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IN THE SUPREME COURT OF FLORIDA

ERIC A. KAPLAN,

Petitioner,

V.

STATE OF FLORIDA,

Respondent.

CASE NO. 89,445

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

MR. KAPLAN'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATION3

CASES **PAGE**

TABLE OF CITATIONS
continued

CASES **PAGE**

Other Authorities

PRELIMINARY STATEMENT

In this brief, the parties and the record on appeal will be referred to as in Mr. Kaplan's initial brief. Mr. Kaplan's initial brief on the merits will be referred to by "IB." The state's answer brief on the merits will be referred to by "AB."

STATEMENT OF THE CASE AND OF THE FACTS

The state asserts that Mr. Kaplan's employer, on the day before the shooting, discovered Mr. Kaplan siphoning gas into Pepsi bottles, with strips of cloth present **(AB** 1-2). In its argument, the state asserts that this shows Mr. Kaplan was preparing to firebomb the Starks' home, but fortunately this plan was foiled by Mr. Kaplan's employer **(AB** 15). First, the state misrepresents the record as the person who discovered Mr. Kaplan in the warehouse siphoning gasoline was not Mr. Kaplan's employer, but a business man who rented space from Mr. Kaplan's father (T2/264-65). Secondly, the state's assertion that Mr. Kaplan was making firebombs to use on the **Starks'** household flies in face of other evidence. The state's premeditation theory seems to be based on the fact that Mr. Kaplan practiced shooting a gun a week or so prior to the incident (AB 14). It is clear that a gun was used. There is absolutely no evidence that firebombs were used, or ever intended to be used. Quite simply, there was no evidence to link the "firebomb" evidence to the Starks incident. The state's attempt to bootstrap the "firebomb" evidence into its premeditation argument must be rejected.

ARGUMENTS

I.

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

It is important to note that the state does not complain that a special verdict form was used in Mr. Kaplan's case, nor is the state alleging that the trial court erred in instructing the jury as it did **(AB** 16 n.4). Therefore, the propriety of the use of the special verdict form and the accompanying instructions is not at issue in this Court. The sole issue is the appropriate remedy following vacation of an attempted first-degree felony murder conviction based upon this Court's ruling in State v. Gray, 654 So.2d 552, 554 (Fla. 1995), that the crime of attempted felony murder no longer exists in Florida. The state's contention that Mr. Kaplan may be retried on the theory of attempted first-degree premeditated murder cannot be squared with the facts or the law,

The most important single fact in Mr. Kaplan's case is that the jury returned a special verdict finding Mr. Kaplan guilty only of the offense of attempted first-degree felony murder. In that circumstance, as in Bateman v. State, 681 So.2d 820 (Fla. **2d DCA** 1996), a remand for retrial only on lesser included offenses is permitted. It is clear the Kaplan jury had the opportunity to, and did not, convict Mr. Kaplan of attempted first-degree premeditated murder. Bateman must be contrasted with Valentine v. State,

688 So.2d 313, 317 (Fla. 1996), where the verdict failed to state on which ground the jury relied."

The state's argument that because attempted first-degree premeditated murder is an offense "equal to" the offense of attempted first-degree felony murder, Mr. Kaplan can be retried on the offense of attempted first-degree premeditated murder despite the jury's specific finding of guilt solely as to the offense of attempted first-degree felony murder, must be rejected. The state cites four cases, State v. Ellis, 685 So.2d 1289 (Fla. 1996); State v. Jones, 685 So.2d 1280, 1281 (Fla. 1996); State v. Riggins, 684 So.2d 818 (Fla. 1996); State v. Wilson, **680** So.2d 411 (Fla. 1996) **(AB** 12-13). In Wilson, the defendant had been charged with attempted first-degree felony murder, but not attempted first-degree premeditated murder, and the jury was instructed on that offense and three **(3)** lesser included offenses. The Court remanded for a retrial on any of the lesser included offenses previously instructed on. 680 So.2d at 412-13. There is no discussion in Wilson as to retrial on offenses "equal to" attempted first-degree murder because no such offense existed in that case.

~~Jones~~, ~~Ellis~~, and Riggins, were all decided on the same date. All do include the language of remanding for retrial on offenses "equal to" or lesser than the offense convicted of. However, none of those three **(3)** cases involve the same factual scenario as Kaplan. In Jones, the defendant was convicted of attempted third-degree murder. The

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[1/] The Valentine opinion does not discuss a remand for retrial on any theory.

