

**IN THE SUPREME COURT OF FLORIDA**

**JOSE PENA ,**

**Petitioner,**

**v.**

**CASE NO.: SC02-2411**

**STATE OF FLORIDA,**

**Respondent.**

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**ON NOTICE TO INVOKE DISCRETIONARY  
JURISDICTION TO REVIEW A DECISION OF THE  
SECOND DISTRICT COURT OF APPEAL**

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**MR. PENA'S INITIAL BRIEF ON THE MERITS**

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## **PRELIMINARY STATEMENT**

In this brief the Petitioner, **JOSE PENA**, will be referred to as “Mr. Pena.”

The Respondent, the **STATE OF FLORIDA**, will be referred to as “the state.”

The record on appeal to the Second District consisted of five volumes. That record will be referred to by the number of the volume, followed by a slash, followed by the appropriate page reference therein.

## **STATEMENT OF THE CASE AND FACTS**

This case involves a final appeal from a judgment and sentence entered in the Circuit Court, Thirteenth Judicial Circuit, Hillsborough County, Florida (trial court), which was affirmed by the Second District Court of Appeal in Pena v. State, 829 So.2d 289 (Fla. 2d DCA 2002). A copy of the Second District's opinion is attached as Appendix A.

### **A. Trial Court Proceedings:**

On November 24, 1999, the state filed a one count indictment charging Mr. Pena with murder in the first degree, in violation of §782.04, Florida Statutes (1999)(I/8-9). Specifically, the indictment alleged that on or between September 9 and 10, 1999, Mr. Pena did unlawfully and feloniously kill Miranda Fernandes while engaged in the unlawful distribution of heroin and/or MDMA, the drugs being the proximate cause of

Ms. Fernandes' death (I/8).

The case was tried before a jury on February 12-13, 2001 (I/18-20). At trial, the state presented testimony from nine witnesses, and the defense presented testimony from one. Twenty exhibits were admitted on behalf of the state (I/21). The jury returned a verdict of guilty as charged (I/56; IV/490). Mr. Pena was adjudicated guilty (I/58; IV/494). Mr. Pena was sentenced to the Department of Corrections for a term of natural life (I/61; IV/494).

A post-trial motion for judgment of acquittal or for a new trial (I/65-74) was denied (I/77). On March 6, 2001, Mr. Pena filed his timely notice of appeal to the Second District (I/76).

**B. Second District's Opinion:**

On October 18, 2002, the Second District, on rehearing, affirmed Mr. Pena's judgment and sentence.<sup>1/</sup> Pena v. State, 829 So.2d 289 (Fla. 2d DCA 2002). In affirming the Second District addressed four issues: 1) whether the trial court committed fundamental error in failing to instruct the jury on the age requirement for the defendant under § 782.04(1)(a)(3), and in permitting a conviction on this charge when his age was not alleged in the information; 2) whether the trial court committed

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<sup>1/</sup> The Second District's initial opinion, Pena v. State, 27 Fla. L. Weekly D1542 (Fla. 2d DCA 7/3/02), was withdrawn.

fundamental error by failing to instruct the jury on justifiable and excusable homicide; 3) whether the trial court committed fundamental error by failing to swear the jury prior to voir dire; and 4) whether the trial court's causation instruction was error. Id. at 292, 295.

As to the age issue, the Second District declined to decide whether the defendant's age was an element of the offense. Instead, it held that where there was no factual dispute about age, and the defendant could not show that he was misled about the charged crime, the need for this allegation could be waived by failing to file a motion to dismiss. Id. at 292. It further found that there was no fundamental error in failing to instruct on the defendant's age where the undisputed evidence established that his age fulfilled the statutory requirement for this offense. Id. at 293. However, because there was no standard instruction for this offense and a dearth of caselaw interpreting the statute, the Second District certified the following question as one of great public importance:

IS IT FUNDAMENTAL ERROR FOR A TRIAL COURT TO OMIT AN INSTRUCTION THAT A DEFENDANT MUST BE EIGHTEEN YEARS OF AGE OR OLDER TO COMMIT DRUG-DISTRIBUTION, FIRST-DEGREE MURDER UNDER SECTION 782.04(1)(a)(3), FLORIDA STATUTES (1999), WHEN IT IS UNDISPUTED THAT THE DEFENDANT IS OVER EIGHTEEN?

Id. at 295.

As to the justifiable and excusable homicide instruction issue, the Second District held that failure to give this instruction was not fundamental error, in that the offense of conviction was more than one step removed from manslaughter. Id. at 294-95. The Second District then certified the following issue:

IS IT FUNDAMENTAL ERROR FOR A TRIAL COURT TO OMIT INSTRUCTIONS ON EXCUSABLE AND JUSTIFIABLE HOMICIDE WHEN A DEFENDANT IS CHARGED AND CONVICTED OF DRUG-DISTRIBUTION, FIRST-DEGREE MURDER UNDER SECTION 782.04(1)(a)(3), FLORIDA STATUTES (1999), AND THE FACTUAL CIRCUMSTANCES DO NOT SUPPORT ANY JURY ARGUMENT RELYING UPON THE EXCUSABLE OR JUSTIFIABLE HOMICIDE INSTRUCTIONS?

Id. at 295.

As to the jury oath issue, the Second District acknowledged that it was clear from the record that the trial judge did not swear the venire. Id. at 293. The Second District, however, held that it was not fundamental error where the record failed to demonstrate, one way or other, whether the venire received the oath required by Fla.R.Crim.P. 3.300(a). Id. at 293-94. The court noted, however, that the Fifth District, in Martin v. State, 816 So.2d 187 (Fla. 5<sup>th</sup> DCA), dismissed, 823 So.2d 124 (Fla. 2002), had held that if the defendant had preserved the issue, the state would

bear the burden of supplementing the record to establish compliance with Rule 3.300(a). Id. at 294.

Lastly, the court briefly addressed the claim that the instruction as to causation was erroneous. The Second District concluded that the trial court's instruction on causation was “adequate.” Id. at 295. However, it suggested that the matter be considered by the Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases, because a standard jury instruction for this offense would be helpful. Id.

