

IN THE SUPREME COURT OF FLORIDA

ANICETO JAIMES, :

Petitioner, :

vs.

STATE OF FLORIDA, :

Case No. SC09-1694

Respondent. :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BRUCE P. TAYLOR
Assistant Public Defender
Fla. Bar No. 224936

Public Defender's Office
Polk County Courthouse

P.O. Box 9000-- Drawer PD
Bartow, Fl. 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

<u>ITEM</u>	<u>PAGE NUMBER</u>
Table of Citations	2
Statement of Facts and of the Case	3
Issue	6
Summary of Argument	6
Argument	
Does the Decision in <u>Aniceto Jaimes v. State of Florida</u> , Case No. 2D07-2482 (Fla. 2nd DCA April 29, 2009) Conflict with a Decision of this Court or of Another District Court?	7
Conclusion	10
Certificate of Service	10
Certificate of Compliance	10
Appendix	11

TABLE OF CITATIONS

<u>ITEM</u>	<u>PAGE NUMBER</u>
<u>Brown v. State</u> , 124 So. 2nd 481 (Fla. 1960)	8
<u>Gaines v. State</u> , 652 So. 2nd 458 (Fla. 4th DCA 1995)	8
<u>Haley v. State</u> , 315 So. 2nd 525 (Fla. 2nd DCA 1975)	6
<u>Long v. State</u> , 92 So. 2nd 259 (Fla. 1957)	8
<u>Moore v. State</u> , 496 So. 2nd 255 (Fla. 5th DCA 1986)	8
<u>O'Bryan v. State</u> , 692 So. 2nd 291 (Fla. 1st DCA 1997)	8

<u>Perkins v. Mayo</u> , 92 So. 2nd 611, 643 (Fla. 1957)	7
<u>Reed v. State</u> , 837 So. 2nd 366 (Fla. 2002)	8
<u>Sanders v. State</u> , 959 So. 2nd 1232 (Fla. 2nd DCA 2007)	6, 9
<u>State v. Weaver</u> , 957 So. 2nd 586 (Fla. 2007)	8, 9
<u>Young v. State</u> , 195 So. 569 (Fla. 1939)	7
Fla.R.A.P. 9.030(a)(2)A(iv)	7

STATEMENT OF THE FACTS AND OF THE CASE

Petitioner was charged with two counts of aggravated battery by "by touching or striking said person, against said person's will, or by intentionally causing bodily harm to said person, and in committing said battery did use a deadly weapon, to wit: wooden stick or club" (emphasis added). The exact language of those counts, especially in count 4, in whom the named victim was Richard Miller, is critical to the understanding of this case. That count will usually be referred to as the "Miller" count. Appellant was also charged with one count of simple battery and one count of felony battery. Prior to trial, the felony battery count was somehow dropped, and it will not be discussed further.

A jury trial was conducted. The trial consisted of a credibility contest as to the exact details of a barroom brawl. Since those details are not critical to an

understanding of the issues on appeal, most of the testimony will not be described at all, and the remainder will be presented in extremely truncated fashion.

Richard Miller, the alleged victim in count 4 of the information, described getting involved in the fight, and said he was hit on the back of the head with a fist by Petitioner. When the fight migrated outside, he said he was hit on the head by a club, by Petitioner. He also described his injuries as including a gash that needed to be stapled at the hospital. He said he was treated and released at the hospital.

Judy Proctor, the owner of "Judy's Place" (the location of the fight) also described the fight. She said she saw Miller placed in an ambulance and taken to the hospital. She saw that Miller had a big gash on the side of his head. She indicated how long it was, and said she knew it was deep, because she was the one who cleaned it. She followed the ambulance with Miller in it to the hospital and said they stapled the wound.

Jury instructions were agreed to, as well as a verdict form. The verdict form as to counts 1 and 4 (#3 on the form itself, the "Miller" count) each allowed the jury to find that Petitioner was guilty of aggravated battery by causing serious bodily injury (as well as by using a deadly weapon),

even though he had not been so charged in either of those counts. Of course, the jury was so instructed as well, although the term "great" was used in place of the word "serious" which appeared on the actual form. Petitioner was found guilty as charged as to count one and the misdemeanor count. However, as to the "Miller" count (4 in the information, and 3 on the verdict form) the jury declined to find Petitioner guilty of aggravated using a deadly weapon (with which he was charged) by not checking the guilty box for that charge. Instead the jury checked the box finding him guilty of aggravated battery by causing serious bodily harm, with which he was not charged. Interestingly, the jury had asked for a clarification of the difference between serious harm and a deadly weapon, but the Court declined to further clarify. Also of interest, the word "serious" on the verdict form for the "Miller count" was underlined, apparently by the jury foreman.

Petitioner was sentenced to 25 years in prison, concurrently on each felony charge, and to 364 days incarceration concurrently as to the misdemeanor. The obvious sentencing error of imposing a 25 year sentence on a second degree felony has been ordered to be corrected, and will not be addressed further.

