

**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 REPLY BRIEF ON THE MERITS**

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## **PRELIMINARY STATEMENT**

In this brief, the parties and the record on appeal will be referred to as in Mr. Pena's initial brief. Mr. Pena's initial brief will be referred to as "IB." The state's answer brief will be referred as to "AB."

## **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**

#### **A. Indictment**

The state contrasts one of Mr. Pena's statement in his initial brief to this Court with a statement in his initial brief to the Second District (AB 5). That is attempt to make a mountain out of a molehill. The statements in both briefs were statements made by appellate counsel, and obviously were not concessions ever made at the trial level. The statements made in Mr. Pena's brief, both to the Second District and this Court, were made to convey the fact that it is now clear to appellate counsel, based upon the indictment, the evidence presented by the state, and the sentence imposed against Mr. Pena, that the state was proceeding under that section.

The state's assertion that Mr. Pena was aware of the provision under which he was charged and knew of the oversight, i.e., the lack of any allegation as to age, is not

only without any record support, but obviously, is sheer speculation.

**B. Age is Element of Offense**

The state seems to assert that age is not an element of this offense: “Petitioner's age is not nor can it be considered part of the act (or intent) required for conviction under this statute” (AB 8). In doing so, it fails to address the Third District's decision in Jones v. State, 360 So.2d 1293 (Fla. 3d DCA 1998), where the Third District stated it was necessary for a conviction under this offense to show that the drug had been distributed by a person eighteen or over. Id. at 1298, 1299 n. 4. Not only does the state fails to address Jones, but fails to address the decisions of three district courts of appeal as to the analogous situation of capital sexual battery offense, wherein each court has held that age of the offender was an essential element of that offense (IB 14-15). It makes no attempt to demonstrate how those opinions are wrong, or to distinguish between this murder statute and the capital sexual battery statute. The bottom line is the state has provided this Court with no legal support for its bald assertion that age is not element.

As additional authority for the proposition that age is an element of the offense, see Hawes v. State, 712 So.2d 834, 835 (Fla. 4<sup>th</sup> DCA 1998)(juvenile cannot be convicted of attempted capital sexual battery, which requires the perpetrator to be over the age of 18).

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

The state has argued that this issue is waived because of Mr. Pena's failure to file a pretrial motion to dismiss (AB 6-7). Of course, because this case is before the Court on certification of the issue of whether the errors complained were fundamental, i.e., not preserved, it has already been conceded that no such motion was filed. More importantly, however, this state argument overlooks a line of this Court's prior decisions that have held that conviction on a charge not made by an information is a denial of due process. See e.g., State v. Gray, 435 So.2d 816 (Fla. 1983).<sup>1/</sup> In Gray, this Court stated:

Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time - before trial, after trial, on appeal, or by habeas corpus.

Id. at 818. Because Mr. Pena's information wholly failed to allege the essential element of age, his conviction cannot stand.

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<sup>1/</sup> The Second District's attempt to limit this rule of law to aggravated assault cases, 829 So.2d at 292-93 n.1, must be rejected. Gray intended no such limitation.

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

In Chicone v. State, 684 So.2d 736 (Fla. 1996), this Court stated:

A defendant has the right to have a court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. Gerds v. State, 64 So.2d 915, 916 (Fla. 1953). When an instruction excludes an fundamental and necessary ingredient of law required to substantiate the particular crime, such failure is tantamount to a denial of a fair and impartial trial. See id.

Id. at 745. A proper application of those principles requires reversal in this case.

The state's argument that this issue is waived (AB 8) ignores the Second District's certified question. Mr. Pena has conceded that the issue was not preserved. The certified question now before the Court is whether it was fundamental error to fail to instruct on the age component of this offense. The state of course does not even address that issue. Its failure to address the certified question directly must be seen as a concession that either it has no position on the matter, or it cannot articulate a viable position.

The state's assertion that Mr. Pena's reliance on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d. 435 (2000), is “new” is wrong. Mr. Pena raised and argued Apprendi to the Second District on direct appeal. Most importantly, the state's argument in this Court ignores the holding in Apprendi. Apprendi, a

decision based on the fundamental constitutional concepts of both notice and proof beyond a reasonable doubt, requires the state to allege in its charging document, and submit to the jury, all essential facts that increase the penalty. Age is one such element from § 782.04(1)(a)3. With the allegation of age (as well as all other elements), the maximum penalty for this offense is death or life in prison. Without that allegation, there is no offense of murder in first degree by delivery of drugs, and therefore Mr. Pena could never have been subjected to either the death penalty or, as he received, life in prison. Quite simply, Apprendi held that if the fact - whether called an element or a sentencing enhancement factor, 530 U.S. at 476, 482-83<sup>2/</sup> - was not alleged, and if it was not submitted to the jury for resolution under the “beyond a reasonable doubt” standard, conviction and sentence for a crime based on such a fact cannot withstand constitutional scrutiny. A defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. Apprendi, 530 U.S. at 483; Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 2439-40, 153 L.Ed.2d 556 (2002). See also, Amos v. State, 833 So.2d 841 (Fla. 4<sup>th</sup> DCA 2002) (where information did not allege fact, and verdict did

