IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 86-561

CYNTHIA L. POWELL,

Respondent.
_____/

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, State of Florida, who was the prosecuting authority in the trial court and the appellant in the First District, will be referred to herein as "State." Appellee, Cynthia L. Powell, who was the defendant in the trial court and the appellee in the First District, will be referred to herein as respondent or by her last name.

The record on appeal, consisting of one volume of pleadings, etc. and three volumes of trial transcript, will be referred to by the symbols "R," and "T," respectively, followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

In a three-count information Michael Cross was charged with armed sexual battery on L M , occurring on July 21, 1993, possession of a firearm by a convicted felon, and conspiracy to commit murder. This information also charged Cynthia Lynne Powell with conspiracy to commit murder. (R. 48) The third count read:

> And for the third count of this information, your informant further charges that MICHAEL LEE CROSS and CYNTHIA LYNNE POWELL on or between the 30th day of August, 1993, and the 9th day of September, 1993, in the County of Duval and the State of Florida, did agree, conspire, combine or confederate with each other to commit Murder, contrary to the provisions of Sections 782.04(1)(a) and 777.04(3), Florida Statutes.

(R. 48) An amended statement of particulars provided that the conspiracy took place between August 2, 1993 and September 9, 1993 in the vicinity of Jacksonville, Duval County, Florida. (R. 61) Michael Cross and Cynthia Powell were tried together on the conspiracy count.

The State presented the testimony of eleven witnesses: Chrystal Oplander (Cross' friend and owner of home in which Powell was a guest), Susie Lewis, records custodian for Southern Bell Telephone Company; Sgt. Sharon Freeland, records custodian for Pretrial Detention Facility of Jacksonville Sheriff's Office; Sgt. S. R. McCoy, communications coordinator for Pretrial Detention Facility; Misty Sullivan, next door neighbor and baby sitter for Chrystal Oplander; Forest Rothchild, friend of

Oplander who met Powell at a party at Oplander's home; Charles Drew Freeman, friend of Oplander; T M , husband of alleged rape victim; Karen Renckley, deputy with Jacksonville Sheriff's Office; Joseph Collins, detective with Jacksonville Sheriff's Office; and Steven Shinholser, Sr., detective with Jacksonville Sheriff's Office.

Chrystal Oplander had known Michael Cross for approximately a year. (T. 39) He was primarily a friend, but for one month in 1993 (from June to end of July), they had a sexual relationship. (T. 39-40) It ended because Cross stopped calling. (T. 40) He made contact with Oplander again in August while he was incarcerated in the county jail. (T. 41) Oplander met Cynthia Powell through Cross. (T. 43-44) At Cross' request, Powell became a house guest in Oplander's home for one and one-half weeks. (T. 46) Powell was still a house guest at the time of her arrest on or about September 9, 1993. (T. 76, 127, 129, 248, 264-165, 281-282, 317)

Cross and Powell made several statements and committed several acts in the presence of Oplander, which the State relied on to prove the conspiracy. These are summarized in the following paragraphs.

Michael Cross' verbal acts.

1. Cross called from the county jail in August (T. 42) and late August (T. 43). After Powell arrived, he called collect "five, seven times a day." (T. 48-50)

2. Cross asked Oplander if a friend, Cynthia Powell, could stay at her house for a couple of days. (T. 43, 121)

3. Cross wrote Powell a letter and asked Oplander to give it to Powell. (T. 56)

4. When Cross called, "sometimes he would ask for Angel, which was Lynne." (T. 87)

Michael Cross' statements.

1. I am in jail because a girl has accused me of raping her. (T. 42)

2. If you want to know why Powell is coming to Jacksonville, you will have to ask her. (T. 43)

3. Powell is my girlfriend. (T. 49)

4. "If anybody asks, me and you (Oplander) have been seeing each other on and off for the past year, and that me and Lynne (Powell) was no longer together." (T. 49)

5. "From now on your name is Tina, Lynne's name is Angel, and my name is Chuck." (T. 53) The jail phone carries a warning that the conversation may be recorded. (T. 53)

6. I am writing Powell a letter, which will be addressed to you with Powell's name in parentheses. (T. 56)

7. If you come home from work one day and Powell is not there, don't be alarmed. That just means she has left. (T. 50)

Powell's physical and verbal acts.

1. While talking to Cross on the telephone, Powell took notes. (T. 51-52) She wore gloves. (T. 56) After talking to Cross, "she would ask [Oplander] out of the clear blew sky questions," and "she would have to go to the store to get stuff" (T. 47, 52, 118), including a razor blade, gloves, camouflage paint for hunting, pills, baby bottle nipples (T. 62, 67-69, 98). During the last three to five days of her visit, this happened just about every time Cross called her. (T. 52)

2. Powell carried a backpack full of items, including handcuffs, switchblade, a chain from Oplander's yard, and pills from Oplander's house. (T. 65, 69-70) Powell stored some of her belongings in a plastic bag, which included envelopes and note paper belonging to Oplander and on which Powell had wiped off all fingerprints. (T. 71-73, 128-129)

3. Powell discussed with Cross on the telephone a suicide

note. (T. 51)

4. Powell called the apartment complex of the alleged rape victim trying to find out her last name. (T. 74)

5. Powell read the letter she received from Cross and took notes. (T. 57) She then walked outside with the letter. (T. 57)

