IN THE SUPREME COURT OF FLORIDA

ERIC A. KAPLAN,

Petitioner,

v. CASE NO. 89,445

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

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STATEMENT OF FACTS

The State submits the following additions/corrections to Kaplan's Statement of the Case and Facts:

In 1992, Eric Kaplan filed the necessary papers with the state and local supervisor of elections, paid the filing fees, and declared his candidacy for the District 34 seat in the Florida Legislature's House of Representatives. (T. 114). Kaplan's opponent in the election was an incumbent Republican, Representative Bob Starks. (Id.).

District 34 was predominantly Republican and conservative -- a very difficult district for a Democrat to win. (T. 117). Kaplan had little support or money, and he did not follow the advice or enlist the aid of the local Democratic campaign organizations. (T. 116-18, 420-22). In fact, Kaplan was warned by the Chairman of the Seminole County Democratic Party that he was going to lose the campaign for sure if he didn't get on the ball. (T. 113, 118).

On September 22, 1992, only a few days before the crimes at issue took place, Kaplan went to a gun shop in Winter Park. There, he purchased two boxes (100 rounds) of ammunition and a target, and he practiced shooting at the gun range. (T. 209-10, 213-14).

The following Saturday, September 26, Kaplan's employer noticed loud music coming from the warehouse he was using. Upon

investigating this noise, the employer discovered Kaplan inside the warehouse with the doors locked. Kaplan had six glass Pepsi bottles and six strips of cloth, and he was siphoning gas from his car to the bottles. The employer concluded that Kaplan was making fire bombs. (T. 266-70).

The employer called the property manager and Kaplan's father, who came over and ordered Kaplan out of the warehouse. Kaplan then packed up his car and left. (T. 271-74, 615-16). Kaplan attempted to explain his behavior by claiming he was making paint thinner with the gasoline, but when confronted he admitted that this made little sense. (T. 270, 616).

Representative Starks, in addition to his position as a state legislator, was also a pilot for Delta Airlines. (T. 77). Starks normally drove his Volkswagen to the airport and left it there when he had a flight, but on September 26 he decided to get a ride to the airport so he could discuss his campaign with his wife, Judy, and a campaign aid, (T. 81-83). Accordingly, his car remained in his driveway while he was gone, which was very unusual. (T. 83, 93-94).

On the morning of the 27th all three of the Starks' cars were parked in the driveway in front of their house. (T. 103). Judy Starks was asleep in the Starks' bedroom when, at approximately 4

a.m., she awoke to the sound of gunshots. Judy could feel glass on her face as the shots came in through the bedroom window, and she was shot in the upper calf of her left leg. (T. 96-99). Judy ran out to the kitchen, and the police were called. (T. 99).

Physical evidence established that five shots were fired from the Starks' deck. (T. 219-20). The gun used was a five-shot revolver purchased by Kaplan two years earlier and found under the mattress in Kaplan's apartment. (T. 207-08, 241-42, 285-87). When found, the gun had been cleaned and reloaded. (T. 241-42).

In order to get into the Starks' deck area, the shooter had to enter the yard through a closed gate. (T. 100; R. 1267). Pieces of material located on the deck indicated that the shooter had used a piece of cloth or blanket as a crude silencer for the gun. (T. 344-47).

The Starks' neighbor, Timothy Lanier, was working in his garage when the shooting took place. (T. 131). Lanier heard the gunshots and went outside to investigate. He observed a person walking from the direction of the Starks' house to a car parked on the street; the person was walking in a "quick-jog" manner. (T. 135).

Lanier testified that he saw Kaplan's picture on television and in the newspaper, and he looked like the driver of the car.

(T. 159-61). Lanier also testified that a picture of Kaplan's car looked like the car he saw that night. (T. 157).

The car was parked so it was facing away from the dead-end portion of the street; the driver would have had to have made a U-turn at some point in order to park facing in that direction. (T. 136-37) The driver got in and the car sped away, with its headlights off. Lanier then got in his car and followed. (T. 138, 141).

Eventually the driver turned the headlights on and drove at normal speed. (T. 148). When it reached state road 436, the car sped up, even skidding at one point, and turned into the Reflections apartment complex; the car then turned around and drove back the other way on 436, then turned around again and went back to the apartment complex. Lanier managed to follow the car the entire time, noting that the car reached speeds of greater than 65 mph. (T. 149-53).

After the car turned into the Reflections complex the second time, Lanier waited at the entrance for its return. The car never came back, so Lanier went home and reported this encounter to the police. (T. 153-54). Lanier also gave the officers the tag number of the car. (T. 179).

The police officer who responded to the scene traced the license tag and discovered the car was a company vehicle which belonged to Kaplan's father, Buddy. (T. 179-81). Buddy told the officer his son had the car; he also told the officer his son lived at the Reflections apartment complex. (T. 182, 198).