### **C. Trial Testimony**

The state’s primary witnesses were three friends and acquaintances of Mr. Pena and Ms. Fernandes: Bridget Spicer, Anthony Batista, and Anthony’s brother Jose Batista (III/201-03). Anthony Batista testified that on September 9, 1999, he was at Mr. Pena’s apartment in Tampa (III/202). Two girls - Bridget Spicer and Miranda Fernandes - came over (III/203). The foursome began drinking alcohol and smoking marijuana (III/203-04). Later, Ms. Fernandes asked Mr. Pena for some ecstasy (III/205). Mr. Pena gave Ms. Fernandes the ecstasy (III/206). Mr. Pena also consumed ecstasy. Later that evening Ms. Spicer left and Anthony fell asleep in the bedroom (III/208). Some time later Mr. Pena woke him up, and told Anthony that he thought Ms. Fernandes was dead (III/208). Anthony saw Ms. Fernandes naked in the



tub. Her eyes were open, but he checked to see if she had a pulse and thought she was dead (III/209). The two men then clothed Ms. Fernandes and started to drive her to a hospital (III/210). As they were leaving, Anthony saw a small plate in the living room area which had a substance he believed to be heroin on it. He had seen heroin before (II/213). On the way Mr. Pena stopped the car, took Ms. Fernandes out of the car, and left her on a residential sidewalk (III/212). Anthony testified that Mr. Pena told him that he had given Ms. Fernandes 5 grams of heroin (III/215). On cross-examination Anthony admitted that ecstasy pills can often resemble aspirin, and that he did not look closely at the pills (III/217-18). Anthony admitted that he had never seen Ms. Fernandes use any heroin (III/219).

Ms. Spicer corroborated a good deal of what Anthony Batista had said. Ms. Fernandes was her friend and neighbor (III/228). On the Tuesday (September 7) before the fatal incident, she and Ms. Fernandes went over to Mr. Pena's apartment. Ms. Fernandes told Ms. Spicer that she wanted "to roll," which meant to take ecstasy (III/230). That Tuesday, Ms. Spicer drank beer and smoked marijuana, but Ms. Fernandes did not (III/231). Instead, Ms. Fernandes asked Mr. Pena for ecstasy (III/231). Mr. Pena made a phone call and someone came to the apartment (III/232). Mr. Pena bought a bag with drugs in it from that individual (III/233). Mr. Pena then offered those present cocaine, heroin, and ecstasy (III/233-34). Specifically, Mr. Pena

gave Ms. Fernandes what appeared to be ecstasy (III/234).

The following afternoon, Ms. Fernandes told Ms. Spicer that she wanted to go back to the Pena apartment (III/237). The two went back on Thursday evening (III/237). Again, Ms. Spicer testified that Ms. Fernandes wanted “to roll” (III/238). From the Tuesday event to the Thursday event, Ms. Spicer was unaware of Ms. Fernandes using any drugs (III/238). As for Thursday, Ms. Spicer testified the four consumed marijuana and alcohol (III/238-39). She did not personally see Mr. Pena give Ms. Fernandes any ecstasy that evening, or give her any heroin (III/240). However, about three days later, Mr. Pena called her and told her that he had given Ms. Fernandes some heroin (III/241).

Jose Batista testified that on the first occasion everybody was drinking alcohol and (except for him) smoking marijuana (III/251-52). Mr. Pena bought ecstasy pills, which he offered to those present (III/253-54). Both Mr. Pena and Ms. Fernandes had pills, but Jose was not sure whether Ms. Fernandes actually consumed her pill (III/254). On Thursday night, the two girls were back (III/255-56). Around 2:30 in the morning, when Jose came up from the beach, he saw Ms. Fernandes lying on the floor (III/257). He heard breathing sounds coming from her (III/257). He went to bed. The next morning he woke up and went to work (III/257). He saw Mr. Pena and Ms. Fernandes in the living room (III/257-58). On a plate on the table he saw

something which he believed to be heroin (III/257-58). Later that day Mr. Pena told him that Ms. Fernandes was dead (III/259).

The state also admitted into evidence tapes of two interviews of Mr. Pena by law enforcement officers (State Exhibits 20, 21; SR/601). The first tape contained an interview of Mr. Pena which occurred on the evening of Sunday, September 12, 1999 (III/269-70; State Exhibit 20; SR/601). In that interview Mr. Pena stated that the two women came over and drank and smoked marijuana (III/272). Ms. Fernandes stayed and had sex with Mr. Pena (III/272-73). On the second night the girls came over (III/274). Ms. Fernandes had two ecstasy pills and both he and she took one (III/275). Mr. Pena and Ms. Fernandes went to the hot tub, where they argued and she then left (III/280-81). Mr. Pena denied that anybody died at his house (III/283). He stated that Ms. Fernandes left and he did not know what happened to her after that (III/283-84).

The second tape contained an interview of Mr. Pena on the afternoon of September 14, 1999 (III/294; State Exhibit 21; SR/601). During the second interview, Mr. Pena stated that Ms. Fernandes came with two ecstasy pills (III/300). The two were drinking beer and smoking marijuana (III/300). They each took one ecstasy pill (III/301). Ms. Fernandes asked for heroin (III/301). Mr. Pena gave her a quarter of a gram, which she snorted (III/301-02). Mr. Pena stated that he then fell asleep

(III/302). When he woke up Ms. Fernandes was not breathing (III/302-03). He and Anthony then tried CPR, and putting her under water in the shower, but neither effort woke her (III/303). He and Anthony then put her in a car, and left her along the street (III/304-05). As to the earlier night, Mr. Pena stated that the two of them had been drinking mixed drinks, smoking marijuana, sniffing some cocaine, and taking ecstasy (III/311).

Ms. Fernandes was found on that street by a passerby (III/192-93), who then called the police (III/198). The parties stipulated that the individual found on the street was Mirranda Fernandes (IV/439).

Dr. Bernard Adams is the chief medical examiner for Hillsborough County (IV/342). Since he became a medical examiner in 1984, he has performed approximately 4,000 autopsies, hundreds of which dealt with drug overdoses (IV/343). Based upon his autopsy, and his review of the toxicology lab work, he was of the opinion that Ms. Fernandes died from intoxication from the combined effects of heroin and MDMA (IV/343, 348). In his opinion, it is possible that Ms. Fernandes died solely from heroin ingestion, solely from MDMA ingestion, or a combination of the two (IV/348-49).

Dr. Wayne Duer is the chief forensic toxicologist in the Hillsborough County Medical Examiner's Office (IV/374-75). He was accepted as an expert in the field of

toxicology, without objection (IV/376-77). Dr. Duer testified that the concentration of heroin in Ms. Fernandes' heart blood was 1.91 milligrams per liter. The average amount of heroin associated with death is .4 milligrams per liter (IV/383). As for MDMA, the concentration found in her heart blood was 1.7 milligrams per liter, and that is near the average of what is found in people who have died (IV/383-84). Dr. Duer conveyed these findings to Dr. Adams, but he himself did not determine the cause of death (IV/384).

For the defense Dr. Daniel Buffington, a pharmacologist, testified (IV/398). He had reviewed the medical examiner's reports and toxicology reports, as well as police reports and other witness statements (IV/400). Dr. Buffington was of the opinion it was impossible to determine which of the seven drugs found in Ms. Fernandes was the cause of death (IV/405-11).

