proper neutral role (which would be compromised if they had to assume the role of advocate to correct unobjected-to errors); and preventing "gamesmanship" (i.e., letting the error go uncorrected and then raising it on appeal, as a hedge against an adverse result at trial). These purposes are not significantly advanced by a contemporaneous objection rule for evidence sufficiency issues; indeed, the "judicial economy" purpose is undermined by the rule in this context.

Recognizing fundamental error will not increase the courts' overall workload. Trial courts will have additional work in those rare cases where the issue succeeds on direct appeal, but the remedy in those cases -- remand for entry of a judgment of acquittal -- is a small burden. If fundamental error is not recognized, trial courts' workload will increase at the postconviction level, as this is the remedy defendants will have to pursue. Since it is easier for trial courts to enter judgments of acquittal than to deal with postconviction motions, recognition of fundamental error will decrease their overall workload.

Recognizing fundamental error will not significantly increase the appellate workload, and may decrease it overall. Serious unpreserved sufficiency issues are rare and, when they do arise, they can usually be quickly addressed. If fundamental error is not recognized, appellate counsel will have to ask the court to relinquish jurisdiction before filing the initial brief, so the trial court can address the issue (as an ineffective assistance of counsel claim). This will cause more problems than it cures, particularly since: 1) Appellate courts can decide the issue as fundamental error as easily as they can decide whether the issue is substantial enough to justify relinquishing jurisdiction; and 2) the ineffectiveness claim is sure to succeed if the unpreserved sufficiency issue has merit.¹

Recognizing fundamental error will not put trial judges in the improper position of being advocates with respect to evidence sufficiency issues; indeed, rule 3.380(a) authorizes trial judges to consider such issues on their own.

Finally, recognizing fundamental error will not encourage "gamesmanship," as long as rule 3.380(c) allows posttrial acquittal motions. There is no tactical reason for failing to make a posttrial motion; and, since the defendant is the one who suffers from the delay if the issue is not raised in the trial court, there is no advantage in failing to raise the issue posttrial and then trying to get appellate relief as fundamental error.

Florida should recognize that evidence sufficiency issues are fundamental error in all cases. To the

¹ This problem will also arise if Florida continues on its present course of recognizing a general rule requiring a contemporaneous objection subject to a vague exception, variously worded in the cases as "no prima facie showing of the elements of the crime"; "conviction of a crime totally unsupported by evidence"; *etc.* See cases discussed in section IV, below. Under this current approach, appellate courts will have to deal with arguments that the unpreserved issue in a given case falls within the exception to the contemporaneous objection rule, as well as (possibly in addition to) motions to relinquish jurisdiction.

extent the case law holds otherwise, the reasoning of those cases is flawed and has been undermined by more recent cases which hold that: 1) double jeopardy bars retrial if a sufficiency issue is successful (which eliminates the "judicial economy" factor); 2) such issues can be initially raised posttrial (which eliminates the "cure the defect" factor); and 3) claims of ineffective assistance of counsel may be raised on direct appeal if they are apparent on the face of the record (as failure to preserve an evidence sufficiency issue clearly is).

ARGUMENT

FLORIDA SHOULD RECOGNIZE THAT UNPRESERVED EVIDENCE SUFFICIENCY ISSUES ARE ALWAYS FUNDAMENTAL ERROR

I. THE CONTEMPORANEOUS OBJECTION RULE AND FUNDAMENTAL ERROR

The contemporaneous objection rule serves the basic purposes of promoting judicial economy; keeping trial judges in their proper neutral role; and preventing "gamesmanship." Murphy v. International Robotic Systems, Inc., 25 Fla. Law Weekly S610, 615 (Fla. Aug. 17, 2000); Porter v. State, 356 So. 2d 1268, 1270-71 (Fla. 3d DCA 1978)(Hubbart, J., dissenting). The rule is a functional rule designed to achieve certain practical results; it creates no substantive rights and it is not to be blindly followed without regard to its purposes:

[The rule's] real purpose ... applies during a jury trial to assure correct rulings ... on questions relating to the admissibility of evidence and [jury] instructions[;] judicial 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.

Williams v. State, 516 So. 2d 975, 976 (Fla. 5th DCA 1987).

Similarly, "[t]he purpose for the contemporaneous objection rule is not present in the sentencing

process because any error can be corrected by a simple remand to the sentencing judge." State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984).²

Fundamental errors are exceptions to the contemporaneous objection rule. The fundamental error doctrine expresses "the overarching concern that a litigant receive a fair trial and that our system operate so as to deserve public trust and confidence." Murphy, 25 Fla. Law Weekly at S615.

There are several definitions of fundamental error in Florida cases. It is an error that "amount[s] to a denial of due process," Castor v. State, 365 So. 2d 701, 704 (Fla. 1978), or "goes to the foundation of the case." Maddox, 760 So. 2d at 95 (citations omitted). "[F]undamental error should be [recognized] where the interests of justice present a compelling demand for its application [or where] a verdict of guilty could not have been obtained without the ... error." Id. at 96 (citations omitted).

II. EVIDENCE SUFFICIENCY AND FUNDAMENTAL ERROR -- IN GENERAL

Convictions based on legally insufficient evidence seem to be quintessential examples of fundamental error. "The 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." In Re Winship, 397 U.S. 358, 364 (1970). Thus, a conviction on insufficient evidence "amount[s] to a denial

² In Maddox v. State, 760 So. 2d 89 (Fla. 2000), this Court reaffirmed the recognition of fundamental sentencing error. Concerns about the need to correct such errors quickly and easily led to the creation of an alternative method for raising such issues. Fla. R. Crim. P. 3.800(b). Applying these same concerns to evidence sufficiency errors compels the conclusion that such errors must also be corrected quickly and easily; the concerns are even more compelling in this context.

The sentencing context may provide some guidance here; perhaps the applicable rules should be amended to provide the equivalent of rule 3.800(b) for evidence sufficiency issues.

of due process." Castor, 365 So. 2d at 704.³ Evidence insufficiency "goes to the foundation of the case," and "the interests of justice present a compelling demand" for a waiver of the contemporaneous objection rule in this context; certainly, "a verdict of guilty could not have been obtained," Maddox, 760 So. 2d at 95-96, had a proper acquittal motion been made.

There are three possible answers to the question of whether evidence sufficiency issues should be considered fundamental error: "always"; "never"; and "sometimes." "Always" and "never" are easy to apply, although this administrative convenience tells us nothing about the relative fairness or efficiency of either position. "Sometimes" raises difficult questions of "when are sufficiency issues fundamental error" and "why are they not fundamental error in other circumstances."

With respect to the "never" position, it is generally sound policy to encourage the addressing of such issues at the trial level. It could be argued that appellate courts' refusal to address unpreserved sufficiency issues may encourage greater diligence at the trial level, which will ultimately make the whole system run smoother. This argument is flawed at several levels.

First, the trial bar is not static pool of unchanging faces that will, collectively, quickly learn from their mistakes. Each year, new faces appear; it is unrealistic to expect that newcomers will quickly grasp all the subtleties of Florida criminal law, regardless of how often their more experienced colleagues have made

³ Many courts in other jurisdictions say evidence insufficiency is a constitutional due process violation that may be raised on appeal even though unpreserved. State v. Roy, 658 A.2d 566 (Conn. 1995); State v. Puaoi, 891 P.2d 272 (Hawaii 1995); State v. Barker, 851 P.2d 394 (Kan. App. 1993); State v. Cole, 554 So. 2d 831 (La. App. 1989); People v. Wolfe, 489 N.W.2d 748 (Mich. 1992); State v. Gardner, 536 N.E.2d 1187 (Ohio App. 1987); State v. Alvarez, 904 P.2d 754 (Wash. 1995).

mistakes. The trial bar will never be perfect.⁴

This highlights a second problem with the "never" approach: its unfairness. In declining to address unpreserved sufficiency issues, appellate courts would be attempting to modify the behavior of the trial bar by inflicting pain on their clients. But clients are not to blame for the oversight; yet they are the ones who suffer from the mistake. There is no justice in making them pay for their lawyers' continuing legal education. If education of the trial bar is the goal, recognizing unpreserved sufficiency claims on direct appeal as ineffective assistance claims would be more effective; people learn from their mistakes more quickly if they, rather than someone else, suffer the consequences.

The "never" approach causes further problems. If appellate courts do not address such issues as fundamental error, counsel will stop raising them in their briefs. The appellate court will then not know whether counsel is aware of the issue, which means the court will not know whether counsel has informed the client of the issue.⁵ The court could remedy this problem with a short opinion noting the issue and advising the defendant of his options; but an opinion addressing the merits would be just as easy.

Even if notice to the defendant is somehow assured, the "never" approach has a further problem: the lack of a reliable alternative procedure for raising the issue. Rule 3.850 is unsatisfactory. It cannot be assumed that all wrongfully convicted defendants are aware of this remedy and are capable of using it. Rule

⁴ As discussed in section IV below, the same unpreserved issues occasionally reappear in the district court cases. Obviously, some lawyers are not learning the lesson.

