ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ERIC A. KAPLAN,

Petitioner,

CASE NO. 89,445

v.

STATE OF FLORIDA,

Respondent.

On Notice To Invoke Discretionary
Jurisdiction To Review **A** Decision Of The
Fifth District Court Of Appeal

MR. KAPLAN'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the Petitioner, ERIC A. KAPLAN, wil be referred to as "Mr. Kaplan." The Respondent, STATE OF FLORIDA, will be referred to as "the state." The eight volumes of the record on appeal containing pleadings, orders and other documents will be referred to by the letter "R", followed by the appropriate volume and page number. There are eight volumes of transcripts from the trial and sentencing hearing. The transcripts will be referred to by the letter "T", followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND OF THE FACTS

A. PROCEEDINGS BELOW

On October 19, 1992, Mr. Kaplan was charged in a three count criminal information (R1/138-39). Count I charged him with attempted first degree murder with a firearm, alternatively charging Mr. Raplan with attempted first degree premeditated murder and attempted first degree felony murder. Count II charged him with armed burglary to a dwelling. Count III charged him with shooting into a building.

On April **29,** 1993, Mr. Kaplan filed a motion seeking a court ordered mental competency examination (R3/407-62). On June 29, 1993, the defense filed a Notice of Intent to Rely Upon the Defense of Insanity (R4/705-07). **A** hearing was subsequently held on the competency motion, and on September 27, 1993, Mr. Kaplan was adjudicated incompetent to proceed and ordered committed to a state mental facility (R4/627-31). **A**

hearing was later held on February **28,** 1994, after which the trial court adjudicated Mr. Kaplan competent to proceed to trial (R4/741).

Starting on January 30, 1995, a trial was held in this matter. Over the course of the ten-day trial, 19 witnesses testified for the state and 13 testified for Mr. Kaplan. Nearly 40 exhibits were admitted on behalf of the state and 9 exhibits were admitted on behalf of Mr. Kaplan.

On February 10, 1995, Mr. Kaplan was convicted of attempted first degree felony murder with a firearm, armed burglary of a dwelling, and shooting into a building (R6/1120-24). Mr. Kaplan's motion for new trial (R6/1127-28) was denied by the trial court (R6/1131).

On April 13, 1995, Mr. Kaplan was sentenced to 40 years incarceration on the charge of attempted first degree felony murder with a firearm. The sentencing order further provided that subsequent to serving a period of 27 years, the defendant was to be placed on probation for the remainder of the term (R7/1220-29). Mr. Kaplan was sentenced to 27 years incarceration on Count Two, and 15 years incarceration on Count Three, to run concurrently with the sentence on Count One. **A** timely notice of appeal was filed (R7/1252).

B. FACTS

At trial, Mr. Kaplan did not contest that he committed the acts alleged. However, he contended that he committed them while insane (T1/57-72).

A number of psychological evaluations established Mr. Kaplan's background. Mr. Kaplan was adopted by Norma Kaplan and Buddy Kaplan at the approximate age of one (1) month (T3/425-26). As a child, Mr. Kaplan was a loner, who never had a lot of friends. Mr. Kaplan was described by one psychiatrist as having a "pre-morbid personality" during his teenage years (T3/496-97). During his early teenage years, Mr. Kaplan began drinking and often experienced personality changes (T3/430). During these years, Mr. Kaplan exhibited bizarre behavior on several occasions, including one instance wherein he physically attacked his mother (T3/430-31). **At** this time, Mr. Kaplan initially began receiving psychiatric treatment (T3/430). **A** similar incident also occurred while Mr. Kaplan was attending college. Specifically, Mr. Kaplan was involved in an incident with another student wherein he had a starter pistol in his possession. This resulted in Mr. Kaplan being suspended from college and being referred to a rehabilitation center (T3/43 1-36).

When Mr. Kaplan turned eighteen (18) years old, he decided to look into the background of his natural parents. At this time, Mr. Kaplan discovered that his natural mother was not Jewish. This was a shock to all parties involved, as even Norma and Buddy Kaplan had believed that Mr. Kaplan's natural parents were both Jewish (T3/436). Subsequent to this discovery, Mr. Kaplan eventually changed his religion to Buddhism (T3/436). After such conversion, Mr. Kaplan stopped drinking, smoking, and also developed rigid dietary habits (T3/438-40).

In approximately September, 1992, Mr, Kaplan decided to run for the State House of Representatives-District 34 (T1/114). He ran as a Democratic candidate in a heavily Republican area against incumbent Robert Starks, the husband of Judith Starks (T1/112-16). Subsequent to the shooting, Mr. Kaplan initially denied any involvement (T3/440) and became extremely agitated when a psychiatric evaluation was recommended (T3/447).

