

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2005

NICHOLAS PINEDA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D05-3024

[September 28, 2005]

PER CURIAM.

We affirm the order denying postconviction relief, although we conclude that the motion was not untimely as the trial court found. However, the motion was successive, and there is no explanation as to why the grounds asserted in this motion could not have been brought in the prior postconviction relief motion. Were we to consider the merits, the claim should have been denied on the jury instruction issue, as *Rios v. State*, 905 So. 2d 931 (Fla. 2d DCA 2005), and *Cabrera v. State*, 890 So. 2d 506 (Fla. 2d DCA 2005), cited by the appellant, are factually inapposite to this case. *Rios* and *Cabrera* dealt with the use of “and/or” between the names of co-defendants in the jury instructions, thus inviting the jury to find against either defendant if one committed the crime. That is not the situation present in this case, where there is no co-defendant. Affirmed.

STEVENSON, C.J., WARNER and KLEIN, JJ., concur.

* * *

Appeal of order denying rule 3.850 motion from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Richard I. Wennet, Judge; L.T. Case No. 99-6123 CFC02.

Nicholas Pineda, Avon Park, pro se.

No appearance required for appellee.

Not final until disposition of timely filed motion for rehearing.