### **SUMMARY OF THE ARGUMENTS**

#### **I. MR. PENA'S CONVICTION MUST BE VACATED WHERE INDICTMENT FAILED TO ALLEGE, AND JURY WAS NOT PROPERLY INSTRUCTED ON, AGE ELEMENT OF MURDER IN THE FIRST DEGREE**

An essential element of the charge of murder by delivery of a controlled substance was that the defendant be 18 years of age or older. The indictment did not allege that Mr. Pena was 18 years of age or older, nor was the jury instructed that that

was an essential element of the offense. Due to these errors, Mr. Pena cannot legally be convicted of murder in the first degree. His case must be remanded for a new trial on the charge of murder in the second degree.

## **II. FAILURE TO INSTRUCT ON EXCUSABLE AND JUSTIFIABLE HOMICIDE WAS FUNDAMENTAL ERROR**

Mr. Pena's conviction must be vacated because the trial court committed fundamental error in failing to instruct the jury on excusable and justifiable homicide.

## **III. USE OF JURY INSTRUCTION WHICH MISLED JURY AS TO ESSENTIAL ELEMENTS OF MURDER DENIED MR. PENA A FAIR TRIAL**

The trial court erred a) when it improperly failed to instruct the jury, over objection, that it must find the death was caused by Mr. Pena's unlawful drug distribution, and b) as to the element of causation. The primary issue in this case was that of causation. The trial court committed reversible error when it failed to properly instruct the jury on that issue, and specifically when it failed to use the defendant's proposed jury instruction on that issue. The remedy is a new trial.

## **IV. FAILURE TO SWEAR JURY VENIRE PRIOR TO QUESTIONING WAS FUNDAMENTAL ERROR, REQUIRING REVERSAL**

Contrary to the Second District's conclusion, the record is clear that the jury venire was not sworn prior to voir dire questioning by the trial court and both counsel. This error, which goes to foundation of the jury selection process, was fundamental

error. Mr. Pena is therefore entitled to a new trial.

## ARGUMENTS

### **I. MR. PENA’S CONVICTION MUST BE VACATED WHERE INDICTMENT FAILED TO ALLEGE, AND JURY WAS NOT PROPERLY INSTRUCTED ON, AGE ELEMENT MURDER IN THE FIRST DEGREE**

The Second District's first certified question must be answered in the affirmative. Because the indictment did not allege the essential “age” element of the offense of murder in the first degree by unlawful distribution of a controlled substance, and the jury was not instructed on that essential elements, Mr. Pena's conviction on that offense violates fundamental due process.

#### **A. Indictment**

The state attempted to charge Mr. Pena with murder in the first degree charge based upon the unlawful distribution of a controlled substance. In its entirety, the indictment reads:

### COUNT ONE

The Grand Jurors of the County of Hillsborough, State of Florida, charge that **JOSE FRANCISCO PENA**, on or between the 9<sup>th</sup> day of September, 1999, and the 10<sup>th</sup> day of September, 1999, in the County of Hillsborough and State of Florida, did unlawfully and feloniously kill a human being, to-wit: **MIRRANDA FERNANDES** while engaged in the perpetration of, or in the attempt to perpetrate the

unlawful distribution of Heroin and/or Methylenedioxyamphetamine (MDMA), a substance controlled under Florida State 893.03(1), to **MIRRANDA FERNANDES**, the said drugs being the proximate cause of the death of **MIRRANDA FERNANDES**, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 782.04. (I/8).

Although it does not specify which portion of the murder statute - § 782.04 - it was proceeding under, it is now apparent that the indictment was intended to be brought under § 782.04(1)(a)3. That statute states that the unlawful killing of a human being is murder in the first degree when a specified controlled substance is unlawfully distributed “ . . . by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, . . .” (emphasis added).

**B. Age is Element of Offense**

The Second District refused to decide if the defendant's age was an essential element of § 782.04(1)(a)3 offense.<sup>2/</sup> Yet, a plain reading of the statute makes clear an essential element of this offense is that the defendant must be 18 years of age or older. While apparently no Florida appellate court has addressed this issue squarely, in Jones v. State, 360 So.2d 1293, 1298, 1299 n. 4 (Fla. 3d DCA 1978), the Third

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<sup>2/</sup> The only evidence of Mr. Pena's age presented to the jury was his statement on tape at the beginning of the first interview that he was “ . . . born June 25<sup>th</sup>, 1971” (III/270).



District stated that it was necessary for conviction to show the drug had been distributed by a person 18 or over. The indictment does not allege that Mr. Pena was 18 years of age or older. It thus does not allege an offense under § 782.04(1)(a)3.

In a similar vein are cases discussing age requirements of sexual battery convictions. In Baker v. State, 604 So.2d 1239 (Fla. 3d DCA 1992), the state attempted to charge the defendant with capital sexual battery, in violation of § 794.011(2), Florida Statutes (1991). This statute required the defendant to be eighteen years of age or older. However, the charging document omitted any allegation as to the defendant's age. The jury was instructed as to the age requirement. It found the defendant guilty of "Sexual Battery as charged in the Information." Id. at 1240.

The Third District stated:

We hold that in the absence of either a specific allegation in the charging document, or a finding by the jury that the defendant is eighteen years of age or older, a conviction for capital sexual battery cannot stand.

Id. (footnotes omitted). The Third District therefore found the resulting conviction to be fundamental error. One of the cases it cited for that proposition was this Court's decision in Henderson v. State, 20 So.2d 649 (Fla. 1945), in which the Court held that taking from the jury its obligation to determine any element of the offense is a denial of due process. See also, Adams v. State, \_\_\_ So.2d \_\_\_ (Fla. 1<sup>st</sup> DCA 12/31/02)[28

Fla. L. Weekly D99] (in capital sexual battery case, age is element of the offense); Glover v. State, 815 So.2d 698 (Fla. 5<sup>th</sup> DCA 2002)(in capital sexual battery case, age of defendant should be element of offense), review granted, \_\_ So.2d \_\_ (Fla. 11/5/02; Case No. SC02-1064); D'Ambrosio v. State, 736 So.2d 44 (Fla. 5<sup>th</sup> DCA 1999)(age of defendant is an essential element of capital sexual battery); M.J.C. v. State, 681 So.2d 1203 (Fla. 5<sup>th</sup> DCA 1996) (juvenile could not be convicted of capital sexual battery where he was not eighteen years of age or older at the time of the offense)<sup>3/</sup>.