Notwithstanding such objection, Mr. Kaplan was initially evaluated by Cynthia White, M.D., a Board Certified Psychiatrist, employed at the North Florida Evaluation and Treatment Center (T3/557). Although Dr. White's evaluation was primarily conducted in the context of determining Mr. Kaplan's competency to proceed with trial (T3/568), she specifically noted that Mr. Kaplan's history was consistent with a diagnosis of bipolar disorder, and also confirmed that he was experiencing delusions (T3/569).

Thereafter, Mr. Kaplan was evaluated by Robert Graham Kirkland, M.D., a medical doctor specializing in psychiatry, who is currently the medical director at the Florida Medical Center (T3/464). Dr. Kirkland also diagnosed Mr. Kaplan as having bipolar disorder manic-type (T3/479). Dr. Kirkland explained this was a physical disorder demonstrated by chemical abnormalities and brain changes (T3/481). Further, such condition apparently has a strong genetic component as it appears to run in families (T3/482). In this regard, Mr. Kaplan's natural mother had also experienced many difficulties which suggested a problem with alcohol and depressive illness (T3/483). Dr. Kirkland further testified that at the time of the incident, Mr. Kaplan was experiencing insane delusions resulting from his mental disorder wherein a life force told him that if

he shot the gun at the house, Representative Starks would be scared out of the race and that good things would follow because he would win the race and save the world (T3/535). Mr. Kaplan believed that what he was doing was right and would benefit mankind (T3/536). On the basis of his diagnosis of bipolar disease, Dr. Kirkland testified that at the time of the subject incident, Mr. Kaplan was in a psychotic break wherein he could not perceive reality as it was, and did not respond to reality as it was (T3/498-99).

Mr. Kaplan was also examined by Robert Theodore Michael Phillips, M.D., Ph.D. Dr. Phillips is **a** forensic psychiatrist who is currently the Deputy Medical Director of the American Psychiatric Association, and is also a member of the faculty at Yale University School of Medicine (T4/640-42). Dr. Phillips also diagnosed Mr. Kaplan as suffering from bipolar disease (T4/719). He further elaborated that Mr. Kaplan suffered from an atypical psychosis, most closely defined as a manic depression, and that he also suffered from a personality disorder that was not otherwise specified, but having very strong schizoparanoid and schizotypal traits (T4/676). Likewise, Dr. Phillips also testified that at the time of the incident Mr. Kaplan was under a delusion that the "force" had told him that no one would be hurt by his actions (T4/679, 700-01). Accordingly, Mr. Kaplan believed, in his delusional state, that no would be harmed by his actions (T4/738). Dr. Phillips explicitly stated that such psychosis precluded Mr. Kaplan's ability to consciously form the requisite intent (T4/689).

The defense also presented testimony from Jeffrey Danziger, M.D., a Board Certified Psychiatrist who specializes in forensic psychiatry (T4/773-74). Dr. Danziger testified that at the time of the alleged offense, Mr. Kaplan was suffering from a psychotic illness and was not capable of consciously intending to hurt anyone (T5/805, 817). Likewise, Dr. Danziger also testified as to Mr. Kaplan's delusional belief that "no one would be hurt and nothing bad would happen, and therefore he did not have the intent to harm anyone" (T5/817).

Finally, the defense also presented testimony from Deborah 0. Day, Psy . D., a Central Florida psychologist, who has previously been recognized on numerous occasions as an expert by various courts (T5/870-76). She testified that Mr. Kaplan's whole behavior was delusional and that he believed what he was doing was right (T5/960).

Even the various court-appointed psychiatrists and psychologists acknowledged Mr. Kaplan's psychiatric problems. Specifically, Lawrence Benjamin Erlich, M.D., a local psychiatrist, initially diagnosed Mr. Kaplan as suffering from a bipolar disease, manic-type, and expressly stated that Mr. Kaplan did not know the nature and quality of his acts, nor did he know it was wrong (T6/113 1). Although Dr. Erlich never conducted a second evaluation, he subsequently change his opinion with regard to the foregoing (T6/1115).

Mr. Kaplan was also evaluated by William Reibsame, Ph.D., a licensed psychologist appointed by the court (T5/992; 6/1004). While Dr. Reibsame testified that

Mr. Kaplan was sane at the time of the acts, he also acknowledged that Mr. Kaplan met the criteria for a diagnosis of a major depressive disorder, recurrent (T6/1033)

Finally, Mr. Kaplan was also evaluated by Ralph Edwin Ballentine, M.D., a medical doctor with degrees in both psychiatry and law. Dr. Ballentine was also a court-appointed expert (T6/1173-75). While Dr. Ballentine testified that Mr. Kaplan was sane at the time of these acts, he also acknowledged that Mr. Kaplan was suffering from a major depressive disorder, recurrent-type (T6/1187)

On the basis of the foregoing expert testimony, Mr. Kaplan requested the following special jury instruction relating to the legal effect of Mr. Kaplan's delusions:

> A person may be legally sane in accordance with the instructions previously given and still yet, by reason of mental infirmity, have hallucinations or delusions which cause him to honestly believe to be facts, thing which are not true or real. The guilt of a person suffering from such hallucinations or delusions is determined just as though the hallucinations or delusions were actual facts. If the defendant would not have been guilty of the crime with which he is charged, had such hallucinations or delusions been the actual facts, then the defendant is not guilty.