6. Powell asked to borrow Oplander's truck (T. 58) and Forest's car (T. 61). Powell went out one night to steal a car but came back empty handed. (T. 89-90, 102)

7. Powell asked Oplander to get her a gun. (T. 58) She also asked Drew Freeman to get her a gun, initially for protection. (T. 59) She gave Freeman money to purchase a gun. (T. 60) Powell asked Oplander if Powell's cap gun looked real, if it would look anymore real if covered with a towel, and if it would scare Oplander if covered with a towel. (T. 64) She asked Oplander if someone held a gun to your head, would you be scared and would you do what the person requested? (T. 133)

8. Powell asked Oplander if Powell's knife she carried which belonged to Cross would scare someone. (T. 65)

9. Powell asked Oplander, "If you had people cut their wrists, you know, if they commit suicide by cutting their wrists, if you cut it this way or this way, which one would be better or faster, or would do it?" (T. 134); "Do you cut your arm straight across or up your arm?" (T. 98)

Powell's statements.

1. I live in Tennessee with my father. I have made two trips to Jacksonville. The first time I stole my father's car and drove to Jacksonville, and the second time I hitchhiked. (T. 45, 75)

2. **Powell's statement made to Oplander when they first met:** I came to Jacksonville to kill the girl that put Cross in jail. (T. 46, 84) I am joking; I came here to see a friend. (T. 46, 84) **Powell's statement made sometime later:** The purpose of my first trip was to kill the girl who put Cross in jail, but I got scared when her husband answered the door. I asked for someone else and then walked away. (T. 75-76) **Powell's statement made two day's before her arrest and after she had obtained razor blades and gloves and wiped fingerprints off stationery:** I am going to L M 's house and kill her. (T. 104, 124)

3. Cross is my boyfriend. (T. 49)

4. The handcuffs in my backpack are for "the girl that put Michael in jail" or for her husband if he shows up. (T. 65-66, 98, 142-43)

5. The purpose of the face paint is to prevent anyone from seeing me. (T. 67)

6. In the event I get a gun, I will use the baby bottle nipples as a silencer on the gun. (T. 68-69)

7. The purpose of the gloves is to eliminate my fingerprints. (T. 69)

8. The envelopes and note paper without fingerprints are to be used by me to write Cross and by the girl who put Cross in jail to write a suicide note. (T. 72-73)

9. After she writes the suicide note, I can make her take the pills, shoot her, or use a razor blade. (T. 97-98)

10. "As far as they know, this guy tried to rape me, but actually I tried to get his car." (T. 76-77) This statement was made on September 9th, the same evening that Detective Shinholser called Oplander. (T. 76, 127)

Oplander was not scared of Powell. (T. 98, 132-133) At first Oplander did not take Powell's threats seriously, but later she did. (T. 84, 121) On September 7th, her "threat was more serious because the week before she was doing all these things, she was getting razor blades, she was getting gloves, she was writing letters that would have no fingerprints." (T. 124) On the date that Drew Freeman dropped Powell off on 103rd Street, Oplander did not think Powell would follow through with her plan to kill L M because Powell "was nervous and clammy, and she had too many questions and things." (T. 104)

Cross did not admit that he was involved in the conspiracy when Oplander, wearing a wire, went to the jail to see him after

Powell had been arrested. (T. 109, 136) Neither did he admit being involved in the conspiracy during recorded conversations with Oplander. Cross "didn't really say he did, he didn't really say he didn't, he just didn't say anything, he changed the subject." (T. 110) Cross denied knowing anything about a gun and told her to tell the truth. (T. 140-141)

The testimony of the other witnesses for the State are summarized in the following paragraphs.

On August 2, 1993, Michael Cross was assigned to Cell 3E, 4A, Room 74, and on August 6th, he was moved to 5 West, 4-76, Room 76, of the Jacksonville County jail, where he remained until September 22nd. (T. 156) Collect telephone numbers 356-5500, 356-5047, 356-5223, and 356-5504 were assigned to 5 West, 4, and 356-4027 was one of the telephone numbers assigned to 3 East, 4A. (T. 159-160)

Misty Sullivan saw Powell take letters out of her book bag and on one occasion saw her burning a letter outside Oplander's mobile home. (T. 166-167, 177) Misty saw that one of the letters "said something about something to do with a lady named L ," and also "there was something about getting money from an apartment" in the letter. (T. 167. 170, 176) Misty asked Powell why she was burning a letter, and Powell responded, "Evidence." (T. 168)

At a party at Oplander's home, Powell informed Forest Rothchild that she was in need of a vehicle because of something involving "a weapon (a gun) and her possibly being a getaway

driver." (T. 181-182) She first asked Rothchild if a friend of his could loan her a car and then she asked Rothchild himself to loan her a car. (T. 182) She explained that she would return the vehicle to a location easy to find, but that he probably would never see her again. (T. 182) Later during the week when Rothchild called Oplander's home, Powell continued with her request to borrow his car. (T. 183) Rothchild did not loan Powell a car. (T. 183)

