ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ERIC KAPLAN,

Petitioner,

v. CASE NO. 89,445

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The facts of this case were set forth in the opinion below as follows:

> Kaplan was charged with attempted first degree murder, based on two theories: premeditated attempted first degree murder and attempted first degree felony murder. ...
>
> The prosecution agreed to submit to the jurors a special verdict form which required them to select one theory of the crime or the other, or a list of lesser included offenses. The trial court instructed the jury it could return a verdict on either one of the two attempted murder theories charged in Count I, but not both. The jury returned with a verdict of guilty of attempted first degree felony murder with a firearm.

Kaplan v. State, 21 Fla. L. Wkly. D2089 (Fla. 5th DCA Sept. 20, 1996).

The district court overturned Kaplan's conviction for attempted felony murder and remanded for retrial for attempted premeditated murder. The court rejected Kaplan's argument that he could not be retried on this charge, in light of the specific jury instructions given below. Id. This appeal follows.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction of this case. None of the cases cited by Kaplan expressly and directly conflict with the decision of the court below, as they all involve different factual scenarios.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION OF THIS CASE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

In this case, Kaplan argues that the district court's decision conflicts with numerous decisions of this Court and other district courts. This argument must be rejected, as all of the cases cited by Kaplan involve factual scenarios different from the case at bar.

Kaplan first argues that the district court's decision conflicts with State v. Wilson., 680 So. 2d 411 (Fla. 1996), and its progeny. In Wilson, this Court addressed the proper remedy to be applied where a defendant has been prosecuted solely under an attempted felony murder theory. In fact, in addressing this issue this Court specifically noted that the jury in that case had not been instructed on attempted premeditated murder. Id. at 412.

Here, in contrast, Kaplan was charged with attempted murder under both a premeditation and a felony murder theory, and the jury was instructed on each. This case does not fall under the Wilson line of cases and therefore does not conflict with such cases.

Because Kaplan's case was pursued under both an invalid theory (attempted felony murder) and a valid theory (attempted premeditated murder), the appropriate remedy differs somewhat from the remedy in cases where only an invalid theory was pursued. In each situation retrial is ordered on the valid offenses instructed on at trial, but in cases where premeditation was one of the valid offenses this charge too is available for retrial -- not just the "lesser" offenses. The district courts around the state have uniformly applied this remedy on numerous occasions. See, e.g., Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996); Harris v. State, 658 So. 2d 1226 (Fla. 4th DCA 1995). The district court followed these cases here.

Kaplan also argues that the district court's decision conflicts with the opinion in Bowers v. State, 676 So. 2d 1060 (Fla. 4th DCA 1996). In fact, the opinion reflects that the court in Kaplan actually followed the decision in Bowers. 21 Fla. L. Wkly. at D2090.

In Bowers, the jury was instructed on both theories of attempted murder -- premeditation and felony. During deliberations, the jury asked how to list their verdict under the felony murder theory rather than premeditated murder, and the court responded by rereading the instructions on that count. The jury then returned with a verdict of guilty.

Following the line of cases involving dual theories, the district court reversed and remanded for retrial on the charge of attempted premeditated murder. Rowers, 676 So. 2d at 1061. The Kaplar court cited this case and agreed with its result. Because it was impossible to determine what the jury thought of the attempted premeditated murder theory in either case, in each case a retrial was ordered on this charge.

Kaplan finally argues that the district court's decision conflicts with the decision in Bateman v. State, 21 Fla. L. Wkly. D2211 (Fla. 2d DCA Oct. 11, 1996). There, the court remanded for retrial on lesser offenses where the jury was instructed under both theories and 'convicted the defendant of attempted felony murder." On the face of this opinion, there is no conflict.

In Kaplan, the district court specifically found that while the jury returned a verdict of guilty of attempted felony murder, given the rest of the jury instructions it simply could not find

that by this verdict the jury had also implicitly acquitted Kaplan of attempted premeditated murder. 21 Fla. L. Wkly. at D2089-90. The jury could just as easily have found that both theories were proven, but it was precluded by the instructions from making this finding known. Accordingly, under these unique circumstances the verdict was essentially the equivalent of a general verdict of guilt, and remand was appropriate under the dual theory cases.

The court in Bateman may have addressed a situation with a similar jury instruction precluding a finding under both theories, and it may have found that such an instruction did not affect its analysis and the verdict still represented a rejection of premeditation. On the other hand, the jury in Bateman may have actually had the option of choosing both theories and made a specific finding that premeditation had not been proven. It is simply impossible to tell from the face of the opinion.