⁵ This logic dictates that appellate courts should address unpreserved sufficiency issues even if appellate counsel fails to raise them. Both this Court and two district courts have followed this course. Troedel v. State, 462 So. 2d 392 (Fla. 1984); O'Connor v. State, 590 So. 2d 1018 (Fla. 5th DCA 1991); Dydek v. State, 400 So. 2d 1255 (Fla. 2d DCA 1981). Courts in other jurisdictions have as well. United States v. Santistevan, 39 F.3d 250 (10th Cir. 1994); State v. Todd, 805 S.W.2d 204 (Mo. App. 1991).

3.850 can be a difficult and time-consuming procedure, especially for the uneducated and illiterate.⁶

Aside from its unfairness, the "never" approach will not advance the policy objectives of the contemporaneous objection rule. The judicial system would not be unduly burdened, at either the appellate or the trial level; indeed, the courts' overall workload may increase. Nor will recognizing fundamental error put trial judges in an improper role or encourage "gamesmanship."

The "never" approach will not significantly reduce the appellate court's workload. Appeals from criminal convictions are virtually automatic already. Evidence sufficiency issues (whether preserved or not) are rarely raised. If fundamental error is recognized, extra judicial labor will be needed only in those rare cases in which there is an unpreserved sufficiency issue that merits serious consideration.

The "sometimes" approach will not significantly reduce appellate courts' workload either. If evidence sufficiency issues are "sometimes" fundamental error then, in those rare cases where the issue arises, appellate counsel will no doubt argue that the issue is one of fundamental error under the existing exception to the contemporaneous objection rule. Thus, the appellate court will have to address that issue in any event. Since sufficiency issues, on the merits, tend to be relatively simple, judicial economy is best

⁶ One district court has said (albeit in dicta) that evidence sufficiency issues cannot be directly raised in a rule 3.850 motion. Meek v. State, 566 So. 2d 1318, 1319 (Fla. 4th DCA 1990). This seems to be correct; such issues "could have or should have been raised at trial and, if properly preserved, on direct appeal," and thus are barred by rule 3.850(c). This means sufficiency issues will have to be phrased as ineffective assistance claims. Defendants will have to comply with all the procedural requirements of rule 3.850; further, there is a two year time limit. Fla. R. Crim. P. 3.850(b). Defendants are not entitled to assistance of counsel in preparing such motions. Finally, if the defendant gets a proper motion filed in a timely fashion, he gets to go to the end of the line in the trial judge's chambers, underneath that unending stack of pro se postconviction motions full of handwritten hieroglyphic scrawl, miscited and misstated cases, and paranoid rantings. The possibility that the trial court will quickly discover a legitimate sufficiency issue in this pile of general nonsense is, maybe not impossible, but probably unlikely. "Needle in a haystack" is the obvious metaphor; "panning for gold in a sewer" is more accurate.

served by recognizing a blanket fundamental error rule in this context.⁷ This would allow appellate courts to get right to the merits without being detoured into the issue of the applicability of the existing limited fundamental error doctrine.

Further, both a "never" and a "sometimes" approach may increase appellate courts' motion work. "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." Combs v. State, 403 So. 2d 418, 422 (Fla. 1981). Since the trial court has no jurisdiction to hear a rule 3.850 motion while an appeal is pending, State v. Meneses, 392 So. 2d 905 (Fla. 1981), this means appellate counsel must file a motion to relinquish jurisdiction in the appellate court. If appellate courts require that motions to relinquish jurisdiction must establish something like "a prime facie showing of entitlement to relief" before they will grant such motions, then appellate courts will, in effect, already be addressing the sufficiency issue in the motion to relinquish. Appellate courts may avoid this problem by adopting a blanket policy of either granting or denying motions to relinquish. But a blanket denial policy will mean that appellate courts may have to address other (perhaps complex) issues in appeals that could be

⁷ As the cases discussed in section IV below illustrate, unpreserved sufficiency issues tend to be relatively simple. The law regarding the elements of most Florida criminal offenses is well-settled and easily determined. Whether the facts in the record prove all those elements is generally a simple question as well; when the law is well-settled, applying that law to record facts is usually easy. Granted, some trials are lengthy and complex, and the determination of evidence sufficiency may require analysis of conflicting circumstantial evidence. But, if the cases are a valid measure, it appears that sufficiency issues tend to be overlooked in factually simple cases, presumably because defense counsel is simply unaware of the applicable law. In complex circumstantial cases, acquittal motions are usually made, precisely because the issue is so obvious that only an idiot would fail to raise it (and, of course, we have no idiots practicing criminal law in Florida).

easily disposed of on a sufficiency basis, if the sufficiency issue has merit. A blanket policy of granting such motions transfers the problem to the trial courts. If jurisdiction is relinquished, new counsel will be needed; original trial counsel cannot argue his own ineffectiveness. However, defendants are not entitled to appointed counsel for such purposes. Graham v. State, 372 So. 2d 1363 (Fla. 1979).⁸

This means a defendant's options include: proceeding with his appeal (with the sufficiency issue going unaddressed); dismissing his appeal and filing a rule 3.850 motion (thus surrendering his appellate rights on any other possibly meritorious issues and staking everything on the sufficiency issue); or filing a motion to relinquish which may require the defendant to prepare a pro se 3.850 motion while the appeal is stayed. This is hardly a fair or efficient way to handle the problem, particularly since postconviction relief should be automatic if the sufficiency issue has merit.⁹

⁸ Graham dealt with the issue of appointing counsel after an evidentiary hearing was set on a rule 3.850 motion (and held that appointment of counsel was discretionary, not mandatory). Graham did not address the problem of appointing counsel to help the defendant prepare a rule 3.850 motion. There are no cases authorizing the appointment of counsel for such purposes.

⁹ There are two components to an ineffective assistance claim: "Deficient performance" and "prejudice." Strickland v. Washington, 466 U.S. 668, 687 (1984). Failure to raise a valid sufficiency issue should be per se ineffectiveness. Deficient performance is shown by the fact that counsel is supposed to know the applicable substantive and procedural rules, Wright v. State, 446 So. 2d 208, 209 (Fla. 3d DCA 1984); Chapman v. State, 442 So. 2d 1024, 1026 (Fla. 5th DCA 1983), and no tactical reason could justify the failure to raise a sufficiency issue. Counsel may legitimately forego making a motion during trial because he does not wish to alert the state to (possibly curable) defects in its evidence; but failing to make a posttrial motion is wholly unjustified. The showing of prejudice is equally clear: A proper motion would have resulted in an acquittal. Compare Crowe v. Sowders, 864 F.2d 430, 434, (6th Cir. 1998)("we must assume that had Crowe's counsel [properly objected], the ... trial court would have acted in accordance with the law.").

The few reported cases on point support the conclusion that postconviction relief should be automatic. Lowman v. Moore, 744 So. 2d 1210, 1211 (Fla. 2d DCA 1999)(finding appellate counsel ineffective for failing to argue a valid sufficiency issue as fundamental error); Sapio v. State, 643 So. 2d 68, 69 (Fla. 5th DCA 1994)(remanding for evidentiary hearing on a 3.850 motion because "had the [sufficiency] argument been presented, a different result would have occurred."); Holsclaw v. Smith,

Finally, in the overwhelming majority of Florida cases that require a contemporaneous objection for sufficiency issues, the appellate court goes on to address (and reject) the merits. See, e.g., Woods v. State, 733 So. 2d 980, 984-86 (Fla. 1999).

Thus, recognizing unpreserved sufficiency issues as fundamental error will not unduly burden the appellate courts, particularly if they are going to address such issues anyway. Addressing such issues as fundamental error is the most efficient way to handle the problem, as it would eliminate the need for postconviction proceedings (which might not commence until after the defendant tried to convince the appellate court to address the issue on direct appeal, or relinquish jurisdiction, or both).

Nor will the trial courts' workload increase if fundamental error is recognized in this context. Trial courts will have additional work only in those rare cases where the issue succeeds, and the remedy in those cases -- remand for entry of a judgment of acquittal -- is a small burden. Conversely, requiring contemporaneous objections for sufficiency issues increases the courts' workload with respect to post-conviction motions.

In sum, requiring contemporaneous objections for evidence sufficiency issues would not significantly

822 F. 2d 1041, 1047 (11th Cir. 1987)(granting habeas corpus relief because counsel's failure to raise a valid sufficiency issue "could not conceivably have been a strategic decision."); State v. Fennell, 578 A.2d 329, 333 (N.H. 1990)(finding counsel ineffective for failing to preserve a valid sufficiency issue).

The lack of reported decisions on this issue illustrates two points: 1) The problem of valid unpreserved sufficiency issues rarely arises; and 2) when such issues do arise, their resolution is so obvious that appellate opinions are unnecessary.

But, if postconviction relief should be automatic, then "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 [in a postconviction proceeding]." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987); State v. Ashley, 889 P.2d 723, 729 (Idaho App. 1994); State v. Lyles, 517 A.2d 761, 768-69 (Md. 1986)(Eldridge, J., concurring); State v. McAdams, 594 A.2d 1273, 1278-79 (N.H. 1991)(Batchelder, J., concurring specially).

advance the goal of judicial economy, and may in fact hinder it.