Buddy attempted to contact Kaplan and finally reached him at approximately 2 o'clock that afternoon. (T. 187). Buddy told Kaplan that he was a suspect in a shooting at the Starks' home, as his car had been spotted there. (T. 187). Kaplan acted surprised and said he had nothing to do with it. (T. 187-88). When the police interviewed Kaplan later that afternoon, he denied having anything to do with the crime. He also told the police his car might have been stolen, as he had a hide-a-key device under the vehicle. (T. 193).

The police later located this key box under the car, and it appeared to have been placed there very recently. The surrounding area of the car was dirty, and underneath the key box was dirty, yet the key box itself looked brand new. (T. 296-98, 304-08).

The police also searched Kaplan's apartment. In addition to the gun, the police found a legal pad with the Starks' home address written at the top. (T. 241). The handwriting was Kaplan's. (T. 323-25, 334-35).

Kaplan was arrested on September 28, 1992. (R. 15). After his arrest, Kaplan continued to protest his innocence. (T. 440). In fact, he had great difficulties with his original attorney because that attorney wanted him to pursue an insanity defense. Kaplan thought this defense was unethical and a "sham," and he claimed that the attorney was "psychiatrist shopping" -- attempting to find psychiatrists who would find something wrong with him. (T. 563-64, 780-81). Kaplan was eventually found incompetent to stand trial, as he could not cooperate with his attorney. (T. 562).

Kaplan was then sent to the North Florida Evaluation and Treatment Center. At that point, Kaplan continued to assert that he had nothing to do with the crimes and was being framed. (T. 565, 656-57, 666, 788-89).

At the Treatment Center, Kaplan spent time reading books on psychiatry, psychology, and the law. (T. 1024-25). Dr. Erlich, a court-appointed psychiatrist, testified that a hospital such as this is essentially a "college of malingering;" there are opportunities to observe many crazy people, and the residents tend to swap stories regarding how to fool the doctors and fake symptoms. (T. 1140). Kaplan was unquestionably very intelligent, with an IQ of 126, and he had a psychology degree from the University of Florida. (T. 950, 450).

Kaplan was found to be competent to stand trial in December of 1993. (T. 560). After leaving the hospital, and a year and a half after the crimes, Kaplan for the first time stated that he had committed the crimes charged, but was acting under the guide of a higher power who told him to take these actions in order to save the world. (T. 528, 671-72, 788-93).

Four doctors, each of whom examined Kaplan at the request of defense counsel, testified that Kaplan was insane when he committed his crimes. (T. 491-92, 676, 805, 939-40). However, all three court-appointed doctors testified that Kaplan was in fact sane. **(T.** 1050-51, **1143-44, 1196).** Court-appointed doctors are different from paid defense experts in that the reports of experts contacted independently by the defense are disclosed only to the defense, until the decision is made that they will actually be used. The reports of court-appointed doctors, on the other hand, are disclosed to both sides no matter what their findings. (T. 507-09).

Dr. Riebsame, a court-appointed psychologist, examined Kaplan in September of 1994. (T. 1004-06). Riebsame concluded that Kaplan was sane at the time of the crimes and was, in fact, malingering -- that is, faking his mental illness in order to excuse his wrongdoing. (T. **1033-34).**

Dr. Erlich, a court-appointed psychiatrist, came to the same conclusion -- Kaplan was sane at the time of the crimes, and he was malingering. (T. 1133-35, 1142-44). Erlich had initially concluded that Kaplan was insane, but upon receiving more information and thinking further about the case he changed his opinion. Erlich explained the reasons for his change of opinion at great length during his trial testimony. (T. 1131-42).

The third court-appointed expert was another psychiatrist, Dr. Ballentine. He also concluded that Kaplan **was** sane at the time of the crimes. (T. 1196). Ballentine noted that Kaplan did not appear psychotic and seemed to be trying to convince him of his insanity through subtle elaboration. (T. 1186-88).

The jury ultimately rejected Kaplan's insanity defense and found him guilty **as** charged of attempted murder, armed burglary, and shooting into a building. (T. 1442). The district court affirmed Kaplan's convictions for the latter two crimes, rejecting his claims that the jury had been improperly instructed on his insanity theory. Because Kaplan was prosecuted for attempted murder under both premeditation and felony murder theories, the court reversed his conviction for this crime **and** remanded for a new trial on the charge of attempted premeditated murder. Kaplan v. State, 681 So. 2d 1166 (Fla. 5th DCA 1996).

SUMMARY OF ARGUMENT

ISSUE I: First of all, the State respectfully submits that jurisdiction was improvidently granted in this case, and the Court's exercise of jurisdiction should be reconsidered. As is even more apparent after reading Kaplan's Initial Brief, the circumstances in this case **are** unique, and no other Florida decision has dealt with this specific situation. Accordingly, there is no basis for conflict jurisdiction.

As to the merits of Kaplan's claim, the State submits that the district court's decision was proper. In cases involving attempted felony murder, the appropriate remedy is retrial on all equal or lesser charges -- including, in this case, the charge of attempted premeditated murder. Given the instructions below, it cannot be said that the jury's verdict was the equivalent of an acquittal of this crime.

