**IN THE SUPREME COURT OF TENNESSEE**
**AT NASHVILLE**

| | | |
|---|---|---|
| **STATE OF TENNESSEE,** | ) | |
| | ) | **Supreme Court** |
| **Appellee,** | ) | **Case Number _____** |
| | ) | |
| | ) | **Court of Criminal Appeals** |
| | ) | **Case No. M2001-00461-CCA-R3-CD** |
| **vs.** | ) | |
| | ) | **Wilson County Criminal** |
| **BRIAN VAL KELLEY,** | ) | |
| | ) | |
| **Appellant.** | ) | |

**ON APPEAL FROM THE**
**COURT OF CRIMINAL APPEALS**

---

# RULE 11, T.R.A.P., APPLICATION FOR PERMISSION TO APPEAL

---

**David L. Raybin**
HOLLINS, WAGSTER & YARBROUGH, P.C.
2210 SunTrust Center, 424 Church Street
Nashville, Tennessee 37219

*Attorney for Appellant*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**FEDERAL CASES**



**STATE CASES**

**STATE STATUTES**



**OTHER AUTHORITIES**

## PREFACE

*A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of her act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong.... We find nothing either in the history of the [M'Naghten] rule, or in its reason or purpose, or in judicial exposition of its meaning, to justify a conclusion so abhorrent.*

*People v. Schmidt*, 110 N.E. 945, 949 (N.Y. 1915) (Judge Cardozo)

## INTRODUCTION

Mr. Brian Kelley requests that this Court grant his application for permission to appeal,[1] so as to review his conviction for the first degree murder of his infant daughter which was perpetrated while Mr. Kelley was under the delusion that the child's death would herald the "Second Coming of Christ." The Court of Criminal Appeals affirmed the conviction on May 7, 2002 in an opinion attached to this application. No petition to rehear was filed by either party.

There is one primary issue here: the trial judge failed to define "wrongfulness" to the jury, and by extension, that the intermediate appellate court did not correctly apply any definition to the term when assessing the insanity defense on appeal. This Court should grant review here so as to reaffirm *Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977) which does not limit "wrongfulness" to only legal wrong.

The issue of the definition of "wrongfulness" is central to this and any other insanity case. Tenn. Code Ann. § 39-11-501 (a) provides: "It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe **mental disease** or defect, was unable to appreciate the nature or **wrongfulness** of such defendant's acts." The intermediate appellate court found that while Mr. Kelley was certainly mentally ill his witnesses failed to establish that he could not appreciate the wrongfulness of his acts.

---

[1] A Brief on the merits accompanies this application as permitted by Rule 11 (b) T.R.A.P.

The entire case turned on the term "wrongfulness"; yet, there was no definition of this term at trial and, significantly, the intermediate appellate court failed to appropriately apply this term so as to ascertain Mr. Kelley's mental state on appeal. The defense asserts that the thirteen lay and six expert witnesses established a valid insanity defense by clear and convincing evidence if one utilizes the correct definition of "wrongfulness."

The failure of a correct definition of the term was most profound in the prosecutor's closing argument to the jury: **"*Guess who gets to define 'wrong'; <u>you</u> get to define 'wrong'*."** Given that the jury was invited to "come up with their own definition of wrongfulness" it is understandable why this jury went astray. They were a ship without a rudder.

The failure to confront the ONLY real issue in this case leaves the definition of "wrongfulness" blurry, which allows the jury to decide how they want to interpret the meaning of "wrongfulness" in each case. Since the definition is left vague, it completely undermines the meaning and usefulness of any insanity defense.

As to the affirmative defense of insanity, this Court should grant review because ALL the expert and lay witnesses testified that Mr. Kelley's mental state was consistent with a delusional individual. This was not a case where the evidence was pro and con on the matter. The government did nothing more that call police officers who repeated Mr. Kelley's statements that he was "doing wrong by man's laws" but that he was following the "laws of God."

This rare psychotic delusion, where the defendant acts at the behest of God, is known in the case-law as the "deific-decree." Most jurisdictions which have considered the question do not find that such a person can appreciate the wrongfulness of his or her actions notwithstanding their own statements to the contrary. One does not ask a madman to diagnose his affliction. This Court should grant review here to consider the insanity issue particularly in light of *State v. Flake*, Tenn. Crim App. at Jackson, filed July 13, 2001, *appeal granted,* which was recently argued to this Court in Jackson. Although the intermediate appellate court in Mr. Kelley's case attempted to distinguish *Flake*, Mr. Kelley's appeal presents an even stronger factual pattern given that in Mr. Kelley's trial there was NO expert proof introduced by the government.

Finally, Mr. Kelley asks this Court to grant review because the holding of the intermediate court is inconsistent with this Court's opinions in *Davis v. State*, 28 S.W.2d 993 (Tenn. 1930) ("How can such a defendant be guilty of murder while his delusion persists.") and *State v. Thornton*, 730 S.W.2d 309 (Tenn. 1987) (Court reduces conviction from murder in the first degree to voluntary manslaughter where defendant interposed unsuccessful defense of temporary insanity). Given that Mr. Kelley's delusions produced extreme religious passion he could have been guilty of no greater crime than voluntary manslaughter. Accordingly, this Court should reduce the grade of conviction to voluntary manslaughter should the insanity defense be rejected.

Mr. Kelley asserts that this case meets many of the criteria for the exercise of this Court's discretionary review authority pursuant to Rule 11, T.R.A.P.. Because there are

conflicting decisions by the intermediate appellate courts there is a need to secure a settlement of important questions of law. This is also a matter of great public interest given that the insanity issue reoccurs in the most serious of cases throughout our State. Accordingly, Mr. Kelley respectfully requests that this Court grant this application for permission to appeal and entertain the merits of the case.

## STATEMENT OF THE ISSUES

**I. Whether the trial judge committed reversible error in failing to properly define "wrongfulness" in the test for insanity.**

**II. Given an appropriate definition of "wrongfulness" whether the defendant carried his burden of showing insanity by clear and convincing evidence and thus whether the state's evidence was insufficient to support the verdict as a matter of law.**

**III. Whether the failure to charge voluntary manslaughter as a lesser included offense was reversible error.**

**IV. Whether this Court should reduce the grade of the conviction to voluntary manslaughter if this Court affirms the rejection of the insanity defense.**

## FACTS RELEVANT TO THE QUESTIONS PRESENTED

The facts of this case are set forth in great detail by the Court of Criminal Appeals as well as in the accompanying brief on the merits. In summary, the record reflects that Mr. Brian Kelley was born on August 16, 1971, the only child of Val and Betty Kelley. He graduated from high school and attended Cumberland University where he met and married his wife, Lori. Mr. Kelley had a responsible job at the Wilson County Landfill where he worked for many years. Lori was employed as a physical therapist. On July 7, 1998, their daughter Erin was born.

In June and July, 1999, Mr. Kelley started experiencing some emotional problems. As the doctors would later explain, Mr. Kelley had a significant family history of mental illness. Brian's grandmother was diagnosed as schizophrenic and bipolar, an aunt had spent time in a psychiatric unit, and Mr. Kelley's father had previously been treated for anxiety. Brian Kelley's problems began with physical symptoms of loss of weight, headaches, stomach pains and problems sleeping. He became less attentive to his job and family as well as his personal appearance such as coming to work unshaven.

