

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

LEO TOBY,

Petitioner,

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

v.

CASE NO. 1D09-3638

STATE OF FLORIDA,

Respondent.

_____ /

Opinion filed October 8, 2009.

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

Leo Toby, pro se, Petitioner.

Bill McCollum, Attorney General, and Michael T. Kennett, Assistant Attorney
General, Tallahassee, for Respondent.

PER CURIAM.

Petitioner Leo Toby was convicted of second-degree murder as charged by a
Duval County jury and sentenced to a term of imprisonment. He appealed and this
court affirmed. Toby v. State, 7 So. 3d 1102 (Fla. 1st DCA 2009). He now alleges
that he received ineffective assistance of counsel in the direct appeal. We agree,
reverse the conviction, and remand for a new trial.

Petitioner's counsel filed the initial brief in the direct appeal on September 29, 2008, and the state's answer brief was filed 25 days later. Our opinion issued on April 15, 2009. In the interim, however, we decided Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), review granted, 11 So. 3d 943 (Fla. 2009), holding that giving of the standard jury instruction on manslaughter in a case such as petitioner's was fundamental error. Petitioner argues that his appellate counsel was ineffective in failing to seek supplemental briefing in the direct appeal on the Montgomery issue. In Ortiz v. State, 905 So. 2d 1016 (Fla. 2d DCA 2005), the court found counsel was ineffective when he did not ask for supplemental briefing based on an appellate decision concerning a self-defense jury instruction in similar circumstances. We adopt the reasoning of Ortiz and conclude that petitioner is entitled to relief. Because the jury instruction here relates to elements of the crime rather than an affirmative defense, we find it unnecessary to order another appeal. The conviction is reversed and the cause is remanded to the trial court for further proceedings. In so doing, we certify the same question of great public importance that we certified in Montgomery:

IS THE STATE REQUIRED TO PROVE THAT THE
DEFENDANT INTENDED TO KILL THE VICTIM IN
ORDER TO ESTABLISH THE CRIME OF MAN-
SLAUGHTER BY ACT?

PETITION GRANTED.

KAHN, WEBSTER, and ROBERTS, JJ., CONCUR.