ISSUE II: Kaplan's jury instruction claim need not be considered by this Court, as it does not form a basis for conflict jurisdiction. Should this Court exercise its discretion and consider the issue, the State submits that Kaplan's claim should be rejected because the issue **was** not properly preserved for appeal, as defense counsel never objected to the jury instructions.

Even if this claim had been preserved, it is without merit. The trial court properly denied Kaplan's requested instruction on delusions, as this instruction is not an accurate statement of the M'Naghten test for insanity and was not supported by the facts of the case. Even if Kaplan's delusions were actual facts, his conduct was still not **legally** justified.

ARGUMENT

ISSUE I

THE DISTRICT COURT PROPERLY REMANDED FOR RETRIAL ON EQUAL OR LESSER OFFENSES OF ATTEMPTED FELONY MURDER -- INCLUDING ATTEMPTED PREMEDITATED MURDER.

Kaplan first argues that the district court erred in remanding this case for retrial on the charge of attempted premeditated murder. The State submits that it is readily apparent, from Kaplan's Initial Brief, that the situation in this case is unique in Florida law.

While numerous cases have addressed the proper remedy for a conviction of attempted felony murder, and numerous cases have addressed the proper remedy for a general guilty verdict of attempted murder, none have addressed the situation in the present case -- a conviction of attempted felony murder which, because of the other instructions given, is found to be the legal equivalent of a general verdict. Whether this Court agrees with the district court's resolution of this issue or not, it is clear that such resolution was the first, and only, in a case of this kind. Accordingly, this Court has no basis for jurisdiction,

Should this Court reject the above argument, the State submits that the district court's decision should be approved. Under the

circumstances, the district court properly remanded for retrial on equal or lesser offenses of attempted felony murder -- including attempted premeditated murder.

Kaplan was charged with attempted first degree murder with a firearm. (R. 138). The State based this charge on two alternative theories -- that Kaplan premeditated his crime, or that Kaplan committed his crime during the course of a burglary.[1] Subsequent to Kaplan's trial, this Court decided that the latter crime, attempted felony murder, no longer exists in Florida. State v. Gray, 654 So. 2d 552, 554 (Fla. 1995). This decision is applicable to all cases "pending on direct review or not yet final" when Grav was decided, which includes the case at bar. Id.

This Court has held that the proper remedy in cases of Gray error is retrial on any offenses of a degree 'equal to or lesser than" the crime for which the defendant was convicted. See, e.g., State v. Ellis, 685 So. 2d 1289 (Fla. 1996); State v. Jones, 685

[1]Contrary to Kaplan's argument, the State did not abandon the premeditation theory at trial. As discussed below, there was extensive evidence of premeditation presented by the State, although of course the more obvious and indisputable felony murder theory was emphasized in closing argument.

So. 2d 1280, 1281 (Fla. 1996); State v. Riggins, 684 So. 2d 818 (Fla. 1996); State v. Wilson, 680 So. 2d 411 (Fla. 1996).[2]

In accord with the above cases, the district courts have uniformly held that in cases such as this, where the State proceeds under two theories of attempted murder, premeditation and felony, the proper remedy is a retrial on the charge of attempted premeditated murder. As long as there is sufficient evidence to support a guilty verdict on premeditation, the courts have reasoned, there is no impediment to remanding for a new trial on this charge. Thompson v. State, 667 So. 2d 470, 471 (Fla. 3d DCA), rev. granted, 675 So. 2d 931 (Fla. 1996). See also Bell v. State, 685 So. 2d 1 (Fla. 1st DCA 1996); Allen v. State, 676 So. 2d 491,

[2]Of course, in Wilson, and numerous other cases cited by Kaplan, there were no "equal" offenses to the crime of attempted felony murder, but only lesser offenses. In those cases the charge of attempted premeditated murder was not even pursued. See, e.g., Chastine v. State, 22 Fla. L. Wkly. D395 (Fla. 4th DCA Feb. 12, 1997) (remanding for retrial on attempted manslaughter where State never argued or presented evidence of premeditated murder).

492 (Fla. 5th DCA 1996); Williamson v. State, 671 So. 2d 281, 282 (Fla. 4th DCA 1996).[3]

Here, there was plainly sufficient evidence of premeditation. Kaplan's actions before, during, and after the crime clearly establish a "fully formed conscious purpose to kill." Asav v. State, 580 So. 2d 610, 612 (Fla.), cert. denied, 112 S.Ct. 265 (1991).

Notwithstanding the offer of help from the local Democratic party, Kaplan did little to further his goal of election to the Florida House of Representatives. If he wanted to achieve that goal, drastic action **was** required -- murdering his opponent, Representative Bob Starks.