Oplander and Powell visited Charles Drew Freeman in his home in August 1993. (T. 189) Powell wanted to purchase a .22 caliber firearm on which she could use a baby's nipple as a silencer. (T. 191) Thereafter, Powell gave Freeman $60 to purchase the firearm, $40 of which was returned to Powell two days later. (T. 199, 210) During the next two weeks, he talked to Powell by telephone every day, sometimes three times a day. She wanted to know if Freeman had obtained a gun for her. (T. 193) Freeman saw Powell approximately fourteen times at Oplander's home. Powell wanted to know when Freeman would be able to get the gun for her. (T. 193-194) Powell explained that she needed a gun to force a woman to write three letters stating that she had falsely accused Mike of rape and could no longer live with herself. (T. 195-197) She further explained that if the lady refused, she was going to go ahead and "off" her. (T. 197) During the two week period, Powell mentioned "offing" the lady approximately six times. (T. 204) Powell "had indicated that somebody had asked her to do it." (T. 197) Freeman was "sure that she had mentioned about her

boyfriend, doing it for her boyfriend, or a friend," whom she loved, but he was uncertain whether she actually mentioned her friend's name. (T. 197-198, 221, 223) Freeman decided not to get her the gun. (T. 195, 199)

While at Oplander's home, Freeman overheard Powell say to Cross on the telephone that "she didn't know when she was going to be able to do it," and on another occasion that "she had to do it soon, because she had to be back up north." (T. 199)

On September 7, 1993, Freeman gave Powell a ride to 103rd Street and dropped her off at a Lil' Champ store. (T. 199-203) Powell explained that she intended to try to find the lady and do what needed to be done so that she could get back up north. (T. 203-204) She had her backpack with her, which contained a knife with spikes on the handle, handcuffs, box of envelopes, paper, pens, and clothes. (T. 205) As she wiped the knife off with a rag, she stated she was going to threaten the lady with it and kill her with it if she refused to do as she was told. (T. 205) Freeman saw Powell the next night, and Powell stated that the lady had moved. (T. 206) She again asked about getting a gun and stated that she intended to try to find the lady. (T. 206) Freeman believed that Powell was sincere but lacked the courage to go through with the killing. (T. 213, 218-219, 224) She was too nervous. (T. 213)

T[illegible] and L[illegible] M[illegible] lived in Apt. No. [illegible], [illegible] Apartments, Jacksonville in July 1993 until September 4, 1994. (T. 230, 237) They did not have a telephone. (T. 230) On July

22nd, T reported a crime against his wife to the police, and the case was assigned to Detective Shinholser. (T. 232)

On or about August 25th, Powell, whom he did not know, came to his door and told him that her father, a Navy man, was looking for him and had sent her to his house to see if he was home. (T. 232-234) When she left, Powell backed out of the driveway in an awkward manner, as if to conceal the license tag, which was either an Alabama or Tennessee tag. (T. 235)

About the second week of September, T received two strange phone calls at his command post. (T. 235) The caller at one time represented that she was with 1-800-Flowers and needed to confirm his address to deliver some flowers. (T. 236) The caller gave a false telephone number, and no flowers were delivered. (T. 236) The caller on another occasion left a bogus message about a bank loan with T 's landlord. She used the same telephone number as did the first caller. (T. 237, 239, 246) T took these messages to Detective Shinholser. (T. 237) The telephone number left by the caller was Oplander's number. (T. 240, 329, 340)

On September 9, 1993, Karen Renckley was called to the scene of a reported attempted carjacking. (T. 248) When she arrived, she observed Cornelius Taylor with blood all over his white dress Navy uniform and a bandage around his head. (T. 248) She also observed the car and a backpack belonging to the person who had injured Taylor. (T. 248, 250) Taylor was taken to the hospital for the wound to be sewed up, and then he was taken to the police station to be interviewed. (T. 250)

On September 9, 1993, Deputy Collins was advised of a possible kidnapping and attempted sexual battery. (T. 264-265) Powell, the alleged victim, was transported to the police station. (T. 264) She reported that a man abducted her, took her to a wooded area, and told her to remove her clothes. (T. 266) She hit him in the head with a hammer. (T. 266) While telling this story, Powell was calm. At one point, she stated that all she wanted was her bag, not to prosecute. (T. 267-268) She explained that all the items in her bag were for her protection. (T. 268) Taylor was then interviewed, following which Powell was interviewed again. (T. 269) She recanted the kidnapping story. (T. 260-270) No one was arrested. (T. 270, 278) Taylor agreed to take a polygraph test but never showed up. (T. 272-273) The police knew where Taylor lived and worked. (T. 277) Due to discrepancies in both parties' stories, the sexual battery case was not pursued. (T. 274) As standard procedure, the case was turned over to the State Attorney, but it was not prosecuted. (T. 275-276)