Mr. Kelley and his family belonged to a local church which they attended every Sunday. Mr. Kelley's religious beliefs were certainly normal for the community in which he lived. However, he became increasingly preoccupied with religious matters.

Brian Kelley would begin praying at inappropriate times. He told his wife and parents that he was having a religious experience and that the "Holy Spirit had come over him."

Mr. Kelley began missing work and became distant and detached from his wife and parents. He reported religious visions and saw odd relationships in numbers. For example, he thought it significant that he had written the number 777 on a golf scoring card and believed that this number appeared in the Bible. He said that he thought he was going to be on the Larry King show with Billy Graham and a television pastor. He thought that Billy Graham was Moses.

On another occasion he found a photograph of a temple that was taken in Jerusalem and he went off to have the print framed but it would take several weeks for this to be finished. Nevertheless, Mr. Kelley went to the store just a few days later and waited around for hours for the religious print to be framed. He engaged the manager in a religious conversation.

During this time his family could not locate him and, because of his odd behavior, thought that perhaps he had killed himself or was injured in some way. Mr. Kelley's father found the Sheriff and a search was initiated for Mr. Kelley.

Mr. Kelley's father had Mr. Kelley meet with some engineers about starting another business. Brian Kelley acted inappropriately during the meeting and asked the several gentlemen about their religious views.

Mr. Kelley's co-workers noticed that he was behaving strangely at work. He asked them about their religious views and said that soon he would have a new kneecap.

Mr. Kelley started having strange visions such as seeing words on the television when the screen was blank. He attached great significance to an eclipse that occurred in Jerusalem and was concerned with a tornado in Utah.

Mr. Kelley told his wife that Jesus was coming on Sunday. He told his wife that God had chosen him and that he was seeing things that other people were not allowed to see. His parents discussed getting him professional help.

As the doctors would later explain, Mr. Kelley became convinced that Jesus would return on Monday, August 16, 1999, which was Mr. Kelley's birthday. For this to happen he would have to sacrifice his daughter who would be resurrected with the second coming of Christ.

On Saturday, August 14, 1999, Mr. Kelley left a message on the telephone answering machine of a friend who lived in Ohio. He told his friend that soon his friend would be called Paul, the writer of Letters in the New Testament.

Lori Kelley said that she was very upset with Brian's behavior. However, he appeared to be at "complete peace with everything" and he was really sorry that she was upset and that there was no reason for her to be upset.

Because the next day was Sunday, Lori tried to make a joke with Brian and said, "I guess you are trying to get all of your ducks in a row before Jesus comes back tomorrow." Mr. Kelley just looked at her seriously and said, "every day could be the last day."

Shortly after midnight Lori woke up and found that her husband was in the shower. She then went to check on their baby and found the child dead. She began screaming and

asked Brian, "what did you do, what did you do?" Brian said, "I did it, but it is going to be okay, it is going to be okay." She called 911 but then Brian took the phone from her and hung the telephone up and again tried to calm her down by saying that: "It is okay, it is going to be okay, everything is going to be okay." Lori ran out of the house and went to the neighbor's home to summon for help. She was afraid that Brian might be killing himself.

The police arrived shortly after 1:00 a.m. The officer walked into the house with Lori and the neighbor. Brian was in the bedroom naked. The officer asked Brian about his daughter and if he had killed his daughter. Brian told the officer, "God told me to."

Mr. Kelley was arrested and was questioned by the police at various times over the next four hours. Brian Kelley told the police that he had been "saved" when he was five years old at a Billy Graham crusade. He said that he had a religious experience at a golf course and saw Jesus at a wood carving booth at the fair. He said that this was a test from God. He said that the "Holy Spirit was placed on him and prompting him and testing him to do different things." He said he was "getting visions of Abraham and Isaac from the Bible" and that he was "being told to sacrifice his daughter because she was perfect and that it had to be done before Christ could return." Mr. Kelley told the police that everything would be all right and that "the Father, the bride and the daughter would all be together again." Mr. Kelley said that, "God was revealing to him when Christ was going to return and it was going to be soon."

At the end of the interview Mr. Kelley was asked if what he did was wrong. Mr. Kelley said that, "what I did according to the law of the country, yes sir, it was wrong. But

I don't go by the laws of this land, I go by the laws of God." With respect to the laws of man, Mr. Kelley said that, "the laws here only exist because God allows them."

Mr. Kelley was then taken from the Lebanon police station to the Wilson County Jail where he was seen by Sheriff Terry Ashe who had known Brian all of his life. Sheriff Ashe said that Brian was not rational and that "he just wasn't Brian."

The next day was Monday, Brian's birthday. He was seen by Dr. Sandy Phillips. Brian told Dr. Phillips that Jesus was to come that very evening.

Mr. Kelley was very calm and explained that he had sacrificed his daughter so that Christ could return. He described to Dr. Phillips how he had stood alone in his child's bedroom watching her sleep and praying over her. He felt that there was a "leading to sacrifice her." He told the doctor that he had "argued with God about it as Jesus had done asking if there was any other way." Because he had received no "alternative instructions" he smothered his daughter "so Christ could return." He told Dr. Phillips that he "cried out to God over and over to please end this." He told Dr. Phillips that, "I am at peace with it. I have been obedient and I will see her soon."

Dr. Phillips said that she ended the interview with a compromise that "we would most certainly see each other tomorrow, either we would see each other in Heaven if he was right and Christ would return, or in the Wilson County jail if he were wrong."

Dr. Phillips returned the next day because she was most concerned that Mr. Kelley would harm himself given that Christ had not returned according to his delusion.

Dr. Phillips said that Mr. Kelley "felt like the Holy Spirit had directed him" to smother his daughter. She said Mr. Kelley "recognized that it was contrary to man's law and in point of fact, he expected that he was going to be arrested." Dr. Phillips said that Mr. Kelley "also thought that God's law was a higher law, and therefore, he thought he was justified and ultimately was not wrong in what he did." He "thought that Jesus was going to return by sundown" and that the "nightmare was going to be over and he was going to see his daughter again."

Dr. Phillips signed commitment papers and Brian Kelley was taken to Middle Tennessee Mental Health Institute for further evaluation. After approximately ten months of treatment, including massive amounts of medication, Mr. Kelley was found to be competent to stand trial. All of the treating psychiatrists and psychologists were of the view that Mr. Kelley was insane at the time of the commission of the offense.

The prosecution secured the judge's permission to have a separate evaluation conducted so as to acquire their own expert. The District Attorney selected Dr. Daniel Martell who is a psychologist from California. Dr. Martell is probably the most conservative forensic expert in the United States. He has testified for the prosecution in multiple death penalty cases in Tennessee including that of the late Mr. Coe.

Dr. Martell evaluated Mr. Kelley. Dr. Martell determined that Mr. Kelley was suffering from a severe mental illness at the time of the commission of the offense and also that Mr. Kelley could not appreciate the wrongfulness of his acts. Thus, Dr. Martell testified for the defense along with all the other experts.

