

# Third District Court of Appeal

## State of Florida

Opinion filed August 21, 2019.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D19-335  
Lower Tribunal No. 07-30955

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**Octavio Cazarez,**  
Appellant,

vs.

**The State of Florida, et al.,**  
Appellees.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Spencer J. Multack, Judge.

Octavio Cazarez, in proper person.

Ashley Moody, Attorney General, for appellee, The State of Florida.

Before HENDON, MILLER and LOBREE, JJ.

HENDON, J.

Octavio Cazarez appeals from the January 8, 2019, circuit court order denying his petition for writ of habeas corpus, new trial, and other relief. Because it is apparent that the defendant is seeking an untimely and successive motion for

postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, we affirm.

The post-conviction motion, filed on December 10, 2018, is untimely filed. The defendant had two years from the date appellate proceedings concluded and the mandate issued.<sup>1</sup> See Pearson v. State, 141 So. 3d 722 (Fla. 3d DCA 2014); Saavedra v. State, 59 So. 3d 191 (Fla. 3d DCA 2011). A defendant may not escape the two-year time limit for filing a rule 3.850 motion by styling the pleading as a petition for writ of habeas corpus. Bermudez v. State, 870 So. 2d 875, 876 (Fla. 3d DCA 2004). In addition, the defendant raises issues that should have, and could have, been raised on direct appeal and are thus not cognizable on post-conviction motion. See Connor v. State, 979 So. 2d 852, 868 (Fla. 2007) (holding that postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record).

Furthermore, the petition is successive, the defendant having unsuccessfully raised the same Montgomery<sup>2</sup> issue in prior postconviction motions.<sup>3</sup> Even if we

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<sup>1</sup> Cazarez v. State, 141 So. 3d 189 (Fla. 3d DCA 2013).

<sup>2</sup> State v. Montgomery, 39 So. 3d 252 (Fla. 2010) (holding that a jury instruction for the crime of manslaughter by act containing an element of intent to cause death is fundamentally erroneous).

<sup>3</sup> Cazarez v. State, 162 So. 3d 1012 (Fla. 3d DCA 2014); Cazarez v. State, 179 So. 3d 331 (Fla. 3d DCA 2015); Cazarez v. State, 222 So. 3d 1218 (Fla. 3d DCA 2017).

were to consider the merits of the defendant's argument that the jury was provided with fundamentally flawed instructions on attempted voluntary manslaughter, the record conclusively refutes the claim. The record shows that the jury instruction for attempted voluntary manslaughter, a lesser included offense to attempted second degree murder, clearly explained that the State does not have to show an intent to cause death.

The defendant's remaining issues are without legal merit. Finding no error, we affirm.

Affirmed.