**C. Failure to Allege Age Precludes Conviction for First Degree Murder**

Under both the United States and Florida Constitutions, a fundamental right of due process which every defendant possesses is the right to notice of the nature of the accusation against him. Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); Amendments VI, XIV, United States Constitution; Article I, § 16, Florida Constitution. It is the specific charge for which a defendant has been put on notice, and it alone, that a defendant must prepare his defenses and for which

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<sup>3/</sup> The Second and Fourth Districts disagree with the First, Third, and Fifth Districts on this point. See Winchester v. State, 639 So.2d 84, 85 (Fla. 2d DCA 1994), review denied, 651 So.2d 1197 (Fla. 1995); Jesus v. State, 565 So.2d 1361 (Fla. 4<sup>th</sup> DCA 1990)(age is sentencing factor, not element).

he may ultimately be convicted. As the United States Supreme Court stated in Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948):

[N]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

68 S.Ct. at 517.

It is fundamental tenet of Florida and federal constitutional due process that a person may not be convicted of and sentenced for a crime for which he was not charged and tried. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000); Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948); Long v. State, 92 So.2d 259, 260 (Fla. 1957); Gallon v. State, 648 So.2d 309 (Fla. 2d DCA 1995) (defendant could not be convicted of felony petit theft where crime was not charged in the information). As the United States Supreme Court stated in De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937), "Conviction upon a charge not made would be sheer denial of due process." See also, Ray v. State, 403 So.2d 956, 959 (Fla. 1981). Mr. Pena therefore cannot be convicted of murder in the first degree, as the criminal information did not allege all of the essential elements of that offense and therefore did not place him on notice

as to that offense. The proper remedy is vacation of the judgment and sentence, and remand for a new trial on the charge of murder in the second degree.

**D. Failure to Instruct Jury on Age Element Precludes First Degree Murder Conviction**

Also, Mr. Pena is entitled to a new trial due to the trial court's failure to properly instruct the jury on all elements of this first degree murder prosecution. Although this error was not objected to below, it constitutes fundamental error. See Ray, supra; Palazzolla v. State, 754 So.2d 731, 737 (Fla. 2d DCA 2000); Dowling v. State, 723 So.2d 307, 308 (Fla. 4<sup>th</sup> DCA 1998) (failure to give complete and accurate instruction, if it relates to element of charged offense, is fundamental error). See also, Holcomb v. State, 760 So.2d 1097 (Fla. 3d DCA 2000) (failure to instruct on essential element of crime of sexual battery constituted fundamental error). One essential element of first degree murder by delivery of drugs - that Mr. Pena was 18 years of age or older - was not alleged in the indictment, and not submitted to the jury. The element of Mr. Pena's age was omitted from the final jury instructions (IV/464-65), and that omission has resulted in fundamental error.

It is fundamental component of the due process guarantees of both the Florida and Federal Constitutions that the jury be completely and accurately instructed on each

element of a criminal offense, and that each element must be proved beyond a reasonable doubt. See Fifth and Fourteenth Amendments, United States Constitution; Article I, § 9, Florida Constitution; In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1967); Gerds v. State, 64 So.2d 915, 916 (Fla. 1953). Materially erroneous jury instructions which adversely affect the defense constitute reversible error. Motley v. State, 20 So.2d 798, 800 (Fla. 1945); Hayes v. State, 564 So.2d 161, 163 (Fla. 2d DCA 1990).

Almost nothing is more prejudicial to a defendant than a trial court's erroneous instructions. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946). Because instructions to the jury are so vital, the trial court must correctly explain the applicable law. Where it does not, fundamental error is often held to occur. See e.g., Hernandez v. State, 575 So.2d 1321 (Fla. 4th DCA 1991), aff'd, 596 So.2d 671 (Fla. 1992); Rhames v. State, 473 So.2d 724 (Fla. 1st DCA 1985), review denied, 494 So.2d 205 (Fla. 1986).

Also, Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435(2000), provides a separate basis for reversal. In Apprendi, the United States Supreme Court held:

Other than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

120 S.Ct. at 2362-63. See also, Ring v. Arizona, 536 U.S. \_\_\_\_, 122 S.Ct. 2428, 2432, 153 L.Ed.2d. 556 (2002) (applying Apprendi in death penalty cases; stating that Apprendi applies even if the state determines the additional findings made by the trial judge are “sentencing factor[s]”).

Mr. Pena was charged with murder in the first degree, and initially faced the death penalty. Because the state chose not to seek the death penalty, this offense required a mandatory life sentence upon conviction. §§ 775.082(1), 782.04, Florida Statutes (1999). On the other hand, if Mr. Pena had been convicted of second degree murder or one of the lesser offenses on which the jury was instructed, that would have constituted a felony of the first or second degree. As such, he would have been scored under the sentencing guidelines. See Fla.R.Crim.P. 3.704 and 3.992(a). Under the 1999 guidelines, a murder in the second degree conviction would have resulted in a sentencing scoresheet of 116 points (primary offense) plus 120 (victim injury) minus 28 equals 208 points. A possible sentence of 208 months is a far cry from a mandatory sentence of life without any possibility of parole, which is what Mr. Pena received. Applying the rule of Apprendi, because the age element of unlawful drug distribution murder in the first degree was not alleged in the indictment and not

submitted to the jury, Mr. Pena cannot be convicted of or sentenced for that offense. See also, Gonsalves v. State, 830 So.2d 265, 266-67 (Fla. 2d DCA 2002)(where second death not alleged in the information, and not decided by the jury beyond a reasonable doubt, sentence violated Apprendi). Again, the remedy is reversal of the conviction and remand for a new trial on the charge of murder in the second degree.

The Second District's conclusion that it is not fundamental error to exclude an essential element from the jury instructions, where the element is not disputed, cannot be squared with fundamental due process. It is axiomatic that once Mr. Pena entered his plea of not guilty to the charge in the indictment, all elements which the state needed to prove were at issue, and therefore were disputed. Chief Judge Blue recently articulated this argument:

I reluctantly concur in the majority opinion because I believe the case law cited on fundamental error requires the result. I do so although I disagree with the law we are required to follow. In this case, Mr. Battle pleaded not guilty to the charge of attempted felony murder. At that point, the State had the burden of proving each of the elements comprising that crime to the jury hearing the case, beyond a reasonable doubt. There is no provision in the law that would allow a directed verdict in favor of the State on any of the elements of the crime, but the case law we apply appears to say that it is not necessary for the jury to find all the elements proven beyond a reasonable doubt. We, rather than the jury charged with deciding the case, can determine that one of elements of the charged crime was undisputed. That would make it appear that the defendant

has a burden to offer some evidence beyond his not guilty plea in order to place elements of a crime in dispute.

Battle v. State, \_\_\_ So.2d \_\_\_ (Fla. 2d DCA 1/17/03) [28 Fla. L. Weekly D236, D237](Blue, C.J., specially concurring). In his dissent, Chief Judge Blue also cited the dissent in Morton v. State, 459 So.2d 322 (Fla. 3d DCA 1984), review denied, 467 So.2d 1000 (Fla. 1985). There a judge stated:

The majority has created a rule of law which departs from the well-settled constitutional principle that in a trial by jury every element of a criminal offense must be proved sufficiently to satisfy the jury, not the court, of its existence.

