IN THE SUPREME COURT OF FLORIDA

ANICETO JAIMES, **Petitioner,** v. **STATE OF FLORIDA,** **Respondent.**	**Case No. SC09-1694**

MERIT ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts, for the purposes of this proceeding, with the following stated exceptions, clarification and/or additions, or as independently argued when same are in conflict with general or specific representations made by Petitioner:

The charges below arose out of a barroom brawl, involving the Petitioner and three of his friends (V1, R1-5). In count four of the amended information, Petitioner was charged with aggravated battery with a deadly weapon, as to victim Richard Miller.[1] (V1, R10-11). Miller, a patron of the bar, testified he overheard sounds of a fight coming from the bar area; he and a friend went to break things up (V1, T.96-97). After Miller successfully pulled one of the individuals away from a victim, and it appeared the four assailants would be leaving, he was suddenly struck from behind (V1, T.98).

Petitioner used his fist to punch Miller in the back of his head (V1, T.98). Miller turned around and punched Petitioner, who was then led out of the bar, by one of his companions (V1, T.98). Moments later, Miller heard a disturbance outside in the parking lot and went out to see what was happening (V1, R99).[2] As soon as

[1] The original information listed the Petitioner as the sole perpetrator. The amended information included charges against Petitioner's co-defendants.

[2] Miller's girlfriend, Karen Lamb, and her daughter were asleep in his truck (V1, T.94-95,99).

Miller walked out of the door, the Petitioner swung what appeared to be a large stick or ax handle, striking him on the side of the head (V1, T.99). Miller testified that several staples were required to close a gash on the side of his head (V1, T.102).

Petitioner testified he became involved in the fray, after he saw someone strike his friend; he pulled the two men apart (V2, T.179-181). As Petitioner turned around, someone struck him in the face with a pool stick (V2, T.181). He fell to the floor and blacked out (V2, T.181). When the Petitioner came to, he did nothing, but try to get out of the bar (V2, T.184-185). Petitioner denied hitting any of the alleged victims, including Miller, with a stick or his fist (V2, T.184-185). He could remember nothing (V2, T.186). At least two witnesses testified they saw Petitioner strike Miller in the head or face with the wooden club (Proctor: V1, T112; Lamb:V1, T.126).

During the jury charge conference, the court noted:

THE COURT: Okay, I see aggravated battery, as to Michael Proctor, felony battery as to Michael Proctor, and battery as to Michael Proctor. Battery as to John Hornsby, aggravated battery as to Richard Miller, felony battery as to Richard Miller, and battery as to Richard Miller. . .

* * *

(V2, T.190). Defense counsel told the court, “I don’t have a problem with those instructions. That’s fine.” (V2, T.190).

Regarding the verdict form, the trial court observed, "Well, I don't like that verdict form that I see there on 3.12, tell you that you have too many two things under aggravated battery, serious injury, deadly weapon." (V2, T.190). After further discussions, the court stated:

THE COURT: The verdict form should not look like that.

STATE: How should it look, Your Honor?

THE COURT: It should have aggravated battery with ***serious physical injury***, A. or B., with a deadly weapon. I believe that's how it is charged.

(V2, T.192-193)(***emphasis added***). When the court asked defense counsel, "does it appear to be in order," he responded, "Yes, it does." (V2, T.195). During closing arguments, the state focused on Petitioner's use of a deadly weapon to commit an aggravated battery against Richard Miller (V2, T.200,202-203).

The trial court instructed the jury, as follows:

THE COURT: As to Count III, which goes to Richard Miller, to prove the crime of aggravated battery the State must prove the following two elements beyond a reasonable doubt. The first element is a definition of battery. Aniceto Jaimes intentionally touched or struck Richard Miller against his will, and-or intentionally caused ***great bodily harm*** to Richard Miller. Aniceto Jaimes in committing the battery intentionally or knowingly caused great bodily harm

to Richard Miller and-or by the use of a deadly weapon. A weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm.