One week before the crimes took place, Kaplan acquired ammunition for his handgun and practiced shooting. He found out the home address of Starks, and he wrote this address on **a** sheet of

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[3]In fact, it could be argued that in cases such as this the defendant's conviction should simply be affirmed, rather than reversed for a retrial, as long as the valid theory (premeditation) is supported by substantial competent evidence. See Murray v. State, 491 so. 2d 1120, 1122-23 (Fla. 1986) (upholding guilty verdict for attempted manslaughter where one of the State's theories of guilt **was** supported by the evidence -- even though under the alternative theory (culpable negligence) the crime did not exist). But see Valentine v. State, 22 Fla. L. Wkly. S10, S11 (Fla. Dec. 19, 1996) (reversing attempted murder conviction because it may have been based on legally unsupportable attempted felony murder theory).

paper. Then, the day before the crime, Kaplan prepared to firebomb the home of his opponent by making six Molotov cocktails. (Fortunately for the Starks, this part of Kaplan's plan was foiled by his employer).

Kaplan then took his revolver and went to the Starks' home at 4 a.m. on a Sunday morning. From the cars parked in the driveway, it appeared that Bob Starks was at home that night. Kaplan made a U-turn and parked his car so he could make a quick get-away, then entered the Starks' yard. He brought along some type of material to use as a crude silencer, and he fired 5 shots into the Starks' home -- one of which hit Mrs. Starks as she was in her bed, sleeping.

Kaplan emptied his revolver into the house and then sped away, driving with his lights off so his car would not be easily seen. When it appeared that he was being pursued, Kaplan took evasive action in a successful attempt to escape from his pursuer. Finally, when confronted with the fact that his car was spotted at the scene of the crime, Kaplan constructed a story of a potential theft of his car, and he purchased a magnetic key box to corroborate this story.

Given the substantial evidence of premeditation in this case, a retrial on the charge of attempted murder was clearly proper.

The result should be no different simply because in this case there was a specific jury finding as to its theory. As the district court explained, under the unique facts of this case this jury finding was not dispositive.[4]

It is well established that a special jury verdict explaining its theory of guilt is not required under Florida law. See, e.g., Young v. State, 579 So. 2d 721, 724 (Fla. 1991), cert. denied, 112 S.Ct. 1198 (1992); Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991). Moreover, as the following cases illustrate, special jury findings do not always resolve the issues they purport to resolve. See Brown v. State, 473 So. 2d 1260, 1265 (Fla. 1985) (jury verdict specifying theory of guilt would not resolve question of whether defendant intended that killing take place), cert. denied, 474 U.S. 1038 (1983); Hill

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'Kaplan argues that the State cannot complain about the special verdict because the form was agreed to below and no cross-appeal was taken. Contrary to this argument, the State is not complaining that a special verdict form was used, nor is the State in any way alleging that the trial court erred in instructing the jury as it did.

Rather, the State is addressing the appropriate remedy to be applied in light of what the trial court did. Certainly no one could have anticipated that the special verdict would one day have any effect whatsoever on the validity of Kaplan's conviction. Cf. Wilson, 680 So. 2d at 412 (noting that attempted felony murder was a valid offense for approximately eleven years, until Gray was decided).

v. State, 616 so. 2d 1160, 1162 (Fla. 5th DCA) (special finding by jury that evidentiary error was harmless did not resolve this issue), rev. denied, 624 So. 2d 266 (Fla. 1993); North v. State, 538 So. 2d 897, 898 (Fla. 5th DCA 1989) (guilty verdict would not be overturned on basis of special jury findings which allegedly contradicted the verdict itself).

In the present case, the trial court took an extra, completely unnecessary step in creating the verdict form -- it put separate lines on the form for premeditated and felony murder. (R. 1120). However, the court did not take the additional step needed to make this choice dispositive -- it did not tell the jury that it had the option of choosing *both* theories if it found both theories had been proven.

Rather, the court instructed the jury that it had to pick one of the theories, as only one verdict could be returned for each count. (T. 1431-33). Accordingly, once the jury found that Kaplan was guilty of attempted felony murder, an easy conclusion under the clear facts of this case, it was ***precluded*** from finding him guilty of attempted premeditated murder as well. The jury was forced to make a choice in filling out the verdict form no matter what it found -- even if it found both theories had been established, it

did not have the option of indicating this finding on the verdict form.

Accordingly, while the jury definitely found that the State had proven attempted felony murder, this finding did not "logically or legally" constitute a rejection of the premeditation charge. Kaplan, 681 So. 2d at 1168. Cf. State v. Sykes, 434 So. 2d 325, 328 (Fla. 1983) (conviction of non-existent lesser included offense was not an acquittal of main offense where the two offenses were in fact equal; retrial on main offense ordered); Achin v. State, 436 So. 2d 30, 31-32 (Fla. 1982) (same).

Under the facts of this case, then, the "special finding" cannot be deemed a definitive choice of one, and only one, theory of guilt. Given the instructions, the 'special finding" was mere surplusage, with no binding legal effect. Of course, had the jury been given the option to convict of both offenses in this case, and chosen only to convict of attempted felony murder, then Kaplan's implicit acquittal argument may have merit.[5] Under the instructions as given, however, this argument must be rejected.