Nor would recognizing fundamental error put trial judges in the position of being advocates with respect to sufficiency issues. As discussed in the next section, rule 3.380(a) authorizes trial judges to consider such issues on their own. Further, trial judges are not merely blind arbiters of a clash between the parties; they have some responsibility to see that justice is done. There is a distinction between: 1) trial judges assuming the advocate's role in matters of trial tactics by raising issues such as improper cross-examination or argument (the concern that motivates this policy consideration of the contemporaneous objection rule); and 2) trial judges making rulings, in the interests of justice, on such fundamental questions as evidence sufficiency.

Finally, recognizing fundamental error will not encourage "gamesmanship," as long as rule 3.380(c) allows posttrial acquittal motions. There is no reason for failing to make a posttrial motion; and, since the defendant is the one who suffers from the delay if the issue is not raised in the trial court, there is no advantage to be gained from deliberately failing to raise the issue posttrial and then trying to get appellate relief as fundamental error. See Collier v. State, 999 S.W. 779, 788, 790 (Tex. Cr. App. 1999)(en banc)(Keller, J., dissenting)("[L]egal sufficiency claims are not subject to gamesmanship. A legal sufficiency review is a final, due process safeguard ensuring only the rationality of the factfinder Appellate requirements for legal sufficiency are independent of the parties' strategies The legal sufficiency review is a ... safeguard designed to prevent unjust convictions.").

Thus, the policy objectives of the contemporaneous objection rule will not be offended if evidence sufficiency issues are recognized as fundamental error.

Further support for this conclusion is found in Maddox, which addressed the question of

fundamental error in sentencing. Although "anticipat[ing] that [new] rule 3.800(b) ... should eliminate the problem of unpreserved sentencing errors," the Court reaffirmed the recognition of fundamental sentencing error for those defendants in the pre-3.800(b) "window period." 760 So. 2d at 94. The Court said:

[R]igid adherence to the contemporaneous objection rule [does not] always serve the goal of judicial economy....

... Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more postconviction motions to correct errors that can be safely identified on direct appeal.

...

... Even assuming the availability of postconviction relief ..., if the goal ... is efficiency, ... shifting to ... postconviction motions [does not] advance[] th[at] goal

Another potential problem [is] defendants ... will not necessarily be afforded counsel during collateral proceedings....

... [T]he interests of justice will not be advanced if appellate courts decline to correct certain categories of sentencing errors ... during the window period

Id. at 98 (citations omitted).¹⁰

As Maddox makes clear, Florida has not rejected the notion of fundamental sentencing error, but rather has created an alternative method for raising such issues. The Florida public policy on this issue is that unpreserved sentencing errors must be corrected quickly and easily. This in turn requires a procedure in which the defendant is represented by counsel.

Applying these policy considerations to sufficiency errors compels an obvious answer: Such errors should also be corrected quickly and easily. The policy considerations are even more compelling in this

¹⁰ Maddox said a sentencing issue is fundamental error if it is "patent and serious." Id. at 99. An error is "patent" if it is "apparent from the record" and "serious" if it "affects the ... length of the sentence such that the interests of justice will not be served if the error remains uncorrected." Id. Clearly, a conviction on insufficient evidence is also a patent and serious error.

context; with sufficiency issues, a defendant stands convicted even though the state failed to prove his guilt.

Further support for this conclusion is found in this Court's recent Murphy decision, which addressed the question of fundamental error in closing arguments in civil cases. Murphy recognized an exception to the contemporaneous objection rule for cases where the closing argument was improper, harmful, incurable, and "seriously affect[ed] the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process" 25 Fla. Law Weekly at S617.

If unpreserved closing argument issues in civil cases may be fundamental error (albeit if only rarely), then unpreserved evidence sufficiency issues in criminal cases must also be fundamental error (at least in some circumstances). If improper remarks in closing arguments in civil cases may undermine public confidence in the system, convictions on insufficient evidence must do the same. If consideration of public trust and confidence may outweigh the policy objectives of the contemporaneous objection rule with respect to closing arguments in civil cases (cases in which liberty is not at stake, and which will result in retrials if fundamental error is recognized), that same consideration must carry extra weight with respect to sufficiency issues in criminal cases (where liberty is very much at stake and recognition of fundamental error will result in a simple remand for a judgment of acquittal).¹¹

It is true that Murphy requires that closing argument issues must first be presented to the trial court in a motion for new trial. Id. at S616. But this is because "the trial judge ... is in the best position to determine the propriety and potential impact of allegedly improper closing argument" Id. This in turn

¹¹ Murphy noted that "[this] decision does not affect the law in criminal cases regarding improper, but unobjected-to, closing argument." Id. at S619, n.2. Although this remark was not amplified, it obviously means that courts must be more diligent in this context in criminal cases because of the more onerous consequences to the losing party.

depends on such factual matters as the tone and volume of the advocate's voice; the perceived visual impact on the jurors; and the relative strengths of the parties' evidence (which in turn requires assessment of witness demeanor, the "flow" of the trial, and the like). All of these considerations are for the trial court because they cannot be assessed from a cold record.¹² In contrast, appellate courts can address evidence sufficiency issues as easily as trial courts. Indeed, there is no doubt that such matters are proper for appellate courts if preserved; the lack of preservation may provide policy reasons for not addressing such issues, but that does not undermine the competence of appellate courts to address them.¹³

It is also true that Murphy recognized only a limited fundamental error doctrine. But this is no reason to do likewise with evidence sufficiency issues in criminal cases. The error is more egregious in the sufficiency context; an innocent person being convicted is more shocking than the possibility that a civil litigant did not get a fair trial. There may be legitimate tactical reasons for not objecting to closing arguments; there is no reason for failing to make an acquittal motion (at least posttrial). Further, competent counsel for criminal defendants is constitutionally required; civil litigants are the mercy of the legal marketplace. Finally, again, the remedy in sufficiency cases is significantly less disruptive to the judicial system.

¹² Murphy's requirement of first presenting the closing argument issue to the trial court is not a true contemporaneous objection requirement. Presenting the argument for the first time in a motion for new trial is not a "contemporaneous" objection; it is too late to cure the error at that point, at least in the sense usually meant in this context. The "cure" under Murphy is a new trial; the contemporaneous objection rule is supposed to prevent the need for a new trial. Murphy's "preservation" requirement is really designed to create a record regarding the effect the error had on the fairness of the trial.

¹³ The judicial standard of review is the same regardless of whether the issue is addressed at the trial or appellate level, and regardless of whether the appellate court is reviewing the trial court's denial of an acquittal motion or considering the issue for the first time. State v. Williams, 742 So. 2d 509, 511 (Fla. 1st DCA 1999)(collecting cases).

Thus, there is no policy reason for requiring contemporaneous objections in this context, and strong reasons for not requiring them. However, as discussed in section IV below, Florida cases do not adopt this view (although it is not clear why not). Before addressing the cases, the applicable procedural rules will be noted.

III. RULES 3.380, 3.600(a)(2), and 9.140(h)

Rule 3.380, which governs acquittal motions, provides:

(a) Timing. If, at the close of evidence for the state or at the close of all the evidence ..., the court is of the opinion that the evidence is insufficient ..., it may, and on the motion of ... the defendant shall, enter a judgment of acquittal.

(b) Waiver. A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all the evidence. The motion must fully set forth the grounds on which it is based.

(c) Renewal. [T]he defendant's motion may be made or renewed within 10 days after the reception of a verdict

Subsection (a) gives the trial court discretion to grant an acquittal on its own motion. This eliminates any argument that the contemporaneous objection rule is needed to keep trial judges from assuming the role of advocate in this context. This also indicates that unpreserved sufficiency issues could be raised on direct appeal without resort to fundamental error; the issue could be phrased as "the trial court abused its discretion by failing to grant an acquittal on its own motion."¹⁴

Subsection (c) undermines any argument that the contemporaneous objection rule serves any "cure

¹⁴ There are no Florida cases addressing the validity of this argument. One federal court accepted this argument under the federal procedural rules. United States v. Meadows, 91 F.3d 851, 854 (7th Cir. 1996). However, the federal rule says trial judges shall enter acquittals on their own motion if they feel the evidence is insufficient. Fed. R. Crim. P. 29(a).

the evidentiary defect" purpose in this context. Under this subsection, "[a] ground for judgment of acquittal may be raised for the first time in a post-trial motion" State v. Stevens, 694 So. 2d 731, 732 (Fla. 1997). In Stevens, the defendant was convicted of auto theft for failing to comply with the terms of a long-term auto lease. In a posttrial motion, he argued for the first time that the evidence "failed to prove that the creditor has 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." Id. at 731. Concluding that subsection (c) authorized the posttrial raising of such an issue for the first time, the Court asserted:

[O]ur conclusion will further the interests of justice Our interpretation of the rule provides a procedural mechanism through which a substantive error can be corrected Empowering a trial court with the ability to enter a [posttrial] judgment of acquittal ... will thus promote judicial economy.