(V2, T. 210-211)(***emphasis added***). The verdict form asked jurors to find (as to victim, Richard Miller):

_____a. The defendant is guilty as charged of Aggravated Battery with

_____a. Deadly weapon or

_____b. ***Serious Bodily Harm***

_____b. The defendant is guilty of Felony Battery.

_____c. The defendant is guilty of Battery.

_____d. The defendant is not guilty.

(V1, R34-35)(***emphasis supplied***). The jury retired to deliberate at 4:44 P.M., but sent an inquiry to the court within twenty minutes (V2, T.219). The jury inquired: "Please define the difference between deadly weapon and serious bodily harm." (V1, R14).

The trial court, per agreement of the parties read the following:

THE COURT: I have previously instructed you that a weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm. The statute and the instructions do not define great bodily harm. It is a definition you wish to give to great bodily harm. And with

that I'll send you back into the jury room.

(V2, T.220-221). The jury deliberated for another twenty minutes before returning guilty verdicts, including aggravated battery, by serious bodily harm, as to victim, Richard Miller (V2, T.221).

On appeal below, Petitioner alleged, the trial court committed fundamental error, by allowing him to be convicted of aggravated battery, by inflicting serious or great bodily harm, an offense for which he had not been charged.

The Second District Court of Appeal held as follows:

> First, he claims that he was found guilty in count three of aggravated battery by causing great bodily harm on Mr. Miller when the information did not charge him with causing great bodily harm.
>
> * * *
>
> Although we recognize that it was error to convict Mr. Jaimes of aggravated battery by causing great bodily harm on Mr. Miller when that crime was not charged in the information, we affirm because defense counsel failed to preserve the issue for review on appeal. Defense counsel made no objection to the jury instructions or verdict form, and we conclude such error is not fundamental in Mr. Jaimes's circumstances. See *State v. Weaver*, 957 So. 2d 586 (Fla. 2007).

Jaimes v. State, 19 So. 3d 347, 348 (Fla. 2d DCA 2009).

Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction of this Court, this Court subsequently accepted jurisdiction after briefing. This briefing on the merits of the case follows.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's decision should be upheld. Under *State v. Weaver*, 957 So. 2d 586 (Fla. 2007), the error was not fundamental because the record shows the state, in seeking Petitioner's conviction for aggravated battery with a deadly weapon, never relied upon the alternate, uncharged theory in presenting its evidence or argument, regarding victim Richard Miller. Consequently, the Second District's opinion in *Jaimes v. State*, 19 So. 3d 347, 348 (Fla. 2d DCA 2009), which is in accord with *Weaver*, should be affirmed.

ARGUMENT

ISSUE

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN FINDING THAT FUNDAMENTAL ERROR DID NOT OCCUR WHEN THE TRIAL COURT, WITHOUT OBJECTION, INSTRUCTED THE JURY ON AN ALTERNATE, UNCHARGED THEORY WHICH WAS NOT IN DISPUTE OR RELIED UPON BY THE STATE?

The Second District Court of Appeal, correctly ruled that Petitioner's conviction for an offense not charged in the information did not result in fundamental error. The district court's ruling is also in conformity with this Honorable Court's holding in *State v. Weaver*, 957 So. 2d 586 (Fla. 2007).[3]

In *Weaver*, the defendant was arrested and charged with battery on a law enforcement officer following an altercation at his home. The information alleged the defendant committed the battery, by intentionally touching or striking the officer. At trial, the court instructed the jury as to both forms of battery. Weaver posed no objection to the instruction. In argument to the jury, the State focused on its evidence of intentional touching, and made no argument or suggestion that either officer suffered bodily injury. The jury returned a general verdict of guilty. On appeal to the Second District, Weaver argued "that the trial court

[3]*Weaver* was the only case cited by the district court in finding fundamental error did not occur in this case. Petitioner, however, suggests the district court cited and relied upon other decisions to support its holding, which he alleges are inapplicable to his case. Petitioner's Brief at pg. 13.

committed fundamental error, by instructing the jury that it could convict him of battery by causing bodily harm, or by intentional touching, when the Information alleged only an intentional touching."

The Second District began its analysis by recalling its previous decisions in *Vega* and *Dixon*[4]. Judge Altenbernd, writing for the district court, found *Dixon* and *Vega*, on which the court relied, were grounded in the principal that it is fundamental error to convict a defendant of a crime with which he has not been charged. In this context the court noted that "the evidence at trial [in this case] was directed solely to the 'intentional touching' form of battery." *Weaver*, 916 So. 2d at 897. Thus, "[i]t [was] improbable, to say the least, that the jury convicted Gregory Weaver based solely upon the alternative provided in the jury instruction without any evidence to support that alternative." Id. at 897.

