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

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MR. KAPLAN'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief, the Petitioner, ERIC A. KAPLAN, will be referred to as "Mr. Kaplan. The Respondent, STATE OF **FLORIDA,** will be referred to as the "state." The Appendix attached to this brief will be referred to as "App. **,"** followed by the appropriate page number. The record on appeal will be referred to by the letter "R", followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

Mr. Kaplan was charged in a three count criminal information. Count **I** charged him with attempted first degree murder with a firearm, alternatively charging Mr. Kaplan 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.

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 (R **1411-18,1432-33).** There was no objection to that instruction or the verdict form which was submitted to the jury (R **1331).** 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 (R **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 **11),** and shooting into a building (Count 111). 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 11, and fifteen years on Count **111,** all to run concurrently.

Mr. Kaplan appealed his conviction, raising three issues on appeal. In an opinion dated September **20, 1996,** the Fifth District affirmed the judgments and sentences on Counts II and 111, but reversed the judgment and sentence on Count I **(App. A). 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. Judge **Sharp** filed a dissent from the remand of Count 1. 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.

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

SUMMARY OF THE ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION EXPRESSLY *AND* DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL CONCERNING THE VACATION OF A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER

This Court has jurisdiction pursuant to Art. V, **§ (3)** (B) **3,** 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. This Court must exercise its jurisdiction and accept Mr. Kaplan's case for review because 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. Also, contrary to decisions of this Court and other district courts **of** appeal, the Fifth District affirmed the sentences on Counts II and **111,** 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 111, because those sentences were dependent upon the now-vacated conviction.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION EXPRESSLY *AND* DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL CONCERNING THE VACATION OF A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER.

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 nineteen months, this Court has explicitly stated that upon vacation of a conviction **for** attempted first degree felony murder **(or** a conviction of an invalid lesser theory of attempted 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 accept this case for review.

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. As stated 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: 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 felony murder is retrial on any lesser offense instructed on at the initial trial. See e.g., State v. Pratt, So.2d ___ (Fla. 11/14/96)[21 Fla. L. Weekly S492]; State v. Wilev, ___ So.2d ___ (Fla. 11/14/96)[21 Fla. L. Weekly S492]; State v. Gibson, ___ So.2d (Fla. 10/24/96)[21 Fla. L. Weekly S465]; 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 Bateman v. State, ___ So.2d ___ (Fla. 2d DCA 10/11/96)[21 Fla. L. Weekly D2211]; 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, like 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. 21 Fla. **L.** Weekly at D2211. Based on Gray and Wilson, the defendant's conviction for attempted first degree felony murder was vacated and remanded for retrial only on the lesser included offenses. 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 one case it cites to support it: Bowers v. State, **676** So.2d 1060 (Fla. **4th DCA 1996)'.** 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

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

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 to support the remand for a retrial on attempted first degree premeditated murder.

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. Besides violating the Gray/Wilson line of cases, such a retrial would violate the state and federal constitutional prohibitions against double jeopardy. See **App. A** (Sharp, J., dissenting).

* * *

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. 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'g Miller v. State, **651** So.2d 1313 (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** accept jurisdiction 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.

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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).

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must grant Mr. Kaplan's petition for review, and order briefing on the merits.

Respectfully submitted this 4th day of December, 1996.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December, 1996, a true copy of this brief and appendix have 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 32118.

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APPENDIX TO
MR. KAPLAN'S BRIEF ON JURISDICTION

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Appendix A

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 hc 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, 447 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 hcrc. 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 dcfcndant 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, 1776. 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 Appellce.

(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 be 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 attcmptcd first dcgrec premeditated murder and attcmptcd first degree felony murder, evidence was prcscntcd 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 attcmptcd murder theories, but not both, fact that jury convicted dcfcndant of attemptcd felony murder did not equate to finding that dcfcndant was not guilty of attempted premeditated murder-Conviction of attcmptcd first dcgrcc 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, 75-1118. 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 Tcrrcnce 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,' 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, 454 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 WC find to bc without merit. However, pursuant to Gray, WC 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 dcgrec 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 commissionof 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 attcmptcd 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 *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 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 Stare v. ***Wilson,*** 21 Fla. L. Weekly 5292 (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. Safe, 65 1 So.*** 2d 13 13 (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 apre-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.)

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[1]§§ 782.04(1)(a), 777.04, 775.087(1), Fla. Stat. (1991).
[2]§§ 810.02(1) nnd (2)(B), 775.087(2)(A)(1), Fla. Stat. (1991).
[3]§§ 790.001(6), 790.19, Fla. Smt. (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). 1 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 ofproving 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 dcgrcc felony murder because under that theory, the state did not need to prove beyond 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, 67*** 1 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-rend 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. 19691.