Court permitted remand for retrial on two **(2)** other offenses "equal to" or lesser than attempted third-degree murder, i.e., attempted manslaughter and aggravated assault. In Riggins, the defendant was convicted of attempted third-degree felony murder. Retrial was permitted on the equal or lesser offenses of resisting an officer with violence and resisting an officer without violence. In Ellis, neither this Court's opinion or the First District's opinion, Ellis v. State, 685 So.2d 859 (Fla. 1st **DCA** 1996), specify what exact offenses were available on remand. Ellis, like Mr. Kaplan, was convicted of attempted first-degree felony murder. However, there is no mention of the charge of attempted first-degree premeditated murder in either this Court or the First District's opinion. While this Court does use the language "equal to or lesser" than attempted first-degree felony murder, there appears to have been no offense "equal to" the offense of attempted first-degree felony murder for Ellis to be retried on.

Mr. Kaplan's case is different from Jones and Riggins. In Jones and Riggins, the offenses that were "equal to" the offense of conviction were separate and distinct offenses, and not alternative theories by which a defendant can be convicted of a single offense. Felony murder and premeditated murder are simply alternative ways of obtaining a conviction for the single offense of first-degree murder under § 782.04(1)(a). In that sense, they are not offenses "equal to" each other. They are two **(2)** legally distinct methods of proving the same offense - murder in the first degree. None of the cases in which this Court employs the language on remand for an offense "equal to" the offense of conviction involves a remand for retrial on an alternative method of proving

the single offense of conviction. Instead, in all such situations the remand is for a retrial under a separate, distinct statute which is the same degree in Florida law as the offense of conviction.

The state cites numerous cases in which the jury returned a general verdict of attempted first-degree murder, where the jury was instructed on both attempted first-degree premeditated murder and attempted first-degree felony murder **(AB** 13-14). They do not govern this appeal. Those cases do not involve a situation of a specific verdict finding guilt only as to attempted first-degree felony murder.

The state's argument that the evidence is sufficient to support premeditated murder is erroneous, and more importantly, beside the point. First, the state is not entitled to construction of the evidence in its favor, since the jury did not convict Mr. Kaplan on a premeditated murder theory. Instead, Mr. Raplan is entitled to construction of the evidence in his favor. Second, the evidence presented at trial was not sufficient to prove attempted first-degree premeditated murder. Premeditation is a conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act. Mungin v. State, 689 So.2d 1026, 1029 (Fla. 1995). The evidence presented to Mr. Kaplan's jury was simply insufficient to prove the theory that Mr. Kaplan planned and intended to kill anyone at the Starks' residence. See e.g., Long v. State, 689 So.2d 1055 (Fla. 1997); Mungin, supra.

The state's reliance on State v. Svkes, 434 So.2d 325 (Fla. 1983), and Achin v. State, **436** So.2d 30 (Fla. 1982) **(AB** 18) is also misplaced. Both Svkes and Achin involve situations in which the defendant, like Mr. Kaplan, was convicted of a non-existent offense. In Sykes, the defendant was convicted of attempted grand theft. However, this Court ruled that attempted grand theft was subsumed within the statutory definition of grand theft, and there was no separate crime of attempt. The Court allowed retrial on the grand theft charge because in that charge all elements were equal to the elements in the attempted grand theft conviction. **434** So.2d at 328, Similarly, in Achin, the defendant was convicted of attempted extortion. The crime of extortion included by definition an attempt, and therefore the defendant was convicted of a nonexistent offense. This Court ruled that the defendant could be retried on extortion, because the elements of it and attempted extortion are identical. 436 So.2d at 32.

The flaw in applying Achin and **Sykes** to Mr. Kaplan's case is that the elements of attempted first-degree premeditated murder are not equal to the elements of attempted first-degree felony murder. The state does not so claim in its brief and the law is clear on that point. In no way can the conviction of Mr. Kaplan on an attempted first-degree felony murder be considered identical to or equal to conviction for attempted first-degree Premeditated murder. Sykes and Achin are simply inapplicable to Mr. Kaplan's case.

It interesting to note that the state provides no legal authority in support of its argument that the Fifth District's remedy in this case does not present a double jeopardy problem **(AB** 19-20). The state simply argues that there is no implicit acquittal of

anything, without attempting to discuss or distinguish the cases cited by Mr. Kaplan on this point (IB 17-20). The one case it references, State v. Wilson, 680 So.2d 411 (Fla. 1996), was not a situation in which the defendant was charged with attempted first-degree murder, under both theories of premeditation and felony murder. Instead, Wilson was charged with and convicted of only attempted first-degree felony murder. It does not present the same issue presented in Mr. Kaplan's case.