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<sup>2/</sup> Under an Apprendi analysis, the Second District's refusal to decide whether age is an element of the offense or sentencing factor, 829 So.2d at 292, is not as important. Either conclusion requires a vacation of the first degree murder conviction and sentence.

not necessarily include fact, defendant could not be sentenced for offense which required said fact).

This Court addressed an analogous situation in State v. Estevez, 753 So.2d 1 (Fla. 1999). In that case it applied the same rules of law the United States Supreme Court later applied in Apprendi. Id. at 5-6. In Estevez, this Court stated that a trial judge is not free to direct a verdict as to a trafficking amount, even where the evidence presented by the state is not controverted. Id. at 7. It is important to note that in Estevez, the information did specify the amount of cocaine as being in excess of 400 grams. Estevez v. State, 713 So.2d 1039 (Fla. 3d DCA 1998). The jury was instructed on the amount element. 753 So.2d at 2. Nonetheless, because the jury, by its verdict, did not make a finding that 400 grams or more was involved the sentence based on that amount could not stand. Id. at 7. Thus, pursuant to Estevez, even assuming there was no dispute as to the age element, this fact still must be submitted to the jury to justify the increased sentence.

\* \* \*

In his initial brief, Mr. Pena asserted that the remedy for reversal due to failure to allege or instruct on the age element was a vacation of the judgment and sentence, and a “. . . remand for a new trial on the charge of murder in the second degree” (IB 16). Upon reflection, that statement is erroneous. As it stands, the information would

not support a charge of murder in the second degree under § 782.04(2) or (3), Florida Statutes (1999). The information does not properly charge the offense of murder in the third degree under § 782.04(4)(1), Florida Statutes (1999), because again the defendant's age is an element of that statute. Instead, the highest offense for which all elements are alleged would be the offense of delivery of a controlled substance, in violation of § 893.13(1)(a)1, Florida Statutes (1999). Therefore, should this Court reverse on the basis on the argument set forth in Argument I of Mr. Pena's appeal, the remedy is that his conviction must be reduced to one of delivery of a controlled substance, and the case be remanded so that he be resentenced according. Should the Court reverse for one of the reasons set forth in Arguments II - IV, the case should be remanded for a new trial on the charge of distribution of a controlled substance.

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

Appellate counsel for the state misread the record when they assert:

The trial court instructed counsel for Petitioner to get together with the prosecutor and tell him what standard instructions Petitioner wanted. It was therefore left to the Petitioner to advise the State and ultimately the court which instructions he wanted and to then bring this to the court's attention. (AB 9).

The exact colloquy between the trial court and counsel is set forth in Mr. Pena's initial brief (IB 22-23). At the point in question where the trial court advised defense counsel

to “tell him which ones you think are standard and he'll include them,” the trial court was discussing lesser included offenses and only lesser included offenses. It was not discussing instructions in general. It clearly was not discussing the introduction to homicide, excusable or justifiable homicide instructions.

The state's argument is an effort to ignore the rule of cases such as Van Loan v. State, 736 So.2d 803 (Fla. 2d DCA 1999), and Blandon v. State, 657 So.2d 1198 (Fla. 5<sup>th</sup> DCA 1995), where the courts held that the only exception to the fundamental error rule was where defense counsel affirmatively agreed to the omission or alteration of the jury instruction. Obviously, Mr. Pena's trial counsel did not affirmatively agree to the omission of those instructions. The state cannot (and does not) go so far as to make that argument, as the record cannot support it.

The state's assertion that the excusable and justifiable homicide instructions are not necessary when the charge is predicated on distribution of drugs (AB 9) must be rejected. This is a first degree murder case. This is not simply a drug distribution case. The “Note to Judge” in the standard homicide instructions advises the Florida trial judges that excusable and justifiable homicide instructions are to be given in all murder and manslaughter cases. There is no exception for murder by drugs, any more than there is one for murder by a knife or murder by a gun or murder by a fist.

The state's argument further flies in the face of this Court's prior statement in

Hill v. State, 688 So.2d 901, 906 (Fla. 1996), cert. denied, 522 U.S. 907 (1997), cited in Mr. Pena's initial brief (IB 24), that the trial court is required to instruct the jury on excusable and justifiable homicide in all murder cases.