Given the absence of facts in the opinion in Bateman, it is impossible to determine whether the unique factual circumstances upon which the opinion in Kaplan is based were applicable there as well. Accordingly, there is no conflict between the two cases.

Kaplan finally argues that the district court's decision conflicts with numerous cases because it fails to remand for resentencing on the other two counts. In each of the cases cited

by Kaplan the attempted murder conviction was simply reversed, with no mention of any retrial possibility. In such circumstances resentencing is obviously necessary for the other offenses.

In this case, however, a retrial has been ordered as to count I. While resentencing may be necessary at some point in the future, it would be inappropriate to order such resentencing until final resolution of the charges in count I of this criminal transaction. Should Kaplan be convicted once again after retrial on this charge, his current scoresheet will be correct -- with counts II and III scored as additional offenses at conviction. If Kaplan is ultimately acquitted of count I, or convicted of a lesser offense, then, and only then, a new scoresheet would be appropriate.

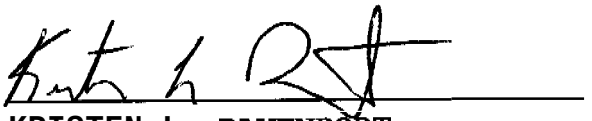
The district court's decision is based on the unique circumstances of this case, and there is no express and direct conflict with any of the cases cited by Kaplan. This Court should therefore decline to accept jurisdiction of this case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by U.S. mail to Chandler R. Muller, 1150 Louisiana Avenue, Suite 2, Winter Park, FL 32789,, this 31st day of December, 1996.

Kristen L. Davenport
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

ERIC KAPLAN,

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v. CASE NO. 89,445

STATE OF FLORIDA,

Respondent.

RESPONDENT'S APPENDIX

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Even assuming that Ms. Gary is African-American, still this claim must fail. The State asserted as its race neutral reason that the juror, apparently while discussing the criminal history of relatives, stated that her son had "become psychotic and he hit an individual," When asked what her son had been accused of, she replied, "[h]e hit a man." Since the man had died from the blow, it was the State's position that the juror's reluctance to acknowledge that her son's action had caused the death of another indicated that she might minimize criminal conduct. The trial court found that this indeed was a race neutral reason and the record supports the court's ruling.

The second issue that deserves discussion is whether the court committed ***reversible*** error by sentencing Watson as an habitual felony offender without making oral or written findings. Although section 775.084(3)(b)3, Florida Statutes (1995), provides that "[e]ach of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence," there is no specific requirement that the court orally dictate such findings into the record or reduce them to writing. However, in *DeCosta v. State*, 647 *So.* 2d 818, 819 (Fla. 1994), in response to a certified question as to whether the harmless error rule could apply in this situation, the supreme court stated:

> We recently answered this certified question in the affirmative in *Herrington v. State*, 643 *So.* 2d 1078 (Fla. *1994).* We held that because ascertaining whether a criminal defendant has prior felony convictions is a ministerial determination, it is harmless error when a trial court fails to make findings of fact . . . where the evidence of the prior convictions is unrebutted.

Such is the case here. Although Watson professed his innocence of certain of the crimes and confused some of his previous robberies with others, the bottom line is that he did not rebut the fact that the previous felony convictions relied on by the State in fact existed. Further, the record belies Watson's claim that he was sentenced to all his priors at the same time.

AFFIRMED. (DAUKSCH and **GRIFFIN,** JJ., concur.)

* * *

Criminal law—Probation revocation—Statement in written order that defendant committed offenses of aggravated battery and domestic battery, thereby violating condition of probation requiring him not to violate any law, conflicts with court's oral finding that defendant violated a different condition by "being hostile" to some unspecified victim, a violation which was not alleged in charging document—Testimony at violation hearing does not support finding that defendant violated condition requiring compliance with law where alleged victim testified that she was not battered—Hearsay statements of police officer insufficient, standing alone, to support finding of violation