Apart from the medical examiner, the prosecution's proof consisted only of the testimony of police officers who questioned Mr. Kelley at the scene and at the police station. The government presented no other lay or expert testimony.

During the trial the judge did not define the term "wrongfulness" for the jury. The jury was left to speculate as to the meaning of this term.

As noted, the defense called thirteen lay witnesses and six expert witnesses all testifying to Mr. Kelley's state of mind for the several months both before and after August 15, 1999. Although the jury rejected the insanity defense, Mr. Kelley asserts that he established the insanity affirmative defense by clear and convincing evidence and that the jury should have been charged as to the meaning of the term "wrongfulness."

## REASONS WHY THIS COURT SHOULD GRANT REVIEW

### I. THIS COURT SHOULD DEFINE THE TERM "WRONGFULNESS" IN THE STATUTORY TEST FOR INSANITY AS "MORAL WRONGFULNESS" RATHER THAN HAVING NO DEFINITION AT ALL.

Tenn. Code Ann. § 39-11-501(a) provides in pertinent part:

> "It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or **wrongfulness** of such defendant's acts."

The term "**wrongfulness**" must be defined in terms of "moral wrongfulness" rather than "criminal wrongfulness." A proper definition of the concept of "**wrongfulness**"is particularly crucial where an insane delusion is the product of "a command from God" so as to take into account this bizarre mental affliction.[2]

**A.**

In this case the trial judge charged the affirmative defense of insanity in statutory language, as well as giving a direction regarding the several issues which the jury had to consider:

> "For you to return a verdict of not guilty by reason of insanity the defendant must prove both of the following things by clear and convincing evidence: (1), that he had a severe mental disease or defect at the time that the acts constituting the crime were committed (2), that as a result of this severe

[2] While the defense believes the correct definition of "wrong" can be derived by construction, to deny the defendant the right to have the jury instructed on the definition of "wrongfulness" as argued in this issue denies the defendant his right to Trial by Jury under the Sixth Amendment to the United States Constitution as well as the Due Process provisions of the United States Constitution and the similar provisions of the Tennessee Constitution.

mental disease or defect he was not able to understand what he was doing or to understand that what he was doing was wrong."

While other terms were defined for the jury, such as the meaning of "clear and convincing evidence" the trial judge did not otherwise define the term "wrong."

The intermediate appellate court never reached the merits of this critical point because of an alleged procedural default. Given that insanity was the ONLY issue in this case an appropriate definition of an affirmative defense is no different than the requirement that all of the elements of the offense be instructed to the jury. Consequently, the "fundamental error rule" will permit litigation of an omission in the jury instructions notwithstanding a lack of a trial objection where the matter is otherwise properly raised in the motion for a new trial. *State v. Stephenson* 878 S.W.2d 530 (Tenn. 1994) (the fundamental error rule has been applied to a variety of omissions in instructions, including prior inconsistent statements, circumstantial evidence, weight of a dying declaration, and guilt beyond a reasonable doubt).

There is no waiver here and this Court may reach the merits of this issue. The defense asserts that the trial judge should have charged the jury that the concept of "wrongfulness" considers more than just "legal wrongdoing." Thus, this Court should hold that a defendant has met his or her burden of establishing insanity if he or she can establish by clear and convincing evidence that he or she failed to appreciate the moral wrongfulness of his or her acts.

There is no suggestion in the defense brief that any defendant might be exonerated merely because he or she subscribed to some personal code of behavior. If that were the test

then those terrorists who merely "followed the will of God" last September 11 would be exonerated for their actions. The defense does not assert such an extreme position.

Our current insanity law makes allowance for those rare cases of psychotic delusions rendering an individual incapable of appreciating moral wrongs. In the final analysis this is what distinguishes a lack of appreciation of the moral wrongfulness of an act from its merely legal consequences. The distinction is of supreme importance in a case such as the one here not only as to the question of an appropriate jury instruction but ALSO for purposes of assessing the sufficiency of the evidence on appeal .

There is a split of authority in the United States concerning appropriate instructions where the defense of insanity is based on the "command of God delusion." *See*, Morris, *"God Told Me to Kill ," Religion or Delusion?*, 38 San Diego L. Rev. 973 (Fall 2001). This case will resolve the controversy in this jurisdiction.

It is suggested that this Court follow its earlier holding in *Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977) as well as adopting the language found in those jurisdictions cited in the accompanying Brief which do not limit "wrongfulness" to only legal wrong.

**B.**

It is true that the Tennessee Code does not directly address the definition of "wrongfulness" but an analysis of the statutory history demonstrates a solution. Under Tennessee law "wrongfulness" or "wrong" is not to be equated with just "criminality" or "illegality." In other words, a defendant might "know" that his or her actions were illegal and that he might be subject to punishment but still be incapable of appreciating the greater

wrongfulness of the act in its more general and moral sense and thus still meet the statutory definition of insanity. This is particularly the case where the defendant acts at the behest of God. This rare psychotic delusion is known in the case-law as the "deific-decree."

The issue of the "definition" of "wrong" is summarized by Professor LaFave:

> "If the defendant does not know the nature and quality of his act, then quite obviously he does not know that his act is "wrong" and this is true without regard to the interpretation given to the word "wrong." For example, a madman who believes that he is squeezing lemons when he chokes his wife to death does not know the nature and quality of his act and likewise does not know that it is legally and morally wrong. On the other hand, as noted above, a defendant might know the nature and quality of his act (especially if that is taken to refer only to the physical consequences), but yet not know that it is "wrong." The extent to which such situations might arise, however, depends upon whether the *M'Naghten* test refers to legal wrong or moral wrong: "A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to procure that result by those means. A's act is a crime if the word "wrong" means illegal. It is not a crime if the word wrong means morally wrong."
>
> The *M'Naghten* judges did not make clear what construction they were giving to the word "wrong." At one point they said that a person is punishable if "he knew at the time of committing such crime that he was acting contrary to law;' by which expression we . . . mean the law of the land." But at another point they observed: "If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."
>
> In England, *M'Naghten* is now read as requiring that the defendant know that the act was legally wrong. In this country, however, the question of whether wrong means legally or morally wrong has not been clearly resolved. The issue has very seldom been raised; this part of the *M'Naghten* test is simply given to the jury without explanation. In the few cases in which the

> matter has been put into issue, some have held that the defendant must not have known that the act was legally wrong, while other have interpreted "wrong" to mean morally wrong. Some courts have held that the defendant must not have realized that the act was wrong *and* punishable, but have not made it clear whether this refers to both moral and legal wrong or only one of the two."

*LaFave*, Substantive Criminal Law § 4.2, 442-443 (West 1986) (Footnotes omitted).

At the end of the nineteenth century American jurisdictions followed the English rule that for the defendant to be insane he or she must not "know" that his act was criminal in the sense that it was illegal. This more limited view was expanded by most jurisdictions either by a court decision or legislation beginning in the early twentieth century to include "moral wrongness." See, *People v. Schmidt*, 110 N.E. 945 (N.Y. 1915) an excellent opinion by Judge, later Justice, Cardozo. In *Schmidt*, Judge Cardozo stated that juries generally should be allowed to consider whether a defendant who claimed that he acted on a command from God was capable of perceiving that his act was morally wrong. 110 N.E., at 949.