Id. at 733 (footnote omitted).

The state could not reopen its case to prove the missing element in Stevens. The issue that succeeded in Stevens is the type of defect the state may have been able to cure. Yet the Court seemed unconcerned by this, which indicates the Court did not feel acquittal motions should serve any "cure the defect" purpose.¹⁵

¹⁵ Although it may generally be said that the contemporaneous objection rule has a "cure the defect" purpose, this usually refers to the trial court's being able to cure procedural defects (e.g., evidentiary and jury instruction issues) during the trial. "Cure the defect" does not generally mean "give a party a chance to cure substantive defects in its case."

It could be said that society has an interest in seeing that trials (particularly criminal trials) are decided on their merits, rather than on some negligence of counsel (such as failing to present available evidence to prove an element of the charged crime). Thus, "curing the substantive defect" may be a valid policy reason for requiring contemporaneous objections for sufficiency issues. However, this

Stevens said allowing posttrial acquittal motions "further[s] the interest of justice [and] promote[s] judicial economy"; as noted above, the contemporaneous objection rule serves similar interests. It may appear that Stevens implicitly endorses the contemporaneous objection rule in this context. But, if the interests of justice and judicial economy are furthered by allowing trial courts to initially consider sufficiency issues posttrial, those same interests would be equally served by recognizing such issues as fundamental error. Presumably, when Stevens refers to "promot[ing] judicial economy," it means that the trial court's granting of a posttrial acquittal motion would eliminate the need for an appeal. But it would only eliminate the need for a defense appeal. The state can (and, probably quite often, does) appeal the granting of such motions. See sec. 924.07(1)(j), Fla. Stat. (1999). If Stevens means that justice and judicial economy are best served by considering sufficiency issues as soon as possible, then such issues should be recognized as fundamental error.

It is true that rule 3.380(b) requires that "[acquittal] motion[s] must fully set forth the grounds on which [they are] based." But this subsection does not expressly state that the issue is waived if grounds are not "fully set forth." As discussed in the next section, Florida courts have long recognized fundamental error in at least some circumstances, even though rule 3.380(b) imposes a blanket requirement. Further, as noted

argument loses all force if sufficiency issues can be initially raised posttrial, as rule 3.380(c) allows.

Further, if "curing the substantive defect" is the purpose being served here, then appellate courts, when faced with a valid unpreserved sufficiency issue, should remand for a determination of whether the deficiency could have been cured, rather than refuse to address the issue because it is unpreserved.

But this procedure will raise another thorny problem: How will the court know whether the jury would have accepted the unpresented evidence as being sufficient to prove the missing element? It is one thing for a court to read the evidence presented in a light most favorable to the state; it is quite another for a court to presume that the jury would have believed unpresented evidence.

above, a contemporaneous objection rule serves no purpose in this context.

In sum, rule 3.380 provides no basis for requiring contemporaneous objections for evidence sufficiency issues.

The second criminal procedure rule to note here is rule 3.600(a)(2), which allows trial courts to grant a new trial if "the verdict is contrary to ... the weight of the evidence."

Rules 3.380 and 3.600(a)(2) embody a distinction that has long been recognized: "evidentiary sufficiency" versus "evidentiary weight."¹⁶ See Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981) ("Tibbs II"). Rule 3.600(a)(2) has no direct bearing on the issue here. There is no question that issues of evidentiary weight are not fundamental error; rule 3.600(a)(2)'s importance here is primarily historical, as discussed in the next section.

The final procedural rule to note here is rule 9.140(h), which is also historically significant;¹⁷ its current relevance to the issue under discussion is unclear. Rule 9.140(h) outlines the scope of appellate review in criminal cases:

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.

¹⁶ Both rules have long existed -- separate and distinct -- in Florida, either as rules or statutes. See Ch. 19554, secs. 213, 241 Laws of Florida (1939) and the Committee Notes to both rules.

¹⁷ Rule 9.140(h) has also been in effect, in various forms, for many years. See Ch. 19554, sec. 308, Laws of Florida (1939). Rule 9.140(h) took effect on March 1, 1978, along with the rest of the current appellate rules. Fla. R. App. Proc. 9.010. Before that date, the analogous rule was former appellate rule 6.16, which was substantively identical to rule 9.140(h).

Rule 9.140(h) could be read as pointing in both directions on this issue. The second sentence seems to recognize the doctrine of fundamental error; but is the defendant "entitled" to an acquittal "in the interest of justice" if the issue was not preserved? Further, can claims of ineffective assistance of counsel be raised on direct appeal "in the interest of justice"?

The third sentence is also ambiguous. Does it mean unpreserved sufficiency issues can be raised only in death penalty cases? Or does it simply direct the appellate court to consider sufficiency issues in such cases even if such issues are not raised on appeal and thus does not address the issue of fundamental error in non-capital cases?

As discussed in the next section, the answer to these questions is unclear. Tibbs II and other cases from the 1970's indicate neither unpreserved sufficiency claims (in non-capital cases) nor ineffectiveness claims can be addressed on direct appeal "in the interest of justice." However, the foundations of these cases have been eroded by more recent cases.

IV. THE FLORIDA CASES

A. Florida Supreme Court Cases

The cases from this Court establish a general rule requiring contemporaneous objections for sufficiency issues, with a limited fundamental error exception. The logic of the cases is unclear.

For many years, the Court held that sufficiency issues cannot be considered on appeal unless first raised in a motion for new trial. See Gilbert v. State, 4 So. 2d 330 (Fla. 1941).¹⁸ A second line of cases

¹⁸ "The reason for this rule is that the appellate court sits in review of the rulings of the trial judge, and not directly upon the findings of the jury." Johnson v. State, 43 So. 430, 430 (Fla. 1907).

These cases never drew the sufficiency/weight distinction. Technically, a motion for new trial only raised a weight issue. Acquittal motions raised the sufficiency issue; but, as discussed below, it was

sometimes appeared to grant relief from this rule.

Although it has long been recognized that appellate courts cannot overturn jury verdicts "upon the ground of the insufficiency of the evidence, ... [e]xceptions to this rule [were] recognized ... where the verdict was not in accord with the manifest justice of the case." Fuller v. State, 110 So. 528, 528 (Fla. 1926). There are many older cases from this Court reversing convictions on "interest of justice" grounds.¹⁹ It is not clear whether the Court was reversing in any of these cases even though the issue was unpreserved; most cases do not mention the preservation issue. In at least one case it appears the issue was unpreserved, although that conclusion must be based on the dissenting opinion; the majority opinion is silent on the point. See Little v. State, 21 So. 2d 902 (Fla. 1945).²⁰

not until 1973 that acquittal motions were considered sufficient to preserve that issue. Mancini v. State, 273 So. 2d 371 (Fla. 1973). The older cases implicitly accepted that a proper motion for new trial preserved both weight and sufficiency issues. Since the remedy was a new trial either way, the older cases did not need to distinguish between weight and sufficiency. The distinction did not become significant until 1978, when it was established that double jeopardy principles barred a retrial if the court reversed on sufficiency grounds (although not if the reversal was on weight grounds). See Tibbs II, 397 So. 2d at 1121.

¹⁹ See, e.g., Cordell v. State, 25 So. 2d 885, 887 (Fla. 1946)(collecting cases). Although Fuller referred to "the insufficiency of the evidence," 110 So. at 528, in several of these cases the Court reversed convictions even though the evidence was technically sufficient. See, e.g., Padgett v. State, 170 So. 175 (Fla. 1936); McNeil v. State, 139 So. 791 (Fla. 1932); Clark v. State, 124 So. 446 (Fla. 1929). In most of the cases, it is unclear whether the reversal was on sufficiency grounds or weight grounds; as noted earlier, the distinction was irrelevant at the time.

This line of cases seems to predate the enactment of a specific rule or statute that authorized appellate relief "in the interest of justice" (e.g., current rule 9.140(h)). As noted in footnote 17 above, it appears this provision of law first appeared in a statute in 1939. The first Florida appellate case granting a new trial on sufficiency/weight grounds appears to be Green v. State, 17 Fla. 669 (1880). Green relied on common law authorities from other jurisdictions as precedent.

²⁰Little was not a death penalty case, so it cannot be explained as being a case under the specific exception to the contemporaneous objection rule applicable to such cases.

Florida district courts began to question this strict preservation rule in the mid-1960's. Two courts held sufficiency issues could be preserved by a motion for judgment of acquittal, as well as a motion for new trial. Owens v. State, 227 So. 2d 241 (Fla. 4th DCA 1969), quashed, State v. Owens, 233 So. 2d 389 (Fla. 1970); Hogwood v. State, 175 So. 2d 817 (Fla. 3d DCA 1965). Interpreting rule 6.16, one court held unpreserved sufficiency issues can be raised on appeal if they are "included in the assignments of error." Wright v. State, 216 So. 2d 229, 232 (Fla. 2d DCA 1968), quashed, State v. Wright, 224 So. 2d 300 (Fla. 1969).

This Court initially rejected these approaches.²¹ However, in Mancini, the Court agreed that motions for judgment of acquittal could preserve sufficiency issues. 273 So. 2d at 372.