Id. at 325 (Ferguson, J., dissenting). Because Mr. Pena's not guilty plea placed all elements at issue <sup>4/</sup>, the failure to instruction on the age element cannot be deemed to be harmless error. But see, Reed v. State, \_\_\_ So.2d \_\_\_ (Fla. 12/19/02) [27 Fla. L. Weekly S1045] (element must be “disputed” for fundamental error to occur).

\* \* \*

While Mr. Pena believes that the failure to instruct on the age element alone constitutes fundamental error, it is clear that when combined with the failure to instruct on excusable and justifiable homicide (Argument II), and the incorrect instruction on this offense which was actually given to the jury (Argument III), Mr. Pena did not

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<sup>4/</sup> In this, as in all criminal cases, the jury was so instructed in final instructions (IV/473-74).



receive a full and fair consideration of the law surrounding his offense by his trial jury.

Therefore, if this jury instruction issue, considered alone, is not deemed sufficient to reverse Mr. Pena's conviction, the cumulative effect of the jury instruction errors complained of herein must be held to have denied Mr. Pena a fair trial, and therefore require reversal of his conviction and remand for a new trial.

## **II. FAILURE TO INSTRUCT ON EXCUSABLE AND JUSTIFIABLE HOMICIDE WAS FUNDAMENTAL ERROR**

The Court must also answer the Second District's second certified question in the affirmative. This was a prosecution for murder in the first degree. However, the trial court failed to instruct the jury on the introduction to homicide, excusable homicide, and justifiable homicide portions of the standard jury instructions on murder. While this was not objected to below, this too constituted fundamental error. Ray v. State, 403 So.2d 956, 960 (Fla. 1981).

From the closing instructions, the trial court omitted all of the introduction to homicide instructions, including the excusable and justifiable homicide instructions (IV/464-69). These instructions are to be given in all murder cases. There was no agreement by the defense to forego use of these instructions. The only time this issue was mentioned was during the following discussion:

[Prosecutor]: I don't know if [defense counsel] would concur with that time on Pena. If I could have the lessers

that he's requesting so I can get the jury instructions started.

[Defense Counsel]: Well, there's going to be some issues.

The Court: What's going to be an issue?

[Defense Counsel]: Causation is I believe going to be an issue.

The Court: Causation.

[Defense Counsel]: So I believe all non-homicide lessers would be involved.

[Prosecutor]: Which, Judge, in using the felony murder or premeditated murder I was looking for example at all homicides, we give the introduction to homicide and I don't think it applies.

It talks about killing and intentional act and this is not required essentially so I think that the introduction to homicide will not be applicable but as far as all homicide lessers I ask defense counsel to think about it and tell me exactly what lessers he's requesting.

The Court: I think he said he wanted all of them.

[Defense Counsel]: All non-homicide lessers as well.

The Court: All non-homicide lessers.

[Prosecutor]: The problem with that is there is no category lesser for a drug overdose murder and there are no standard lessers so I ask that if he wants to sit down and tell me what all the lessers he thinks are standard and I'll include them.

The Court: Okay, tell him which ones you think are

standard and he'll include them. (I/3-4).<sup>5/</sup>

As can be seen, this matter was only discussed by the state. The state, contrary to the "Note to Judge" in the standard jury instructions, decided that in this murder case these instructions were unnecessary. The trial court erroneously went along with that determination.

In Hill v. State, 688 So.2d 901, 906 (Fla. 1996), cert. denied, 522 U.S. 907 (1997), this Court stated that a trial court is required to instruct the jury on excusable and justifiable homicide in all murder cases. This Court, along with others, has held that the failure to so instruct the jury is fundamental error, requiring reversal of a murder conviction.

In Van Loan v. State, 736 So.2d 803, 804 (Fla. 2d DCA 1999), the Second District held that the failure to give the instruction on excusable and justifiable homicide was fundamental error. The only exception to that rule was where the defense counsel affirmatively agreed to the omission or alteration of the jury instruction. As in Van Loan, defense counsel in Mr. Pena's case never agreed to the omission. Therefore, Mr. Pena was denied a fair trial, and due process of law. The Second District thus

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<sup>5/</sup> Jury instructions were discussed on two later occasions in the trial (III/329-33; IV/337-41). However, at neither of these discussions was the matter of the introduction to homicide, justifiable or excusable homicide instructions discussed.

should have reversed his conviction. Amendments V, VI, XIV, United States Constitution; Article I, § 9, Florida Constitution. See also, Smith v. State, 773 So.2d 1278, 1279-80 (Fla. 5<sup>th</sup> DCA 2000); Ortiz v. State, 682 So.2d 217 (Fla. 5<sup>th</sup> DCA 1996); McNeal v. State, 662 So.2d 373 (Fla. 5<sup>th</sup> DCA 1995), review denied, 670 So.2d 940 (Fla. 1996); Blandon v. State, 657 So.2d 1198, 1199 (Fla. 5<sup>th</sup> DCA 1995).

The Second District held that this error was not fundamental because the offense of conviction - first degree murder - was more than one step removed from manslaughter. Essentially it concluded that the justifiable and excusable homicide instructions really only apply to manslaughter cases, and not to first degree murder cases. Yet, in Tamayo v. State, 237 So.2d 251 (Fla. 3<sup>d</sup> DCA 1970), the defendant was convicted of first degree murder. The Third District reversed the defendant's conviction, finding that the exclusion of jury instructions on justifiable and excusable homicide require reversal. In so doing, the Third District rejected that conclusion that the justifiable or excusable homicide instruction related only to manslaughter. Id. at 252.

This Court has not carved out any exception to its requirement that a jury is to be instructed on excusable and justifiable homicide in all murder cases. See State v. Smith, 573 So.2d 306, 309-10 (Fla. 1990). The Court has made clear that this instruction is essential to understand the crimes charged. Rojas v. State, 552 So.2d

914 (Fla. 1989). Contrary to the Second District's opinion, 829 So.2d at 294, the instruction is necessary and must be read even if there is no basis in fact for the instruction. Blandon v. State, 657 So.2d 1198, 1199 (Fla. 5<sup>th</sup> DCA 1995). This is so because in its absence, the jury is not fully instructed as to what constitutes lawful acts versus unlawful acts. Id.

Because the excusable and justifiable homicide instructions apply to all murder cases, and not simply to manslaughter cases, it is unfair and unwise to have a system whereby the failure to give that instruction in second degree murder or manslaughter cases, or attempts thereof, is fundamental error, yet failure to give that instruction in first degree murder cases is not. If anything, first degree murder cases, above all others, demand and require complete and accurate instructions on the law, especially the law relating to lawful versus unlawful homicides. The failure to explain that law in Mr. Pena's case must be held to be fundamental error.