Detective Shinholser was the lead detective in the sexual battery case against Michael Cross. (T. 279) L M filed the complaint on July 22, 1993, and Cross was arrested in August. (T. 280) Thereafter, T M became concerned for his wife's safety and began communicating with Shinholser. (T. 281) On September 9th, he came to the police station with a telephone number (786-5107) of a person trying to locate his wife. (T. 281-282) The phone number was listed to a Ruth Osborne on Hyde Park

or Grove. (T. 282) Shinholser, in T 's presence, called the number. (T. 282) It turned out to be Chrystal Oplander's telephone number. (T. 329, 340) As a result of that telephone call, he communicated with Oplander on several occasions on that date, both on the telephone and at the sheriff's office. (T. 283-286) At this same time, Powell was in the sheriff's office being interviewed because of the Taylor incident. (T. 284) She told Shinholser her address was 7710 East Brainered Road, No. 701, Chattanooga, Tennessee, which is the same address as is listed on State's Exhibit No. 3. (T. 292-293) Shinholser inventoried Powell's backpack, which contained handcuffs, link chain, toy gun wrapped in a washcloth, plastic baggie containing assorted pills, two small containers of pills, knife with spikes, switch blade, notes, three pacifiers, camouflage paint, and other items. (T. 293-294) Powell's personal effects brought to the sheriff's office by Oplander included notes, thee envelopes with stamps on them and blank paper inside, another envelope with some notes and a letter, and a piece of legal paid inside an address book. (T. 294-295) Powell admitted writing the notes (T. 316), some of which were described by co-defendant's counsel outside the jury's presence as "suicide letters that she was going to force L M to write." (T. 310) Shinholser arrested Powell and Cross for conspiracy to commit murder. (T. 317)

The notes written by Powell provided:

> M , I'm very sorry for this, I don't mean to hurt you or my family, it's best this way. I made everything up about Michael, he never

raped me, he never intimidated me, I can't go on lying to you about him. I wanted him because you were never around, alone. I can't keep lying, I love you, M. . I'm sorry. Love, Me. (T. 317)

State Attorney's Office. I'm writing in regards to Michael Cross. First of all I want to clear his name. I've lied about everything. I made everything up about the rape, the gun, everything. I wanted him. I lied in fear of losing my husband. I didn't mean to hurt anybody. I can't keep lying about something that never happened. I'm sorry for the trouble I've caused. Please drop all the charges, he's innocent.
Your name.
It's better this way. (T. 317-318)

Parents. I'm writing in regards to Michael Cross. First of all I want to clear his name, he never raped me, there was never a gun, and I was never scared of him or for my life. I'm sorry I lied and have caused so much trouble, I was afraid of losing my husband. Please drop all of the charges, he's innocent. Thank you.
For your family, your son.

Mike, I'm sorry for lying to you, I didn't want you to leave me. You were never around, and I needed someone around. I lied about Michael Cross, he never raped me or intimidated me with a gun. There wasn't a gun, and I wasn't raped. I'm sorry. I love you. (T. 318)

[The next note is a list of items with check marks beside them.] I got pills - all, gloves (2), letters, flashlight, face paint, handcuffs. (T. 318-319) [The word "gun" is then underlined three times.] (T. 319)

On attorneys' letter put Mike's jail number. Go in. Lock door behind me. Put gloves on. Get her at gunpoint. Take her to bedroom. Get her to write letters. Address envelopes, one to Mike, one to Mike's parents. Tell her if she writes notes she will live. Make her get glass of water and take all pills. Make her touch pill bottles. Cut her wrist. Put her hand on the razor.

Jail number 9932542P-2. (T. 319)

Take a deep breath. Make sure she's dead. Change gloves. Open the door. Take breath. Look everything over. Don't touch. Make sure she's dead. Leave. Looks like Witacker.(T. 319)

630-2400. (T. 319)
State Attorney's Office, 330 East Bay Street, Jacksonville, Florida, 32202.
2810 Green Ridge Road, OP, Florida, 32073.
(T. 319-320)

The telephone records reflected that the following number of collect calls were made from a Jacksonville telephone number to the telephone located in the residence of Chrystal Oplander: 1 call for the billing date of July 14, 1993; 12 calls for the billing date of August 14, 1993; three full pages of calls for the billing date of September 14, 1993 (between August 15th and September 14th); and 3 for the billing date of October 14, 1993. (T. 151-152)

The State admitted twelve exhibits: jail telephone records, Oplander's telephone bills, Powell's telephone bills, photograph of injury sustained by Mr. Taylor, Powell's notes, stamped envelopes, blank paper, a letter, piece of a legal pad, and purple backpack and its contents previously described (T. 162, 163, 268-269, 294-299, 301)

EVIDENCE FOR THE DEFENSE

Cross did not present any witnesses. (T. 399) Powell presented two witnesses: Christine Mishoe and Reverend Norman Gardner.

Christine Mishoe, who was fourteen years old and Oplander's next door neighbor, testified to the following facts: She resided with both her parents who were divorced, but mostly with her father who lived next door to Oplander. (T. 366) She was in the eighth grade and attended the Madiview Road Alternative for Education Center. (T. 366)

She met Oplander a year ago and babysat for her, usually in the afternoon when she went to work. (T. 367, 373) Oplander was like a big sister to her. (T. 380) Sometimes Mishoe would spend the night at Oplander's trailer. (T. 373, 381) Mishoe met Powell at Oplander's home. (T. 368) Mishoe was there, usually babysitting, almost every night during the time period when Powell was a house guest (T. 373-374, 381, 382), but Misty babysat some of the nights (T. 388). When Mishoe babysat, Oplander was at work. (T. 388) Sometimes Oplander would go to work at 4:00 p.m. and come home at midnight or five a.m. (T. 381) Mishoe was uncertain as to exactly what times of the day she was present at Oplander's home because Oplander's work schedule changed. (T. 385) When Powell arrived, Oplander went to work at 4:00 p.m., and three to four days later, her schedule was changed. (T. 387) After Powell was arrested, Mishoe did not stay at Oplander's home much. (T. 379) Oplander was dating a man named Whit when Powell was a house guest, and she is still dating this man. (T. 386-387)