The term "wrong" is now interpreted by most jurisdictions as a more general "wrong" against society as opposed to the more restrictive "criminal" or "legal" awareness.

**C.**

Has Tennessee ever made a choice between adopting "wrongfulness" in its broader sense or in using the term "criminality" in its more narrow, "legal" meaning? In *Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977) this Court adopted the Model Penal Code definition of insanity which, in relevant part, requires that the accused lacks the substantial capacity "to appreciate the wrongfulness of his conduct." Justice Henry observed that "it

will be noted that we have used the word 'wrongfulness' in the place of 'criminality' so that the rule requires an appreciation of the wrongfulness of conduct as opposed to its criminality." This passage should remove all doubt that "wrongfulness" should be interpreted in a broader sense consistent with holding in the Connecticut case addressed above and other American jurisdictions.

As we know, the *Graham* test for insanity was adopted by the Tennessee legislature as part of the Sentencing Reform Act of 1989. The 1995 affirmative defense alteration of our insanity law retained the identical language regarding the cognitive prong of the insanity test to the effect that the accused would be "unable to appreciate the . . . wrongfulness of such defendant's acts."

Certainly, when the legislature enacted the 1995 affirmative defense provision it was well aware of the existence of *Graham's* "wrongfulness" concept and did not utilize the more restrictive "criminality" language. It is a basic rule of statutory construction that a court will not construe a statute to change existing law more than a statute itself declares or necessarily implies. *Winter v. Smith*, 914 S.W.2d 527 (Tenn. App. 1995). Certainly the legislature is presumed to know the state of the law on the subject under consideration at the time it passes legislation. *State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999).

Given that *Graham v. State* was decided in 1977 this Court is probably inquiring as to why this issue has not "come up" in twenty-five years. The simple answer is that the distinctions between the different definitions of "wrong" almost always make no difference. But here, the difference is critical!

In *State v. Worlock*, 569 A.2d 1314 (N.J. 1990) the New Jersey Supreme Court also recognized that the word "wrongfulness" should be used in its broader sense. In determining whether the broader definition should have been instructed in the particular case at hand under the plain error doctrine, the Court found that:

> ***"In most instances, legal wrong is coextensive with moral wrong. . . Thus, the distinction between legal and moral wrong generally need not be critical in a murder prosecution.***
>
> ***Occasionally, however, the distinction between moral and legal wrong may be critical. For example, if the defendant contends that he or she knowingly killed another in obedience to a command from God, a jury could find that the defendant was insane. . . . Although a 'command from God' is the only generally-recognized exception***, other delusion-based exceptions conceivably might arise. For the purposes of this opinion, however, we need to attempt to identify any other such exception.
>
> . . .
>
> Because an act that is contrary to law will generally contravene societal morals, a defendant who claims that he or she lacked the capacity to comprehend either legal or moral wrong need not receive a charge distinguishing the two kinds of wrong. ***In the exceptional case, such as the deific exception in which the defendant claims that he or she acted under the command from God, the court should instruct the jury that "wrong" encompasses both legal and moral wrong."***

569 A.2d 1314, 1321-1322.

In *State v. Wilson*, 700 A.2d 633 (Conn. 1977) the Court found that:

> "Finally, with respect to the fundamental policies that undergird our criminal law, defining the moral element of wrongfulness according to a purely personal standard tends to undermine the 'moral culture on which our societal norms of behavior are based.' ***There may well be cases in which a defendant's delusional ideation causes him to harbor personal beliefs that so cloud his cognition as to render him incapable of recognizing the broader moral implications of his actions. In such cases, the defendant would be entitled to be acquitted under the cognitive prong of the defense.***

> ***Those cases involving the so-called 'deific command,' in our view, fall into this category. Contrary to the defendant's position at oral argument, we are hard pressed to envision an individual who, because of mental disease or defect, truly believes that a divine power has authorized his actions, but at the same time, truly believes that such actions are immoral. An individual laboring under a delusion that causes him to believe in the divine approbation of his conduct is an individual who, in all practicality, is unlikely to be able fully to appreciate the wrongfulness of that conduct."***

700 A.2d 633, 641.

Many jurisdictions interpret "wrongfulness" as suggested here. See e.g. *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983), and *People v. Alverez*, 763 F.2d 1036 (9th Cir. 1985). See also, *United States v. McGraw*, 515 F.2d 758 (9th Cir. 1975) noting that five Circuit Courts of Appeal utilize the doctrine that "wrongfulness" means moral wrongfulness rather than "criminal" wrongfulness.

This Court should grant review here and find that "wrongfulness" in Tennessee is as was adopted by this Court in *Graham* and carried through two statutes: a broader moral sense and not necessarily a literal illegality. There is nothing in the Tennessee statutory scheme which suggests we should resort to precedent dating back to the beginning of the last century that "wrongfulness" must be exclusively limited to knowledge of criminal wrongdoing. We should be mindful of Judge Cardozo's observation in *People v. Schmidt*, 110 N.E. 945, 949 (N.Y. 1915):

> A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of her act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong. . . . We find nothing either in the history of the [M'Naghten] rule, or in its reason or purpose, or in judicial exposition of its meaning, to justify a conclusion so abhorrent.

In Mr. Kelley's case the evidence of mental disease or defect was overwhelming. There is no question Mr. Kelley was operating under a deific decree delusion which was also overwhelming. That this destroyed his capacity to appreciate the wrongfulness of his acts was also clearly in evidence.

The failure of a correct definition of the term here was most profound in the prosecutor's closing argument to the jury: **"*Guess who gets to define 'wrong'; <u>you</u> get to define 'wrong'*."** (Volume IV, page 433). Given that the jury was invited to "come up with their own definition of wrongfulness" it is understandable why this jury convicted Mr. Kelley. This Court should grant review so as to reaffirm *Graham* which does not limit "wrongfulness" to only legal wrong. A definitive ruling on this question will be a marked improvement over the instructions given here which allowed the jury to speculate as to the meaning of a critical term central to the case. Moreover, a proper definition of "wrongfulness" will assist in the assessing the sufficiency of the evidence on appeal.

## II. APPLYING THE STANDARD OF REVIEW IN *STATE V. FLAKE*, AND USING A CORRECT INTERPRETATION OF THE TERM "WRONGFULNESS," MR. BRIAN KELLEY CARRIED HIS BURDEN OF SHOWING INSANITY BY CLEAR AND CONVINCING EVIDENCE AND THUS THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT AS A MATTER OF LAW.

Tenn. Code Ann. § 39-11-501 provides:

> (a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

In *State v. Flake*, Tenn. Crim App. at Jackson, filed July 13, 2001, *appeal granted and argued* this Court is considering the appropriate standard of review where the jury rejects the affirmative defense of insanity. The defendant in *Flake* is asking this Court to adopt the holding of the intermediate appellate court in *Flake* which held that:

> "Nevertheless, if we determine, after viewing the evidence in a light most favorable to the state, that a rational trier of fact could only find that insanity has been established by clear and convincing evidence, then a guilty verdict may not be sustained. See generally Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

It is this constitutionally-based standard which should govern Mr. Kelley's appeal as well.