The court denied this requested jury instruction (R6/1069).

With the agreement of the state, a special verdict form was used as to Count I. This verdict form advised the jury as to Count I that it could convict Mr. Kaplan of one of the following: 1) attempted first degree premeditated murder (with or without a firearm), 2) attempted first degree felony murder (with or without a firearm), or 3) one of several lesser included offenses, or 4) find him not guilty (T8/141 1-18,1432-33).

There was no objection to that instruction or the verdict form which was submitted to the jury (T7/1272-73, 133 1) . In his closing argument, the prosecutor virtually abandoned the attempted first degree premeditated murder theory, arguing that the jury should return a verdict of attempted first degree felony murder (T7/1335-37). The jury gave the state what it asked for, returning a verdict of guilty as to attempted first degree felony murder with a firearm. The state did not raise any claimed error in the instruction or verdict form below, and did not file any cross-appeal to the Fifth District on this point.

After the ten day jury trial, the jury also convicted Mr. Kaplan of armed burglary of a dwelling (Count II), and shooting into a building (Count III). He was sentenced to forty years in the Florida Department of Corrections on Count I, to be placed on probation after serving twenty-seven years, twenty-seven years on Count II, and fifteen years on Count III, all to run concurrently.

C. FIFTH DISTRICT

Mr. Kaplan appealed his conviction, raising three issues on appea l. In an opinion dated September 20, 1996, the Fifth District affirmed the judgments and sentences on Counts II and III, but reversed the judgment and sentence on Count I. Kaplan v. State, 681 So.2d 1166 (Fla. 5th DCA 1996). As to that count, the Fifth District panel majority reversed for a retrial on the charge of attempted first degree premeditated murder and any lesser included offense. Id. at 1168. The court stated:

> 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. The jury, in effect, was precluded from making that finding by the court's instruction that he could not find guilt on both theories submitted to: premeditation and the attempted felony murder. The jury's selection of the latter theory, which was nullified by the decision in Gray, 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 [sic] consideration thereof in the form of the nonexistent crime of attempted felony murder and the instructions pertaining thereto.

Id. (emphasis in original; footnote omitted).

Judge Sharp filed a dissent from the remand of Count I. She would have remanded for a trial only on the lesser included offenses previously instructed, and not for the offense of attempted first degree premeditated murder, Id. at 1168-70.

On October 7, 1996, Mr. Kaplan filed a motion for rehearing, rehearing en banc, or certification to this Court. That motion was denied by order dated November 1, 1996. A notice to invoke the discretionary jurisdiction of this Court was filed in the Fifth District on November 26, 1996.

SUMMARY OF THE ARGUMENTS

I.

BECAUSE JURY CONVICTED MR. KAPLAN OF ATTEMPTED FIRST DEGREE FELONY MURDER, RETRIAL IS PERMITTED ONLY AS TO LESSER INCLUDED OFFENSES

This Court has jurisdiction pursuant to Art. V, § (3) (b) 3, Fla. Const. , to review cases which directly and expressly conflict with opinions of this Court or other district courts of appeal on the same question of law. The Fifth District's opinion expressly and directly conflicts with a number of this Court's and other appellate courts' decisions concerning the proper remedy after the vacation of a conviction for attempted first degree felony murder.

Contrary to decisions of this Court and other district courts of appeal, the Fifth District concluded that although Mr. Kaplan was convicted under a special verdict of attempted first degree felony murder, he could be retried on attempted first degree premeditated murder, as well as the applicable lesser included offenses. That decision violated not only recent decisions of this Court but fundamental principles of double jeopardy. Also, contrary to decisions of this Court and other district courts of appeal, the Fifth District affirmed the sentences on Counts II and III, despite the fact that the single scoresheet used to score all three offenses included a large number of points attributable only to Count I. The vacation of Count I requires the vacation of the

sentences of Counts II and III, because those sentences were dependent upon the now-vacated conviction.

II.

DENIAL OF APPROPRIATE THEORY OF DEFENSE "DELUSIONS" INSTRUCTION REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL ON ALL COUNTS

Mr. Kaplan presented ample evidence at trial that he was operating under severe delusions at the time of his actions. Based upon this evidence, he submitted a proposed jury instruction which tied these delusions into his insanity defense. The trial court's denial of that theory of defense instruction denied Mr. Kaplan a fair trial. He is entitled to reversal of his convictions and remand for a new trial on all counts.

ARGUMENTS

I.

BECAUSE JURY CONVICTED MR. KAPLAN OF ATTEMPTED FIRST DEGREE FELONY MURDER, RETRIAL IS PERMITTED ONLY AS TO LESSER INCLUDED OFFENSES

The only appropriate remedy for the vacation of Mr. Kaplan's conviction on attempted first degree felony murder with a firearm is to remand for retrial on any lesser included offenses on which the jury was instructed at Mr. Kaplan's first trial.