The United States Court of Appeals for the Sixth Circuit recently issued an opinion which directly addresses this double jeopardy issue. In Terry v. Potter, F.3d ___ (6th Cir. 4/15/97) [1997 WL 1772071 (copy attached as Appendix **A),** the Sixth Circuit reversed the denial of a federal habeas corpus petition. In that case, the defendant had been indicted for the offense of murder by intentionally or wantonly causing the death of another **(App. A,** p. **3).** In Kentucky, intentional murder and wanton murder are forms of the capital offense of murder **(App. A,** pp. **3,** 8). At trial, the jury was instructed that it could convict Terry on one of the following offenses: intentional murder, wanton murder, or lesser included offenses. The jury found Terry guilty of wanton murder and left blank the forms for intentional murder and other charges (App. **A,** p. **3).**

The Supreme Court of Kentucky reversed the conviction for wanton murder, finding that there was insufficient evidence. It permitted retrial on the charge of intentional murder (App. A, p. **3).** Prior to retrial, the defendant sought to avoid the retrial on the basis of double jeopardy. The Kentucky courts and the federal district court, ruled against Terry (App. A, pp. **3-4).**

On appeal, the Sixth Circuit ruled that retrial on intentional murder was barred by double jeopardy principles (App. A, pp. 4-8). The court ruled that what happened here was a termination of jeopardy, without a conviction or an acquittal, but a termination nonetheless. The jury had ample opportunity to convict Terry on intentional murder but it did not (App. A, p. 6). Further, the lack of a verdict on the intentional murder charge could be interpreted as an implied acquittal (App. **A,** p. 6). The court noted that a retrial would implicate all of the dangers that the double jeopardy clause was intended to avoid (App. **A,** pp. **7-8).** The court specifically found that when the charge of murder is brought under two separate statutory subsections of a unitary offense, jeopardy attached separately as to each. Because the jury was discharged without convicting Terry of intentional murder, he cannot be subject to re-prosecution on that theory (App. **A,** p. 8).

The application of Terry to Mr. Kaplan's case is obvious. The Florida capital murder statute is a unitary offense which may be violated in two separate ways, as with the Kentucky statute. Mr. Kaplan's jury was also told that it could return a verdict of guilty on only one of the two charged theories (or a lesser offense). For the reasons set forth in Terry, the Kaplan jury verdict of guilt as to attempted first-degree felony inurder was an implied acquittal on the theory of attempted first-degree premeditated murder. Re-prosecution on the theory of attempted first-degree premeditated murder would clearly violate Mr. Kaplan's state and federal double jeopardy rights, and cannot be permitted by this Court.

In his initial brief, Mr. Kaplan argued that the Fifth District's decision was wrong in not requiring the vacation of the sentences on Counts Two and Three (IB 20-21). The state implicitly acknowledges that the Fifth District's decision on this point is erroneous (AB 21). At the present, Mr. Kaplan does not stand convicted of Count One. The state acknowledges if Mr. Kaplan is ultimately acquitted of Count One, a new scoresheet would be appropriate. The Fifth District's decision does not allow for such a scenario. Under the Fifth District's decision, Mr. Kaplan's judgment and sentence as to Counts Two and Three stand affirmed, and cannot be changed on remand no matter what occurs in Mr. Kaplan's retrial. Under the Fifth District's decision, whether Mr. Kaplan is convicted of attempted premeditated murder, any lesser offense, or acquitted of Count One, the sentences on Counts Two and Three have been affirmed and may not be altered. That holding must, of course, be rejected by this Court on the basis of the authority cited in Mr. Kaplan's initial brief. The state, by conceding that if Mr. Kaplan is ultimately acquitted on Count One, he is entitled to a new scoresheet and resentencing on Counts Two and Three (AB 21), implicitly concedes the correctness of Mr. Kaplan's position and the need for reversal on this point.

11.

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

A. JURISDICTION

The state does not contend that this Court lacks jurisdiction to consider the jury instruction issue. Instead, it asserts that the Court "need not" consider it (AB 22). Because the denial of the requested jury instruction was error which affected the fundamental fairness of the trial and thus the validity of all three convictions, this Court should consider the jury instruction issue on its merits.

B. THE MERITS

The state first argues that this issue is not preserved because defense counsel failed to object to the denial of his written proposed jury instruction (AB 22-23). That argument is legally incorrect. Here Mr. Kaplan's written "theory of the defense" jury instruction was presented to the trial court (R6/1005), argued by both sides (T7/1322-25), and then denied by the trial court (T7/1325-28). The issue was preserved. There was no need for any further objection. The contemporaneous objection rule had been satisfied because the issue had been presented to the trial court for a ruling and the trial court issued a ruling which can be reviewed on appeal by this Court. See e.g., Toole v. State, 479 So.2d 73 1, 733 (Fla. 1985) (where written request for instruction is made and denied issue is preserved); Thomas v. State, 419 So.2d 634, 636 (Fla. 1982) (same); Beniamin v. State, 462 So.2d 110, 111 (Fla. 5th DCA 1985).

The state argues that Mr. Kaplan's proposed delusions instruction has never been approved by this Court as accurately reflecting the law of this state (AB 23). For that proposition it cites Cruse v. State, 588 So.2d 983, 989 (Fla. 1991), cert. denied, 112 S.Ct. 2949 (1992). However, Cruse did find that the giving of such an instruction was not reversible error. Also, Cruse did not denounce the instruction as an inaccurate reflection of law, and did not hold the instruction was error, albeit harmless. Cruse therefore must be read as approving the instruction as an accurate reflection of Florida law.