Against this backdrop, one Barber challenged his grand larceny conviction on the ground that the state failed to prove the value of the stolen property. Trial counsel made no motions for acquittal or new trial. In the district court, the issue was phrased as an ineffective assistance claim; that court granted a new trial. Barber v. State, 286 So. 2d 23 (Fla. 1st DCA 1973), quashed, State v. Barber, 301 So. 2d 7 (Fla. 1974).

In its opinion, the district court first noted Chester v. State, 276 So. 2d 76 (Fla. 2d DCA 1973), which held that ineffectiveness claims cannot be raised on direct appeal because they "ha[ve] not previously been ruled on by the trial Court." 286 So. 2d at 25 (quoting Chester).²² The court then noted a federal

²¹ In Wright, the Court reaffirmed the requirement of a motion for new trial, asserting the district court's interpretation of rule 6.16 conflicted with the cases imposing that requirement. 224 So. 2d at 301. Owens reaffirmed Wright. 233 So. 2d at 390. Other than citing precedent, neither case gave reasons for its conclusions.

²² The ineffectiveness issue in Chester was the failure to comply with procedural requirements for claiming an alibi defense, which resulted in the alibi witness being unable to testify.

habeas corpus case that held that counsel "had no authority ... deliberately to forego [the client's] right to move for a new trial or to appeal. When he did so, counsel proved himself ineffective" Id. (citation omitted).²³ Noting this Court had interpreted old rule 6.16 as reaffirming the contemporaneous objection requirement, the district court said Barber was lost "in a maze of Rules of Procedure" and concluded the court must grant a new trial on grounds of ineffective assistance. Relying on the "interest of justice" language in rule 6.16, the court said "sooner or later, whether under [federal habeas corpus] or another state court proceeding, the relief sought ... will be granted [and] the commonsense approach to ... this case is for us to [do] as ... justice dictates." Id. at 27.

This Court took jurisdiction in Barber to resolve a conflict with Mancini, Owens, Wright, and Chester. Quashing the decision, the Court said the district court's interpretation of rule 6.16 was erroneous. The Court first noted that Mancini, et al., established that "unless the issue of [evidence] sufficiency ... is first presented to the trial court ..., the issue is not reviewable on direct appeal" 301 So. 2d at 9. The Court then said the issue could not be addressed as an ineffective assistance claim because appellate courts cannot address issues not ruled upon by trial courts; "[rule] 3.850 provides a means by which this issue may properly be resolved." Id. The Court also said the issue was not one of fundamental error: "To accept this contention would be to disregard entirely the holdings in Mancini[, et al.] The issues here can be reviewed [under rule] 3.850." Id. at 10.

Five months after Barber, in Negron v. State, 306 So. 2d 104 (Fla. 1974), overruled in part on

²³ The case cited here was Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966). In the case, defense counsel did not move for a judgment of acquittal or file a notice of appeal. The federal court granted a belated appeal.

other grounds, Butterworth v. Fluellen, 389 So. 2d 968 (Fla. 1980), the 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 hold "there was fundamental error committed [because] the state's evidence did not support a conviction of grand larceny" because there was "no sufficient evidence of the [stolen] items' market value" 306 So. 2d at 107-08 (emphasis added). Negron's conviction was reduced to one for petit theft.

Negron did not cite Barber. The cases appear to conflict.²⁴

This apparent conflict leads to the next point: The precise "holding" in Barber may be debated. The actual issue presented there -- the only issue the district court ruled on -- was whether an ineffective assistance claim could be considered on direct appeal "in the interests of justice." Thus, Negron and Barber may not conflict. Yet Barber seems to flatly reject the notion that unpreserved sufficiency issues can be considered on direct appeal, regardless of how they are phrased.

Barber did not discuss why a contemporaneous objection is required in this context. However, as noted above, for many years in Florida a successful appellate argument on evidence sufficiency resulted in a new trial; it was only later established that double jeopardy principles barred a retrial. See Tibbs II, 397 So. 2d at 1121. Thus, when Barber was decided, the contemporaneous objection rule may have been justified by its "judicial economy" purpose.²⁵ Further, it had not yet been determined (in Stevens, decided

²⁴ There is no indication in Negron that the state raised the issue of lack of preservation. Thus, the Court may have considered it waived (although it did not state as much). It is also possible that Negron may be using the phrase "fundamental error" to include something more than "unpreserved error." Nonetheless, if we assume "fundamental error" means "unpreserved error," Barber and Negron are difficult to reconcile; the substantive sufficiency issue in both cases was identical.

²⁵ The undersigned cannot pinpoint the exact moment when Florida appellate courts began to reverse convictions and remand for entries of judgments of acquittal (rather than a new trial); presumably, that began in the mid-1960's, when the district courts began recognizing that acquittal

in 1997) that evidence sufficiency issues may be initially raised posttrial. Thus, Barber may also have relied on the "cure the defect" purpose of the contemporaneous objection rule.

Barber's conclusion that sufficiency issues cannot be raised on direct appeal as ineffectiveness claims also merits further comment. As a general matter, Barber is correct. Such claims usually involve questions of fact that are unresolved in the appellate record (particularly questions of whether there was any reasonable trial strategy that may explain the alleged deficiency of counsel). However, as noted above, there is no legitimate reason for failing to make a posttrial acquittal motion; counsel's failure to do so in cases where the evidence is insufficient amounts to "ineffectiveness ... 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." Blanco, 507 So. 2d at 1384. See discussion in footnote 9, above.

Cases like Blanco also came out after Barber.²⁶ Thus, to the extent that Barber seems to adopt a blanket rule that ineffectiveness claims cannot be considered on direct appeal (whether as fundamental error

motions were sufficient to preserve sufficiency issues. When the basis for appellate review was the denial of a motion for new trial, the appellate relief was, obviously, a new trial. The undersigned is not aware of any pre-1960's cases that remanded for entry of a judgment of acquittal.

However, in Negron, the Court reduced the conviction to one for petit theft, rather than remand for a new trial.

²⁶ This Court first addressed an ineffectiveness claim on direct appeal in Foster v. State, 387 So. 2d 344 (Fla. 1980), a death penalty case in which the Court granted a new trial based on counsel's conflict of interest in representing both the defendant and a co-defendant who entered a plea and testified for the state. Cases like Blanco continue to recognize that ineffectiveness claims may be raised on direct appeal if "apparent on the face of the record"; however, no such claims have been successful in this Court. The district courts have granted relief for such claims in a variety of circumstances, albeit rarely. See Eure v. State, 25 Fla. Law Weekly D1739 (Fla. 2d DCA July 21, 2000); Rodriguez v. State, 25 Fla. Law Weekly D1041 (Fla. 2d DCA April 28, 2000); State v. Bodden, 756 So. 2d 1111 (Fla. 3d DCA 2000); Rios v. State, 730 So. 2d 831 (Fla. 3d DCA 1999); Ross v. State, 726 So. 2d 317 (Fla. 2d DCA 1998); Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998); Gordon v. State, 469 So. 2d 795 (Fla. 4th DCA 1985).

or "in the interest of justice"), Barber has been undermined by more recent cases.²⁷

During this time, this Court addressed the "interest of justice" language in current rule 9.140(h) in other cases; the Court eventually rejected the notion that appellate courts could grant relief on evidentiary weight grounds "in the interest of justice." State v. Smith, 249 So. 2d 16 (Fla. 1971); Tibbs II.²⁸ In reaching

²⁷ Worth noting here are State v. Bodden, 756 So. 2d 1111 (Fla. 3d DCA 2000) and Robinson v. State, 462 So. 2d 471 (Fla. 1st DCA 1985), which illustrate the relationship among fundamental error, ineffectiveness claims, and "the interest of justice." In both cases, trial counsel filed an untimely motion for new trial that raised an evidentiary weight issue. Both trial courts granted the motion, but the appellate courts held the motions were untimely (which deprived the trial courts of jurisdiction). In Bodden -- the state's direct appeal from the granting of the untimely motion --, the appellate court went on to grant a new trial based on counsel's ineffectiveness for filing an untimely motion; the required prejudice was established by the fact that the trial court had granted the motion. In Robinson -- the defendant's direct appeal after the appellate court upheld the state's appeal on the untimeliness ground --, the court also granted a new trial. Although it felt counsel's untimely filing of the new trial motion constituted ineffectiveness, the court held "the interest of justice" required a new trial. 462 So. 2d at 477.

As these cases show, there is some overlap in these three concepts. Inherent in any finding of fundamental error is a finding that there was no legitimate tactical reason for failing to raise the issue. This does not necessarily mean counsel was deficient; deficient performance also requires a showing that a reasonably competent lawyer would not have overlooked the issue. But, in most cases, the overlooking of an issue that amounts to fundamental error should be deficient performance. Further, Florida recognizes that fundamental errors may be harmless. State v. Clark, 614 So. 2d 453 (Fla. 1992). This means that there must be a showing of prejudice in both ineffectiveness claims and fundamental error claims. Thus, the issues in both contexts are quite similar; whether phrased as ineffectiveness or fundamental error, "the interest of justice" require the granting of appellate relief if there was no legitimate excuse for failing to raise the issue and the defendant was prejudiced by the error.