A. Facts

At the jury charge conference, as to Count I the defense proposed a separate verdict for both attempted first degree felony murder and attempted first degree

premeditated murder (T7/ 1274-75). The assistant state attorney readily concurred in that proposal (T7/1272-73, 1277-78). Thereafter, with the state's agreement, the jury was told that as to Count I it could convict Mr. Kaplan of one of the following: attempted first degree premeditated murder (with or without a firearm), attempted first degree felony murder (with or without a firearm), a listed lesser included offense (T8/141 1- 18, 1432-33), or find Mr. Kaplan not guilty. There was no objection to that instruction, or to the verdict form which was submitted to the jury (T7/1331). In his closing argument, the prosecutor virtually abandoned the attempted first degree premeditated theory arguing that the jury should return a verdict of attempted first degree felony murder (T7/1335-37).

The state, which did not raise any claimed error in the instruction or the verdict form below, and did not file any cross-appeal on this point, cannot now complain that it received a verdict which it agreed to and specifically asked for, See McCarthren v. State, 635 So.2d 1005, 1006 (Fla. 5th DCA 1994) (appellate counsel is bound by the objections made or not made by trial counsel). As the state concurred in the use of the special verdict form and the instructions as to its use, it cannot now complain that the jury should have been permitted to convict Mr. Kaplan of one or both theories underlying attempted first degree murder.

B. Fifth's District's Reasoning

The Fifth District majority asserted that there was sufficient evidence to prove the offense of attempted first degree premeditated murder, and that this fact was not denied

by Mr. Kaplan. 681 So.2d at 1168 n. 4. That assertion is incorrect. At the trial level, Mr, Kaplan asserted that the evidence was not sufficient to convict him of that offense (T2/352-53; 7/1264). Because Mr. Kaplan was not convicted of attempted first degree premeditated murder, the sufficiency of the evidence to prove that charge has never been an issue on appeal.

The Fifth District went on to say that the jury was precluded from making a finding of guilt on attempted first degree premeditated murder by the trial court's instruction that the jury could not find guilt on both theories submitted to it. The Fifth District also stated that it did not know whether the jury would have convicted Mr. Kaplan of attempted first degree premeditated murder had there been no impediment to its consideration of that offense. Id.

There was no impediment. The jury was not precluded from making a finding of guilt on attempted first degree premeditated murder. It was precluded from making a finding of guilt on both theories. The jury was free to consider attempted first degree premeditated murder as it was to consider attempted first degree felony murder, as it was to consider the lesser included offenses, and as it was to consider "not guilty. " Had the jury so chosen, it obviously could have rendered a verdict of guilty as to attempted first degree premeditated murder. The fact is that the state argued the attempted first degree felony murder theory, and virtually abandoned the premeditated theory. The jury simply gave the state what it asked for.

C. Gray and Wilson Require Retrial on Lesser Included Offenses

The Fifth District applied a remedy to Mr. Kaplan which has not been applied to any other defendant in his position.

The written judgment and sentence clearly show that Mr. Kaplan was convicted of attempted first degree felony murder. In a number of cases decided in the last two years, this Court has explicitly stated that upon vacation of a conviction for attempted first degree felony murder the proper remedy is that the defendant can be retried only on any lesser included offense on which the jury was instructed at the defendant's initial trial. Contrary to the unambiguous precedent of this Court, the Fifth District did not remand for a retrial solely on the lesser offenses, but has exposed Mr. Kaplan to a retrial on the theory of attempted first degree premeditated murder. Because of the direct conflict with this Court's and other Florida appellate precedents, this Court must reverse the Fifth District's decision.

In State v. Gray, 654 So.2d 552 (Fla. 1995), this Court ruled that the offense of attempted felony murder no longer existed in Florida. Id. at 554. Because Gray had been convicted of attempted first degree felony murder, this Court affirmed the Third District's reversal of that conviction. Id.

Subsequently, in State v. Wilson, 680 So.2d 411 (Fla. 1996), this Court answered the question as to the state's remedy in a case in which Gray mandated vacation of an attempted first degree felony murder conviction. In Wilson, the proper remedy is to remand to the trial court for retrial on any lesser offenses instructed on at trial. Id.

at 412-13. Wilson does not state that some convictions for attempted first degree felony murder are to be treated one way, and some to be treated another way. The rule is straightforward: when convicted of attempted first degree felony murder, a retrial is permitted only on any lesser offense instructed at the initial trial.