Secondly, in making that argument the state ignores the Fourth District's decision in Boswell v. State, 610 So.2d 670, 673 (Fla. 4th DCA 1992). In Boswell, the Fourth District reversed a conviction due to the failure to give a delusions instruction. To reverse a conviction on that basis, the Boswell court obviously found the proposed instruction to be an accurate reflection of law in this state. Boswell, as it was issued prior to Mr. Kaplan's trial, and as it had neither been withdrawn or overruled by the Fourth District, rejected by the Fifth District, or overruled by this Court, was binding upon the circuit court in Seminole County. Pardo v. State, 596 So.2d 665, 666-67 (Fla. 1992).

The state additionally argues that the instruction is not supported by the facts. However, there was ample testimony by medical experts supporting the delusions instruction. That testimony is set forth in detail in Mr. Kaplan's initial brief (IB 3-7) and will not be reiterated herein.

The state additionally argues that this issue is inapplicable to Counts Two and Three, the burglary and shooting into a dwelling counts, as no intent to harm is necessary for these offenses (AB 25). That is incorrect. The proposed instruction was applicable to those two counts because both counts are specific intent crimes. Shooting into an occupied dwelling requires a mental state of a "wanton or malicious" act. That is a specific intent mental state. See Florida Standard Jury Instructions in Criminal Cases, instruction for Shooting or Throwing Missiles in Dwelling F.S. 790.19. Armed burglary of a dwelling is a specific intent crime, because it contains the essential element of the specific intent to commit a crime inside the dwelling. See Florida Standard Jury Instructions in Criminal Cases, instruction for Burglary Fla. Stat. 810.02.

Finally, the state's brief contention that this instruction was harmless error (AB 26-27) must also be rejected. Mr, Kaplan defended this case on the theory that he was either insane or lacked the required specific intent to commit the crimes charged. The insanity instruction did not cover the same precise theory of defense which was covered by this proposed delusions instruction. In effect, the trial court's denial of this instruction denied Mr. Kaplan his fundamental rights to due process and to present a full defense to the crimes charged. The error cannot be deemed harmless beyond a reasonable doubt.

CONCLUSION

Based on the arguments and authorities set forth in this brief and in Mr. Kaplan's initial brief on the merits, this Court must reverse the Fifth District's decision and grant Mr. Kaplan a new trial on all counts. As to Count I, that new trial must be limited to

consideration of only those lesser included offenses on which the initial jury was instructed.

Respectfully submitted this 13th day of May, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May, 1997, a true copy of this brief has been fur ished by United States mail, first class postage prepaid, to Kristen L. Davenport, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32 118.

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IN THE SUPREME COURT OF FLORIDA

ERIC A. KAPLAN,

Petitioner,

CASE NO. 89,445

v.

STATE OF FLORIDA,

Respondent.

APPENDIX TO
MR. KAPLAN'S REPLY BRIEF ON THE MERITS

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INDEX TO APPENDIX

--- F.3d ----
(Cite as: 1997 WL 177207 (6th Cir.(Ky.)))

Richard Wayne TERRY, Petitioner-Appellant,
v.
John W. POTTER, Judge, Respondent-Appellee.

No. 95-6697.

United States Court of Appeals,
Sixth Circuit.

Submitted Dec. 5, 1996.
Decided April 15, 1997.

Petitioner sought writ of habeas corpus to prevent his retrial for intentional murder, following reversal of his conviction for wanton murder. The District Court for the Western District of Kentucky, Charles M. Allen, J., denied petition, and defendant appealed. The Court of Appeals, Engel, Circuit Judge, held that defendant's jeopardy of conviction for intentional murder expired at time original jury was discharged.

Reversed and remanded, with instructions.

[1] FEDERAL COURTS k776
170Bk776
Court of Appeals reviews de novo legal conclusions of district court.

[2] FEDERAL COURTS k382.1
170Bk382.1
Kentucky Supreme Court's interpretation of Kentucky law is binding on federal courts.

[3] DOUBLE JEOPARDY k59
135Hk59
For purpose of determining whether subsequent prosecution violates double jeopardy protections, jeopardy attaches in jury trial at time jury is empaneled and sworn. U.S.C.A. Const.Amend. 5.

[4] DOUBLE JEOPARDY klOO.l
135Hk100.1
For purpose of determining whether subsequent prosecution violates double jeopardy protections, jeopardy generally ends with acquittal or conviction; however, if conviction is reversed on appeal, defendant may be retried for same offense. U.S.C.A. Const.Amend. 5.

[4] DOUBLE JEOPARDY k105
135Hk105
For purpose of determining whether subsequent prosecution violates double jeopardy protections, jeopardy generally ends with acquittal or conviction; however, if conviction is reversed an appeal, defendant may be retried for same offense. U.S.C.A. Const.Amend. 5.