Under any standard of review of the rejection of an affirmative defense by a jury,[3] the defense asserts that this case should be an instance where a reversal of the conviction is mandatory. This case was not a matter of the evidence being pro and con. The evidence of insanity was overwhelming. ALL the proof in this record demonstrated that Mr. Kelley was insane. His horrible decent into madness, culminating in the death of his beloved daughter, was documented by both lay and expert testimony.

Here, as in *Flake,* there was abundant testimony that Mr. Kelley had for some time suffered from a severe mental disease. The expert testimony was also unanimous that Mr. Kelley could not appreciate the wrongfulness of his conduct. In this sense Mr. Kelley's

[3]Any standard of review which prohibits an assessment of the failure of the government to rebut with substantial evidence, the defendant's proof of insanity violates the Sixth Amendment and Due Process provisions of the United States Constitution and similar provisions of the Tennessee Constitution.

appeal is even stronger than in *Flake* where there was some arguably contrary expert testimony although it did not rise to the level of a legitimate opinion as to Mr. Flake's mental state at the time of the crime. Mr. Kelley's evidence was not limited to just expert proof. Lay witnesses testified to his gradual mental disintegration and his bizarre religious delusion.

The intermediate appellate court and the State relied upon the lay testimony of the police officers that Kelley knew what he was doing was "wrong." It is true that after hours of interrogation by the detectives Mr. Kelley eventually stated to a patrol officer that what he did was "wrong." This must be viewed in context of Mr. Kelley's statements to other police officers that he was following the "laws of God." Again, this calls into question the issue of what "wrong" means, something the intermediate appellate court chose not to address.

An analysis of the facts demonstrates that Mr. Kelley's perception of "wrong" was itself delusional and certainly cannot serve as the basis to affirm his conviction. Recall that the killing in this case occurred around midnight. The police arrived at the scene at approximately one o'clock. Mr. Kelley was questioned at length at his home and was then taken to the Lebanon police station where he signed a written statement which concerned his belief that God had commanded him to kill his daughter. "What was the Holy Spirit saying?" Mr. Kelley answered: "I felt like he was telling me to take my daughter's life."

Later, Detective Osborn asked Mr. Kelley, "based on the laws and rules that people have here on earth that we go by, do you feel like what you did was wrong?" Mr. Kelley's answer was "basically, what I did was wrong. I know I could be punished for it and that the

laws here only exist because God allows them." This concluding colloquy ended the interview at 4:28 a.m.

Detective Osborn said they tried to keep Mr. Kelley focused. Mr. Kelley wanted to go back to his childhood. Mr. Kelley told Detective Osborn about being saved when he was five years old at a Billy Graham crusade.

Detective Burton also interviewed Mr. Kelley at the Lebanon police station. Mr. Kelley started "back quite a ways about the Holy Spirit being placed on him and prompting him and testing him to do different things." At this point Mr. Burton tried to get Mr. Kelley "back on track" to tell him more about that evening.

Detective Burton asked Mr. Kelley what he had done and what his plans were had his wife not woken up. Mr. Kelley said that he "really hadn't thought that much or that far into it." He said "he thought he would probably sleep in the study." Mr. Kelley said in the morning his "wife would wake up and everything would be all right and that the Father, the bride and the daughter would all be together again."

At the end of the interview, Detective Burton asked Mr. Kelley, "according to the laws of this country and following the laws of this land, do you think that what you did was wrong?" Mr. Kelley said, "oh, yes sir. What I did according to the laws of this country, yes sir, it was wrong. But I don't go by the laws of this land, I go by the laws of God."

After Mr. Kelley's interview at the Lebanon Police Department, which as just noted, ended at 4:28 a.m., Officer Wentzell transported Mr. Kelley to the Wilson County Jail. While transporting Mr. Kelley to the Wilson County Jail, Mr. Kelley told Officer Wentzell

that he "appreciated his kindness towards him and that it must have been a difficult kind of call to go through." Mr. Kelley also stated that "he knew what he did was wrong." Officer Wentzell stated that to him there was just a slight change in his personality. "It wasn't the personality that Mr. Kelley had entered into at the scene [over three hours earlier]. There was a change in his personality."

What is clear from this rendition of the facts is that Mr. Kelley was out of touch with reality and that very little of what he says can be described as reliable. The officers all admitted that they had difficulty keeping Mr. Kelley on track. One does not ask a madman his opinion on his insanity.

From a legal perspective, "going by the laws of God" does not automatically translate into an appreciation of the wrongfulness of one's conduct. Mr. Kelley was "having an acute psychotic episode," and he "was obviously, religiously delusional at that point." (Testimony of Dr. Phillips at Volume III, page 273). The testimony of Dr. Phillips is compelling because the doctor saw Mr. Kelley on his birthday, the day after the homicide, which was the very time that "God was to return."

Sheriff Terry Ashe saw Mr. Kelley on the same morning that the homicide occurred. Sheriff Ashe knew Mr. Kelly all his life. The sheriff testified that Mr. Kelley was not rational and that "it just wasn't Brian."

More to the point, we know from Officer Wentzell that when Mr. Kelley was talking about "wrong" three and a half hours after Officer Wentzell first saw Mr. Kelley at the

house, that Mr. Kelley was different. "It wasn't the personality that Mr. Kelley had entered into at the scene. There was a change in his personality."

It is elementary that insanity must exist "at the time of the offense." Tenn. Code Ann. § 39-11-501(a) provides in pertinent part: "It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts."

In *Forbes v. State*, 559 SW.2d 318 ( Tenn.1977) this Court held that a defendant had to establish non-remission at the time of the crime where the defendant was suffering from episodic insanity. Conversely, a defendant could well be in non-remission at the time of the crime (and thus fully insane at midnight) and in at least slight remission four-and-one-half hours later. There is little question that Mr. Kelley's mental condition goes through periods of remission as Dr. Martell explained in some detail.

As we know Dr. Martell is one of the most conservative doctors in the country having testified for the prosecution in Tennessee capital murder cases involving Paul Reid, Darryl Horton, and the late Mr. Coe. Dr. Martell was originally hired by the prosecution here to counter the battery of State doctors who were all of the view that Mr. Kelley was insane. After evaluating Mr. Kelley, Dr. Martell also found Mr. Kelley insane. The experts were now unanimous.