This Court's opinions since Wilson have consistently reiterated that the proper remedy for vacation of a conviction for an attempted first degree felony murder conviction is retrial on any lesser offense instructed on at the initial trial. See e.g., State v. Gibson, 682 So.2d 545 (Fla. 1996); State v. Lee, 676 So.2d 1365 (Fla. 1996); State v. Alfonso, 676 So.2d 1365 (Fla. 1996). The district courts to have ruled on this issue since Wilson have applied that same remedy. See Chastine v. State, So.2d (Fla. 4th DCA 2/12/97) [22 Fla. L. Weekly D395]; Bateman v. State, 681 So.2d 820 (Fla. 2d DCA 1996); Carrazana v. State, 678 So.2d 6 (Fla. 3d DCA 1996).

The Kaplan decision also directly and expressly conflicts with the Bateman decision, issued three weeks after Kaplan. In Bateman, as in Kaplan, the defendant was charged with attempted first degree felony murder either with premeditated design or in the commission of a felony. The jury was instructed on both theories of attempted first degree murder. Based on Gray and Wilson, the defendant's conviction for attempted first degree felony murder was vacated and remanded for retrial onlv on the lesser included offenses. Id. at 821. In direct contrast to Kaplan, the defendant in Bateman was not exposed on remand to possible conviction for the offense of attempted first degree premeditated murder.

Additionally, the Kaplan majority opinion conflicts with the sole case it cites to support it: Bowers v. State, 676 So.2d 1060 (Fla. 4th DCA 1996)[1/]. In Bowers, there was not a special verdict as to the charge of attempted first degree murder with a deadly weapon. Instead, the jury was instructed on both the premeditation and felony murder theories, and returned a general verdict of guilty as to attempted first degree murder. Id. at 1061. The Fourth District remanded for a retrial on the theory of attempted first degree premeditated murder, However, the Fourth District held that remedy was proper because it was impossible to determine which theory the jury used to convict the defendant. Id. The result in Bowers obviously would have been different if the Fourth District could determine on which theory the verdict rested. In Kaplan, due to the special verdict form, the court and all parties know that the verdict rested solely on the theory of attempted first degree felony murder. Kaplan therefore does not even follow or accept, and in fact conflicts with, the logic of Bowers, the sole case cited by the Fifth District to support the remand for a retrial on attempted first degree premeditated murder.

In Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), the Court stated the rule followed by Bowers as follows:

> With respect to findings of guilt on criminal charges, the court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which

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1/ Bowers does not cite or discuss Wilson, which was decided two weeks earlier.

> of the two grounds was relied upon by the jury in reaching the verdict.

108 S.Ct. at 1866. This is obviously a two-part test. Unlike Bowers, in Mr. Kaplan's case the second part of the test cannot be met, for here everyone is certain as to which of the two grounds was relied upon by the jury for its verdict. That was the whole purpose behind the special verdict. Because of that certainty, the Mills/Bowers rule cannot be used to permit retrial on the attempted first degree premeditated murder theory.

There is no reason for Mr. Kaplan to be treated differently from the other defendants. He too is entitled to face a retrial only on the applicable lesser included offenses, and not on the charge of attempted first degree premeditated murder on which he was implicitly acquitted by the jury.

D. Double Jeopardy Precludes Retrial on Attempted First Degree Premeditated Murder

Besides violating the Gray/Wilson line of cases, such a retrial would violate the state and federal constitutional prohibitions against double jeopardy.

In both Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the United States Supreme Court held that where a defendant had previously been sentenced to life imprisonment following a conviction for first degree murder, the defendant could not thereafter be exposed to a sentence of death following vacation of his conviction. Bullington, 101 S.Ct. at 1861-62; Rumsey, 104 S.Ct. at 2310.

The principles discussed in those cases are applicable to Mr. Kaplan's double jeopardy situation. In both Bullington and Rumsey, the sentencer had two sentencing options derived from the one first degree murder conviction. These options were a) a sentence of death or b) a sentence of life imprisonment. The United States Supreme Court held that a determination of those options is similar to a determination of guilt in a criminal trial. Bullington, 101 S.Ct. at 1861-62; Rumsey, 104 S.Ct. at 2309-10. The Supreme Court further ruled that the choosing of life precluded later choosing of death, and in effect, the choosing of life was an implicit acquittal of the choosing of death. Id.

In reaching its decision, the Rumsey court stated:

> The double jeopardy principle relevant to respondent's case is the same as that invoked in Bullington: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the Bullington principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding - whether death was the appropriate punishment for respondent's offense.

104 S.Ct. at 2310.

In Mr. Kaplan's case, the jury had two first degree murder options for conviction generated from the one charge of attempted first degree murder. Those options were a) attempted first degree premeditated murder and b) attempted first degree felony murder. Applying the logic of Bullington and Rumsey, the Kaplan jury's choosing of attempted first degree felony murder was, in effect, an implied acquittal of attempted first degree

premeditated murder, and therefore precludes a later choosing (at a retrial) of attempted first degree premeditated murder.