CURTIS L. WYNS, Appellant. v. STATE OF FLORIDA, Appellee. 5th District. Case No. 95-1224. Opinion Filed September 20, 1996. Appeal from the Circuit Court for Orange County, Richard F. Conrad, Judge. Counsel: George T. Paulk, II, Palm Bay, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin Compton Jones, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) The trial court's order of violation of probation states that the court found that Curtis Leon Wyns violated Condition 4 of his probation by committing the offenses of aggravated battery and domestic battery. Condition 4 required him to "not violate any law while on probation." This written finding must be stricken because it conflicts with the court's oral finding that the revocation was based on Wyns having violated Condition 15 of his probation by "being hostile" to some unspecified victim. *Walker v.* State, 593 *So.* 2d 301 (Fla. 2d DCA 1992). A violation of Condition 15 was in fact not alleged in the violation of probation charging document. Because fundamental due process requires revocation to bc based upon only those violations alleged, the order of revocation is reversed. *Towson v. State*, 382 *So.* 2d 870 (Fla. 5th DCA 1980). We note, additionally, that the testimony at the violation hearing does not support the finding that Wyns violated Condition 4. The alleged victim testified that she was not battered and, the hearsay statements of the police officer cannot, by themselves, support a probation violation. *Colina v. State*, 629 *So.* 2d 274 (Fla. 2d DCA 1993).

REVERSED. (PETERSON, C.J., **DAUKSCH** and ANTOON, JJ., concur.)

* * *

Criminal law—Where defendant was charged with attempted first degree premeditated murder and attempted first degree felony murder, evidence was presented to support both theories, jury was given special verdict form which required them to select one theory of the crime or the other, and jury was instructed that it could return on either one of the two attempted murder theories, but not both, fact that jury convicted defendant of attempted felony murder did not equate to finding that defendant was not guilty of attempted premeditated murder—Conviction of attempted first degree felony murder was nullified by supreme court's ruling that offense does not exist—State may retry defendant for attempted first degree premeditated murder

ERIC KAPLAN. Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 95-1118. Opinion filed September 20, 1996. Appeal from the Circuit Court for Seminole County, Alan Dickey, Judge. Counsel: Chandler R. Muller of Law Offices of Chandler R. Muller. P.A.. Winter Park. and Terrence E. Kehoe of Law Offices of Terrence E. Kehoe, Orlando, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) Kaplan appeals from his convictions and sentences for attempted first degree felony murder with a firearm,[1] armed burglary of a dwelling,[2] and shooting into a building.[3] The shooting incident took place in 1992, but the trial was not held until February of 1995, just prior to the Florida Supreme Court's opinion in *State v. Gray*, 654 So. 2d 552 (Fla. 1995). Kaplan raises issues concerning the correctness of the court's denial of a jury instruction regarding **Kaplan's** mental condition, and an instruction on hallucinations or delusions, which we find to be without merit. However, pursuant to *Gray,* we reverse Kaplan's conviction for attempted first degree felony murder.

In this case, **Kaplan was** charged with attempted first degree murder, based on two theories: premeditated attempted first degree murder and attempted first degree felony murder. The information charged in Count I:

> In the County of Seminole, State of Florida, Eric **Adam** Kaplan, a/k/a Eric Adam Kalan [sic] on the **27th** day of September, 1992, did commit the **offense** of Attempted First Degree Murder in that he did attempt to kill Robert **Starks** or Judith Starks, a human being, by shooting at Judith **Starks with a** gun, with a premeditated design to effect the death of Robert **Starks,** or did, while engaged in the perpetration of or in the attempt to perpetrate **a burglary,** said Defendant committed an act that could, but did not cause the death of Judith Starks, a human being, to wit: shooting into the home of Judith **Starks** with a gun, contrary to sections 777.04(1), 774.04(4)(a), and 782.04(1)(a)1 or 782.04(1)(a)2.e, and further. during the commission of said offense, the defendant carried or used and personally had in his possession a firearm as defined by section 790.001(6), Florida **Statutes,** contrary to section 775.087(1)(a) and 775.087(2)(a)1, **Florida** Statutes.

The prosecution agreed to submit to the jurors a special verdict form which required them to select one theory of the crime or the other, or a list of lesser included offenses. The trial court instructed the jury it could return a verdict on either one of the two attempted murder theories charged in Count I, but not both. The jury returned with a verdict of guilty of attempted first degree felony murder with a firearm.