Powell went out almost every night she was there. (T. 371, 382-383) Mishoe did not know where she went, but on one

occasion, Powell said that "she went to walk the interstate." (T. 371, 382) Sometimes Powell came back at night and sometimes the next morning. (T. 372-374) "She came back almost every night with money." (T. 372, 383) She would come back with at least $100, and by the end of the week, she had $300 to $400, assuming she saved it all. (T. 372)

Before Powell arrived, Cross called "maybe two or three times a week." (T. 370) Sometimes he would call twice a day, and sometimes he would wake Oplander up to go to work. (T. 380) After Powell arrived, Cross called "almost every day." (T. 370-371) He called more than five times. (T. 383) Sometimes Mishoe answered the phone, and once Powell may have answered the phone. (T. 371) Oplander never told Mishoe that Powell was not to answer the phone. (T. 371) When Cross called, he did not ask to speak to Cynthia or Chrystal but used some other name. (T. 374, 386) He did not identify himself as Mike but used a weird name. (T. 385-386) Cross did not use the real names so that "people wouldn't find out that they was talking to each other." (T. 386) Mishoe never asked Cross why he was using different names. (T. 387) Powell would speak to him first. (T. 374) Mishoe never overheard any conversations between Powell and Cross, and neither did she ever hear any words mentioned like murder, suicide, or conspiracy. (T. 375, 384)

Mishoe read part of a letter Cross wrote to Powell but never finished it. (T. 375, 384) She read nothing about murder, conspiracy, or suicide. (T. 375) Mishoe saw Powell "burn a wad

of letters one time," and a "paper the other time." (T. 377) She only saw one letter from Cross, but there were other letters that Powell was burning as well. (T. 379) When Powell was burning the letter from Michael, she stated, "I'm burning letters of evidence." (T. 386)

Powell had a backpack in which she kept "personal stuff," such as a notepad, lipstick, and Mountain Dew bottle. (T. 378) Unless she went to the store with Oplander, Powell always took her backpack with her. (T. 378) As far as Mishoe knew, all of Powell's belongings were in the backpack. (T. 378)

Mishoe met Charles Freeman at Oplander's home at a party. (T. 374) Since then, Freeman visited Oplander's home maybe two or three times. (T. 374) Mishoe saw Freeman only twice. (T. 384)

Reverend Gardner testified that he knew Cynthia Powell since she was age sixteen but that he had not seen her during the last 1 1/2 to 2 years, except to visit her in jail after she was arrested in the instant case. (T. 394, 396-397) He knew some of her classmates who attended the same church, but he did not know her other acquaintances, co-workers, or friends. (T. 394-395) He had kept in touch with Powell's mother and stepfather since they moved to Rhode Island 1 1/2 years ago. (T. 396)

The jury acquitted Cross and convicted Powell. (T. 514-515) The trial court did not formally adjudicate Powell guilty. (T. 517-518)

Thereafter, Powell filed a motion to arrest the judgment because of the inconsistent verdicts. (R. 73-74) The trial court granted the motion stating:

> I have a very sophisticated memorandum directed to the issue. It is not law of which I approve, but I have the duty to follow it. I think that it is wrong, it is wrong logically, because the courts permit convictions to stand if their trials are not conducted simultaneously, which makes no sense whatsoever, however, had the charging instrument in this case said, "and others," the conviction could have been sustained. In any event, judgment is arrested.

(T. 522) The trial court reduced its verbal order to writing and incorporated by reference a legal memorandum that was prepared by its law clerk. (R. 79-92)

The State appealed the order arresting judgment. (R. 95) It argued that the rule of consistency in verdicts was an unsound doctrine which should be abandoned. The First District "doubt[ed] the continued viability" of this doctrine, given that the federal law on which it was based had been overruled. It "reluctantly" affirmed the trial court's order with a certified question to this Court:

> DOES THE "RULE OF CONSISTENCY" EXCEPTION, AS IT RELATES TO A JURY VERDICT IN A SINGLE CASE AND TRIAL WHERE ALL BUT ONE OF THE CO-CONSPIRATORS ARE ACQUITTED, REMAIN VIABLE IN FLORIDA FOLLOWING THE DECISIONS IN UNITED STATES V. POWELL, 469 U.S. 57 (1984) AND UNITED STATES V. ANDREWS, 850 F.2D 1557 (11TH CIR. 1988), CERT. DENIED, 488 U.S. 1032 (1989), THE LATTER OF WHICH OVERRULED FEDERAL CASE LAW UPON WHICH THE FLORIDA EXCEPTION WAS ORIGINALLY BASED?

SUMMARY OF ARGUMENT

The answer to the certified question is a resounding "No." The acquittal of one conspirator should be legally irrelevant to the conviction of the other conspirator. Acquittals may result from factors unrelated to the defendant's guilt, such as compromise, lenity, or inadmissibility of evidence. Acquittals are not subject to review, nor are they susceptible to interpretation. No remedial procedures exist for correcting erroneous acquittals, the burden for which falls only on the government and its citizens. On the other hand, criminal defendants are afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence by both the trial and appellate courts.