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[5]This may well have been the case in Bateman v. State, 681 so. 2d 820 (Fla. 2d DCA 1996), where both theories went to the jury and a verdict of attempted felony murder was returned. It is impossible to tell, however, given the paucity of facts in the written opinion.

The verdict in this case is the legal equivalent of a general verdict, and the analysis of the general verdict cases, discussed above, should be applied by this Court. Under this case law, the district court properly remanded for a retrial on the charge of attempted premeditated murder. Cf. Bowers v. State, 676 So. 2d 1060 (Fla. 4th DCA 1996) (where it was obvious that the jury found the felony murder theory had been proven, but it was impossible to tell if the premeditation theory had been proven as well, retrial on this theory was required).

Contrary to Kaplan's argument, the remedy applied by the district court in this case does not present a double jeopardy problem. Unlike cases wherein the jury convicts of a lesser offense, implicitly acquitting of the greater offenses,[6] or recommends a life sentence, implicitly acquitting of a death sentence,[7] in this case there was no implicit acquittal of anything.

Neither attempted felony murder nor attempted premeditated murder was presented as a higher degree of crime which was to be

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[6]See, e.g., Green v. United States, 355 U.S. 184 (1957); Jones, 685 So. 2d at 1281; Riggins, 684 So. 2d at 818.

[7]See, e.g., Arizona v. Rumsey, 467 U.S. 203 (1984); Bullington v. Missouri, 451 U.S. 430 (1981).

considered before moving on to the "lesser" alternative. Rather, they were presented as equal but alternative means of proving the exact same crime -- attempted first degree murder. (T. 1410, 1412).

Attempted felony murder is not a lesser offense of attempted premeditated murder, and the jury was told it could not convict of both; accordingly, there was no implicit acquittal of the latter crime. Cf. Wilson, 680 So. 2d at 413 (no double jeopardy violation on retrial where jury convicted defendant of highest offense on which it had been instructed; such verdict did not constitute an acquittal, explicit or implicit, of other offenses).

Allowing Kaplan to escape full responsibility for the attempted murder of Mrs. Starks would bestow on him a windfall which has absolutely no basis in the law and is contrary to public policy. The district court applied the proper remedy in this case by remanding for a retrial on all offenses equal to or lesser than the offense convicted of, and its decision should be approved by this Court.

Finally, Kaplan argues that the district court erred in failing to vacate the sentences on counts II and III and remand for resentencing on this counts. This argument was properly rejected by the district court.

In every case[8] cited by Kaplan in support of his argument, the attempted murder conviction was simply reversed, with no mention of any retrial possibility. In such circumstances resentencing is obviously necessary for the other offenses.

In this case, however, a retrial has been ordered as to count I. While resentencing may be necessary at some point in the future, it would be inappropriate to order such resentencing until final resolution of the charges in count I of this criminal transaction. Should Kaplan be convicted once again after retrial on this charge, his current scoresheet will be correct -- with counts II and III scored as "additional offenses at conviction."[9] If Kaplan is ultimately acquitted of count I, or convicted of a lesser offense, then, and only then, a new scoresheet would be appropriate.

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[8]See Initial Brief at p. 20-21.

[9]Under the guidelines, these offenses accrue more points if scored as 'additional offenses at conviction," rather than as "prior record." See Fla. R. Crim. P. 3.988(a).

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING KAPLAN'S PROPOSED JURY INSTRUCTION ON DELUSIONS.

Kaplan next argues that the trial court erred in denying his proposed jury instruction on delusions and hallucinations. First of all, this Court need not consider this claim, as there is no asserted conflict between the district court's resolution of this issue and any other case.[10]

Should this Court exercise its discretion and consider this claim, the State submits that it should be rejected, as Kaplan's argument was not properly preserved for appeal.

A party may not raise on appeal "the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict." Fla. R. Crim. P. 3.390(d); see, e.g., Harris v. State, 438 So. 2d 787, 795 (Fla. 1983), cert. denied, 466 U.S. 963 (1984). Here, Kaplan submitted his proposed special instruction in writing and it was discussed during the charge conference. (R. 1069; T. 1311-22). However, Kaplan never objected to the jury instructions or to the denial of his proposed

[10]In fact, the district court summarily rejected this claim as without merit. Kaplan, 681 So. 2d at 1167.

instruction. Accordingly, this claim has not been properly preserved and should be rejected on this basis.

Even if this claim had been preserved, it is without merit. The instruction requested by Kaplan is not a part of the Standard Jury Instructions and has never been approved by this Court as an accurate reflection of the law in this state. Cruse v. State, 588 So. 2d 983, 989 (Fla. 1991), cert. denied, 112 S.Ct. 2949 (1992).[11]

Essentially, such an instruction provides an ***additional*** means by which ***a*** jury may find a defendant insane -- allowing a finding of insanity where the delusions of the defendant were of such a nature that if the delusions had been true the defendant's actions would have been lawful. Id. Accordingly, the giving of such an instruction will never be harmful to ***a*** defendant, as this Court held in Cruse. This does not mean, however, that the instruction must be given if requested.