Of great relevance is Dr. Martell's testimony that he relied on the police reports in his evaluation of Mr. Kelley. Dr. Martell was of the view that Mr. Kelley had a psychotic

episode and that he could not appreciate the wrongfulness of his conduct when he killed his daughter. The pertinent testimony is worthy of an extended quotation from the record:

> A [by Dr. Martell]. What I think was more significant, there were a couple of things. I believe that part of what explains what happened here, is that Mr. Kelley had his first psychotic break. His first psychotic episode. And of course, the disease that I believe is probably schizophrenia. Schizophrenia is a disease that begins somewhere in your 20's. Most people have their first psychotic episode sometime in their 20's. And that's true in this case. *In addition, it's significant in the history that his grandmother was also diagnosed as schizophrenic and treated in Central State Hospital. This is important because you can't just get schizophrenia from the air. It's a genetic disease and you can't have it unless somebody in your family had it before you.*[4] And that's true in this case. So, that fits together and I think it's significant in his history. In addition to the fact that he had been very high functioning, he was a bright young man who had spent some time in college. He had a successful family, successful work career. This is all consistent with the history that you see in patients with schizophrenia. They look just like you or me until they get into their mid 20's. Then they begin to have these strange ideas and these odd experiences as the chemistry in their brain changes.
>
> Q. What was the significance of Mr. Kelley decompensating when he was transferred back to the Wilson County jail in September of '99?
>
> A. Well, I think the reason that [Assistant District Attorney] Hibbett had hired me in the first place was that, here is a man who has killed his child and said that God made me do it. But when he gets to the mental hospital they couldn't find anything wrong with him. And you know, this is strange. And I think that's why he had hired me to come in and take another look at this, to see what was going on or did they miss something. Or was this guy telling a story about hearing God's voice. What I think is significant is when I saw him he again was in remission. Now, this is consistent with schizophrenia. It's not a disease that is steady all through your life once you get it. You have periods where you have a psychotic episode and you hear voices and see things. And then you have periods of time when they may go two weeks, two months, two years, where you don't have any of that. You may be a little odd or a little flat in your affect, so you're not very emotional. But you'll look pretty normal and function very well until you have another psychotic break and you hear the

[4] See, *Hagan v. State*, 64 Tenn. 615 (Tenn. 1875), "If medical science has determined any one question more clearly than another, it is that insanity is hereditary."

voices again. And it goes like that throughout your life where you have several episodes like this, for the rest of your life. And what we see with Mr. Kelley, is that he has a psychotic break during the legal proceeding and leading up to the crime, then he goes into remission, then he has another psychotic break, then he goes into remission, then he as another psychotic break and is found incompetent to stand trial, then he goes into remission and is competent to stand trial. This tells me that it's completely consistent with the natural course of this disease.

Q. And you saw Mr. Kelley in December of '99?

A. Yes, sir.

Q. Dr. Martell, did you gather enough information to form an opinion about Mr. Kelley?

A. Yes, I did.

Q. On December 2nd, 1999, when you were interviewing him, did you determine if he was in fact suffering from a severe mental condition at that time?

A. On December 2nd, when I saw him he was not acutely psychotic, so, he was not suffering from a severe mental disorder at that time. But I believe that at the time of this crime and the week prior to this crime, he was suffering from a severe mental disorder. And that it is a disorder that will continue to plague him throughout his life.

Q. Was the testing that you've done, the observations that were made, the history that was gathered, the police reports that you saw, the reports from various officers that you saw, was all that enough for you to make that determination?

A. Yes, it was.

Q. Doctor, generally how long does it take for you to make a psychiatric evaluation?

A. This varies greatly depending on the type of case that it is, how complicated it is and how much information you have. I had the benefit of all the work that the Middle Tennessee doctors had done, so, I didn't have to do another IQ test. That had already been done. I didn't have to give another

MMPI, that had already been done, so, I saved some time. Sometime doctors will do these evaluations in 45 minutes. Psychologists always take a little more time because we do testing and that testing takes time. But certainly, in this case, the three and-a-half hours I spent with him and the additional hours I spent reviewing the records and rescoring the data and all of that, provided an adequate basis to come to a reasonable opinion about his mental condition.

Q. Doctor, were you able to form an opinion as to whether Mr. Kelley appreciated the wrongfulness of his act at the time of the incident?

A. Yes, I was.

Q. What is that opinion?

A. *I believe that he was not capable of appreciating the wrongfulness of his act at the time that he smothered his daughter. I say that because I believe he was truly suffering from schizophrenia. He was truly hearing the voice of God commanding him to do this.* He believed the following day, his birthday, would be the second coming of Jesus Christ and he needed to do this to prove to God, his worthiness to have an important place in Christ's government, to his second coming. *I can see jurors kind of rolling their eyes.* It sounds incredible. But this is what schizophrenia is. This is the way they think. And I believe that he truly had his beliefs and *there is no reason for him to have done this other than in response to God's command.*

Doctor Craddock's testimony was very similar to that of Dr. Martell:

A. [by Doctor Craddock] That [ Mr. Kelley] was out of touch with reality at the time of his daughter's death. That he personally thought what he was doing was logical and justified, that anybody else would be perceived as being not in contact with reality.

Q. Was he in fact, suffering from a severe mental disease?

A. A psychosis at the time, yes.

Q. What is a psychosis please, sir?

A. Well, it refers to a person not being able to make accurate perceptions of reality. *In his case, he maintained this very strong delusion that sacrificing his daughter would bring the second coming of Christ and his daughter would be resurrected and everything would be fine*.

Q. Dr. Craddock, what is the difference, please sir, between a delusion and a hallucination?

A. Hallucination is when somebody is perceiving something that doesn't exist. Most frequently, we hear individuals saying that they're hearing voices when no one is around. People that have taken drugs sometimes have visual hallucinations; LSD is a classical example there, people see things that they normally wouldn't see. Delusions are false beliefs that may or may not be hallucinations. The person may or may not hear things. But a person can be very delusional and not have hallucinations. They can have this false belief that is irrefutable, regardless of how you try to reason with them, they are absolutely convinced that they are right.

Q. Was Brian Kelley suffering from delusions or hallucinations during that August time period?

A. It was my impression that he had both. That he was certainly delusional and had hallucinations to the extent that, he spoke of being directed by the spirit or feeling it. He didn't describe them as necessarily being audible voices. But he felt as though he was being guided and directed. And I think other times he had mentioned that he had heard the voice of God.

Q. Based on your observations, on the history, on everything that you testified thus far, could you make a determination, within a reasonable degree of psychological certainty, whether Brian's perception of what was going on, on August 14th, and 15th, 1999, allowed him to understand the wrongfulness of what he did?

A. Yes, I have an opinion.

Q. What is that opinion please, sir?

A. ***My opinion is that he saw his actions that resulted in his daughter's death, for the greater good of humanity, that it was going to bring back Christ and his daughter would be resurrected. It was not a malicious act. There was no criminal intent. That what he intended to do, which he now describes as being very horrible, repugnant, but he was convinced that's what needed to be done.***

Dr. Farooque, a psychiatrist, had seen Mr. Kelley for almost a year while he was hospitalized at Middle Tennessee. Dr. Farooque testified that: "I feel like that at the time of

the incident, because of the delusional thinking, because of the hallucinations, [Mr. Kelley] was not able to appreciate the wrongfulness of the act." Dr. Farooque explained the delusional thinking in great detail:

> Q. And are there some, depending on the illness or the disease, is there some thing that could trigger or make the disease manifest itself, and in Brian Kelley's case, religion. Was that the trigger in his case?
>
> A. [by Dr. Farooque] I cannot say because we all saw that that's what happened, what he became. But I think that that came from his mental illness. I think that the mental illness manifestation started that he became religiously preoccupied and that religious preoccupation went farther. He became more and more delusional. Then he became psychotic. So, I think at first maybe religion and then that went farther and that is a part of his mental illness.

Officer Wentzell's testimony that Mr. Kelley said what he did "was wrong," must be read in conjunction with the more detailed questioning of the detectives just prior to Officer Wentzell's conversation with Mr. Kelley on the way to the jail. The detective testified that Mr. Kelley said he went by the "laws of God."