Another case whose principles preclude retrial of Mr. Kaplan on a charge of attempted first degree premeditated murder is Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). In Green, the defendant could have been found guilty of either first degree murder or second degree murder. The jury returned a verdict of second degree murder. The Supreme Court concluded that because the jury at Green's first trial ". . . had refused to find him guilty on [the first degree murder] charge . . . ", Green, 78 S .Ct. at 225, despite having been ". . . given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so", id., there had been an implicit acquittal.

In Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), the Supreme Court stated that the ruling in Green rested on two premises: 1) that Green's verdict of guilty on second degree murder was an "implicit acquittal" on the charge of first degree murder, and 2) that Green's jeopardy on the greater charge had ended when the jury was given a full opportunity to return a verdict on that charge and instead reached a verdict on the second degree murder charge. 90 S.Ct. at 1761.

This second premise of Green is equally applicable to Mr. Kaplan's case. In Mr. Kaplan's case, the jury obviously refused to find him guilty on the charge of attempted first degree premeditated murder, despite having been given a full opportunity to return that verdict, and therefore there was an implicit acquittal on that charge. Green precludes

retrial of Mr. Kaplan on the attempted first degree premeditated murder theory. See also Rav v. State, 213 So.2d 813, 815 (Fla. 1969) (after reversal, double jeopardy precludes retrial for offense other than one for which defendant was convicted).

* * *

The Fifth District's decision also conflicts with Gray and its progeny in another respect. The Fifth District's opinion affirmed the convictions and sentences on Counts II and III. However, those sentences were based on a single sentencing guideline scoresheet which included points scored for Count I (R7/1249). Absent the points scored for Count I, the recommended and permitted guideline ranges on the sentencing scoresheet would have been far lower, The sentences actually imposed by the trial court on Counts II and III would far exceed the permitted and recommended sentencing guideline ranges if the points for Count I are eliminated. Therefore, upon vacation of Count I due to a Gray error, the Fifth District was also required the vacate the sentences on Counts II and III for recomputation of Mr. Kaplan's scoresheet and for resentencing on those two counts. See e.g., State v. Miller, 660 So.2d 272 (Fla. 1995), aff'p., Miller v. State, 65 1 So.2d 13 13 (Fla. 3d DCA 1995)(other conviction remanded for resentencing in light of reversal based upon Gray); State v. Gray, 654 So.2d 552, 554 (Fla. 1995); Bramlett v. State, 677 So.2d 962 (Fla. 1st DCA 1996); Johnson v. State, 669 So.2d 1070 (Fla. 2d DCA 1996); Crystal v. State, 657 So.2d 77 (Fla. 1st DCA 1995)(Gray reversal of one count required remand for resentencing on remaining counts due to recomputation

of sentencing guidelines scoresheet).[2/] Even if this Court does not reverse the Fifth District's decision as to Count I, this Court must reverse the Fifth District's affirmance of the sentences on Counts II and II to bring Kaplan in line with the above-established caselaw on the effect of a Gray reversal on the sentences of other counts scored under a single scoresheet.

II.

DENIAL OF APPROPRIATE THEORY OF DEFENSE "DELUSIONS" INSTRUCTION REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL ON ALL COUNTS

A. JURISDICTION

Once this Court has determined to accept jurisdiction over a case, it has the authority to consider and decide all legal issues properly preserved and presented. In Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982), this Court stated that:

> Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case. See, Whitted [v. State, 362 So.2d 668 (Fla. 1978)]; Miami Gardens, Inc. v. Conway, 102 So.2d 622 (Fla. 1958); Vance v. Bliss Properties, Inc., 109 Fla. 388, 149 So. 370 (1933).

Two and one-half years later, this Court again clearly stated its position in Tillman v. State, 471 So.2d 32, 34 (Fla. 1985):

2/ On this point, for some inexplicable reason the Fifth District's decision is contrary to its own prior decisions in Selway v. State, 660 So.2d 1176 (Fla. 5th DCA 1995); Valladares v. State, 658 So.2d 626 (Fla. 5th DCA 1995).

> The district court's certification that its decision passed upon a question of great public importance gives this Court jurisdiction, in its discretion, to review the district court's "decision. " Art, V, § 3(b)(4), Fla. Const. Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and presented. See, e.g., Trushin v. State, 425 So.2d 1126 (Fla. 1982).

In Reed v. State, 470 So.2d 1382, 1383 (Fla. 1985), this Court stated:

> We first address the issue of our scope of review. Respondent urges that we limit our review to the certified question and not reach the issue of whether the United States Constitution grants petitioner the right to a jury trial. We decline to do so. First, our scope of review encompasses the decision of the court below, not merely the certified question. Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976); Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

Again, in Lee v. State, 501 So.2d 591, 592 (Fla. 1987), the Court stated:

> Although we have jurisdiction to consider issues ancillary to those directly before this court in a certified case, we decline to entertain Lee's Glosson claim, as we have determined the claim would not affect the outcome of the petition. See Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982).