[4] DOUBLE JEOPARDY k107.1

APPENDIX A

135Hk107.1

For purpose of determining whether subsequent prosecution violates double jeopardy protections, jeopardy generally ends with acquittal or conviction; however, if conviction is reversed on appeal, defendant may be retried for same offense. U.S.C.A. Const.Amend. 5.

[5] DOUBLE JEOPARDY k109
135Hk109
For purpose of determining whether subsequent prosecution violates double jeopardy protections, exception to rule that jeopardy continues until conviction becomes final on appeal is that retrial is barred if conviction is reversed because of insufficient evidence. U.S.C.A. Const.Amend. 5.

[6] DOUBLE JEOPARDY k166.1
135Hk166.1
Defendant's jeopardy of conviction for intentional murder expired at time jury was discharged, where defendant faced alternative charges of intentional murder and wanton murder, and jury convicted defendant of wanton murder and left verdict form with respect to charge of intentional murder blank; even if jeopardy on wanton murder charge continued after trial and defendant's successful appeal, jury had ample opportunity to convict defendant on intentional murder charge and did not do so, "silent" verdict on intentional murder charge could be interpreted as implied acquittal thereon, and any ambiguity in verdict could not be attributed to defendant or his counsel. U.S.C.A. Const.Amend. 5.

[7] DOUBLE JEOPARDY k107.1
135Hk107.1
If charge of murder is brought under two legal theories, such as direct and accomplice liability, or two factual theories, such as shooting and stabbing, reversal of conviction based on only one theory may not bar retrial under other theory; however, if charge of murder is brought under two separate statutory subsections of unitary offense, jeopardy attaches separately as to each. U.S.C.A. Const.Amend. 5.

Richard Wayne Terry (briefed), Louisville, KY, pro se.

Paul Donald Gilbert (briefed), Office of the Attorney General, Frankfort, KY, for Respondent-Appellee.

Before: ENGEL, MERRITT, and MOORE, Circuit Judges.

ENGEL, Circuit Judge.

*1 Petitioner Richard Terry appeals the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. s 2254. We reverse.

I.

Terry was convicted in a Kentucky circuit court of the wanton murder of his brother-in-law, Abraham King. The incident occurred soon after the death of Terry's sister, for which Terry apparently blamed King. Terry and King were both in Terry's mother's house,

and Terry shot King at close range in the back of the head. According to Terry, the shooting was in self-defense because King had pulled out the gun.

The indictment charged that Terry had "committed the offense of Murder by intentionally or wantonly causing the death of Abraham King." In Kentucky, intentional murder and wanton murder are forms of the capital offense of murder: A person is guilty of murder when: (a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or (b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person. Ky.Rev.Stat. s 507.020(1) (emphasis added). At trial, the jury was instructed as follows: [Y]ou may find the defendant, Richard Wayne Terry, not guilty or you may find him guilty of one of the following offenses: (1) Intentional Murder . . . . OR (2) Wanton Murder . . . . OR (3) First-Degree Manslaughter . . . . OR . . . . The jury was presented with one verdict form for each offense. Each form contained two possible places for the foreperson to sign: one for "not guilty," and one for "guilty." The jury found Terry guilty of wanton murder and left blank the forms for intentional murder and the other charges. Neither Terry nor the prosecutor objected in any way to the jury's leaving all but one of the pages blank. The court entered judgment "that the defendant is guilty of the crime of MURDER (WANTON)" and sentenced Terry to forty-five years' imprisonment.

The Supreme Court of Kentucky reversed the conviction, holding that the trial court had erred in denying Terry's motion for a directed verdict on the charge of wanton murder because there was no doubt from the evidence that the shooting was intentional. The court explained that wanton murder is not a lesser- included offense of intentional murder. Rather, wanton murder and intentional murder are the two possible ways to commit "murder." Each is as culpable as the other. What distinguishes the mental state of wanton murder from that of intentional murder is that "the actor is indifferent to who is/are the victim(s)." The court noted that if the jury believed Terry's self-defense story, it could find him guilty of second-degree manslaughter or reckless homicide. If the jury did not believe the self-defense story, the court continued, it could find Terry guilty of intentional murder or first-degree manslaughter. The court concluded that "[w]anton murder is not an available option under the evidence presented." McGinnis v. Commonwealth, 875 S.W.2d 518, 520-21, 528-29 (Ky.1994).

*2 On remand, facing a new trial for intentional murder, Terry filed a motion to dismiss on grounds of double jeopardy. The trial

court denied that motion, and the Kentucky Court of Appeals rejected Terry's petition for a writ of mandamus or prohibition to bar retrial. The Supreme Court of Kentucky affirmed, opining that although Terry could not be retried for wanton murder, the Double Jeopardy Clause did not bar retrial for intentional murder because "intentional murder and wanton murder are not the same offense." Terry v. Potter, No. 94-CA-2671-OA, at 3 (Ky. July 6, 1995). Terry then filed a petition for writ of habeas corpus under 28 U.S.C. s 2254 in the Western District of Kentucky. The district court denied the petition, and this appeal followed.

