

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JOHN ELLIS HARTLEY,

Petitioner,

v.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

CASE NO. 1D11-1522

STATE OF FLORIDA,

Respondent.

/

Opinion filed July 12, 2011.

Petition Alleging Ineffective Assistance of Appellate Counsel -- Original Jurisdiction.

John Ellis Hartley, pro se, Petitioner.

Pamela Jo Bondi, Attorney General, and Jennifer J. Moore, Assistant Attorney General, Tallahassee, for Respondent.

PER CURIAM.

Petitioner presents a timely claim of ineffective assistance of appellate counsel. He was charged with first-degree murder and convicted by a jury of

second-degree murder. The initial brief in his direct appeal was filed shortly after this court's decision in Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), which held that the giving of the standard jury instruction on manslaughter in a case of this nature was fundamental error. The Florida Supreme Court has approved the decision of this court. See Montgomery v. State, 39 So. 3d 252 (Fla. 2010). The state has responded to this petition and concedes that Hartley is entitled to relief as in Sharpe v. State, 39 So. 3d 342 (Fla. 1st DCA 2010) and Toby v. State, 29 So. 3d 1138 (Fla. 1st DCA 2009). We therefore grant the petition, reverse the murder conviction and sentence, and remand to the trial court for further proceedings.

PETITION GRANTED.

WETHERELL, MARSTILLER, and RAY, JJ., CONCUR.