Dr. Phillips testified:

> "In considering that this is a second part of the insanity defense, the first being that issue of mental illness, in considering the issue of wrongfulness, I felt that from all that I heard Mr. Kelley say, that he had felt like the Holy Spirit had directed him to do the act. I think he recognized that it was contrary to man's law and a point in fact, he expected that he was going to be arrested. But he also thought that God's law was a higher law, and therefore, he thought he was justified and ultimately, was not wrong in what he did. He also recognizes that he would probably be arrested, but he thought that Jesus was going to return by sundown, literally, hours after I had seen him. He said that nightmare was going to be over and he was going to see his daughter again."

With respect to "man's law," Brian Kelley explained to Detective Osborn that "the laws here only exist because God allows them." *Thus, Mr. Kelley's perception of "wrong" was itself distorted.* As Dr. Martell explained, Brian Kelley killed his daughter for the "greater good of humanity." This is not "wrong" where it is the product of a psychotic delusion.

When evaluated in the context of the entire record it is apparent that the intermediate appellate court's reliance on Mr. Kelley's self-described diagnosis to Officer Wentzell of one of the components of the insanity test made some four to five hours after the fact, is insufficient to generate a genuine jury issue of the ultimate question as to whether Mr. Kelley's defense team established insanity by clear and convincing evidence. Quite simply the State presented nothing to counter the testimony of Dr. Phillips, Dr. Craddock, Dr. Stout, and Dr. Farooque, a veritable who's-who of Tennessee experts in the mental health field all of whom have testified in a multitude of cases. Dr. Martell's testimony is exceptional and should have laid to rest any question on the matter.

Apart from the expert testimony there was abundant lay testimony that amply supported insanity. One could not improve on the testimony of the Sheriff himself that Mr. Kelley was "not rational" and that "it just wasn't Brian."

Lori, Brian Kelley's wife, related an absolute nightmare of events surrounding her husband's mental disintegration. His problems first involved headaches, loss of weight and repeated instances of insomnia. Brian became increasingly concerned with religion. He saw signs everywhere. On one occasion he saw that he had written the number 777 on a golf

score card and determined that this was somehow significant. Brian became convinced that certain religious figures were individuals from the Bible and that this meant the second coming of Christ.

Brian's parents and Lori Kelley all testified to an instance where Brian disappeared and had gone to a mall to try and recover a photograph of a temple which he should have known would not be ready for weeks later. The manager of the store testified that Brian waited in the store for three hours although the photograph would never come that day. The manager said that Brian was talking about religion and that it was very "weird."

Lori Kelley testified that Brian told her that "Jesus was going to come back on Sunday." He became concerned about an eclipse in Jerusalem and a tornado in Utah. Brian told Lori that God was letting him see things that other people were not allowed to see and that "God had chosen him."

Brian's parents both testified to numerous instances of their son's increasingly strange behavior. Mr. Val Kelley was concerned that his son would commit suicide because of the family history of mental illness. Brian's parents discussed with each other about getting Brian some professional help. This was prompted by Brian seeing religious messages on a blank television screen.

Co-workers all testified that Brian Kelley was a great employee and had always done a wonderful job at the landfill. However, Brian started talking about the Lord returning and that Brian said he was going to have a new kneecap. They described this a "different Brian."

Another co-worker testified that Brian Kelley talked about the eclipse and the crucifixion of Jesus and the workers' views on religion.

Brian Kelley's father arranged a meeting with an engineer and another gentleman to see about setting Brian up in a new business. Brian was not able to finish his sentences and his thoughts were disjointed. Brian asked one of the gentlemen about his religious background and about his faith. At a separate meeting with the engineer Brian inquired about his religious beliefs which the engineer "thought was quite odd." Brian became disjointed and left the room. The engineer testified that Brian's behavior was certainly not consistent with what he had seen over the past three years.

Just hours before he took his daughter's life, Brian attempted to contact one of his childhood friends by e-mail. When unable to do so he left his friend a message on the telephone answering machine. Brian said that "I guess I am going to have to start calling you Paul." Brian related to Dr. Phillips that this conversation was with "Paul, the writer of Letters in the New Testament."

Lori Kelley described Brian's reaction when she discovered her dead daughter. Brian was trying to calm Lori and repeated, over and over that, "It's okay, it's going to be okay, everything is going to be okay." Lori knew that something was terribly wrong with her husband and that in fact it was not her husband because he had loved his baby very much.

The question, at this point, however, is not how much evidence of insanity there was but rather, whether there was any proof to the contrary. There was none. The defense asserts that after viewing the evidence in a light most favorable to the state, and by utilizing an

appropriate definition of wrongfulness, a rational trier of fact could only find that insanity has been established by clear and convincing evidence. Thus, the guilty verdict may not be sustained. *See, People v. Wilhoite*, 228 Ill. App. 3d 12, 169 Ill. Dec. 561, 592 N.E.2d 48 (1991) *; Christian v. State*, 351 So.2nd 623, 624 (Ala. 1977); *Alvis v. State*, 434 So.2d 859 (Ala. Crim. App. 1983) (containing extensive discussion of Alabama case law and cases where insanity verdict was reversed under statute placing burden of proof on defendant). Mr. Kelley asserts that the proof in this case establishes by clear and convincing evidence that he was insane at the time of the commission of this offense and thus this Court should grant review here, adjudicate him not guilty by reason of insanity and remand the matter for further proceedings pursuant to Tenn. Code Ann. § 33-7-303.

## III. THE FAILURE TO CHARGE VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE WAS REVERSIBLE ERROR.

Due to the passion engendered by Mr. Kelley's delusion, voluntary manslaughter was "at issue" and thus, the failure to give an instruction on this lesser included offense was erroneous. A companion issue, appearing immediately hereafter, argues that, should this Court affirm the rejection of the insanity defense, then this Court should reduce the grade of conviction to voluntary manslaughter because Mr. Kelley was operating under an insane delusion.

The distinctions between murder and manslaughter, of course, are inherent in the nature of the crimes at issue, all being identical as to the requirement of an intentional killing. Murder in the first degree is a "premeditated and intentional killing of another."

Tenn. Code Ann. § 39-13-202(a)(1). Murder in the second degree is a[n] " [intentional or] knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1).[5] Tenn. Code Ann. § 39-13-211(a) defines voluntary manslaughter as the "intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Thus, it can be seen that murder in the first degree, murder in the second degree and voluntary manslaughter all permit a conviction if the homicide is committed intentionally ignoring for the moment the issue of insanity.

Voluntary manslaughter, in addition to the intentional element, also contemplates that the accused be in a "state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." The term "passion" is discussed in the Sentencing Commission Comments as follows:

> "While the terminology is slightly different from the common law definition of voluntary manslaughter, the basic principles of voluntary manslaughter remain intact in this section. First, the defendant's 'passions' must be produced by 'adequate provocation' which would lead a 'reasonable person' to act in an irrational manner. The latter phrase 'irrational manner' is utilized so as to encompass a broad consideration of mental states produced by adequate provocation. This section should also read in conjunction with § 39-13-201, which defines a 'deliberate act' as one performed with a cool purpose [definition deleted by 1995 amendment of § 39-13-201]. If the state proves a premeditated and deliberate killing another, meaning that the state has proven the absence of passion or provocation, then, under § 39-13-202, the defendant should be adjudged guilty of first degree murder. The fact-finder may consider lesser included offenses of second degree murder or voluntary manslaughter."