In denying the petition the district court ruled: In the case at bar, the inconclusive termination of the first trial was apparently due to an oversight on the part of the prosecutor, the defendant, and the trial judge. This is true even though the trial judge correctly instructed the jury on the theory of intentional murder. We can discern no motive on the part of the prosecutor in overlooking the intentional murder theory since the evidence was very strong in support of that theory. We therefore decline to bar reprosecution on the theory of intentional murder. Our opinion in this regard is bolstered by the fact that under Kentucky law, as reflected in the statute KRS 507.020, wanton murder and intentional murder are two different offenses. See Smith v. Commonwealth, [FN1] 737 S.W.2d 683 (1987).

* * *

As pointed out in McGinnis, supra, when a person wantonly engages in conduct under circumstances manifesting extreme indifference to human life and which causes a grave risk of death to another person ..., that constitutes the crime of wanton murder. Since the Court is of the opinion that two separate offenses were charged in the indictment, and only one was disposed of conclusively, and since no bad motive on the part of the prosecutor is shown, petitioner is not entitled to rely upon the double jeopardy clause.

II.

[1][2] We review de novo the legal conclusions of the district court. Lundy v. Campbell, 888 F.2d 467, 469-70 (6th Cir.1989). The Kentucky Supreme Court's interpretation of Kentucky law is binding on federal courts. Gilbert v. Parke, 763 F.2d 821, 826 (6th Cir.1985).

[3][4][5] The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." At a jury trial, jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28, 35, 98 S.Ct. 2156, 2160-61, 57 L.Ed.2d 24 (1978). In general, jeopardy ends with an acquittal or a conviction; if the conviction is reversed on appeal, however, a defendant may be retried for the same offense. United States v. Ball, 163 U.S. 662, 672, 16 S.Ct. 1192, 1195-96, 41 L.Ed. 300 (1896). The Supreme Court has explained Ball as holding that jeopardy continues until a conviction becomes final on appeal. See Price v. Georgia, 398 U.S. 323, 326, 90 S.Ct. 1757, 1759-60, 26 L.Ed.2d 300 (1970). An exception to this rule is that retrial is barred when a conviction is reversed because of insufficient evidence. Burks v. United States, 437 U.S. 1, 17-18, 98 S.Ct. 2141, 2150-51, 57 L.Ed.2d 1 (1978). The peculiar

circumstance of Terry's case is that the jury did not explicitly acquit or convict him of intentional murder.

*3 The issue to be decided here is whether Terry's jeopardy of conviction for intentional murder continued after his trial or expired when the jury was discharged.

In Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), the Supreme Court addressed a case with a similar background. A District of Columbia jury had been instructed that it could find the defendant guilty of either first- or second-degree murder. It found him guilty of second-degree murder, and its verdict was "silent" on the first-degree charge. On appeal, the conviction for second-degree murder was reversed. On remand, the defendant was tried again and was found guilty of first-degree murder. The Supreme Court held that the second trial violated the Double Jeopardy Clause. The Court noted that for jeopardy to attach, "it is not . . . essential that a verdict of guilt or innocence be returned...." Id. at 188, 78 S.Ct. at 224. Because "the original jury had refused to find [the defendant] guilty on [the first-degree murder] charge," the Court found that jeopardy on that charge had ended with the discharge of the jury. Furthermore, the Court held that the silent verdict amounted to an "implicit acquittal." The jury had had "a full opportunity" to find the defendant guilty of first-degree murder, the Court noted, so its failure to convict the defendant must be treated "no differently" from a verdict of not guilty. Id. at 190-91, 78 S.Ct. at 225-26.

The Commonwealth argues that Green is inapplicable because wanton murder is not a lesser-included offense of intentional murder in Kentucky. The Green Court explained, however, that the relationship of the two offenses is not determinative: Green's plea of former jeopardy does not rest on his conviction for second degree murder but instead on the first jury's refusal to find him guilty of felony murder. It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense. Id. at 194 n. 14, 78 S.Ct. at 227 n. 14.

The next Supreme Court case to address a similar situation was Cichos v. Indiana, 385 U.S. 76, 87 S.Ct. 271, 17 L.Ed.2d 175 (1966). The defendant had been charged in state court with reckless homicide and involuntary manslaughter and had been found guilty only of reckless homicide, the less serious offense. The verdict was silent as to the manslaughter count. After the conviction was reversed on appeal, the defendant was retried on the same two counts, with the same result. The Supreme Court granted a petition for certiorari to decide whether the Double Jeopardy Clause applied to state prosecutions through the Due Process Clause of the Fourteenth Amendment. [FN2] The Court dismissed the writ of certiorari as improvidently granted because of its finding that even if the Double Jeopardy Clause applied, the defendant could not benefit from it. With little discussion and only a fleeting reference to Green, the Court noted that it could not accept the argument that the first jury had acquitted the defendant of the manslaughter charge. Id. at 80, 87 S.Ct. at 273.