²⁸ In Smith, this Court quashed a district court decision that reversed a conviction on weight grounds. The district court said "[j]udges have historically granted new trials in the interests of justice where the [evidence], though technically sufficient, raises so much doubt that cannot in conscience be upheld." Smith v. State, 239 So. 284 (Fla. 2d DCA 1970), quashed, State v. Smith. This Court called the district court's approach "novel" and asserted "[once] the District Court determined that the evidence supported the conviction and the trial was free from error[, its] duty ... was to affirm" 249 So. 2d at 17-18.

Tibbs II was the continuation of Tibbs v. State, 337 So. 2d 788 (Fla. 1976)(Tibbs I), a death penalty case in which this Court reversed for a new trial "in the interest of justice." Shortly after Tibbs I,

this conclusion, Tibbs II seemed to reject the argument that unpreserved sufficiency issues may be considered in non-capital appeals "in the interest of justice":

"[I]n the interest of justice" ... has long been ... a viable and independent ground for appellate reversal.... This rule ... has often been used ... to correct fundamental injustices, unrelated to evidentiary shortcomings

With respect to the special mention of capital cases in the second sentence [of current 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.

Id. at 1126 (second emphasis added).

Tibbs II (and Smith) seem to be rewriting Florida legal history; as noted above, Florida courts have long granted appellate relief "in the interest of justice" on both weight and sufficiency issues. Nonetheless, taken together, Tibbs II and Barber seem to foreclose any argument that unpreserved sufficiency issues (in non-capital cases) can be considered on direct appeal, either as fundamental error or as ineffectiveness claims.

This Court recognized an exception to the contemporaneous objection requirement for sufficiency issues in Troedel v. State, 462 So. 2d 392 (Fla. 1984). Based on a single entry into a residence, Troedel was convicted of two counts of burglary: one count of armed burglary and one count of burglary with assault. Troedel did not challenge the dual convictions, either at trial or on appeal. Nonetheless, this Court

the United States Supreme Court ruled that, under double jeopardy principles, appellate reversals on sufficiency grounds (but not on weight grounds) barred a second trial. See Tibbs II, 397 So. 2d at 1121. The issue in Tibbs II was whether Tibbs I barred a retrial; concluding Tibbs I was decided on weight grounds, Tibbs II held retrial was allowed.

held that, since the two forms of burglary were both enhancements of the same offense, and there was "no evidence of more than one ... unlawful entry," the two counts should be merged into a single conviction. The Court said it could reach the issue even though it was not raised because "a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error." Id. (emphasis added).

Troedel was followed in Vance v. State, 472 So. 2d 734 (Fla. 1985), which held it was fundamental error to convict Vance of two counts of improper exhibition of a firearm because the statute outlawed exhibitions "in the presence of one or more persons." Sec. 790.10, Fla. Stat. (1981). The Court said "[Vance's] exhibition of the firearm in the presence of two persons ... violated the statute only one time. A second conviction is therefore totally unsupported by evidence." Id. at 735 (emphasis added).²⁹

Neither Troedel nor Vance cited Barber. It is not clear if the cases are consistent. Granted, there are factual distinctions in these cases. Yet Troedel and Vance flatly say it is fundamental error to be convicted of a crime "totally unsupported by evidence," while Barber just as flatly says "unless the sufficiency of the evidence ... is first presented to the trial court ..., the issue is [waived]." 301 So. 2d at 9.

These cases cannot be reconciled by asserting the language in Troedel-Vance is overbroad and those cases create only a narrow exception to Barber. Two problems arise here: How do we rephrase Troedel-Vance to reach their "true" meaning and, assuming we can do that, why do we only allow this

²⁹ The defendant in Vance was charged with two counts of aggravated assault and convicted of the two counts of improper exhibition as lesser included offenses. On direct appeal, the district court held he waived the sufficiency argument by requesting jury instructions on the improper exhibition lesser offense on both aggravated assault counts; that court held this was "invited error" and affirmed the dual convictions. Vance v. State, 452 So. 2d 994 (Fla. 3d DCA 1984). Obviously, this Court implicitly rejected this argument.

If waiver is not found in these circumstances, why should it be found in a straightforward sufficiency issue?

narrow exception?

We can try to rephrase Troedel-Vance along the following lines: It is fundamental error to convict a defendant of two violations of the same statute when the evidence establishes only one violation.³⁰ The first problem with this rephrasing is that it is a far cry from what Troedel-Vance actually said and, if the Court meant these cases to be so narrow, why didn't it say so?

Beyond that lies the question of why we would allow only this narrow exception to the contemporaneous objection requirement: What is the principle that requires limiting fundamental error here?

The limiting principle stated in Troedel-Vance is "a crime totally unsupported by evidence." Since these cases did not purport to overrule the prior cases, it would appear Troedel-Vance believe that not all evidence sufficiency issues concern "a crime totally unsupported by evidence"; rather, there is at least one other category of evidence insufficiency issue.

It is not clear what that other category might include; "the evidence was insufficient but the

³⁰ It could be argued that Troedel-Vance are really decided on double jeopardy principles, particularly that branch of double jeopardy known as "the unit of prosecution." See, e.g., Sanabria v. United States, 437 U. S. 66, 69-70 (1978). Thus, Troedel-Vance may be based on the premise that double jeopardy issues are fundamental error but "mere" evidence sufficiency issues are not.

But, aside from the obvious problem that neither Troedel nor Vance were expressly decided on this ground, we would still have to consider why fundamental error is recognized in one context but not the other. Since due process forbids convictions unless all elements of the offense are established beyond a reasonable doubt, evidence sufficiency issues are grounded in constitutional principles just as much as double jeopardy issues. Why is being convicted of two offenses when the evidence proves only one more fundamentally erroneous, or more constitutionally egregious, than being convicted of one offense when the evidence proved none? In either event, the defendant is being convicted of one more offense than the constitution allows.

Troedel was a death penalty case, and thus may be explained as being within the exception for such cases specifically recognized by rule 9.140(h). But Vance was not a death penalty case.

conviction was not "totally unsupported by evidence?"³¹ "The conviction was supported by some evidence, just not enough to eliminate all reasonable doubt?"

Assuming this is the distinction Troedel and Vance are drawing, and assuming we can determine when a conviction is totally unsupported by evidence, the question remains: Why recognize fundamental error in one case but not the other? Why is conviction of a crime totally unsupported by evidence so different from conviction of a crime that is only insufficiently supported by evidence?

More recent cases from this Court do not address these questions.³² We will return to these questions after a discussion of the district court cases. In every district, there are cases going both ways on this issue; those cases also fail to answer the questions just raised.

B. First District Cases

Some First District cases require contemporaneous objections for sufficiency issues, with no

³¹ Does "totally unsupported" mean there is no evidence to establish any of the elements of the crime of conviction? No evidence to establish one of the elements, although the other elements were established? No evidence to prove the defendant committed the crime, although it is clear that someone did?

³² In Archer v. State, 613 So. 2d 446 (Fla. 1993), the Court held that the issue of whether charged murder was an "independent act" of the accomplice-killer (for which the non-killer defendant could not be held responsible) requires a contemporaneous objection. In Woods v. State, 733 So. 2d 980 (Fla. 1999), the Court held that the issue of whether the evidence proved premeditation required a contemporaneous objection. Neither case discussed the purpose served by the contemporaneous objection requirement. Nor is it clear why the Court required an objection in Archer and Woods; both were death penalty cases and would seem to be within rule 9.140(h)'s exception for such cases. Further, in both cases, the Court went on to consider (and reject) the sufficiency issues. 733 So. 2d at 986; 613 So. 2d at 448.

A case worth noting briefly here is J.B. v. State, 705 So. 2d 1376 (Fla. 1998), which held it was not fundamental error to allow a confession into evidence in the absence of independent evidence of the corpus delicti. The Court analyzed the question as one of evidence admissibility, not one of evidence sufficiency. Clearly, with a confession the state has produced prima facie evidence of guilt; thus, J.B. sheds no light on the issue here.

discussion as to why. See, e.g., Clark v. State, 635 So. 2d 68 (Fla. 1st DCA 1994). Four cases recognize fundamental error.

In K.A.N. v. State, 582 So. 2d 57 (Fla. 1st DCA 1991), the court reversed a juvenile escape conviction because the evidence failed to prove that "the residential program that [the defendant] left fell within restrictiveness level VI or higher as required by the statute" Id. at 58. The court said "a conviction in the absence of a prima facie showing of the crime charged is fundamental error" Id. at 59 (emphasis added).

In Harris v. State, 647 So. 2d 206 (Fla. 1st DCA 1994), the court reversed a conviction for obstructing an officer without violence (based on the defendant's flight from the officer) because the evidence did not prove the officer had a founded suspicion to stop him. The court said "[being] convict[ed] of a crime which did not [occur]" is fundamental error. Id. at 208 (emphasis added).