### **III. USE OF JURY INSTRUCTION WHICH MISLED JURY AS TO ESSENTIAL ELEMENTS OF MURDER DENIED MR. PENA A FAIR TRIAL**

Mr. Pena was denied a fair trial and due process of law when the trial court denied his proposed jury instruction on murder in the first degree.<sup>6/</sup> Amendments V, VI, XIV, United States Constitution; Article I, § 9, Florida Constitution. Contrary to the Second District's conclusion, 829 So.2d at 295, the trial court's instruction on causation was not "adequate." Instead, the instruction used by the trial court a) did not require the jury to find that Mr. Pena's unlawful distribution of drugs caused the death, and b) improperly instructed the jury as to critical elements of causation. Because these claims involve essentially issues of law, they are reviewable on appeal de novo.

The portion of the murder statute under which Mr. Pena was charged reads, in pertinent part, that the unlawful killing of a human being which resulted from the

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<sup>6/</sup> Once this Court accepts jurisdiction over a cause in order to resolve a legal conflict, it has jurisdiction over all issues. See Savoie v. State, 422 So.2d 308 (Fla. 1982). The Court's authority to consider issues other than those upon which jurisdiction is based is discretionary and is exercised only when those other issues have been properly briefed and argued and are dispositive of the case. Murray v. Regier, \_\_\_ So.2d \_\_\_ (Fla. 12/5/02) [27 Fla. L. Weekly S1008, S1010 n.5]. This causation issue has been properly briefed and argued in both the Second District and in this Court. It too presents an issue which is dispositive of the case.

unlawful distribution of a controlled substance by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree. § 782.04(1)(a)3, Florida Statutes (1999). It should be noted that there is no standard jury instruction for first degree murder based on the distribution of drugs.

The first degree murder instruction sought by Mr. Pena at trial read as follows:

Before you can find the defendant guilty of Murder in the First Degree, the State must prove the following elements beyond a reasonable doubt:

1. Jose Pena unlawfully distributed heroin or MDMA or both to Miranda Fernandes.
2. Miranda Fernandes is dead.
3. **But for Jose Pena's unlawful distribution of heroin or MDMA or both, the death of Miranda Fernandes would not have occurred.**
4. **The death of Miranda Fernandez was proximately caused by the unlawful distribution of heroin or MDMA or both.**

It is not necessary for the State of Florida to prove the defendant had the premeditated intent to cause death.

“Proximate Cause” is defined as that which in a natural and continuous sequence, unbroken by any new independent cause produces an event, and without which the victim's death would not have occurred.

“Distribute” means the transfer from one person to another of a controlled substance. (I/23-24; IV/337-39; emphasis added).

Instead, over objection (IV/337-39), the trial court instructed the jury as follows:

Before you can find the defendant guilty of Murder in the

First Degree, the State must prove the following three elements beyond a reasonable doubt:

One, Jose Pena distributed, or caused to be distributed, heroin and/or MDMA to Miranda (sic) Fernandes.

Two, Miranda (sic) Fernandes is dead.

**Three, the death of Miranda (sic) Fernandes was proximately caused by the criminal act or agency of Jose Pena.**

It is not necessary for the State of Florida to prove the defendant had a premeditated intent to cause death.

“Proximate Cause” means that which in a natural and continuous sequence, unbroken by any new independent cause produces an event without which the victim’s death would not have occurred. (IV/464-65; emphasis added).

The instruction used by the trial court is erroneous for several reasons. First, the trial court's third element is clearly erroneous. The statute, and the indictment, required that the jury find that the death of Ms. Fernandes was proximately caused by the unlawful distribution of a controlled substance, and not simply by the criminal act or agency of Mr. Pena. Mr. Pena’s proposed paragraph four would have made this clear to the jury. Outside of the distribution of the specified drugs, the criminal act or agency of Mr. Pena in any other regard was irrelevant to the charge. That error alone requires reversal.

Second, the failure to include Mr. Pena’s paragraph three was error. Contrary to the state’s argument at trial, the inclusion of the “but for” paragraph did not increase the state’s burden of proof. In order for a valid conviction to occur, the jury needed



to find that Ms. Fernandes' death was a direct result of Mr. Pena's unlawful distribution of heroin and/or MDMA. Mr. Pena's proposed paragraph three made that clear. The instruction proposed by the state, and used by the trial court, did not make that clear.

Mr. Pena was charged under a seldom used section of the murder statute which requires in part that the State prove that the unlawful killing ". . . resulted from . . . the distribution of heroin or MDMA in this case." § 782.04(1)(a)3, Florida Statutes (1999). The jury instruction that the court used failed to adequately instruct the jury on this causation element, but merely included a definition of proximate cause. The proximate cause definition is not in dispute. What is disputed is the omission of the "cause in fact" element.

This Court has consistently held that causation in criminal cases consists of two distinct elements.

Causation consists of two distinct subelements. As legal scholars have recognized, before a defendant can be convicted of a crime that includes an element of causation, the State must prove beyond a reasonable doubt that the defendant's conduct was (1) the "cause in fact" and (2) the "legal cause" (often called "proximate cause") of the relevant harm. See e.g. 1 Wayne R. LaFare & Austin W. Scott, Jr., Substantive Criminal Law § 3.12, at 390, 392 (2d ed. 1986). See also, United States v. Pitt-Des Moines, Inc., 970 F. Supp. 1359, 1364 (N.D. Ill. 1997), aff'd, 168 F.3d 976 (7<sup>th</sup> Cir. 1999).

In order to establish that a defendant's conduct was the "cause in

fact” of a particular harm, the State usually must demonstrate that “but for” the defendant’s conduct, the harm would not have occurred. See LaFave & Scott, supra, at 390, 392-94; Pitt-Des Moines, 970 F.Supp. at 1364; Hodges v. State, 661 So.2d 107, 110 (Fla. 3d DCA 1995) (quoting Velazquez v. State, 561 So.2d 347, 350 (Fla. 3d DCA 1990)). \*\*\* In those rare circumstances where “two causes, each alone sufficient to bring about the harmful result, operate together to cause it, the “but for” test becomes impossible to prove . \*\*\* In these circumstances, the State may prove “cause-in-fact” causation by demonstrating that the defendant’s conduct was a “substantial factor” in bringing about the harm. \*\*\*

In addition to establishing “cause-in-fact” causation, the State must also demonstrate that the defendant’s conduct was the “proximate cause” of the particular harm . \*\*\*

Eversley v. State, 748 So.2d 963, 966 (Fla. 1999). See also, State v. Hubbard, 751 So.2d 552 (Fla. 1999).

In Velazquez, cited above approvingly by this Court in Eversley, the Third District stated:

Clearly there can be no criminal liability for such result-type offenses [like murder] unless it can be shown that the defendant's conduct was a cause-in-fact of the prohibited result, whether the result be the death of a human being, personal injury to another, or injury to another's property.