*4 We see some tension between Green and Cichos, and we find

Green more relevant to this case. Cichos technically decided only that the petition for certiorari had been improvidently granted. Indeed, it has been cited infrequently by the Supreme Court, far less often than Green. Moreover, to the extent that Cichos discussed the "silent verdict" issue at all, it placed great weight on the relevant statutory scheme, which provided that a conviction of either reckless homicide or involuntary manslaughter "shall be a bar to a prosecution for the other." 385 U.S. at 78, 87 S.Ct. at 272 (quoting Ind.Stat.Ann. s 47-2002 (1965)). The Kentucky murder statute has no such provision.

Three years later, the Court addressed a similar issue in Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970). The defendant had been tried for murder and found guilty of the lesser-included charge of voluntary manslaughter; the jury verdict had made no reference to the murder charge. After the conviction was reversed on appeal, the defendant was retried under the same indictment with the same verdict. Without any mention of Cichos, the Court held that under Green, the retrial placed the defendant in double jeopardy. The Court stressed that the Double Jeopardy Clause protects defendants from the "risk of conviction"; because the defendant had once faced the risk of conviction for murder, he could not again be subjected to that risk, notwithstanding the lack of an explicit verdict on that charge. Id. at 326-29, 90 S.Ct. at 1759-61.

[6] We hold that under Green and Price, Terry may not be retried for intentional murder. As we noted in Saylor v. Cornelius, 845 F.2d 1401 (6th Cir.1988), "[w]hat happened here most accurately is described as a termination of the jeopardy ... without a conviction or an acquittal, but a termination nonetheless." Id. at 1404. The jury had ample opportunity to convict Terry on the intentional murder charge at the first trial, and it did not. McGinnis, 875 S.W.2d at 520. Retrying Terry would violate his "valued right to have his trial completed by a particular tribunal." Crist, 437 U.S. at 36, 98 S.Ct. at 2161 (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949)). In sum, although jeopardy on the wanton murder charge may have continued after the trial and successful appeal, we hold that jeopardy on the intentional murder charge ended with the trial.

*5 Furthermore, the verdict on the intentional murder charge can be interpreted as an implied acquittal. [FN3] Like the Green jury, the jury at Terry's trial was instructed in the disjunctive-- that it could find Terry guilty of intentional murder or wanton murder. Once the jury found Terry guilty of wanton murder, therefore, there was no need for the foreperson to sign the "not guilty" line on the intentional murder verdict form. [FN4] This was not a case in which the inconclusiveness of the verdict was any party's "fault." See United States v. Scott, 437 U.S. 82, 95-96, 98 S.Ct. 2187, 2196-97, 57 L.Ed.2d 65 (1978) (fault of defendant); Saylor, 845 F.2d at 1408 (fault of prosecutor).

We realize that a Second Circuit decision reached the opposite conclusion in a similar case. In United States ex rel. Jackson v. Follette, 462 F.2d 1041 (2d Cir.1972), the defendant had been tried in the New York state courts for two types of first-degree murder:

premeditated murder and felony murder. The jury was instructed that if it returned a verdict on one count, it should remain silent as to the other. The defendant was convicted of premeditated murder; after this conviction was overturned in a habeas corpus action, he was retried on both counts and found guilty of felony murder. The Second Circuit held that the retrial was permissible because the first jury had not implicitly acquitted the defendant of felony murder. The court read Green as being limited to situations in which a defendant is convicted of a lesser-included offense at the first trial. Id. at 1050. We do not read Green so narrowly; indeed, Green noted that it is "immaterial" whether the charge that originally resulted in a guilty verdict is a lesser-included offense of the charge that is retried. 355 U.S. at 194 n. 14, 78 S.Ct. at 227 n. 14.

Jackson queried whether the "continuing jeopardy" language in Ball and other existing case law attached to first-degree murder as a whole or merely to the particular form of first-degree murder on which the first conviction was based. 462 F.2d at 1045-46. That question was not answered in Green, in which the relevant offenses were first-and second-degree murder. The statute relevant to the instant case is more analogous to that in Jackson than to that in Green, because intentional murder and wanton murder are forms, rather than degrees, of the unitary offense of murder under Kentucky law. If we viewed the continuing jeopardy on the particular offense of wanton murder as constituting jeopardy on the general offense of murder and therefore as encompassing jeopardy on the particular offense of intentional murder, we could not rule in Terry's favor. The Jackson court implicitly adopted such a view, but we cannot accept that reasoning.

