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In The Supreme Court OF The United States

Frank L. PERRY - Petitioner

vs.

Case No.: 22-6512

Ricky D. Dixon, - Respondent

Secretary, Florida Department OF Corrections

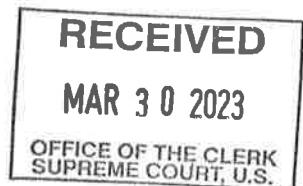
Date: Day OF March 2023

Motion For Rehearing And/OR
Judicial Clarification

/S/ Frank L. Perry

Frank L. Perry 127041
Florida State Prison
P.O. Box 800
Raiford, Florida 32083

(4)



Rehearing

A defendant can never receive due process without true and correct jury instructions as to what constitutes his/her guilt, nor, justice until given equal protection of the law after that determination, U.S. Const. Amend. 5 and 14.

This court is overlooking, defendant sought relief on Montgomery I timely by postconviction motion on Aug. 16, 2010, with still over a year left on his two-year timelimit for postconviction motions. The motion was denied by the trial court for only one reason, the trial court held, "all the case law defendant used to support his claim was decided after defendant's direct appeal became final." This court and all the others, denial of this claim is a clear mis-carriage of justice.

First, Montgomery v. State, 70 So. 3d 603 (Fla. 1st DCA Feb. 12, 2009) was decided 10-months before my direct appeal became final.

Second, Lamb v. State, 18 So. 3d 734 (Fla. 1st DCA Oct. 14, 2009) was decided 2-months before my direct appeal became final.

Third, I filed for "leave of court," which was granted, requesting the trial court permission to file the Montgomery I, claim timely.

Fourth, the trial court ruled on the claim June 22, 2011, 6 months, before the 2-year time limit expired for post-conviction relief.

Fifth, Minnich v. State, 130 So. 3d 695 (Fla. 1st DCA May 11, 2009), Lamb v. State, 18 So. 3d 734 (Fla. 1st DCA Oct. 14, 2009), (Rushing v. State, 133 So. 3d 943 (Fla. 1st DCA June 21, 2010), Burton v. State, 125 So. 3d 788 (Fla. 5th DCA 2011), all attempt murder cases, all holding that the holding in Montgomery I, applied to attempt murder cases also.

Not only was defendant entitled to relief based on Montgomery I, defendant was also entitled to relief based on the "pipeline" rule, see De La Hoz, 123 So. 3d 101 (Fla. 3rd DCA Sept. 25, 2013) (citing Mitchell v. Moore, 786 So. 2d 521, 530 (Fla. 2001) (recognizing that "pipeline" theory allows a defendant to seek application of a new rule of law if the case is pending on direct review or not yet final at the time the new rule of law was announced). Montgomery I, case was decided February 12, 2009, Minnich v. state, was final May 11, 2009, Lamb v. state, was decided Oct. 14, 2009, all was final or decided before defendants direct appeal became final on December 17, 2009.

— The Petitioners jury was given the fundamentally erroneous pre-Montgomery Florida standard jury instruction on manslaughter-by-act which, in defendants case, is fundamental error and reversible per se. Therefore, Defendant Perry, is still entitled to a new trial.

At this point, the petitioners sole remedy is via-writ of certiorari, and this court may still grant certiorari relief based on a mis-carriage of justice exception. Where the issue is deemed one of fundamental error, as it was in Montgomery I and II, the writ of habeas can be used to provide relief after the expiration of term of court in limited circumstances. See Minnich v. state, 130 So. 3d 695 (Fla. 1st DCA Jan. 28, 2011); Zeno v. state, 910 So. 2d 394 (Fla. 2d DCA 2005); Rawerson v. state, 724 So. 2d 641 (Fla. 4th DCA 1999). There was no legal or procedure impediment at that time to granting the relief requested by the petitioner. Under those limited circumstances, where the record supports it, not to extend the same relief to petitioner Perry as was provided to similarly situated defendants during the same time frame is manifestly unjust, and a mis-carriage of justice, also denial of due process and equal protection of the law in violation of U.S. Const. Amendment 5 and/or 14.

Conclusion

For the Reasons Stated above I Respectfully ask this honorable court to Reconsider it's denial of this claim, and REVERSE that decision, OR at the very least, clarify why the motion was denied.

"Certification OF Counsel"

Petitioner, Frank L. Perry, Pro Se, Certify, that this petition is restricted to the grounds specified in Rule 44(2) and that its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. I also certify that this petition is presented in good faith and not for delay.

IS/ Frank L. Perry
Frank L. Perry 127041

Certificate OF Service

I Herby Certify that a true and correct copy of this Rehearing motion has been sent, postage prepaid by U.S. Mail to the OFFice OF The Attorney General, PL-01 The Capitol, OFFice OF Legal AFFairs, Tallahassee, Florida On Day OF March 2023

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