We disagree with Kaplan's contention that he cannot **now** be retried for attempted premeditated murder. There was evidence adduced at trial which was sufficient to sustain a jury verdict of guilt of that offense.[4] The jury, in effect, was precluded from making that finding by the court's instruction that it could not find guilt on *both* theories submitted to it: premeditation and the attempted felony murder. The jury's selection of the latter theory, which was nullified by the decision in *Gruy,* does not

logically or legally constitute a rejection of the premeditation charge. We cannot agree with the appellant's argument that the jury indirectly exonerated Kaplan of attempted premeditated murder, We cannot know whether or not the trial jury would have convicted Kaplan of attempted premeditated murder had there been no impediment to their consideration thereof in the form of the nonexistent crime of attempted felony murder and the instructions pertaining thereto.

Nor do we read the various cases cited by the dissent, including *State v. Wilson*, 21 Fla. L. Weekly S292 (Fla. July 3, 1996) and *State v. Miller, 660* So. 2d 272 (Fla. 1995), as precluding a new trial on the charge of attempted premeditated murder. In *Miller,* the Florida Supreme Court merely approved the result reached by the Third District in *Miller v. State, 651 So.* 2d 1313 (Fla. 3d DCA 1995), wherein the appellant's conviction for the nonexistent crime of attempted felony murder was reversed, and his conviction for armed robbery was affirmed. There is no indication that the defendant in either *Wilson* or *Miller* was ever charged with attempted premeditated murder, as was Kaplan in the instant case. The premeditation charge was also absent in *all* of the other cases cited by the dissent as representative of "sole" or "non-general" verdicts. The only line of cases which we have found that deals with the instant issue, where a pre-*Gray* trial jury was forced to choose between attempted felony murder and attempted premeditated murder, is represented by *Bowers v. State. 676 So.* 2d 1060 (Fla. 4th DCA 1996). We agree with the result reached by the Fourth District in that case, *i.e.*, the requirement of a new trial for attempted premeditated murder.

We affirm Kaplan's convictions and sentences for armed burglary and shooting into a building; we reverse his conviction for attempted felony murder and remand for a new trial on the charge of attempted first degree premeditated murder.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR NEW TRIAL. (PETERSON, C.J., concurs. SHARP, W., J., dissents with opinion.)

[1]§§ 782.04(1)(a), 777.04, 775.087(1), Fla. Stat. (1991).
[2]§§ 810.02(1) and (2)(B), 775.087(2)(A)(1), Fla. Stat. (1991).
[3]§§ 790.001(6), 790.19. Fla. Stat. (1991).
[4]This fact is not denied by the appellant or by the dissent.

(SHARP, W., J., dissenting.) I respectfully dissent, in part, because in my view, Kaplan should not be retried on the premeditated attempted first degree murder theory. Retrial on the lesser included offenses on which the jury was instructed, which pertain to the non-existent crime of attempted first degree felony murder, should be the only crimes on remand for which Kaplan is tried. See *State v. Wilson,* 21 Fla. L Weekly S292 (Fla. July 3, 1996). I agree no other reversible error occurred, and the other convictions for crimes in this case, should be affirmed.'

This case is different from any other precedent I have found in this state involving the *State v. Gray,* 654 So. 2d 552 (Fla. 1995) problem because it is one in which the jury rendered a special verdict, and it is clear that the jury elected *not* to convict Kaplan of attempted premeditated murder. It could have, but it did not.

Kaplan's primary defense in this case was diminished mental capacity at the time of the crime. Acknowledging the weakness of the state's case on the element of proving premeditation beyond a reasonable doubt, the prosecutor stressed in his closing argument, that if the jury had a reasonable doubt about intent or premeditation, it should not find Kaplan guilty of attempted first degree Premeditated murder. Rather, the prosecutor urged the jury to return a verdict of attempted first degree felony murder because under that theory, the state did not need to prove beyond a reasonable doubt, that Kaplan had an intent to kill when he fired shots into the dwelling. The jury did just that: guilty of attempted first degree felony murder.

In my view this is entirely different than cases in which a jury returned a general verdict of guilty. having been charged on two attempted murder theories (attempted premeditated murder and attempted felony murder), and it is impossible to determine on which theory the jury convicted. *See Humphries v. State,* 20 Fla. L Weekly D2634 (Fla. 5th DCA, Dec 1, 1995) (defendant charged with attempted murder of victim either by premeditation or during commission of a felony, and jury simply found defendant guilty as charged.); *Campbell v. State,* 671 So. 2d 876 (Fla. 4th DCA 1996) (defendant convicted of attempted first degree murder based on either attempted felony murder or attempted premeditated murder, but appellate court could not conclude beyond a reasonable doubt that he was not convicted on the attempted felony murder theory). In both *Humphries* and *Campbell,* the courts stated reversal and retrial on the premeditated attempted murder theory was proper because "it is impossible to determine which of the two theories the jury accepted." *Humphries,* 20 Fla. L. Weekly at D2635.