*6 Judge Oakes in Jackson candidly acknowledged that "[w]e have, in short, a case that is sui generis, not controlled by any Supreme Court case on its facts, and not capable of simple resolution either on an historical or logical basis." Id. at 1049. He then concluded that "[w]e come to the point where we must weigh on a fine scale the competing interests of the public and the petitioner." Id. We of course have the benefit of continuing case law generated since Jackson was decided in 1972, including authority within our own circuit. And, if Jackson is in fact sui generis, we deal here with a different state's own statutory scheme. Even that, however, does not fully demarcate our different viewpoint.

While we respect the careful logic which led Judge Oakes to his decision we cannot follow it. If indeed it is proper to follow a prudential rationale when interpreting federal constitutional law we believe that the constitutional language embodies more durable Stuff and is entitled to greater deference. "Twice put in jeopardy" means just that. If Terry is now to stand trial on the intentional murder charge it will be fully twice that he has, and none of the justifications used in existing Supreme Court and Sixth Circuit authority in our judgment exist within the factual confines of this case. Further, even assuming it is within our power to bend the force of the principle on other considerations which led the Second Circuit to weigh and balance the interests of the petitioner and the public, or as here to refuse to enforce the constitutional

protection simply because only when no "bad motive" of the prosecutor is shown, we do not view application of such standards as that benign. Neither the defendant here nor his counsel can be charged with having brought on the dilemma faced by the Kentucky court. It is not for us to extricate that court from the untoward results of a decision construing Kentucky statutory law, nor to question the wisdom of its own logic in doing so. That is Kentucky's business; ours is application of the Fifth Amendment as made applicable to state criminal prosecutions under the Fourteenth. We respectfully decline to view the Kentucky court problem as merely an "oversight" for indeed it appears to have been a common practice rather than an isolated one. Terry has already stood trial once and was already in very real jeopardy of a jury conviction for intentional murder, a conviction which we now know would have been upheld on appeal. Terry has already gone through not only the risk but the trauma of that trial, and his counsel has already done his job at the first trial, whoever paid him. It may be true that the prosecutor was free of guile or design if he is otherwise to be charged fault for letting the "oversight" to occur, but what about the next time someone in Kentucky is tried under similar circumstances? How can anyone tell whether the motive was innocent or covertly designed to procure a second bite of the apple should the first one come a cropper or produce a result not to the prosecution's liking? Does the double jeopardy clause allow such a result? Aren't these exactly the dangers the double jeopardy clause was designed to prevent?

***7** [7] The Kentucky statute separately describes intentional murder and wanton murder, and we find that continuing jeopardy as to one may not be bootstrapped onto the other. We recognize that if a charge of murder is brought under two legal theories, such as direct and accomplice liability, or two factual theories, such as shooting and stabbing, the reversal of a conviction based on only one of the theories may not bar retrial under the other theory. See United States v. Garcia, 938 F.2d 12, 15 (2d Cir.1991). When a charge of murder is brought under two separate statutory subsections of a unitary offense, however, as in this case, jeopardy attaches separately as to each. See United States v. Cavanaugh, 948 F.2d 405 (8th Cir.1991). The jury was discharged without convicting Terry of intentional murder, and now the Commonwealth may not again subject him to the same risk of conviction under Ky.Rev.Stat. 507.020(1). See Price, 398 U.S. at 326, 90 S.Ct. at 1759-60.

III.

For the foregoing reasons, we REVERSE the judgment of the district court and remand with instructions to grant the writ of habeas corpus.

FN1. The language in McGinnis relied upon by the district judge is: "Under KRS 507.020(1), 'murder' is but one offense which may be committed in one of two different ways: either by intentionally causing the death of another person, or by wantonly engaging in conduct which 'causes the death of another person' 'under circumstances manifesting extreme indifference to human life.' "

FN2. The Supreme Court **later** held that the Double Jeopardy Clause does apply to state prosecutions. Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969).

FN3. Although we disfavor the citation of unpublished decisions, 6th Cir.R. 24(c), we cannot help but mention that we have ruled that double jeopardy barred retrial in almost identical circumstances. Terry v. Peers, Nos. 85-5076, 85-5077, 1986 WL 16495 (6th Cir. Feb.21, 1986). In Terry [sic Allen Anthony Terry], the jury at the defendant's trial in Kentucky had received the same instructions as in this case. Id. at *1 n. 2. The jury found that defendant guilty of wanton murder and left the other verdict forms blank, and the conviction was reversed on appeal. We held that retrial for intentional murder was barred because of an "implicit acquittal." Id. at *1.

FN4. We do not comment on the effect of the silent verdict as to charges that might be considered lesser-included offenses of wanton murder under Kentucky law. See Morris v. Mathews, 475 U.S. 237, 245, 106 S.Ct. 1032, 1037, 89 L.Ed.2d 187 (1986).
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