While its own analysis suggested that no fundamental error occurred, the Second District, perceiving itself "constrained, by [its] precedents in *Dixon* and *Vega*," reversed Respondent's conviction for battery on a law enforcement officer. However, based on its reservations and its belief that the Criminal Appeal

[4] This Court's *Weaver* cases were premised on *Vega v. State*, 900 So. 2d 572 (Fla. 2d DCA 2004), and *Dixon v. State*, 823 So. 2d 792 (Fla. 2d DCA 2001).

Reform Act, and this Court's interpretation of that Act in *Reed* "call[ed] into question the rule of law that [was] followed in this case," the Second District certified the following question:

> DOES A TRIAL COURT COMMIT FUNDAMENTAL ERROR WHEN IT INSTRUCTS A JURY REGARDING BOTH "BODILY HARM" BATTERY ON A LAW ENFORCEMENT OFFICER AND "INTENTIONAL TOUCHING" BATTERY ON A LAW ENFORCEMENT OFFICER WHEN THE INFORMATION CHARGED ONLY ONE FORM OF THE CRIME AND NO EVIDENCE WAS PRESENTED NOR ARGUMENT MADE REGARDING THE ALTERNATE FORM?

Weaver v. State, 916 So. 2d 895, 898-899 (Fla. 2d DCA 2005). This Court answered the certified question in the negative based on its decisions in *Reed v. State*, 837 So. 2d 366, 370 (Fla. 2002), and *State v. Delva*, 5757 So. 2d 643, 644 (Fla. 1991).

As this Court reasoned in *Reed*, jury instructions are subject to contemporaneous objection and, absent such, can be raised on appeal only if fundamental error occurred. *Reed*, 837 So. 2d at 370. The facts must reflect an error that is pertinent or material to what the jury must consider in order to convict before it can be deemed fundamental. Id. Hence, "to justify not imposing the contemporaneous objection rule, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'[internal citations omitted]." Id. "[F]undamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." *Delva*, 575 So. 2d at 644-

645 [citations omitted].

Noting that *Delva*, unlike *Weaver*, involved the erroneous *omission* of an undisputed element, from a jury instruction, this Court found the same reasoning was applicable when there is an, "erroneous *inclusion* of an element that the State does not argue is present and about which it presents no evidence." Weaver, 957 So. 2d 588-589 (*emphasis added*). This Court further stated:

> As with the omission of an element of the offense that is not contested, this erroneous inclusion of an element that the State concedes does not apply, and concerning which it presents no evidence, is not "pertinent or material to what the jury must consider in order to convict." *Delva*, 575 So. 2d at 645 (quoting *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982). Therefore, such an error does not "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained with the assistance of the alleged error." Id. at 644-45 (*quoting Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960).

Weaver, 957 So. 2d at 589. The *Weaver* court also rejected the district court's reasoning, as stated in *Dixon*, a conviction under such circumstances as *Weaver's*, that it is "impossible to know whether a defendant was convicted of the offense for which he was charged, or one in which he was not charged. Id. at 589. Accordingly, the high court found the inclusion of bodily harm in the jury instruction did not result in fundamental error, as the element itself was not at issue and not relied upon by the state. Id.

Applying the reasoning and holding of *Weaver* to the instant

case, the same finding is warranted. Here, Petitioner was charged with committing an aggravated battery, which may be proven under the alternate theories of use of a deadly weapon, or causing great bodily harm. The information alleged Petitioner committed the aggravated battery, upon victim Richard Miller, by using a deadly weapon. The jury, however, was instructed as to both forms of aggravated battery, which the Second District found to be error. Petitioner posed no objection, but specifically accepted the instruction.