561 So.2d at 350.

Mr. Pena’s proposed jury instruction did include both the “cause in fact” and the “legal cause” elements. The primary defense was based on causation. In opening statements, the jury was informed that the issue was one of causation (III/190). The

defense placed only one witness on the stand. Dr. Buffington, a pharmacologist, testified specifically to these elements. The entire cross-examination of the medical examiner and toxicologist were concerning the element of causation. By excluding that “but for” element of causation, the trial court in effect prevented the defense from effectively arguing its own theory of defense. As if to emphasize this omission, the jury’s first question dealt directly with the issue of causation and, as proposed by defense counsel, could have (and should have) been answered by providing them with the defense’s proposed instruction (I/53-54; IV/483-87).

The law is well settled that a defendant is entitled to an instruction of his theory of defense if that theory is support by the law of this state and there is any basis, however slight, for the instruction. Bryant v. State, 412 So.2d 347, 350 (Fla. 1982). A jury instruction on the accused’s theory of the defense must be granted by the trial court regardless of “how weak or improbable,” Solomon v. State, 436 So.2d 1041 (Fla. 1st DCA 1983), or “however flimsy”, Arthur v. State, 717 So.2d 193, 194 (Fla. 5th DCA 1998), it may be. This is a matter of fundamental due process, made applicable to Mr. Pena’s case by both the federal and state constitutions.

Because the trial court failed to correctly instruct the jury on the essential “causation” element of the offense charged, and because this was essential to Mr. Pena’s theory of his defense, he is entitled to a new trial.

#### **IV. FAILURE TO SWEAR JURY VENIRE PRIOR TO QUESTIONING WAS FUNDAMENTAL ERROR, REQUIRING REVERSAL**

Mr. Pena is entitled to a new trial because the prospective jurors who were summoned to try his case were not sworn to tell the truth at the beginning of voir dire.<sup>7/</sup>

##### **A. Facts**

The record clearly demonstrates that the prospective jurors were not sworn prior to answering the voir dire questions propounded by the trial court and both counsel in Mr. Pena's case. Contrary to the Second District's conclusion, 829 So.2d at 293-94, the record is complete on this issue.

On the morning of trial, the trial court initially considered some pretrial matters (II/3-4). After that discussion, the following occurred:

The Court: We ready?

[Prosecutor]: I will be.

The Court: Let's bring them in.

(Whereupon, the prospective jury panel was in the courtroom)

The Court: Good morning, ladies and gentlemen.

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<sup>7/</sup> For the reasons set forth in footnote 6, supra at page 27, this Court has the discretion to also consider this issue.

Welcome to circuit criminal court. My name is Dan Perry and I'll be the judge presiding here today. (II/4-5).

After that, the trial judge introduced the defendant, the attorneys, and the courtroom personnel (II/5-6). The judge then read the indictment (II/6-7). After explaining that the jury was going to be picked that day, and the testimony would begin the next day, the judge began asking questions (II/7-8). At no time did the trial court place any prospective juror under oath prior to it (II/7-10), the state (II/10-80), or defense (II/83-138) asking them voir dire questions.

At the close of jury selection, the fourteen people chosen (including two alternates) were then sworn to try the case (II/154).

As for the trial court minutes, the only reference to the jury being sworn was that it was sworn at 12:46 p.m. (I/18). According to the clerk's minutes, this is one minute after the jury was selected. There is no reference to any swearing prior to when jury selection began at 9:25 that morning (I/18).

In Mr. Pena's designations to the court reporter, he designated that all of the trial, including the voir dire, be transcribed (I/80). The certificates of the court reporter state that she accurately reported the trial proceedings in this matter (II/157; III/334; IV/495). Undersigned counsel moved to supplement the record on appeal with "Any and all records or documents showing the qualification of the prospective jurors and

the swearing of the prospective jurors prior to voir dire for Mr. Pena's trial on February 12, 2001, in either the jury management room or the trial courtroom" (Pena's July 3, 2001, Motion to Supplement the Record on Appeal, etc.; ¶ 4.d). In her certificate accompanying the supplemental record, the clerk states "no record or documents showing qualification and swearing of prospective jurors prior to voir dire exist" (SR/562). Therefore, to counsel's knowledge, there is no additional documentation in the court below that would affect this issue.<sup>8/</sup>

## **B. Law**

The voir dire of the jury has been generally defined as the examination of prospective jurors for the purpose of securing an impartial jury. More specifically, examination of a jury on voir dire has a dual purpose, namely, to ascertain whether a legal challenge for cause exists and also to determine whether good judgment suggests the exercise of a peremptory challenge. The rules of criminal procedure dictate that a certain procedure must be followed.

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<sup>8/</sup> Contrary to the Second District's suggestion, 829 So.2d at 293-94, this is not a matter that could be resolved by the filing of affidavits on appeal. See Kelley v. Kelley, 75 So.2d 191 (Fla. 1954); Van Gallon v. State, 50 So.2d 882 (Fla. 1951); Vichich v. Department of Highway Safety and Motor Vehicles, 799 So.2d 1069 (Fla. 2d DCA 2001) (appellate/circuit court had no authority to request or obtain additional, extra-record information, and could not rely on such information in reaching its decision).

Fla.R.Crim.P. 3.300(a) states:

**(a) Oath.** The prospective jurors shall be sworn collectively or individually, as the court may decide. The form of the oath shall be as follows:

“Do you solemnly swear (or affirm) that you will answer truthfully all questions asked of you as prospective jurors, so help you God?”

If any prospective juror affirms, the clause “so help you God” shall be omitted.

First, it must be noted that this rule uses the mandatory term “shall.” Thus, the oath is a mandated requirement, and not simply discretionary.

Jury selection is a critical stage of any criminal trial. Article I, §16, Florida Constitution; Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In State v. Baker, 254 So.2d 207, 208 (Fla. 1971), this Court stated:

It is elementary that a trial jury panel is first sworn before any questions (a voir dire examination) are asked of the jurors.

Contrary to the Second District's decision in Gonsalves v. State, 830 So.2d 265, 266 (Fla. 2d DCA 2002), the requirements of Fla.R.Crim.P. 3.300(a) cannot be met in the “common jury pool room.” What occurs in the “common jury pool room” is not part of the individual defendant’s trial. Rule 3.300(a) - part of “The Trial” section of the Rules of Criminal Procedure - makes it clear that this oath is a required

part of the individual defendant's trial rights. See also, Fla.R.Crim.P. 3.180(a)(4) (requiring the presence of the defendant at all parts of the jury selection process); Robinson v. State, 520 So.2d 1 (Fla. 1988) (Rule 3.300(a) oath was beginning of defendant's trial); Moore v. State, 368 So.2d 1291 (Fla. 1979) (individual's trial begins when prospective jurors are sworn for voir dire).<sup>9/</sup> As this oath is intended to be part of Mr. Gonsalves' trial, he had a state and federal due process right to be present. See e.g., Snyder v. Massachusetts, 291 U. S. 97, 54 S.Ct. 330, 78 L.Ed. 647 (1934). Amendments V, XIV, U.S. Constitution; Article I, §§ 9, 16, Florida Constitution.