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[11]Kaplan notes that subsequent to oral argument in the district court the Committee on Standard Jury Instructions in Criminal Cases proposed a delusions jury instruction for comment in the Florida Bar News. The State submits that this publication does not mean the instruction will ultimately be adopted. Moreover, even if at some point in the future this instruction is accepted by this Court, it would still not be applicable to this ***case,*** as Kaplan's actions were not legally justified even if his delusions were true. (See further discussion below).

In fact, it is certainly questionable whether such an instruction is a proper reflection of the law in Florida, as it could be seen as inappropriately expanding the M'Naghten insanity test. See LaFave & Scott, CRIMINAL LAW § 4.2(b)(5) (2d Ed. 1986) (M'Naghten did not intend to create a separate insanity rule for delusions).

At any rate, even if insanity could be proven in the manner provided in the delusions instruction, it is not supported under the facts of this case. The insanity theory which forms the basis for this instruction requires that the delusion ***legally justify*** the defendant's actions. See Blocker v. State, 110 So. 547, 552 (Fla. 1926); Davis v. State, 32 So. 822, 828 (Fla. 1902).

For example, as this Court explained in Davis, if the defendant, because of his delusion, believed he was acting in self defense when he killed the victim, he would be insane under the delusions theory. On the other hand, if the defendant killed the victim out of revenge for some delusional past harm, then he would not be insane under this theory. 32 So. at 828.

According to Kaplan's alleged delusion, if he scared the Starks by shooting into their house, he would win the election and help the world. Even assuming the delusion was based in fact, Kaplan would still not have been legally justified in his actions.

A person is not acting lawfully if he goes onto someone's deck and shoots inside their house, even if such action will ultimately result in some overall world benefit. Accordingly, Kaplan's delusion does not satisfy the delusions test of insanity, even if that test is ultimately adopted as an additional means of establishing insanity under Florida law.

Kaplan attempts to circumvent the legal justification problem by arguing intent. According to Kaplan, pursuant to his delusions he had no intent to harm anyone, as he thought no one would be hurt. However, the delusions instruction, as explained in Davis, is based upon legal *justification,* not a question of intent.[12]

Therefore, to the extent the delusions instruction was requested as a means of negating the proof of Kaplan's intent to harm, it was properly rejected under this Court's holding in Chestnut v. State, 538 So. 2d 820 (Fla. 1989), and its progeny. It is well-established that under Florida law a defendant is not entitled to use a diminished mental capacity defense to negate

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"Moreover, even assuming no intent to harm, Kaplan would still be guilty of burglary and shooting into a dwelling, as no intent to harm is necessary for these offenses.

intent, which is essentially what Kaplan attempted to do through his proposed instruction.[13]

Accordingly, under the facts of this case, the trial court properly denied Kaplan's proposed instruction. See Moody v. State, 418 So. 2d 989, 993-94 (Fla. 1982) (no error in denying delusions instruction where defendant's act would not have been lawful had the delusions been actual facts), cert. denied, 459 U.S. 1214 (1983) ; Boswell v. Stat&, 610 So. 2d 670, 673 (Fla. 4th DCA 1992) (delusions instruction should have been given where pursuant to delusion defendant allegedly believed victim fired shot at him and he was therefore lawfully acting in self defense) .

For the same reason, any error in refusing to give this instruction was harmless, as Kaplan would have been found guilty as charged even if his delusions were actual facts. Consequently, there is no reasonable possibility that this alleged error

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[13]In fact, Kaplan's proposed instruction sidestepped the legal justification requirement by changing the language used in prior instructions (and the Criminal Committee's proposed instruction), which provide that insanity is proven if the defendant's conduct "would have been lawful" had the delusions been true. Kaplan's instruction instead provided that insanity is proven if he "would not have been guilty of the crime with which he is charged" had the delusions been true, which better encompassed his diminished capacity argument. Accordingly, the instruction as written was properly denied as an inaccurate statement of the law.

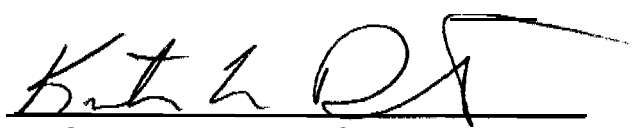
Contributed to the jury's verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the district court's decision.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief on the Merits has been furnished by U.S. mail to Chandler R. Muller, 1150 Louisiana Avenue, Suite 2, Winter Park, Florida 32789, and Terrence E. Kehoe, 18 West Pine Street, Orlando, Florida 32801, this 18th day of April, 1997.

Kristen L. Davenport
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

ERIC A. KAPLAN,

Petitioner,

v. CASE NO. 89,445

STATE OF FLORIDA,

Respondent.

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

SBK sent a letter to all franchisees requesting that royalty payments due on sales through February 28,1993 be made to Sobik's Franchises and that royalties due for the following week be sent to SBK. Thus, Sobik's Sandwich Shops never received any money directly from franchisees.