In Burke v. State, 672 So. 2d 829 (Fla. 1st DCA 1995), the court reversed a conviction for possession of burglary tools because the evidence failed to prove the defendant intended to use the suspect tools in a burglary. The court said "the failure to prove each element of the crime charged constitutes fundamental error" Id. at 831 (emphasis added).

In Johnson v. State, 737 So. 2d 555 (Fla. 1st DCA 1999), the court considered (and rejected) the defendant's unpreserved argument "that his conviction for causing bodily injury during the commission of a felony cannot stand because the state did not establish an essential element of the offense, i.e., the commission of the felony of burglary as charged." Id. at 556. The court said "a conviction is fundamentally erroneous when the facts affirmatively proven by the state do not constitute the charged offense as a matter of law." Id. (emphasis added).

However, in James v. State, 745 So. 2d 1141 (Fla. 1st DCA 1999), the court refused to consider whether the evidence was sufficient to prove the intent element of carjacking. The court rejected a fundamental error argument based on K.A.N. and Johnson because "K.A.N. ... conflicts with ... Barber ... and ... Woods," and Johnson "did not involve the issue of the state's failure to prove the elements of an offense" Id. at 1143.

Finally, in the present case, the court refused to consider the issue of whether the evidence proved premeditation because James had established that "the state's failure to prove all elements of a charged offense does not constitute 'fundamental error.'" Sanders, 25 Fla. Law Weekly at D1660 (emphasis added).

C. Second District Cases

The Second District cases also go both ways on this issue. Fundamental error is recognized in six cases.

In Dydek v. State, 400 So. 2d 1255 (Fla. 2d DCA 1981), the court held it was error to accept a no contest to possession of drug paraphernalia because the factual basis was insufficient to prove that charge. The court said it was fundamental error "[to] convict[] in the absence of a prima facie showing of the essential elements of the crime charged. Id. (emphasis added).³³

In Nelson v. State, 543 So. 2d 1308 (Fla. 2d DCA 1989), the court reversed a conviction for obstructing an officer without violence (based on the defendant's flight from the police) because the police

³³ Dydek apparently overlooked Robinson v. State, 373 So. 2d 898 (Fla. 1979), under which this type of unpreserved issue cannot be raised on appeal. Of course, the present case does not involve plea cases; the issue here addresses trial cases.

had no founded suspicion to detain him. The court said:

Generally, a defendant must [preserve an evidence sufficiency] issue.... This case, however, is not the usual failure of proof case.... Nelson's conduct did not constitute the crime of resisting an officer. [This is] fundamental error [because] Nelson stands convicted of a crime that never occurred.

Id. at 1309 (emphasis added).

In Burrell v. State, 601 So. 2d 628 (Fla. 2d DCA 1992), the defendant was convicted under section 812.019(2), Florida Statutes (1989), which outlaws "initiat[ing, etc.] the theft of property and traffick[ing] in such stolen property." Since that statute applied only to someone who "has no direct contact with the [stolen] property," and the evidence "proved direct contact with the property," the court reduced the conviction to one for a basic dealing in stolen property offense even though the issue was unpreserved.

Id. at 629. The court said:

This is not a case in which the state's failure to prove the offense involves a technical matter that could have been resolved if the issue had been raised It is clear that the state could not have proven an essential element for a violation of section 812.-019(2)

Id. at 629 (emphasis added).

In Garcia v. State, 614 So. 2d 568 (Fla. 2d DCA 1993), the court reduced a robbery conviction to one for theft because the use of force was "[un]connect[ed] with the taking of property." Id. at 569. The court said "convict[ing] a defendant of a crime that never occurred" is fundamental error. Id. at n.1 (emphasis added).

In Lowman v. Moore, 744 So. 2d 1210 (Fla. 2d DCA 1999), the court held appellate counsel was ineffective for failing to raise the unpreserved issue of the victim's being overage in a conviction for lewd

activity with a minor. The court said "[c]onvicting a defendant of a crime when an essential element of the crime has not been proven and could not have been proven is fundamental error." Id. at 1211 (emphasis added).

Finally, in T.E.J. v. State, 749 So. 2d 557 (Fla. 2d DCA 2000), the court reduced a grand theft conviction to petit theft because the state did not prove the value of the stolen items. The court said "this failure of proof on the essential element of value was fundamental error." Id. (emphasis added).

In contrast to these cases are Stanley v. State, 626 So. 2d 1004 (Fla. 2d DCA 1993) and Hornsby v. State, 680 So. 2d 598 (Fla. 2d DCA 1996), both of which required contemporaneous objections.³⁴

In Stanley, the defendant argued his conviction for felony criminal mischief was fundamental error because the state did not prove the requisite amount of damage. Affirming, the court said:

The state merely failed to prove the amount of damage but did prove that damage occurred to the building. Thus, Stanley does not stand convicted of a crime that never occurred.

626 So. 2d at 1005 (emphasis added).

In Hornsby, the court affirmed a conviction for battery on a law enforcement officer and held that no sufficiency issues were preserved. The opinion did not indicate what facts were proved, or what grounds the defendant argued on appeal. The court asserted:

In a typical failure of proof case, ... the defendant must [preserve a sufficiency issue].... [T]his is not a situation where the defendant's conduct clearly did not constitute the crime for which he was convicted. If it were, it would be fundamental error.

³⁴ Other Second District cases require a contemporaneous objection without explaining why or noting the contrary cases. See, e.g., E.J.K. v. State, 508 So. 2d 422 (Fla. 2d DCA 1987).

680 So. 2d at 598-99 (emphasis added).

D. Third District Cases

Some Third District cases require contemporaneous objections without explaining why. See, e.g., Pierre v. State, 597 So. 2d 853 (Fla. 3d DCA 1992). Two cases recognize fundamental error.

In Valdes v. State, 621 So. 2d 585 (Fla. 3d DCA 1993), the court reversed convictions for "violating Marine Fisheries Rules ... relating to crustaceans of the species Panulirus Argus" because the evidence did not prove "that the crustaceans were of [that] species." Id. at 586. The court said "conviction in the absence of a prima facie showing of the crime charged is fundamental error." Id. (emphasis added).

In Stanton v. State, 746 So. 2d 1229 (Fla. 3d DCA 1229), the court reversed a cocaine possession conviction. Stanton encountered a drug dealer who, after being told by Stanton that he "was not looking for any drugs," gave Stanton a cocaine rock "on the house." Id. at 1230. Stanton immediately took the rock to a police officer and offered to help find the dealer; unimpressed by this burst of good citizenship, the officer arrested Stanton. Noting "no crime is committed where a person takes temporary control of contraband in order to ... giv[e] it to police," the court held "a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error." Id. (emphasis added).

Two Third District cases noted a specific reason for requiring a contemporaneous objection in this context; both relied on the "cure the defect" logic. In Johnson v. State, 478 So. 2d 885 (Fla. 3d DCA 1985), the court required a contemporaneous objection for the issue of the victim's age in a capital sexual battery case because "[h]ad counsel complied with the rule ... the error ... might have been cured by allowing the state to re-open its case and supply the missing, technical element of age." Id. at 886 (emphasis added). In Pinder v. State, 396 So. 2d 272 (Fla. 3d DCA 1981), an aggravated assault prosecution, the

defendant argued on appeal that the evidence did not establish that he used a real firearm "rather than a toy pistol." Id. at 272. The court held the contemporaneous objection rule applied "because of the real possibility that if the claim had [raised], it might well have been obviated ... additional testimony" Id. The court said:

We will not reverse on the basis of an initial appellate assertion of alleged error which may have been cured if advanced at ... trial.... [F]undamental error may exist only when ... it clearly and affirmatively appears that the result could not have been affected by the failure to object.

Id. at 273 and n.3 (emphasis partially added)(citations omitted).

E. Fourth District Cases

The Fourth District has also required a contemporaneous objection in some cases, again with no explanation as to why. See, e.g., Gibbs v. State, 693 So. 2d. 65 (Fla. 4th DCA 1997). Two cases recognize fundamental error.

In T.M.M. v. State, 560 So. 2d 805 (Fla. 4th DCA 1990), the court reversed a conviction for obstructing a police officer without violence (based on the defendant's flight from the officer) because the evidence failed to prove the officer had a founded suspicion to stop him. The court said "being convicted of a crime that never occurred is [fundamental] error ... and must be reversed in the interests of justice." Id. at 807 (emphasis added).

In Griffin v. State, 705 So. 2d 572 (Fla. 4th DCA 1998), the court reversed a kidnapping conviction because the confinement of the victim was incidental to an armed robbery (and thus did not constitute a separate offense). The court said this was fundamental error because the defendant was "convict[ed of] a crime that did not take place": "A conviction is fundamentally erroneous when the facts

affirmatively proven ... do not constitute the charged offense as a matter of law." Id. at 574 (emphasis added).

F. Fifth District Cases

The Fifth District also requires a contemporaneous objection in some cases, see, e.g., Hardwick v. State, 630 So. 2d 1212 (Fla. 5th DCA 1994), but not others.