There can be no doubt in the instant case of Powell's guilt. The evidence was overwhelming. To prove its case, the State relied on Powell's conduct--numerous telephone conversations with Cross during which she wore gloves, took notes, and discussed a suicide note; procurement, or attempted procurement, of items needed to commit murder, such as a gun, getaway vehicle, razor blade, pills, gloves; acquisition of knowledge required to commit murder; suicide notes written for the victim to copy in her own handwriting; murder plan reduced to writing, which included a "shopping" list. The State further relied on Powell's admissions. She admitted she intended to kill L M , and that her boyfriend had asked her to do it.

ARGUMENT

CERTIFIED QUESTION

DOES THE "RULE OF CONSISTENCY" EXCEPTION, AS IT RELATES TO A JURY VERDICT IN A SINGLE CASE AND TRIAL WHERE ALL BUT ONE OF THE CO-CONSPIRATORS ARE ACQUITTED, REMAIN VIABLE IN FLORIDA FOLLOWING THE DECISIONS IN UNITED STATES V. POWELL, 469 U.S. 57 (1984) AND UNITED STATES V. ANDREWS, 850 F.2D 1557 (11TH CIR. 1988), CERT. DENIED, 488 U.S. 1032 (1989), THE LATTER OF WHICH OVERRULED FEDERAL CASE LAW UPON WHICH THE FLORIDA EXCEPTION WAS ORIGINALLY BASED?

This Court has addressed the issue of inconsistent verdicts in various contexts but not in the context of joint trials of co-conspirators, which is at issue in the instant case. Mahaun v. State, 377 So. 2d 1158, 1161 (Fla. 1979) and Redondo v. State, 403 So. 2d 954 (Fla. 1981) involved simultaneous inconsistent jury verdicts against a single defendant on a multiple-count information. The rule of consistency was applied in these cases to prohibit conviction of a compound offense where there was an acquittal of the predicate offense.

Potts v. State, 430 So. 2d 900 (Fla. 1982) involved inconsistent jury verdicts against two defendants tried separately. The principal was tried first, then the aider-abetter; the principal was acquitted but the aider-abettor convicted. The rule of consistency was not applied because "acquittals can result from many factors other than guilt or innocence," such as jury lenity or inadmissibility of evidence, and there is no mechanism for the State to appeal an erroneous acquittal. Id., at 903.

Eaton v. State, 438 So. 2d 822 (Fla. 1983) involved inconsistent jury verdicts against two defendants tried jointly. The gun-wielder was convicted of a lesser degree of murder than was his cohort. The rule of consistency was again rejected for the reasons set out in Potts.

Prior to the instant case, four of the district courts of appeal (First, Second, Third, and Fourth) had applied the rule of consistency in conspiracy trials: Pearce v. State, 330 So. 2d 783 (1st DCA 1976); Filer v. State, 285 So. 2d 669 (Fla. 2d DCA 1973)[1]; Cravero v. State, 334 So. 2d 152 (Fla. 3rd DCA 1976) (dicta); and Register v. State, 585 So. 2d 1146 (Fla. 4th DCA 1991). These cases relied on federal law which has since been overruled.

In DeAngelo v. State, 312 So. 2d 735 (Fla. 1975), DeAngelo was tried and convicted of conspiracy to commit robbery. Later, the coconspirator was charged with conspiracy and robbery. He was acquitted of conspiracy but convicted of robbery. The record established that DeAngelo was the wheel man and the co-conspirator the robber. DeAngelo's conviction was affirmed, and he sought review in this Court based on alleged conflict with Filer. This Court held that "where the co-conspirator was

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[1] The result reached in Filer is consistent with the result reached in Hartzel v. United States, 322 U.S. 680, 682 n. 3 (1944); however, both of these cases are distinguishable from the instant case. There, as a matter of law, the State had failed to prove a conspiracy. That is not true here. The State presented evidence from which, if believed, the jury could find beyond a reasonable doubt that Powell conspired with Cross to murder L M.

convicted of a substantive offense, we find no conflict with Filer." In principle, DeAngelo supports the State's position, for only one of two conspirators was convicted of conspiracy, albeit in separate trials.

Turning now to federal law, five supreme court cases are relevant to this issue: Dunn v. United States, 284 U.S. 390 (1932); United States v. Dotterweich, 320 U.S. 277 (1943); Standefer v. United States, 447 U.S. 10 (1980); Harris v. Rivera, 454 U.S. 339 (1981); and United States v. Powell, 469 U.S. 57 (1984).

In Dunn v. United States, 284 U.S. 390 (1932), the defendant was indicted in a three-count information for (1) maintaining a nuisance by keeping liquor for sale; (2) unlawfully possessing liquor; and (3) unlawfully selling liquor. The government's evidence was the same on all three counts. The jury convicted the defendant on the first count but acquitted him on the other two counts. The defendant argued that the verdicts were inconsistent. Affirming the conviction, the supreme court through Justice Holmes held that consistency in the verdicts was not necessary:

> The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

> That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters. [citations and internal quotation marks omitted]

Id., at 393-394.

In United States v. Dotterweich, 320 U.S. 277 (1943), a corporation and its president/general manager were tried together for violating the Federal Food, Drug, and Cosmetic Act. The jury acquitted the corporation but convicted the corporate officer. The supreme court through Justice Frankfurter summarily disposed of the defendant's argument that the verdicts were inconsistent:

> Equally baseless is the claim of Dotterweich that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries.