In cases where the jury was *not* instructed on the premeditated attempted murder theory, and the jury returned a guilty verdict based on the attempted felony murder charge (a non-existent crime of late) the Florida Supreme Court held it was proper to reverse the conviction for the nonexistent crime,[2] or reverse and remand for trial on lesser included (valid) criminal offenses pertaining to the attempted felony murder charge, on which the jury had been instructed.' But no mention was made in those cases of the state's ability on remand to try the defendant for a premeditated attempted murder.[4]

I disagree that *Bowers v. State,* 21 Fla. L Weekly D1645 (Fla 4th DCA July 17, 1996) is on point. In that case the defendant was charged and tried on one count of attempted first degree murder, and the jury was instructed it could convict on either the felony murder theory or the premeditation theory. The jury simply convicted the defendant as charged, although before rendering its verdict it requested instructions on how to list an attempted first degree murder verdict on the felony-murder theory. In response, the court re-read its instructions on count one. The jury then returned a verdict of guilty as charged. This is not the same thing as a special verdict. In fact the court in *Bowers,* in reversing and remanding for a new trial on the premediation theory, quoted from *Williamson v. State, 671 So.* 2d 281 (Fla. 4th DCA 1996). *"It is impossible to determine which theory the jury used* to convict defendant and because the facts could support a guilty verdict on either theory." (emphasis supplied) 21 Fla. L Weekly at D1646.

In this case, the jury convicted Kaplan of the non-existent crime, but it did not convict him for the premeditated crime. There is no doubt about it. Whether the jury *might* have convicted Kaplan for Premeditated attempted murder had it not been given the option to convict him for attempted felony-murder, is speculation. The inescapable fact is, it did not. An accused may only be retried for the offense for which he was convicted, or double jeopardy problems rise in a flury. *Green v. United States, 355* U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957); *Ray v. State,* 231 So. 2d 813 (Fla. 1969).

An explicit finding of "not guilty" in cases involving special verdicts is not required to create a double jeopardy bar on remand. In *Arizona v. Rumsey,* 467 U.S.203, 104 S.Ct. 2305, 81 L. Ed. 2d 164 (1984) and *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the United States Supreme Court accorded double jeopardy protection to special verdicts rendered by factfinders, which refused to impose the death penalty. The court reasoned that the special verdicts which did not impose a death penalty, were indistinguishable from acquittals on charged offenses because: the prosecution had the burden of proving statutorily defined facts beyond a reasonable doubt; the factfinder was required to make a specific fact finding in rendering the special verdict; the factfinder's decision was based on a determination that the prosecution either had or had not proven its case; and the determination was made following a hearing which involved the submission of evidence and

presentation of argument.

In *Green,* the government charged the defendant with first degree murder and sought the death penalty for arson which caused a person's death inside a building. The court instructed the jury on first degree murder as well as the offense of second degree murder. The jury convicted Green of second degree murder. After his conviction was set aside, he was retried, and the second jury convicted him of first degree murder. The United States Supreme Court held that double jeopardy barred his conviction. The Court said:

> In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read, 'we find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'

Green, 78 S.Ct. at 225.

In *Achin v. State,* 436 So.2d 30 (Fla. 1982), the Florida Supreme Court held that the fact that a jury convicted a defendant of a lesser included offense did not bar his retrial for the main offense for double jeopardy purposes. In that case the conviction had been for a non-existent crime. However, key to the court's ruling was the fact that the two crimes involved the same elements. Technically, the non-existent crime (attempted extortion) was the same thing as extortion. It distinguished *Green* on the basis that in *Achin,* the elements for both crimes were identical. In the case before this court, the elements of the two crimes are vastly different.

In my view, the special verdict established that the jury rejected the element of premeditation in this case. Thus, pursuant to *Rumsey* and *Bullington,* the special verdict should be viewed as indistinguishable from an acquittal for double jeopardy purposes. To retry Kaplan for attempted premeditated murder on remand will, in my view be a violation of his constitutional double jeopardy rights.[5]

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[1]Section 810.02(1) and (2)(B) and section 775.087(2)(A)(1), Fla Stat. (1991) (armed burglary of a dwelling).