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 chnrgcd 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-cxistcnt 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)(I), Fla Stat. (1391) (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. State, 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** scttlcmcnt **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 scttlcmcnt **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 Stedrnan, 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.

(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 scttlcmcnt 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 bunk clearance of the settlement proceeds,* the above-styled action shall be dismissed with prcjudicc. (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 Proccdurc 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, 1 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 scttlemcnt 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 scttlemcnt and their refusal to deposit the scttlcmcnt check is a voluntary act for which relief cannot be granted under rule 1.540. State Farm is correct that rule 1.540 does 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 *bunk clearance* of the settlement 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

Appendix B

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

ERIC A. KAPLAN,

Appellant,

CASE NO. 95-1118

v.

STATE OF FLORIDA,

Appellee.

MR. KAPLAN'S MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFICATION TO THE FLORIDA SUPREME COURT

The Appellant, ERIC A. KAPLAN, through undersigned counsel and pursuant to Fla.R.App.P. 9.330(a) and 9.331(d), hereby moves this Court to reconsider its September 20, 1996, opinion. In support of this motion, Mr. Kaplan shows this Court as follows:

In an opinion filed September 20, 1996, this Court affirmed Mr. Kaplan's convictions and sentences on Counts II (armed burglary of a dwelling) and III (shooting into a dwelling), but reversed his conviction and sentence for Count I (attempted first degree felony murder with a firearm). Kaplan v. State, 21 Fla.L.Weekly D2089 (Fla. 5th DCA 1996). The two-judge majority remanded for a retrial as to the charge of attempted first degree premeditated murder on Count I. The dissenting judge would have also remanded for a retrial on Count I, but only as to the lesser included offenses on which the jury was instructed at the first trial, and not on the charge of attempted first degree premeditated murder.

RESENTENCING AS TO COUNTS II AND III

This Court affirms the sentences for Counts II and III. However, those sentences were based on a scoresheet which included points scored for Count I. 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 exceed the permitted and recommended sentencing guideline ranges if the points for Count I are eliminated. Therefore, even if this Court makes no other change in its September 20 opinion, it must remand this case for recomputation of Mr. Kaplan's scoresheet and for resentencing on Counts II and III. See e.g., State v. Miller, 660 So.2d 272 (Fla. 1995), aff'g, Miller v. State, 651 So.2d 1313 (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); Selway v. State, 660 So.2d 1176 (Fla. 5th DCA 1995); Valladares v. State, 658 So.2d 626 (Fla. 5th DCA 1995); 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).

Undersigned counsel express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the decisions of this Court in Valladares and Selway, supra, and

that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court.

Should the Court not change its opinion on this point, Mr. Kaplan requests that it certify its opinion expressly and directly conflicts with Miller, Gray, Bramlett, Johnson, and Crystal, supra.

RETRIAL ON COUNT I

A. Majority's Faulty Reasoning

The majority asserts that there was sufficient evidence to prove the offense of attempted first degree premeditated murder, and that this fact is not denied by Mr. Kaplan (slip opinion at 3, 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. 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 in this appeal.

The majority goes 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 instructions that the jury could not find guilt on both theories submitted to it (slip opinion at p. 3). The Court also states that it does not know whether the jury would have convicted Mr. Kaplan of attempted first degree premeditated murder had there been no impediment to their consideration of that offense (slip opinion at p. 3).

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.

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 convicted on 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.

The sole case the majority relies upon is ~~Bowers v. State,~~ 676 So.2d 1060 (Fla. 4th DCA 1996). However, in Bowers the court directed a retrial on the charge of attempted first degree premeditated murder because it was impossible to determine which theory the jury used to convict the defendant. Id. at 1061.

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 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.

B. Wilson Precludes Retrial on Attempted First Degree Premeditated Murder

It is respectfully submitted that this court's opinion misinterprets the recent opinion in State v. Wilson, ____ So.2d (Fla. 7/3/96)[21 Fla.L.Weekly S292]. In Wilson, like Kaplan, the defendant was convicted specifically of attempted first degree felony murder, not attempted first degree murder. In Wilson, the Supreme Court ruled that where an attempted felony murder conviction must be vacated based upon Gray, the legal remedy is to remand to the trial court for retrial on any other lesser offense instructed on at the initial trial. Accord, State v. Alfonso, 676 So.2d 1365 (Fla. 1996); State v. Lee, 676 So.2d 1365 (Fla. 1996); Accord Carrazana v. State, 678 So.2d 6 (Fla. 3d DCA 1996); Jackson v. State, So.2d __ (Fla. 3d DCA 8/7/96) [21 Fla.L.Weekly D1767].