[5]It should be noted that murder in the second degree deals with a "knowing" killing. However, pursuant to Tenn. Code Ann. § 39-11-301(a)(2) when "acting knowingly suffices to establish an element, that element is also established if a person acts intentionally."

The concept of "passion" is broadly defined by Tennessee law. In *Winton v. State*, 268 S.W. 633 (Tenn. 1925) this Court stated that:

> "When any feeling or emotion completely masters the mind, we call it a passion; as, a passion for music, dress, etc.; especially as anger (when thus extreme) called passion. The mind, in such cases, is considered as having lost its self-control and become the passive instrument of the feeling in question."

268 S.W. 633, 638. Earlier in the opinion, passion was described as a "short madness."

As also noted in the Sentencing Commission Comments accompanying the statutory offense of manslaughter, the words "irrational manner" are utilized "so as to encompass a broad consideration of mental states produced by adequate provocation." In our case the provocation was "caused by God" which unquestionably resulted in the most extreme passion imaginable. Indeed, the record reflects that Mr. Kelley even "argued with God" about the necessity of killing his child. (Volume III, page 270).

Tennessee has long recognized the proposition that passion may be produced by an insane delusion, which, while not sufficient to constitute "full insanity," may be adequate to constitute voluntary manslaughter. In *Davis v. State*, 28 S.W.2d 993 (Tenn. 1930), Dr. Davis, a physician, killed Mr. Noe believing that Noe had commenced an illicit relationship with Dr. Davis' wife. Mrs. Davis, a woman whose "character was above reproach" had no relations with Mr. Noe in any way.

Dr. Davis was convicted of murder but this Court found that the facts would only support voluntary manslaughter because Dr. Davis was operating under the insane delusion that his wife was having an affair. Care must be taken in the examination of the opinion that

the Court was not speaking of some "irresistible impulse." Indeed, this Court soundly rejected that proposition. As to the question of passion, this Court found:

> "We have before us a man found by the jury to have been insane on the subject of his wife's relations with the deceased. How could his status under the law have been affected by a lapse of time between his conception of the provocation and the homicide? Possessed by this insane delusion, deranged on the subject, he remained deaf to the voice of reason and to the voice of conscience. He was beyond reason and conscience in this particular, as the record clearly shows.
>
> It is not necessary that a defendant's reason be dethroned to mitigate a killing to manslaughter. . . . If the excitement and passion adequately aroused obscures the reason of the defendant, the killing will be reduced to manslaughter."

28 S.W.2d 993, 996-997.

The key phrase here, of course, is that since Dr. Davis' "excitement and passion" were aroused so as to obscure his reason, then the crime could constitute only manslaughter. That this "passion and excitement" could be the result of some insane delusion is the central holding of the *Davis* case. *Davis* is certainly not some obscure decision. It was cited with approval almost sixty years later in *State v. Thornton*, 730 S.W.2d 309 (Tenn. 1987).

Faced with the *Davis* precedent, the government here will undoubtedly persist in arguing that the voluntary manslaughter might only be at issue as it relates to the distinctions between that offense and murder in the second degree. However, the relationship of "passion" in voluntary manslaughter is directly related to murder in the first degree as well. How do we know that? The primary element of murder in the first degree is "premeditation." The term "premeditation" is defined in Tenn. Code Ann. § 39-13-202(d) as:

> "Premeditation is an act done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion to be capable of premeditation."

The terms "excitement and passion" in the statutory definition of premeditation are precisely the same terms that one finds in *Davis* to describe manslaughter where the "reason of the defendant is obscured." See also, *State v. Williams*, 38 S.W.3d 532 (Tenn.2001) for an extended discussion of voluntary manslaughter as it relates to common law mutual combat which may give rise to passion and excitement under our modern code.

If "passion and excitement" are statutory elements of the offense which the government charges Mr. Kelley, so that the jury must inquire as to whether his mind was "free" from such "passion and excitement," it is only logical that a lesser crime containing those very elements also must be instructed to the jury. Otherwise, what is a jury to do if the jury determines that his mind was not sufficiently "free" from these emotions? It is for that reason that the failure to charge voluntary manslaughter was not harmless.

Recently this Court addressed the "test" which must be used to determine whether a lesser included offense should be charged:

> "First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense. This two-step analysis is practical, can be easily applied by the trial courts, and remains broad enough

> to preserve both the state's and the defendant's rights to consider any lesser included offenses fairly raised by the proof."

*State v. Burns,* 6 S.W.3d 453, 469 (Tenn. 1999). See also, *State v. Dominy*, 6 S.W.3d 472, 477, (Tenn. 1999) ("*Trusty* failed to recognize that the passion language in the definition of voluntary manslaughter simply reflects a less culpable mental state than required for first or second degree murder.").

Applying this test it is obvious that voluntary manslaughter should have been charged to the jury here.[6] Thus, this Court should grant review so as to apply the appropriate rules regarding instructions for lesser included crimes.

## IV. SHOULD THIS COURT AFFIRM THE REJECTION OF THE INSANITY DEFENSE THIS COURT SHOULD REDUCE THE GRADE OF THE CONVICTION TO VOLUNTARY MANSLAUGHTER.

The preceding discussion of voluntary manslaughter also supports the argument that, should this Court reject the insanity defense, then the proof would, at most, support a conviction for voluntary manslaughter. See, *Davis v. State*, 28 S.W.2d 993 (Tenn. 1930) ("How can such a defendant be guilty of murder while his delusion persists.") Accordingly, this Court should reduce the grade of conviction to voluntary manslaughter. See also, *State v. Thornton*, 730 S.W.2d 309 (Tenn. 1987) (Court reduces conviction from murder in the first

[6] If there were any doubt about the possibility of a manslaughter conviction where a person was charged with murder in the first degree, one need look no further than *State v. Flake*, Tenn. Crim. App. At Jackson, filed July 13, 2001, *appeal granted*, where the defendant was charged with attempted first degree murder but was convicted of attempted voluntary manslaughter where the defense relied on insanity.

degree to voluntary manslaughter where defendant interposed unsuccessful defense of temporary insanity).

## CONCLUSION

This Court should grant review here, vacate this conviction and find Mr. Kelley not guilty by reason of insanity. The matter should be remanded for further proceedings pursuant to Tenn. Code Ann. § 33-7-303. In the alternative this Court should reduce the grade of conviction to voluntary manslaughter or, in the final alternative, grant a new trial.

HOLLINS, WAGSTER & YARBROUGH, P.C.

_____

David L. Raybin, BPR No. 3385
22nd Floor - SunTrust Center, 424 Church Street
Nashville, Tennessee 37219
(615) 256-6666

*Attorney for Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Document has been furnished by U.S. Mail to David H. Findley, Assistant Attorney General, Criminal Justice Division, P.O. Box 20207, Nashville, Tennessee 37202, on this the ____ day of May, 2002.

_____
David L. Raybin

# APPENDIX