The further point made in Lee is that this Court does not have to consider ancillary issues where the issue directly before the Court has been decided in favor of the petitioner. In Lee, this Court decided the issue directly before it in favor of Mr. Lee by allowing him to withdraw his plea of guilty, and thereby nullifying his conviction and sentence. Consequently, it was unnecessary for this Court to decide the other issues since they "would not affect the outcome of the petition."

A decision on the felony murder issue raised by Mr. Kaplan does not eliminate the need to determine the jury instruction issue. If this Court decides the jury instruction issue discussed below in Mr. Kaplan's favor, a reversal of each of his convictions will occur and a new trial will be ordered. This decision will obviously "affect the case." Trushin, 425 So.2d at 1130. Therefore, the scope of review encompasses this jury instruction issue.

B. THE MERITS

At trial, Mr. Kaplan did not contest committing the act of shooting into the Starks' dwelling. Instead, Mr. Kaplan relied upon an insanity defense. One facet of that defense was that the hallucinations or delusions perceived by Mr. Kaplan caused him to believe certain facts were true which were not. Further, that had these hallucinations or delusions been actual facts, Mr. Kaplan could not be found guilty as charged,

Each of the counts with which Mr. Kaplan was charged, and subsequently convicted, required evidence to prove that he acted maliciously, wantonly, or with a specific intent to do the act alleged. Wantonly was defined by the trial court as meaning "consciously and intentionally, with reckless indifference to consequences and with the knowledge that damage is likely to be done to some person" (T8/1424). Maliciously was defined as meaning "wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person" (T8/1424-25). The terms maliciously and wantonly denote

a specific state of mind on the part of a defendant. Johnson v. State, 436 So.2d 248, 248-50 (Fla. 5th DCA 1983) (Cowart, J., concurring specially),

In support of the attempt to negate the specific states of mind described above, expert testimony at Mr. Kaplan's trial affirmatively established that Mr. Kaplan was acting under the delusional belief that not only would no harm be caused by his actions, but that ultimately such actions would result in much good. Specifically, Dr. Kirkland testified that at the time of the incident, Mr. Kaplan was experiencing an insane delusion resulting from his mental disorder wherein a life force told him that if he shot the gun at the house, Representative Starks would be scared out of the race and that good things would follow because he would win the race and save the world (T3/535). Mr. Kaplan believed that what he was doing was right and would benefit mankind (T3/536).

Dr. Phillips also testified that Mr. Kaplan was under a delusion that the force had told him that nobody would be hurt by his actions (T4/679, 700-01). Accordingly, Mr. Kaplan believed in his delusional state that no one would be harmed by his actions (T4/738).

Likewise, Dr. Danziger also testified as to Mr. Kaplan's delusion belief that "no one would be hurt and nothing bad would happen and therefore he did not have intent to harm anyone" (T5/817). Finally, Dr. Day testified that Mr. Kaplan's entire behavior was delusional and that he believed that what he was doing was right (T5/960). In sum, an abundance of expert psychiatric and psychological evidence firmly established that Mr.

Kaplan's delusional beliefs negated any evidence of intent establishing maliciousness or wantonness on his part.

It is axiomatic that a defendant is entitled to have the jury instructed on his theory of the defense. Brvant v. State, 412 So.2d 347, 350 (Fla. 1982); Brunner v. State, 683 So.2d 1129 (Fla. 4th DCA 1996) (reversible error to refuse to give proper insanity instruction). The proposed delusions instruction was part of Mr. Kaplan's theory of his defense of insanity.

Because there was evidence to support it (a contention the state did not dispute in its answer brief to the Fifth District), Mr. Kaplan submitted a proposed instruction in writing which stated:

> A person may be legally sane in accordance with the instructions previously given and still yet, by reason of mental infirmity, have hallucinations or delusions which cause him to honestly believe to be facts, things which are not true or real. The guilt of a person suffering from such hallucinations or delusions is determined just as though the hallucinations or delusions were actual facts. If the defendant would not have been guilty of the crime with which he is charged, had such hallucinations or delusions been the actual facts, then the defendant is not guilty.

(R6/1069). It was denied (T7/13 18-22)

Therefore, this issue was raised on appeal to the Fifth District as a basis for awarding a new trial on all three counts. Both the Fifth District majority and the dissent concurred in the affirmance of Counts II and III, simply concluding this issue was without

merit .[3] 681 So.2d at 1167, 1168. However, the Fifth District obviously misapprehended the law concerning the proposed delusions instruction Although Mr. Kaplan is receiving a new trial on Count I due to the Gray issue, this issue is still important because it affects the legal validity of Mr. Kaplan's convictions on Counts II and III.

This requested instruction is very similar to former Florida Standard Jury Instruction (Criminal) 2.11 (b)-2 (1980), which instruction has never been either approved or disapproved by this Court. However, in Cruse v. State, 588 So.2d 983 (Fla. 1991), cert. denied, 504 U.S. 976 (1992), this Court held that there was no error in giving this instruction. This Court stated:

> The delusions instruction is relevant to the facts of this case. Cruse's delusions were an integral part of the defense case. Each expert witness testified as to Cruse's delusions of people talking about him and attempting to test his sexuality and turn him into a homosexual.
>
> * * *
>
> The additional instruction given by the trial court was actually a second way that Cruse could have been found insane, and it was, therefore, to Cruse's advantage to have the instruction given, We find no error in giving this instruction.