In their complaint, the Berdolls alleged that the revocation of the license to use the service mark and the transfer of the franchise agreements from Sobik's Franchises to Sobik's Sandwich Shops were fraudulent. The Berdolls sought to attach the franchise payments being paid to Sobik's Sandwich Shops in satisfaction of their judgment against Sobik's Franchises.

In 1987, Florida adopted the Uniform Fraudulent Transfer Act. Ch. 87-79, Laws of Fla. (1979). The Uniform Law made significant substantive changes in the law of fraudulent transfers. For example, prior law had required proof of actual fraudulent intent, whereas the Uniform Law makes no such requirement. Additionally, under prior law, "good consideration" was sufficient. The Uniform Law now requires "reasonably equivalent value" to uphold the transfer.[2] *Snellgrove v. Fogazzi*, 616 So.2d 527 (Fla. 4th DCA 1993).

According to Sobik, the consideration for the transfer of the franchise agreements consisted of payment of Sobik's Franchises' bills and rent and assumption of its responsibilities under the franchise agreements. There was testimony regarding Sobik's Franchises' operating losses but no testimony regarding the amount of the bills and rent paid by Sobik's Sandwich Shops on behalf of Sobik's Franchises. Sobik's Franchises used the same building as Sobik's Sandwich Shops and they shared office space suggesting that rent would be nominal. The assumption of Sobik's Franchises' responsibilities under the franchise agreements is not a valid consideration. Once Sobik's Sandwich Shops demanded the return of its service mark and the franchise agreements and received them, it was Sobik's Sandwich Shops' responsibility to service the franchise agreements. Since Sobik's Sandwich Shops had the responsibility to service the agreements, servicing the agreements is not consideration. See *James v. DuBreuil*, 385 So.2d 708 (Fla. 3d DCA 1980) (consideration recited in agreement was invalid as it was based on a transfer of stock which the plaintiff was already obligated to make by virtue of another agreement between the parties).

The franchise agreements are worth at least $7,500—what SBK paid for them-if not $15,000, the total amount SBK paid to take over the service mark and franchise agreements. While there may have been "some consideration" for the transfer from Sobik's Franchises to Sobik's Sandwich Shops, the evidence is insufficient to find that Sobik's Sandwich Shops gave "reasonably equivalent value" for the transfer.

REVERSED and REMANDED.

PETERSON, C.J., and COBB, J., concur.

Eric KAPLAN, Appellant,

v.

STATE of Florida, Appellee.

No. 95-1118.

District Court of Appeal of Florida, Fifth District.

Sept. 20, 1996.

Rehearing Denied Nov. 1, 1996.

Defendant was convicted in the Circuit Court, Seminole County, Alan Dickey, J., of

2. Section 726.106(1) provides as follows:

726.106 Transfers fraudulent as to present creditors.-

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

attempted first-degree felony murder with a firearm, armed burglary of a dwelling, and shooting into a building. Defendant appealed. The District Court of Appeal, Cobb, J., held that defendant who was charged with attempted first-degree murder based on theories of premeditated attempted first-degree murder and attempted first-degree felony murder could be retried for attempted premeditated murder after his conviction for first-degree felony murder was overturned.

Affirmed in part, reversed in part and remanded for retrial.

W. Sharp, J., filed a dissenting opinion.

Homicide ⇐345

Defendant, who was charged with attempted first-degree murder based on theories of premeditated attempted first-degree murder and attempted first-degree felony murder, could be retried for attempted premeditated murder after his conviction for first-degree felony murder was overturned, where jury was instructed on both theories but was told that it could only convict on one theory or the other, and evidence adduced at trial was sufficient to sustain jury verdict of guilt on that offense.

Chandler R. Muller of Law Offices of Chandler R. Muller, P.A., Winter Park, and Terrence E. Kehoe of Law Offices of Terrence E. Kehoe, Orlando, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

COBB, Judge.

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." The shooting incident took place in 1992, but the trial was not held until February of 1995, just prior to the Florida Supreme Court's opinion in *State v. Gray*, 654 So.2d 552 (Fla.1995). Kaplan raises issues concerning the correctness of the court's denial of a jury instruction regarding Kaplan's mental condition, and an instruction on hallucinations or delusions, which we find to be without merit. However, pursuant to *Gray*, we reverse Kaplan's conviction for attempted first degree felony murder.

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

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

The prosecution agreed to submit to the jurors a special verdict form which required them to select one theory of the crime or the other, or a list of lesser included offenses. The trial court instructed the jury it could return a verdict on either one of the two attempted murder theories charged in ***Count***

1. §§ 782.04(1)(a), 777.04, 775.087(1), Fla.Stat. (1991).

2. §§ 810.02(1) and (Z)(b), 775.087(2)(a)1, Fla. stat. (1991).

3. §§ 790.001(6), 790.19, Fla.Stat. (1991).

I, but not both. The jury returned with a verdict of guilty of attempted first degree felony murder with a firearm.