[2]See *State v. Miller,* 660 So. 2d 272 (Fla. 1995).

[3]See *State v. Wilson,* 21 Fla. L Weekly S292 (Fla. July 3, 1996).

[4]See *also Gutierrez v. State,* 665 So. 2d 294 (Fla. 5th DCA 1996) (court simply reversed conviction for attempted third degree murder as a non-existent crime); *Selway v. State,* 660 So. 2d 1176 (Fla. 5th DCA 1995) (court simply reversed defendant's conviction for attempted third degree felony murder); *Valladares v. Srure,* 658 So. 2d 626 (Fla. 5th DCA 1995) (court simply reversed conviction for non-existent crime of attempted felony murder); *Crystal* v. *State,* 657 So. 2d 77 (Fla. 1st DCA 1995) (court simply reversed attempted third degree murder conviction).

[5]Art. I, § 9, Fla. Const.; Fifth Amend., U.S. Const.

Insurance—Relief from judgment—Trial court did not abuse its discretion in setting aside final judgment dismissing insureds' lawsuit against insurer—Where settlement agreement specifically provided that action would be dismissed with prejudice upon receipt and bank clearance of the settlement proceeds, and insureds had not yet deposited check and funds had not cleared the bank, filing of dismissal order was by mistake or inadvertence—If insureds merely seek to avoid settlement obligation without good cause, insurer's remedy is to move to enforce settlement agreement and seek dismissal

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. SEAN ISOM AND JUDY ISOM, his wife, Appellees. 5th District. Case No. 96-8. Opinion filed September 20, 1996. Non-Final Appeal from the Circuit Court for Orange County, Jeffords D. Miller, Judge. Counsel: Sharon Lee Stedman of Sharon Lee Stedman, P.A., Orlando, and Jane H. Clark and Thomas Kane of Kane, Williams, Singer, Planck, Donoghue and Clark, P.A., Orlando. for Appellant. Marcia K. Lippincott of Marcia K. Lippincott, P.A., Orlando, for Appellees.

6 **(SHARP, W., J.)** State Farm Mutual Automobile Insurance Company appeals from an order which set aside a final judgment dismissing the Isoms' lawsuit, The joint dismissal had been filed by State Farm pursuant to a settlement agreement between the parties. The Isoms later moved to set aside the dismissal, alleging that conditions of the settlement agreement had not been met. We affirm.

On November 15, 1991, Sean Isom was injured in an automobile collision by an underinsured motorist. In March 1994, the Isoms filed suit against State Farm, their insurance carrier, seeking uninsured/underinsured motorist coverage benefits. The parties proceeded to mediation.

On September 11, 1995, the parties entered into a settlement agreement, which provided:

> 1. In full and final settlement of all claims in the above styled action, the Defendant(s) shall pay the Plaintiff(s) the total sum of $39,500.00 within 10 days of the date of this agreement.
>
> **2.** ***Upon*** *receipt and* ***bank*** *clearance* ***of the settlement proceeds,*** **the** above-styled action shall be dismissed with prejudice. (emphasis added).

On September 12, 1995, counsel for the Isoms sent State Farm's counsel a joint motion to dismiss and a final order of dismissal. On the following day, State Farm issued a check to Shands Hospital for $1,646.90 referencing their insured (Isom) and issued a check for **$37,853.10** to the Isoms and their attorney. The final order of dismissal was signed by the trial court on September 25, 1995.

On October 24, 1995, the Isoms filed a motion, pursuant to Florida Rule of Civil Procedure 1.540, to set aside the final order of dismissal:

> 1. ...A clerical mistake has occurred in that the Judgment was entered prior to the consummation of this case. In that regard, Plaintiffs have not signed the settlement check related to the underinsured motorist portion of this claim. Until such time as settlement proceeds have been disbursed, it is a mistake to enter a Judgment Dismissing the Claim with Prejudice.

In support of this motion, counsel for the Isoms submitted his affidavit:

> 1. I represent Sean L. Isom and was present, as Mr. Isom's attorney at the mediation conference held in the above-captioned matter on September 11, 1995.
>
> 2. At the mediation conference, all parties signed the attached document setting forth the agreement between the parties with respect to when a stipulation for dismissal would be submitted.
>
> 3. In reliance upon the Mediation Settlement Agreement, I forwarded to the defendant's attorney a stipulation agreeing to the dismissal of Mr. Isom's claim. I did so on the assumption that defendant's attorney would hold the stipulation and would not send the stipulation and order dismissing the case to the court before any settlement proceeds had cleared the bank.
>
> **4.** No settlement proceeds in this case have cleared the bank.