Id. at 989. As in Cruse, Mr. Kaplan's delusions were an integral part of the defense case, based on testimony from expert witnesses. The delusions instruction requested by

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[3] The Fifth District's decision not to address this issue on the merits, despite it being clearly preserved below and in accord with the Cruse and Boswell decisions discussed within, is inexplicable,

Mr. Kaplan was relevant to the facts of the case, and was not covered by any other instruction. It was reversible error for the trial court to refuse to give the instruction.

The Fourth District reversed a conviction for failure to give virtually the identical instruction in Boswell v. State, 610 So.2d 670, 673 (Fla. 4th DCA 1992). In Boswell, as in Kaplan, the defendant requested and received the standard jury instruction on insanity. However, trial court refused to give an additional insanity instruction dealing with delusions. In reversing, the Fourth District stated:

> The state presented a strong case for conviction. Nevertheless, appellant's theory of the case never received the court's imprimatur via an instruction to the jury. Thus, for instance, how could the jury know that they could find the defendant not guilty even though he was not insane as defined by law, if they found that by reason of mental infirmity he was suffering from hallucinations or delusions at the time of the shooting that caused him honestly to believe to be fact things that were not true or real?

Id. at 673

Even more recently, between oral argument at the Fifth District and that court's issuance of its opinion, the Supreme Court of Florida Committee on Standard Jury Instructions in Criminal Cases proposed a jury instruction on Insanity - Hallucinations."[4/]

[4/] One basis for the state arguing to the Fifth District that the denial of the proposed instruction was not error was that it was not part of the Florida Standard Jury Instructions. As this Court has pointed out on numerous occasions, a trial court must look beyond the standard jury instructions to insure that the jury receives proper instructions on the elements of the offense and applicable defenses. See, e.g., Chicone v. State, 684 So.2d 736, 744-46 (Fla. 1996); Yohn v. State, 476 So.2d 123, 127 (Fla. 1985).

See The Florida Bar News, August 1, 1996 at p. 14. For the most part, the proposed instruction is virtually identical to the one submitted by Mr. Kaplan. In its entirety, the proposed instruction reads:

> An issue in this case is whether (defendant) was insane when the crime allegedly was committed.
>
> A person is considered to be insane when:
>
> (1) The person had a mental infirmity, disease or defect .
>
> (2) Because of this condition, the person had hallucinations or delusions which caused the person to honestly believe to be facts things which are not true or real.
>
> The guilt or innocence of a person suffering from such hallucinations or delusions is to be determined just as though the hallucinations or delusions were actual facts. If the act of the person would have been lawful had the hallucinations or delusions been the actual facts, the person is not guilty of the crime.
>
> All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the state must prove beyond a reasonable doubt that the defendant was sane.
>
> In determining the issue of insanity, you may consider the testimony of expert and nonexpert witnesses. The question you must answer is not whether the defendant is insane today, or has ever been insane, but simply if the defendant was insane at the time the crime allegedly was committed.
>
> Unrestrained passion or ungovernable temper is not insanity, even though the normal judgment of the person be overcome by passion or temper.
>
> If the evidence establishes that the defendant had been adjudged insane by a court, and has not been judicially restored to legal sanity, then you should assume the defendant was insane at the time of commission of the alleged crime, unless the evidence convinces you otherwise.
>
> If you find that (defendant) committed the crime but have a reasonable doubt that [he] [she] was sane at that time,

> then you should find [him] [her] not guilty by reason of insanity.
>
> If your verdict is that the defendant is not guilty because insane, that does not necessarily mean [he] [she] will be released from custody. I must conduct further proceedings to determine if the defendant should be committed to a mental hospital, or given other outpatient treatment or released.

The fact that the Supreme Court Committee on Standard Instructions has submitted a proposed instruction which is based on precedent in this state (Boswell and Cruse) demonstrates that it is an accurate reflection of current Florida law. So too was Mr. Kaplan's proposed delusions instruction. Because this instruction was fundamental to his defense on all counts, the denial of this proposed instruction denied Mr. Kaplan his state and federal constitutional rights to due process and a fair trial. This Court must therefore reverse the Fifth District's affirmance of Counts II and III, vacate those convictions, and remand for a new trial on those counts also.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must reverse the Fifth District's decision and grant Mr. Kaplan a new trial on all counts. As to Count I, that new trial must be limited to consideration of only those lesser included offenses on which the initial jury was instructed.

Respectfully submitted this 24th day of March, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 1997, a true copy of this brief has been furnished by United States mail, first class postage prepaid, to Kristen L. Davenport, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32 118.

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