

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2012

BLAKE WARD,

Petitioner,

v.

Case No. 5D11-3366

STATE OF FLORIDA,

Respondent.

_____ /

Opinion filed March 16, 2012.

Petition Alleging Ineffectiveness
of Appellate Counsel,
A Case of Original Jurisdiction.

Blake Ward, Jasper, pro se.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Anthony J. Golden,
Assistant Attorney General, Daytona
Beach, for Respondent.

PER CURIAM.

Blake Ward appeals the summary denial of his rule 3.850 motion. In that motion, he claimed appellate counsel was ineffective for failing to cite to State v. Montgomery, 39 So. 3d 252 (Fla. 2010), and argued that the trial court improperly instructed the jury when it used Florida Standard Jury Instruction (Criminal) 6.6. However, Ward is incorrect in his contentions as his appellate counsel did raise the Montgomery issue on

appeal. Instead, we elect to treat this appeal as a petition for writ of habeas corpus. Based on the reasoning in Dill v. State, 37 Fla. L. Weekly D247 (Fla. 5th DCA Jan, 27, 2012), we grant the petition and remand for a new trial. As in Dill, the First District Court of Appeal's decision in Montgomery v. State, 70 So. 3d 603 (Fla. 1st DCA 2009), was issued during the pendency of Ward's direct appeal in our court.

For the reasons set forth in Burton v. State, 36 Fla. L. Weekly D738 (Fla. 5th DCA Apr. 8, 2011), we again cite conflict with Williams v. State, 40 So. 3d 72 (Fla. 4th DCA 2010), review granted, 64 So. 3d 1262 (Fla. 2011).

The Writ of Habeas Corpus is GRANTED and this matter is REMANDED for a new trial.

PALMER, LAWSON and JACOBUS, JJ., concur.