On appeal, State Farm argues that the Isoms simply had a "change of heart" or got "cold feet" regarding the settlement and their refusal to deposit the settlement check is a voluntary act for which relief cannot be granted under rule 1.540. State Farm is correct that rule 1.540 docs not provide relief for judgmental mistakes nor tactical errors of counsel nor from mistakes of law. This rule merely provides relief from judgments based on mistakes which result from oversight, neglect or accident. *Curbelo v. Ullman,* 571 So. 2d 443 (Fla. 1990); *Harrison v. La Placida Community Association, Inc., 665 So.* 2d 1138 (Fla. 4th DCA 1996); ***Davidson*** *v. Lenglen Condo Association,* 602 *So.* 2d 687 (Fla. 4th DCA 1992); *Eastern* ***Ceiling*** *and* ***Supply*** *Corporation, Inc.,* ***v.*** *Powerhouse Insulation, Inc., 589 So.* 2d 383 (Fla. 4th DCA 1991).

The mediation settlement agreement specifically provides that the action shall be dismissed with prejudice upon receipt and *bank clearance* of the settlemcnt proceedings. Regardless of the Isoms' motivation for not depositing the check,' the fact remains that the settlement check has *not* been deposited and the funds have *not* cleared the bank. Since conditions of the settlement agreement have not been met (or there is at least a question as to whether the conditions have been met), filing of the dismissal

order was by mistake or inadvertence.

Obviously there is some problem with the settlement. But the source of that problem is not evident from this record, although it may have been clear to the trial judge. State Farm's remedy is to [redacted] to enforce the settlement agrccment, to flush out the identity of the problem. If the Isoms are merely seeking to get out of the settlement without good cause, an order dismissing the lawsuit could then be entered. However, at this time we cannot conclude that the trial court abused its discretion in granting relief from judgment. *See Davidson v. Lenglen Condominium Ass'n.*, 602 So. 2d 687 (Fla. 4th DCA 1992).

AFFIRMED. (THOMPSON, J., concurs. GRIFFIN, J., dissents with opinion,)

'The settlement agreement provided that State Farm would pay the Isoms $39,500.00. There was no mention of a payment to Shands Hospital.

(GRIFFIN, J., dissenting.) I respectfully dissent.

In my view, the lower court erroneously granted relief to the Isoms under Rule 1,540. The Isoms entered into a binding agreement whose terms are simple and clear. The Isoms plainly were not entitled to avoid dismissal of the lawsuit by the expedience of refusing to present the settlement check to the bank. The provision in the agreement requiring bank clearance was for their benefit to assure the Isoms received good funds. Contained in the provision "upon receipt and bank clearance of the settlement proceeds, the above-styled action will be dismissed with prejudice" is the Isoms' implied covenant that they will actually present the check to a bank for clearance within a reasonable time. By failing to present the check they, in my view, have waived their right to rely on bank clearance as a condition to dismissal of the lawsuit. Had the Isoms asserted that they had presented the check to the bank and the check had not been honored, it would have been proper to have set aside the dismissal, but this is not a case that involvcs mistake, inadvcrtcncc or fraud. It is a case involving simple non-performance on the part of the Isoms.

The granting of relief under Rule 1.540, whcrc the Isoms conceded that they had not endorsed the check, was an erroneous application of Rule 1.540. By reinstating the lawsuit, the burdcn now falls on State Farm to seek judicial enforcement of the agreemcnt and to obtain dismissal, whereas the burden ought to bc on the Isoms to obtain judicial relief from the agreement they have made. Unless they are excused from their agreement, they have no basis to have the dismissal set aside. I would have left the Isoms in the situation in which they placed themselves—with the option of either seeking relief from the court from the agrccment or simply electing not to cash the check.

* * *

Mandamus—Petition for writ of mandamus to rcquirc judge to rule on pending motion was premature at best where delay in ruling was due to petitioner's failure to comply with a court order

FRED W. KOFF. Petitioner, v. HON. JOHN W. BOOTH, Circuit Court Judge, etc., Respondent. 5th District. Case No. 96-1673. Opinion filed September 20, 1396. Petition for Writ of Mandamus. A Case of Original Jurisdiction. Counsel: Jeffrey A. Blau of Jeffrey A. Blau, P.A., Tampa. for Petitioner. Felix M. Adams, Bushnell, for Respondent.