We disagree with Kaplan's contention that he cannot now be retried for attempted premeditated murder. There was evidence adduced at trial which was sufficient to sustain a jury verdict of guilt of that offense.[4] The jury, in effect, was precluded from making that finding by the court's instruction that it could not find guilt on *both* theories submitted to it: premeditation and the attempted felony murder. The jury's selection of the latter theory, which was nullified by the decision in 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 *State v. Wilson, 680* So.2d 411 (Fla. 1996) and *State v. Miller, 660* So.2d 272 (Fla.1995), as precluding a new trial on the charge of attempted premeditated murder. In *Miller,* the Florida Supreme Court merely approved the result reached by the Third District *in Miller v. State,* 651 So.2d 1313 (Fla. 3d DCA 1995), wherein the appellant's conviction for the nonexistent crime of attempted felony murder was reversed, and his conviction for armed robbery was affirmed. There is no indication that the defendant in either *Wilson* or Miller was ever charged with attempted premeditated murder, as was Kaplan in the instant case. The premeditation charge was also absent in all of the other cases cited by the dissent as representative of "sole" or "non-general" verdicts. The only line of cases which we have found that deals with the instant issue, where a pre-*Gray* trial jury was forced to choose between attempted felony murder and attempted premeditated murder, is represented by *Bowers* v. *State,* 676 So.2d 1060 (Fla. 4th DCA 1996). We agree with the result reached by the Fourth District in that case, i.e., the requirement of a new trial for attempted premeditated murder.

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

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR NEW TRIAL.

PETERSON, C.J., concurs.

W. SHARP, J., dissents with opinion.

W. SHARP, Judge, 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, 680 So.2d 411 (Fla. 1996). I agree no other reversible error occurred, and the other convictions for crimes in this case, should be affirmed.[1]

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

Kaplan's primary defense in this case was diminished mental capacity at the time of the crime. Acknowledging the weakness of' the state's case on the element of proving premeditation beyond a reasonable doubt, the prosecutor stressed in his closing argument,

4. This fact is not denied by the appellant or by the dissent.

1. Section 810.02(1) and (2)(b) and section 775.087(2)(a)1, Fla Stat. (1991) (armed burglary of a dwelling).

that if the jury had a reasonable doubt about intent or premeditation, it should not find Kaplan guilty of attempted first degree premeditated murder. Rather, the prosecutor urged the jury to return a verdict of attempted first degree felony murder because under that theory, the state did not need to prove beyond a reasonable doubt, that Kaplan had an intent to kill when he fired shots into the dwelling. The jury did just that: guilty of attempted first degree felony murder.

In my view this is entirely different than cases in which a jury returned a general verdict of guilty, having been charged on two attempted murder theories (attempted premeditated murder and attempted felony murder), and it is impossible to determine on which theory the jury convicted. *See Humphries v. State*, 676 So.2d 1 (Fla. 5th DCA, 1995) (defendant charged with attempted murder of victim either by premeditation or during commission of a felony, and jury simply found defendant guilty as charged.); *Campbell v. State*, 671 So.2d 876 (Fla. 4th DCX 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*, 676 So.2d at 3.

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.[3] 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*, 676 So.2d 1060 (Fla. 4th DCA 1996) is on point. In that case the defendant was charged and tried on one count of attempted first degree murder, and the jury was instructed it could convict on either the felony murder theory or the premeditation theory. The jury simply convicted the defendant as charged, although before rendering its verdict it requested instructions on how to list an attempted first degree murder verdict on the felony-murder theory. In response, the court re-read its instructions on count one. The jury then returned a verdict of guilty as charged. This is not the same thing as a special verdict. In fact the court in *Bowers*, in reversing and remanding for a new trial on the premediation theory, quoted from *Williamson v. State*, 671 So.2d 281 (Fla. 4th DCA 1996), "*It is impossible to determine wh ich theory the jury used* to convict defendant and because the facts could support a guilty verdict on either theory." (emphasis *supplied*) 676 So.2d at 1061.

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 flurry. Green, *v. United States*, 355 U.S. *184*, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); *Ray v. State*, 231 So.2d 813 (Fla.1969).

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

3. *See State v. Wilson*. *680* So.2d 411 (Fla. 1996).

4. *See also Gutierrez, v. State*, 665 So.2d 294 (Fla. 5th DCA 1995) (court simply reversed conviction for attempted third degree murder as a nonexistent 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).

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

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

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

Green, 355 U.S. at 191, 78 S.Ct at 225.

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

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant,

v.

Sean ISOM and Judy Isom, his wife, Appellees.

No. 96–8.

District Court of Appeal of Florida, Fifth District.

Sept. 20, 1996.

Rehearing Denied Oct. 25, 1996.

Plaintiff in personal injury action sought order to set aside final judgment dismissing lawsuit against insurance company. The Circuit Court, Orange County, Jeffords D. Miller, J., set aside final judgment. Insurance company appealed. The District Court of Appeal, W. Sharp, J., held that order which set aside final judgment dismissing lawsuit based on mediation settlement agreement

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