On appeal Petitioner argued that as to the "Miller count" he was wrongfully convicted of aggravated battery by

causing great (or serious) bodily harm when he had not been charged with that offense. In an opinion dated April 29, 2009, the District Court held the error was neither preserved nor fundamental and declined to reverse the conviction. A timely motion for rehearing and for rehearing en banc, citing conflict with the Second District's own holding in Sanders v. State, 959 So. 2nd 1232 (Fla. 2nd DCA 2007) and Haley v. State, 315 So. 2nd 525 (Fla. 2nd DCA 1975), was denied on August 12, 2009. This petition followed.

ISSUE

Does Issue in the Decision in Aniceto Jaimes v. State of Florida, Case No. 2D07-2482 (Fla. 2nd DCA March 29, 2009) Conflict with a Decision of this Court or of Another District Court?

SUMMARY OF ARGUMENT

The Second District's opinion expressly and directly conflicts with opinions of this Court and with other District Courts on the question of whether fundamental error occurs in a criminal case when the jury is instructed on, and the defendant is convicted of, an offense not charged in the charging document.

ARGUMENT

Fla.R.A.P. 9.030(a)(2)A(iv) provides for the discretionary review by this Court of any decision of a District Court that expressly and directly conflicts with a decision of this Court, or of another District Court. The District Court acknowledged that error was committed as to the "Miller count" in instructing the jury, the verdict form used, and in convicting Petitioner of a crime not charged, but found the error was not fundamental and was not preserved.

In so finding, the District Court placed itself in direct conflict with numerous decisions of this Court and of other district Courts. The decisions cited by the District Court in support of its holding do not deal with jury instructions on offenses with which the defendant was not charged, and are therefore distinguishable and inapplicable. At least as long ago as Young v. State, 195 So. 569 (Fla. 1939) this Court stated it is fundamental that a defendant be acquainted with the charge he must face (emphasis added). In Perkins v. Mayo, 92 So. 2nd 611, 643 (Fla. 1957) it was held that one can not be indicted for one offense and convicted or sentenced for another, even though the offenses are closely related and may be of the same general character. This Court has consistently defined "fundamental error" as one which had it not occurred, the verdict could

not have been reached, Reed v. State, 837 So. 2nd 366 (Fla. 2002), citing Brown v. State, 124 So. 2nd 481 (Fla. 1960). Obviously, since the error in the instant case consisted (at least partly) in allowing the jury to use a verdict form that specifically allowed the jury to reach a guilty verdict for conduct not charged, the verdict of guilty as to that uncharged conduct could not have been reached without that error. The decision of the Second District in the instant case, by not applying that definition of fundamental error, directly conflicts with Reed and the authorities cited therein.

Numerous decisions in both this Court and other District Courts have held it was fundamental error to allow a jury to be instructed on, and to allow the defendant to be convicted of, an offense not charged: Long v. State, 92 So. 2nd 259 (Fla. 1957), O'Bryan v. State, 692 So. 2nd 291 (Fla. 1st DCA 1997), Moore v. State, 496 So. 2nd 255 (Fla. 5th DCA 1986), and Gaines v. State, 652 So. 2nd 458 (Fla. 4th DCA 1995). The decision of the Second District Court in the instant case expressly and directly conflicts with each of those holdings.

Of course, Petitioner is aware in State v. Weaver, 957 So. 2nd 586 (Fla. 2007) this Court has modified the fundamental error concept as to a jury being instructed on an offense not charged, but only to the extent stated in

that opinion (emphasis added). The essential holding in Weaver is that where a general verdict form is used, and the prosecution neither presents evidence of nor makes argument on the theory of prosecution not charged, it can be assumed the jury did not base its verdict on the uncharged conduct. Those conditions are not present in the instant case. A specific verdict form was used, removing any question that the jury based its verdict on the uncharged conduct. Also, although undersigned counsel has not detected any argument made by the prosecution on the uncharged conduct, evidence as to the serious nature of Miller's wounds was presented to the jury from at least two witnesses. To the extent the decision of the District Court in this case goes beyond the limitations of the decision in Weaver, by applying those modifications of the fundamental error in jury instruction principles to facts far different from those in Weaver, the decision also conflicts with Weaver. Petitioner is aware that intra-district conflicts do not form a basis to invoke this Court's jurisdiction, but the Second District correctly analyzed Weaver in its decision of Sanders v. State, 959 So. 2nd 1232 (Fla. 2nd DCA 2007). The discussion in that decision outlines the issue in the instant case more clearly than space permits in this submission.

CONCLUSION

This Court should accept review of the decision of the Second District to resolve the conflict of whether it is fundamental error to allow a criminal defendant to be convicted of an offense not charged.

Respectfully Submitted:

BRUCE P. TAYLOR
Assistant Public Defender
Fla. Bar No. 224936
Public Defender's Office
Polk County Courthouse
P.O. Box 9000-- Drawer PD
Bartow, Fl. 33831
(863) 534-4200

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Office of the Attorney General at 3507 East Frontage Rd. Ste. 200 Tampa, Fl. 33607 on this the 21st day of September, 2009 by regular U.S. Mail.

CERTIFICATE OF COMPLIANCE

This brief is printed in "courier New" 12 point type in compliance with Fla. R. A. P. 9.210(2).

BRUCE P. TAYLOR
Assistant Public Defender
Fla. Bar No. 224936
Public Defender's Office
Polk County Courthouse
P.O. Box 9000-- Drawer PD
Bartow, Fl. 33831
(863) 534-4200

CC: Petitioner

APPENDIX