(THOMPSON, J.) Fred Koff petitions for a writ of mandamus and requests that this court order the Honorable John W. Booth to rule on his pending motion to dissolve a temporary injunction. A review of the responses from the parties and of the court file reveals that the trial court has not yet ruled bccause Koff has not complied with an order of that court. In other words, Koff, not the trial court, is responsible for the delay. We deny the petition for writ of mandamus without prejudice because it is premature at best. *See Martin v. Morphonios*, 580 So. 2d 196 (Fla. 3d DCA 19[redacted]

WRIT DENIED. (GRIFFIN, J., concurs specially in result only. DAUSKCH, J., dissents, without opinion,)

* * *

Criminal law—Post conviction rclicf—No error in denying rule 3.850 motion as successive where, although trial court did not grant dcfcndant a hearing on first motion, court did consider claims on the merits—Where dcfcndant pled nolo contendere, his argument that his counsel was incffcctive bccause he failed to further investigate the case was simply an insufficient attack on the plea bargain

ALONZO HENRY, Appellant. v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-1536. Opinion filed September 20, 1996. 3.850 Appeal from the Circuit Court far Volusia County, R. Michael Hutcheson. Judge. Counsel: Alonzo Henry, Orlando, pro se. No Appearance for Appellee.

(SHARP, W., J.) This is Henry's second appeal from a denial of a Rule 3.850 motion, which raises essentially the same ineffective assistance of trial counsel argument raised in his first motion. In the order of the trial court which denied the first rule 3.850 motion, the judge wrote an extensive order explaining why Henry is not entitled to relief. The judge rebutted each of Henry's claims and attached pertinent parts of the record, This court affirmed without opinion. *Henry v. State,* 670 So, 2d 963 (Fla. 5th DCA 1996).

Although the trial court did not grant Henry a hearing on his first 3.850 motion, it did consider his claims on the merits. Thus the second order denying the almost identical 3.850 motion was properly summarily denied by the trial court as being successive, *Fosfer v. State,* 614 So. 2d 455 (Fla.), *cert. denied,* 510 U.S. 951, 114 S.Ct. 398 (1993); *Davis v. State,* 589 So. 2d 896 (Fla. 1991). A defendant is only entitled to one bite at the same apple.

Further, precedent establishes an additional reason to affirm denial of relicf in this case. Henry pled *nolo contendere,* and waived his right to trial in three felony cases. His argument that his counsel was ineffective because he failed to further investigate the case is simply an insufficient attack on the plea bargain. *See Stano v. State, 520* So. 2d 278, 280 (Fla. 1988) (by entering plea, dcfcndant rendcred further investigation by his counsel pointless). As the trial judge noted in the first order in the prior rule 3.850 motion, Henry was originally facing a maximum sentence in the three cases of ten years, thirty years. and life, if he had been sentcnccd as an habitual offender. His plea bargain resulted in one ten-year sentence and two eleven-year sentences, all to run concurrently. There are no allegations in this proceeding or the prior one which are sufficient to show Henry did not freely and voluntarily enter into these pleas.

AFFIRMED. (PETERSON, C.J., and COBB, J., concur.)

* * *

Criminal law—Juveniles—Error to impose public defender's fee without apprising juvenile or his parents of right to contest amount

B.L., A Child. Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-819. Opinion filed September 20. 1996. Appeal from the Circuit Court for Orange County, Charles N. Prather. Judge, and Jose R. Rodriguez, Judge. Counsel: James B. Gibson, Public Defender, and Anne Moorman Reeves. Assistant Public Defender, Daytona Beach, for Appellant. No Appearance for Appellee.

(PER CURXAM.) In this *Anders*[1] appeal, we affirm B.L.'s adjudication and disposition. However, in so doing, we strike the imposition of the public defender's fee because the court failed to apprise the juvenile or his parents of their right to contest the amount as required by rule 3.720(d)(1), Florida Rules of Criminal Procedure. On remand, the fee may be reimposed upon compliance with the rule. *See, e.g., Green v. State, 650 So.* 2d 635 (Fla. 5th DCA 1995).

AFFIRMED in part; REMANDED. (PETERSON, C.J., DAUKSCH and GOSHORN, JJ., concur.)

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[1]*See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

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