

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

JANUARY TERM 2012

TRAVIUS GAYLE,

Petitioner,

v.

Case No. 5D11-3086

STATE OF FLORIDA,

Respondent.

_____ /

Opinion filed March 2, 2012

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

Travius Gayle, Jasper, pro se.

Pamela Jo Bondi, Attorney General,
Tallahassee, and L. Charlene Matthews,
Assistant Attorney General, for
Respondent.

PER CURIAM.

Petitioner, Travius Gayle ["Gayle"], seeks a second appeal, alleging ineffective assistance of appellate counsel. An *Anders* brief was originally filed in 2009, and this court affirmed the judgment and sentence in 2009. See *Gayle v. State*, 17 So. 3d 1240 (Fla. 5th DCA 2009).

Gayle has raised five claims of ineffective assistance of appellate counsel. There is merit in only one. This is another *Montgomery v. State*, 39 So. 3d 252 (Fla. 2010) fundamental error problem. The trial court gave the standard jury instruction for manslaughter by act, including the erroneous reference to "intent to kill." Although the

Supreme Court's opinion in *Montgomery* had not been issued by the time Gayle's appeal was final on October 7, 2009, the First District's *Montgomery*¹ decision finding fundamental error and certifying conflict with this Court's decision in *Barton v. State*, 507 So. 2d 638 (Fla. 5th DCA 1987) had been published in February 2009. We are bound to find that appellate counsel was ineffective in failing to raise the issue. *Lopez v. State*, 68 So. 3d 332 (Fla. 5th DCA 2011). We accordingly grant the belated appeal, reverse the conviction of second-degree murder and remand for a new trial on that count alone.

REVERSED and REMANDED.

ORFINGER, C.J., GRIFFIN and SAWAYA, JJ., concur.

¹ *Montgomery v. State*, 70 So. 3d 603 (Fla. 1st DCA 2009).