Over 100 years ago, this Court addressed a related issue. In Brown v. State, 10 So. 736 (Fla. 1892), the Court first considered the claim that the record did not show that the jury rendered the verdict against the defendant was sworn. The Court

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<sup>9/</sup> The Second District's citation to Johnson v. State, 660 So.2d 648, 660 (Fla. 1995), for the proposition that a trial judge may delegate the process of swearing potential jurors to a deputy clerk, is misleading. In Johnson this Court stated that the deputy clerk could swear jurors and determine if they were qualified to serve. The Court's opinion had nothing to do with the administration of the Rule 3.300(a) oath. The qualification oath is intended to eliminate individuals who are not qualified under Chapter 48 to even serve as jurors. From the qualified jurors, a venire or panel of prospective jurors is then chosen for a specific case. That group of prospective jurors, from which the final jury will be selected, is then given the Rule 3.300(a) oath by the trial judge. The jurors finally chosen will be given the Rule 3.360 oath.



concluded from review of the record entries and the transcript that there was no mention of the jury having been sworn. The Court stated:

It will not be questioned that it is absolutely essential for a proper conviction of the accused that the jury should have been properly sworn before rendering a verdict against him, and it is also essential that this fact should appear upon the record.

\* \* \*

But the record must show that the jury who tried the accused was sworn.

Id. The Court ruled that the fact that the bill of exceptions stated the jury was sworn did not supply the omission in the record. The Court specifically stated that:

And so we conclude here that the record proper should show in a case of felony that the jury was sworn, and an omission in this respect is fatal to a conviction, and cannot be supplied by the recitals in the preface of a bill of exceptions . . . .

Id. at 738.

Three years later, the Court reached the same conclusion in Zapf v. State, 17 So. 225 (Fla. 1895). Again, the Court held that the record was fatally defective in not showing that the jury was sworn. The statement that a jury was impanelled was not sufficient. In both Brown and Zapf, a new trial was required.

It cannot be said that Mr. Pena's jury was a lawfully impanelled, impartial jury,

as required by Article I, §§ 16, 22, Florida Constitution. Here a jury was selected despite not having been placed under oath. This taints the entire jury selection process, because the jurors were not required to answer questions truthfully.

In Collins v. State, 465 So.2d 1266, 1268 (Fla. 2d DCA 1985), the Second District stated:

The key to a valid oath is that perjury will lie for its falsity. Such an oath must be an unequivocal act in the presence of an officer authorized to administer oaths by which the declarant knowingly attests the truth of a statement and assumes the obligations of an oath.

In Collins, the court vacated a conviction due to an affiant's failure to take an oath on a search warrant affidavit, because the affiant was under no obligation to tell the truth. So too a juror, not being sworn, is under no obligation to answer voir dire questions truthfully. The Collins rationale must be applied equally to Mr. Pena's case: the failure of the jurors to take the oath mandated by this Court in Rule 3.300(a) prior to voir dire must invalidate the entire voir dire process, and therefore Mr. Pena's entire trial.

An analogous situation occurs when a court is presented with unsworn witness testimony. In Houck v. State, 421 So.2d 1113 (Fla. 1st DCA 1982), the court stated that an unsworn witness is not competent to testify. Similarly, in Mesidor v. State, 521 So.2d 333 (Fla. 4th DCA 1988), the court ruled that the defendant was entitled to post-conviction relief based on the trial court's failure to swear in an interpreter and

determine the competency and bias of the interpreter during plea proceedings. See also, Ortega v. State, 721 So.2d 350 (Fla. 2d DCA 1998); Lewis v. State, 653 So.2d 1107 (Fla. 3d DCA 1995); Balderamma v. State, 433 So.2d 1311 (Fla. 2d DCA 1983)(reversible error where interpreter not sworn); R & D Sod Farms, Inc. v. Vestal, 432 So.2d 622 (Fla. 1st DCA 1983).

The Fifth District's decision in Martin v. State, 816 So.2d 187 (Fla. 5<sup>th</sup> DCA), dismissed, 823 So.2d 124 (Fla. 2002), finding this not to be fundamental error must be rejected. First, none of the cases cited therein addressed this specific issue. Second, there are few things more fundamental in a jury trial than the validity of the selection of the jurors. In Mr. Pena's case, the selection of the jury was fundamentally flawed because jurors were not placed under oath, and therefore, their answers were not given under the penalty of perjury, prior to their being questioned as to their ability to be fair and impartial jurors. Since that is the bedrock of the jury system, the failure to require jurors to take that oath must be held to be fundamental error.

It is the burden of the trial court and the state to ensure that the requirements of due process are met in a criminal prosecution. Alexander v. State, 575 So.2d 1370, 1371 (Fla. 4th DCA 1991). That was not done here. Mr. Pena acknowledges that there was no objection to this point at the trial. However, this issue is reviewable under the fundamental error standard set forth in Ray v. State, 403 So.2d 956, 960 (Fla.

1981). Because of this fundamental violation of state and federal due process, Mr. Pena is entitled to a new trial.

**CONCLUSION**

Based on the arguments and authorities set forth in this brief, this Court must vacate the Second District's decision and remand with instructions that Mr. Pena be given a new trial, or his conviction be reduced and he be resentenced accordingly.

Respectfully submitted this 31<sup>st</sup> day of January, 2003.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31<sup>st</sup> day of January, 2003, a true copy of the foregoing, with appendix, was sent by United States mail to Erica M. Raffel, Assistant Attorney General, 2002 North Lois Avenue, Seventh Floor, Tampa, Florida 33607; and the original and 7 copies were sent by United States mail to Thomas D. Hall, Clerk, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief is typed in 14 point TIMES NEW ROMAN proportional space font.

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**TERRENCE E. KEHOE**  
Florida Bar No. 330868

**IN THE SUPREME COURT OF FLORIDA**

**JOSE PENA ,**

**Petitioner,**

**v.**

**CASE NO.: SC02-2411**

**STATE OF FLORIDA,**

**Respondent.**

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**ON NOTICE TO INVOKE DISCRETIONARY  
JURISDICTION TO REVIEW A DECISION OF THE  
SECOND DISTRICT COURT OF APPEAL**

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**APPENDIX TO  
MR. PENA'S INITIAL BRIEF ON THE MERITS**

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**INDEX TO APPENDIX**

**TAB**

**DOCUMENT**

A Opinion of Second District Court of Appeal in Pena v. State, 829 So.2d 289 (Fla. 2d DCA 2002).