The Supreme Court in Wilson noted that there had been no explicit or implicit acquittal on **any** offense. In Mr. Kaplan's case, there had been an implicit acquittal on the charge of attempted first degree premeditated murder. More importantly, the Wilson line of cases dictates that the sole remedy for a conviction on the specific charge of attempted first degree felony murder, as opposed to a conviction for a charge of attempted first degree murder which could encompass both felony or premeditated murder theories, is a retrial on the lesser offenses. Wilson does not say 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: a retrial is permitted only on any lesser offense instructed at the initial trial. This Court must follow Wilson and its progeny.

Should this Court not reconsider its decision on this point, Mr. Kaplan respectfully requests this Court to certify its decision conflicts with Wilson, Alfonso, Lee, Carrazana, and Jackson.

C. **Double Jeopardy Precludes Retrial on Attempted First Degree Premeditate Murder**

This Court should reconsider its decision concerning the retrial of Mr. Kaplan, and the double jeopardy implications of a retrial on attempted first degree premeditated murder. It is respectfully submitted that the majority's decision cannot be reconciled with established Florida and federal double jeopardy law.

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. Bullinston, 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 Bullinston: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the Bullinston 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 Bullinston 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 the 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 Ray 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).

Should this Court not change its decision on this double jeopardy issue, Mr. Kaplan respectfully requests the Court to certify, as an issue of great public importance, the following question:

> Where an information charges a defendant with attempted first degree murder under both premeditated and felony murder theories, and the jury returns a specific verdict of guilty as to attempted first degree felony murder, which must be vacated under this Court's decision in State v. Gray, 654 So.2d 552 (Fla. 1995), does double jeopardy prevent a retrial on the charge of attempted first degree premeditated murder?

REVERSAL OF COUNTS II AND III

Both the majority and the dissent concurred in the affirmance of Counts II and III. However, it is respectfully submitted that the court misapprehended the law concerning the proposed hallucinations instruction discussed in Issue III in Mr. Kaplan's briefs.

Because there was evidence to support it (a contention the state did not dispute in its answer brief), 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. (TR-1069).

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), yet this Court chooses not to address or attempt to distinguish Boswell. It should address the issue head-on.

Even more recently, since the filing of the briefs and oral argument in this case, the Supreme Court of Florida Committee on Standard Jury Instructions in Criminal Cases proposed a jury instruction on Insanity - Hallucinations.[1/] See The Florida Bar News, August 1, 1996 at p.14. A copy of that proposed instruction is attached hereto as Exhibit A. For the most part, the proposed instruction is virtually identical to the one submitted by Mr. Kaplan. In pertinent part, the proposed instruction reads:

> 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

---

1/ One basis for the state arguing that the denial of the proposed instruction was not error was that it was not part of the Florida Standard Jury Instructions (Answer Brief at p. 28).

delusions been the actual facts, the person is not guilty of the crime.

The fact that the Supreme Court Committee on Standard Instructions has submitted a proposed instruction which seems to be based on precedent in this state (Boswell), demonstrates that it is an accurate reflection of current Florida law. So was Mr. Kaplan's proposed instruction. Because this instruction is 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 reconsider its affirmance of Counts II and III, vacate those convictions, and remand for a new trial on those counts.

CONCLUSION

WHEREFORE, for the foregoing reasons, Mr. Kaplan respectfully requests this Court to reconsider its September 20, 1996, opinion.

Respectfully submitted this 4 day of October, 1996.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of October, 1996, a true copy of the foregoing was furnished by U.S. Mail to

Kristen L. Davenport, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

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Proposed standard jury instruction amendments

The Supreme Court Committee *on* Standard Jury Instructions in Criminal Cases proposes the following amendments to the standard jury instructions. After reviewing the comments received in response to this publication, the committee will make its final proposal to the Florida Supreme Court. Please submit all comments to Judge Fredricka Smith Chair, 1351 N.W. 12th St., Room 423, Miami 33125. Your comments must be received by August 20, 1996, to ensure that they are considered by the committee.

(7)

3.04(b)(2) INSANITY-HALLUCINATIONS [New]

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 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,

EXHIBIT A

Appendix C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ERIC A. KAPLAN,
Appellant,

v.

CASE NO. 95-1118

STATE OF FLORIDA,
Appellee.
_____/

DATE: November 1, 1996

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFICATION TO THE FLORIDA SUPREME COURT, filed October 7, 1996, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Chandler R. Muller, Esq.
Terrence E. Kehoe, Esq.
Office of the Attorney General, Daytona Beach