Id., at 279.

In Standefer v. United States, 447 U.S. 10 (1980), the supreme court considered the effect of a principal's acquittal on the case against his accessory. An Internal Revenue Service agent was acquitted of receiving illegal payments. Standefer was later tried and convicted of aiding and abetting this IRS agent in accepting illegal payments. Standefer argued that (1) the aiding and abetting statute did not authorize this result, and that (2) the agent's prior acquittal barred the government from

relitigating the issue of the agent's guilt in connection with the defendant's own prosecution. Justice Burger, writing for a unanimous court, held that (1) a principal's prior acquittal is irrelevant to the prosecution of the accessory, and that (2) application of the doctrine of nonmutual collateral estoppel against a criminal prosecution was inappropriate. As to this latter holding, the court stated:

> Here, petitioner urges us to apply nonmutual estoppel against the Government; specifically he argues that the Government should be barred from relitigating Niederberger's guilt under § 7214(a)(2) in connection with the vacation trips to Pompano Beach, Miami, and Absecon. That issue, he notes, was an element of his offense which was determined adversely to the Government at Niederberger's trial.
>
> This, however, is a criminal case, presenting considerations different from those in **Blonder-Tongue** or **Parklane Hosiery**. First, in a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so: the prosecution's discovery rights in criminal cases are limited both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence; and it cannot secure appellate review where a defendant has been acquitted.
>
> The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of their assumption of a power which they had no right to exercise, but to which they were disposed through lenity. It is of course

true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors. Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect.

The application of nonmutual estoppel in criminal cases is also complicated by the existence of rules of evidence and exclusion unique to our criminal law. It is frequently true in criminal cases that evidence inadmissible against one defendant is admissible against another. The exclusionary rule, for example, may bar the Government from introducing evidence against one defendant because that evidence was obtained in violation of his constitutional rights. And the suppression of that evidence may result in an acquittal. The same evidence, however, may be admissible against other parties to the crime whose rights were [not] violated. In such circumstances, where evidentiary rules prevent the Government from presenting all its proof in the first case, application of nonmutual estoppel would be plainly unwarranted.

It is argued that this concern could be met on a case-by-case basis by conducting a pretrial hearing to determine whether any such evidentiary ruling had deprived the Government of an opportunity to present its case fully the first time around. That process, however, could prove protracted and burdensome. Under such a scheme, the Government presumably would be entitled to seek review of any adverse evidentiary ruling rendered in the first proceeding and of any aspect of the jury charge in that case that worked to its detriment. Nothing short of that would insure that its opportunity to litigate had been "full and fair." If so, the "pretrial hearing" would fast become a substitute for appellate review, and the very purpose of litigation economy that estoppel is designed to promote would be frustrated.

> Finally, this case involves an ingredient not present in either **Blonder-Tongue** or **Parklane Hosiery:** the important federal interest in the enforcement of the criminal law. **Blonder-Tongue** and **Parklane Hosiery** were disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation. That is not so here. *** The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. ***
>
> *** This case does no more than manifest the simple, if discomforting, reality that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. While symmetry of results may be intellectually satisfying, it is not required. [citations and internal quotation marks omitted]

Id., at 22-25. This Court in Potts found the reasoning of the supreme court in Standefer to be both "sound and compelling." 430 So. 2d at 903.

In Harris v. Rivera, 454 U.S. 339 (1981), Robinson and Harris were tried together in a bench trial, which resulted in Robinson's acquittal and Rivera's conviction. The supreme court denied Rivera habeas relief, stating:

> Apart from the acquittal of Robinson, this record discloses no constitutional error. Even assuming that this acquittal was logically inconsistent with the conviction of respondent, respondent, who was found guilty beyond a reasonable doubt after a fair trial,

> has no constitutional ground to complain that Robinson was acquitted.

Id., at 348.

The most recent supreme court case is United States v. Powell, 469 U.S. 57 (1984). There, the defendant was indicted, inter alia, on counts of possession of cocaine with intent to distribute, conspiracy to do so, and use of the telephone to facilitate narcotics violations. The jury convicted the defendant of the telephone charge but acquitted him of the other charges. For purposes of appellate review, the government conceded that the verdicts were inconsistent. Id., at 61, n. 5. In a unanimous decision written by Justice Rehnquist, the defendant's conviction was upheld. The court stated:

> The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote [from Dunn] suggests, inconsistent verdicts--even verdicts that acquit on a predicate offense while convicting on the compound offense--should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.
>
> Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored.

Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. Harris v. Rivera, supra, indicates that nothing in the Constitution would require such a protection, and we therefore address the problem only under our supervisory powers over the federal criminal process. For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest. This possibility is a premise of Dunn's alternative rationale--that such inconsistencies often are a product of jury lenity. Thus, Dunn has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercise of power by the Executive Branch.

The burden of the exercise of lenity falls only on the Government, and it has been suggested that such an alternative should be available for the difficult cases where the jury wishes to avoid an all-or-nothing verdict. Such an act is, as the Dunn Court recognized, an assumption of a power which [the jury has] no right to exercise, but the illegality alone does not mean that such a collective judgment should be subject to review. The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable.