Under *Weaver*, fundamental error would be found if, the record before this Court demonstrated, the state relied on the theory of great bodily harm and that theory was disputed. A review of the instant record shows, and Petitioner concedes, the state's argument focused on Petitioner's use of a large wooden club, as a deadly weapon, and not the uncharged element of great bodily harm. For example, in closing arguments, the state reminded the jury of how Miller testified the Petitioner hit him in the back of the head with a wooden stick or club (V2, T.200, 202-203). The state went on to review the aggravated battery instruction, and asked the jury to examine how Petitioner had used the stick during the attack (V2, T.200, 202-203). The state made no reference to Miller's injuries.

Petitioner maintains, without any citation to the record, some evidence of great bodily harm was presented by the state, sufficient to remove his case from the dictates of *Weaver*.

(Petitioner's Brief at p. 11). Although Miller, himself, told the jury he suffered a gash on his scalp, which required several staples to close, the record clearly shows the state did not rely on this evidence to argue for Petitioner's conviction for aggravated battery. Moreover, the issue of great bodily harm was not in dispute.

In *Sanders v. State*, 959 So. 2d 1232 (Fla. 2d DCA 2007), the court found ineffective assistance of appellate counsel for failure to argue the jury was erroneously instructed on the element of great bodily harm, where the charging document only alleged aggravated battery (on law enforcement officer) was committed by using a deadly weapon. There, unlike here, Sanders was found guilty on a general verdict, after the state not only presented evidence of the officer's injuries, but also argued in closing, such injuries were not the kind found in a misdemeanor battery conviction. Consequently, the court concluded, "it was impossible to know whether the jury convicted Sanders of the uncharged alternate theory of the offense. . ." *Sanders*, 959 So. 2d at 1234. The evidence and argument presented here focused on the deadly weapon form of battery. Also, the element of serious or great bodily harm was not in dispute, nor contested below. Accordingly, *Sanders* is hardly helpful to the position advocated by Petitioner.

Also, in the court below, Petitioner posed no objection to the verdict form, which unlike *Weaver*, required the jury to make

specific findings. For the first time, Petitioner asserts the use of the specific verdict form was erroneous because it listed the alternate, uncharged theory. Petitioner accepted the verdict form at trial, and made no argument regarding its use, on appeal in the district court. This issue, now argued for the first time on appeal to this Honorable Court, is not preserved for review and not properly considered upon review of the case *sub judice*. See generally *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982); See also, *Insko v. State*, 969 So. 2d 992 (Fla. 2007)(Insko could not complain jury improperly convicted him on a lesser included offense, after he failed to object to the verdict form, which listed lascivious conduct by a defendant less than eighteen years of age, as one of four choices, even though it was clear Insko was in his thirties).

After *Weaver*, the Third District in *Jomolla v. State*, 990 So. 2d 1234 (Fla. 3d DCA 2008), agreed with the defendant that the trial court had erroneously instructed the jury on both forms of battery, though he was only charged with intentionally touching or striking the victim. The court, however, went on to find the giving of the instruction did not result in fundamental error. Id. at 1238. There, as in the instant case, the state never relied on the alternate uncharged theory. Also, in line with the state's argument, the defendant admitted hitting the victim. In this case, the Petitioner's defense was that he hit no one, but was

himself a victim, having blacked out, after being struck. In great contrast, the jury heard the testimony of the victims and others, who witnessed the beatings, and identified the Petitioner, as one of the attackers. The jury, had a "fair opportunity to exercise its inherent 'pardon' power." *State v. Abreau*, 363 So. 2d 1063 (Fla. 1978). Here, the jury was instructed on both forms of aggravated battery, felony battery, and simple battery (V1, R18-25; V2, T. 208-212). The jury had an opportunity to find the Appellant not guilty of the offense, but, by its verdict, clearly rejected the Appellant's theory of defense. See, *State v. Wimbley*, 498 So. 2d 929 (Fla. 1986), *Fernandez v. State*, 570 So. 2d 1008, 1011 (Fla. 2d DCA 1990)(Where this Court reasoned the jury had an opportunity to exercise its right to pardon the defendant by finding him guilty of the simple battery, a first-degree misdemeanor, one step removed from the charged offense). The ruling of the Second District Court of Appeal, which found fundamental error did not occur, should be affirmed by this Court.

CONCLUSION

Respondent respectfully requests that this Honorable Court uphold the ruling of the Second District Court of Appeal and affirm Petitioner's conviction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Bruce P. Taylor, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 20th day of January, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR RESPONDENT