In Williams v. State, 516 So. 2d 975 (Fla. 5th DCA 1987), the court reduced a robbery conviction to one for theft because the evidence did not prove that force was used in taking the property: "The facts are totally insufficient to support [the] conviction ... because without question, under the law and the uncontested facts, no robbery occurred." Id. at 977. The court rejected the argument that relief should be sought under rule 3.850:

The defendant in this case is entitled to immediate relief from a wrongful conviction which should not be made to depend on his ability to prove that his trial counsel was ... ineffective.... 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?

... 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 appeal without an objection below ..., and must be reversed "in the interest of justice." ... Alternatively, if necessary to do justice, we would treat this appeal as a petition for certiorari and quash the conviction (1) because it departs from the essential requirements of law ... or (2) because the error here is so serious as to result in a miscarriage of justice ..., or we would treat the instant appeal as a petition for writ of habeas corpus and grant relief....

Id. at 978 (emphasis added)(citations omitted).

In O'Connor v. State, 590 So. 2d 1018 (Fla. 5th DCA 1991) the court reversed a narcotics conspiracy conviction because there was no evidence that the defendant agreed to commit any crime with anyone who was not a police agent. The court said "there was a complete failure of proof on the conspiracy charge [and] the lack of any proof to support the charge constitutes fundamental error." Id. at 1019 (emphasis added).

In Brown v. State, 652 So. 2d 877 (Fla. 5th DCA 1995), a racketeering conviction was reversed because the evidence did not prove the required elements of "enterprise" and "pattern of racketeering activity." The court said this was fundamental error because "the State failed to make a prima facie case and fundamental fairness ... require[s] this court to address the [issue]." Id. at 881 (emphasis added).

G. Summary and Analysis of the Cases

There are several problems with the distinctions these cases are trying to draw. First, what exactly is the perceived distinction? It may be helpful at this point to divide evidence sufficiency issues into two categories: positive element insufficiency and negative element insufficiency.

"Positive element insufficiency" refers to situations in which the evidence affirmatively proves that the defendant did not commit the crime of conviction (although he may have committed a different crime).

"Negative element insufficiency" means there is no evidence in the record to establish an element of the crime, but the evidence does not affirmatively disprove that element.³⁵

³⁵ There is a third category here: "identity insufficiency," which means there is no doubt that someone committed the crime and the only question is whether it was the defendant. All of the cases just discussed addressed issues of element insufficiency. Two cases have addressed identity insufficiency issues. Both required contemporaneous objections; neither discussed why. Daley v. State, 374 So. 2d

Statements in some district court cases lean toward a positive element insufficiency exception to the contemporaneous objection rule: Fundamental error will be found if the state's evidence affirmatively shows that the crime of conviction "never occurred" (e.g., Nelson) because the state, not only did not, but "could not have proven an essential element" (e.g., Burrell). Other cases seem to embrace negative element insufficiency as well: It is fundamental error if there is "[no] prima facie showing of the crime charged" (e.g., Valdes).³⁶

The first problem with this positive/negative distinction is that it is difficult to apply in many cases.

Consider Harris, Nelson, and T.M.M., the three cases that reversed convictions for obstructing a police officer without violence because the evidence failed to prove the officer had a founded suspicion to stop the defendant. Is this positive insufficiency or negative insufficiency? If the evidence fails to prove the founded suspicion, does this mean the evidence affirmatively proves the defendant committed no crime? How do we know whether the state would have been able to establish the founded suspicion if the issue had been raised? Perhaps the state simply forgot to ask the officer a crucial question. Perhaps the officer knew the defendant had a warrant out for his arrest for an unrelated offense, but the state agreed with the defense (in an off-the-record pretrial conversation) not to introduce that evidence because both thought

59 (Fla. 3d DCA 1979); Brumbley v. State, 350 So. 2d 827 (Fla. 1st DCA 1977).

³⁶ Stanley seems to adopt some type of "included offense" logic: "Stanley does not stand convicted of a crime that never occurred," 626 So. 2d at 1005, because the state proved him guilty of misdemeanor criminal mischief, even though it did not prove a felony amount of damage. Yet, if the damage amount is an element of the offense of felony criminal mischief, Meenaghan v. State, 601 So.2d 307 (Fla. 4th DCA 1992); compare Negron, 306 So. 2d at 108 (holding "[p]roof of the element of value is essential to a conviction for grand larceny."), why does Stanley not "stand convicted of a crime that never occurred," even though he did commit a lesser included offense of that crime? Other cases (including Negron) implicitly reject Stanley's logic, in that they reverse with instructions to enter judgment for the lesser offense that was proven. See Garcia; Burrell; T.E.J.; Williams.

(erroneously) that the evidence presented did establish founded suspicion.

Consider Williams and Garcia, both of which held that the evidence failed to prove robbery because the force was not used in conjunction with the taking of the property. Is this positive or negative insufficiency? How do we know that the state did not have available another witness who would testify force was used at an earlier time, but the state decided not to call that witness for some tactical reason because it thought it did not have to?

Consider Burrell, which seems to be a prime example of positive element insufficiency; is it possible the state had other witnesses who would have testified (in contradiction of the witnesses who did testify) that Burrell had no direct contact with the stolen property?

It would be an unusual case in which the record is clear enough to conclude that the state could not have proven the missing element, particularly since (by definition) the issue was not raised at trial. The distinction between positive and negative insufficiency requires appellate courts to speculate on what the state "might have proven" if the issue had been raised.

More importantly, the positive/negative distinction is based on the "cure the defect" logic for requiring a contemporaneous objection. But, as discussed earlier, this logic will not wash, as long as rule 3.380(c) allows posttrial acquittal motions.

It is not clear whether the distinction the district courts are trying to draw is the same one this Court was trying to draw in Troedel and Vance. "A crime totally unsupported by the evidence" can be read as including both positive and negative element insufficiency. Troedel and Vance are no more successful than the district court cases in answering the questions just raised.

In sum, all Florida courts agree that sufficiency issues should be considered fundamental error in

some circumstances. No court has developed a coherent test for determining when fundamental error will be found. The tests in the cases are ambiguous; and, regardless of what test is used, no court has explained why fundamental error is not recognized in all cases.

V. CASES FROM OTHER JURISDICTIONS

Other jurisdictions overwhelmingly adopt the position that unpreserved evidence sufficiency issues are fundamental error.

The federal cases say that unpreserved sufficiency issues cannot be addressed on direct appeal unless they amount to plain error or "a manifest miscarriage of justice." See, e.g., United States v. Meadows, 91 F.3d 851, 854 (7th Cir. 1996). However, a conviction on insufficient evidence is a miscarriage of justice and plain error. See, e.g., United States v. Spinner, 152 F.3d 950, 956 (D.C. Cir. 1998)("It would be a manifest miscarriage of justice to let a conviction stand if the government failed to present any evidence on an essential element of the crime."); United States v. Brown, 151 F.3d 476, 487 (6th Cir. 1998)("If the evidence is insufficient ..., [upholding the conviction], particularly on the procedural ground of forfeiture, would result in a manifest miscarriage of justice."); United States v. Atcheson, 94 F.3d 1237, 1241 (9th Cir. 1996)("Because the Government bears the burden of proving each element of the crime, [defendants] were not required to challenge the sufficiency of the Government's evidence [in] the trial court."); Meadows, 91 F.3d at 855 (same as Spinner)(collecting cases); United States v. McIntyre, 467 F.2d 274, 276, n.1 (8th Cir. 1972)(rejecting waiver argument and noting that, although "[t]his court has given lip service to this waiver doctrine in previous cases[,] the waiver doctrine [is] one of judicial convenience rather than one of legal logic [and it] has received considerable criticism.... Moreover, unless trial strategy may be involved, waiver of a basic constitutional right, as the right to be convicted only by

evidence which proves guilt beyond a reasonable doubt, would seem to require a defendant's consent to his attorney's abandonment of the right.").³⁷ Thus, the federal courts essentially recognize a blanket fundamental error rule for sufficiency issues.

With respect to the state courts, "[o]f the thirty-nine jurisdictions specifically asked whether a court may address a sufficiency ... claim for the first time on appeal, twenty-five have answered in the affirmative.... Twenty of these twenty-five jurisdictions apply a plain error standard or its equivalent." State v. McAdams, 594 A.2d 1273, 1276-77 (N.H. 1991)(Batchelder, J., concurring specially)(citations omitted).

CONCLUSION

In light of rule 3.380(c), there is no reason for requiring a contemporaneous objection for evidence sufficiency issues. Case law to the contrary is not well-reasoned and has been undermined by more recent cases. Florida courts should consider all evidence sufficiency issues to be fundamental error.

³⁷ McIntyre was referring to the "waiver" that some believe occurs when the defendant makes an acquittal motion at the close of the state's case but fails to renew it at the close of all the evidence. However, the court's comments apply equally to a "full" waiver that results from failing to make any acquittal motion.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen Been, 301 S. Monroe St. Tallahassee, FL 32301 and Karen Holland, Office of the Attorney General, The Capital, Plaza Level, Tallahassee, FL 32399-1050, on this ___ day of October, 2000.

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