There is simply no justification for the exception urged by the state in this appeal. Because the purpose of the excusable and justifiable homicide instructions is to explain the differences between lawful and an unlawful homicides to the jury, Richardson v. State, 818 So.2d 679, 680 (Fla. 3d DCA 2002), the inclusion of this language is vital in any murder case, Mr. Pena's included.

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

The state's assertion that the trial court has “wide discretion” in instructing the jury (AB 11) is grossly misleading. A trial judge is required to completely and accurately instruct the jury on each element of a criminal charge, and that each element must be proved beyond a reasonable doubt (IB 17-18). The erroneous “causation” element complained of in this argument was undeniably a disputed issue at trial. In this case, because the errors complained of dealt with the charged offense and the elements therefore, the trial court's discretion in instructing the jury was virtually nil. See also, Giles v. State, 831 So.2d 1263 (Fla. 4<sup>th</sup> DCA 2002) (error in instruction as to defense required reversal).

The state does not respond to Mr. Pena's argument complaining that the third element of the instruction as given by the trial court was wrong because it permitted the jury to find that Ms. Fernandes' death was proximately caused by the unspecified criminal act or agency of Mr. Pena, as opposed to the distribution of heroin or MDMA (IB 29).

Instead, the state simply responds to the second part of Mr. Pena's causation argument. The state takes a direct quotation from this Court's opinion in Eversley v. State, 748 So.2d 963, 966 (Fla. 1999), and attempts to twist it into a concession by Mr. Pena (AB 12). It is, of course, no such thing. The quote from Eversley is simply a recitation of the law as promulgated by this Court.

The state is wrong when it states “The defense in the instant case was that perhaps Petitioner thought the substance was heroin, but perhaps in fact it was not” (AB 12). In that regard, the defense simply argued that the jury should have a reasonable doubt as to whether the substance was, in fact, heroin because the state did not present any evidence, such as scientific testing by a lab, to prove that the substance was actually heroin (4/452). Mr. Pena, from the opening statement (3/190) to the closing argument (4/455-56), always asserted a causation defense.

Because the trial court's instruction failed to adequately advise the jury on the critical causation element, Mr. Pena was prejudiced, and his conviction cannot stand.

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

##### A. Facts

The state asserts, without any record reference, that:

It is the practice in Hillsborough County for a clerk who can administer oaths to swear the potential jurors in before they are called to the courtroom for voir dire. Although the instant record does not and can not contain this, the Hillsborough County Clerk's Office attests to this fact. (AB 13; emphasis added).

The problems with this assertion are several. First, of course, the state does not say where, when, and how the Hillsborough County Clerk's Office has attested to this “fact.” Such an attestation is not part of Mr. Pena's record on appeal from the circuit court. The state's representation is therefore completely improper and must be stricken or ignored. See Alchiler v. State, Department of Professional Regulation, 442 So.2d 349, 350 (Fla. 1<sup>st</sup> DCA 1983).

Second, it is believed the state is talking about the juror qualification oath, which is separate and distinct from the oath required by Rule 3.300(a) (IB 37).

Third, and most importantly, the record makes it clear that Mr. Pena's trial jury was never given the oath required by Fla.R.Crim.P. 3.300(a) (IB 33-35). The state does not, and cannot, now argue otherwise.

**B. Law**

As pointed out in Mr. Pena's initial brief (IB 37) Johnson v. State, 660 So.2d 648 (Fla. 1995), relied upon by the state (AB 13), did not involve a Rule 3.300(a) oath. It has no application to Mr. Pena's case.

More important is the law the state does not discuss. The state fails to specifically address or acknowledge either Rule 3.300(a) or Rule 3.180(a)(4), which requires the presence of the defendant at all parts of the jury selection process. It ignores this Court's prior decisions in Robinson v. State, 520 So.2d 1 (Fla. 1988), and Moore v. State, 368 So.2d 1291 (Fla. 1979), both of which discuss the swearing of jurors for voir dire as the initiation point of an individual's trial. The state's silence on these points speak volumes. The bottom line is that the Rule 3.300(a) oath must be given in the defendant's presence at his trial. Any contention to the contrary cannot be squared with Florida law. Since that was not done in Mr. Pena's case, he is entitled to a new trial.

**CONCLUSION**

Based on the arguments and authorities set forth in this brief and in Mr. Pena's initial brief, this Court must vacate the Second District's decision and remand with instructions that Mr. Pena be given a new trial on a charge of distribution of a controlled substance, or his conviction be reduced to that offense and he be

resentenced accordingly.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_\_ day of March, 2003, a true copy of the foregoing was sent by United States mail to Erica M. Raffel, Assistant Attorney General, 2002 North Lois Avenue, Seventh Floor, Tampa, Florida 33607.

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

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