We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. ***

> Finally, we note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilty beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary. [citations omitted]

Id., at 64-67.

Subsequent to the decision in Powell, several of the federal circuits have reversed their prior case law which had held that when all but one of the charged conspirators are acquitted, the verdict against the one will not stand. Decisions of the Fifth and Eleventh Circuits are especially relevant to the instant appeal: Herman v. United States, 289 F.2d 362 (5th Cir. 1961); United States v. Andrews, 850 F. 2d 1557 (11th Cir. 1988), cert. denied, 488 U.S. 1032 (1988); United States v. Zuniga-Salinas, 952 F.2d 876 (5th Cir. 1992).

In Herman, the second count of an indictment charged Slofsky and Rapaport with receiving stolen property in interstate commerce, and the third count charged Herman, Selander, Slofsky, and Rapaport with conspiracy. The conspiracy count alleged two

overt acts, one involving Herman and Selander, and the other involving Slofsky and Rapaport. The judge struck the first overt act involving Herman and Selander. Selander pled guilty to the third count and did not testify at trial. The jury acquitted Slofsky and Rapaport but convicted Herman. The Fifth Circuit reversed Herman's conviction on the third count:

> A conspiracy cannot be committed by a single individual acting alone; he must act in concert with at least one other person. *** But where all but one of the charged conspirators are acquitted, the verdict against the one will not stand. Similarly, where the substantive offense is the overt act supporting the conviction on the conspiracy count, an acquittal of the substantive offense operates as an acquittal of the conspiracy count, if the acquittal of the substantive offense constitutes a determination that the overt act was not committed. *** In this case the jury decided that Slofsky and Rapaport were not conspirators. That finding erased the slate of any overt act performed by a conspirator. Consequently count three falls for failure to prove an overt act--performed by a conspirator--to support the conspiracy. [citations omitted]

Id., at 368.

In 1988, the Eleventh Circuit en banc, with one dissenter, in Andrews overruled Herman:

> Upon reconsideration of the consistency issue as a full Court, we overrule Herman. Consistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirators are acquitted, the verdict against the one can stand. The compelling rationale of Dunn and its progeny, including Powell, brings us to this conclusion. Andrews urges us to view the jury's verdict in favor of Ford as a finding that no conspiracy existed between Andrews

> and Ford. There are, however, explanations for this inconsistency that have nothing to do with whether Andrews actually conspired with Ford to commit a crime. It is just as likely that the admittedly inconsistent verdicts in this case are "the result of mistake, or lenity, and therefore [they] are subject to the Dunn rationale." Powell, ... Under the circumstances, "the best course to take is simply to insulate jury verdicts from review on this ground." Id., ...

Id., at 1561-62.

In 1992, the Fifth Circuit en banc in Zuniga-Salinas also overruled Herman:

> We determined, sua sponte, to rehear this case en banc, in order to consider whether a verdict convicting one defendant of conspiracy must be set aside where an inconsistent verdict is returned in the same trial acquitting the sole alleged co-conspirator. Concluding that an inconsistent verdict is not a bar to conviction, we reverse the district court's judgment of acquittal on the conspiracy count. In so doing, we overrule Herman ... and its progeny.
>
> *** The appellant, Nolberto Zuniga-Salinas, was convicted of possession of marihuana with intent to distribute. Though the jury found him guilty of conspiracy to possess marihuana, the district court granted his motion for acquittal on that count because of the jury's acquittal of his co-defendant, Ruben Olvera-Garcia. The district court, while predicting that this court ultimately would change its posture on this issue, perceived itself bound by United States v. Sheikh, ... (1982), in which we held that "the conviction of only one defendant will not be upheld when all other alleged co-conspirators on trial are acquitted." ***
>
> *** An inconsistent verdict should no longer be a bar to conviction where all other co-conspirators are acquitted. For the reasons enunciated in Powell (including specifically

> the possibility of mistake, compromise, or lenity, and the independent availability of sufficiency-of-the evidence review), such verdicts should not be subject to review for inconsistency. [citations omitted]

Id., at 877. This was a unanimous decision by fourteen judges.

See, also, United States v. Bucuvalas, 909 F. 2d 593, 597 (1st Cir. 1990) (rule of consistency no longer viable); United States v. Hughes Aircraft Co., Inc., 20 F. 3d 974, 977-978 (9th Cir. 1994) (conviction of coconspirator valid even when others are acquitted); United States v. Thomas, 900 F. 2d 37, 40 (4th Cir. 1990) (acquittal not required where other defendant acquitted, regardless of inconsistency of verdict); United States v. Acosta, 17 F. 3d 538, 544-545 (2d Cir. 1994) (acquittal of other coconspirators not grounds for reversal); United States v. Dakins, 872 F. 2d 1061, 1065-66 (D.C. Cir. 1989) ("[E]ven if Dakins' conviction could be deemed an 'inconsistent verdict,' this jurisdiction has not adopted the rule of consistency, and we decline to do so today"). Zuniga-Salinas provides other citations. 952 F. 2d at 878, n 2.

Several other states have been persuaded by the reasoning of Powell and its progeny. See, e.g., Pennsylvania v. Campbell, 651 A. 2d 1096 (Pa. 1994) (defendant's conspiracy conviction upheld in joint trial in which sole alleged co-conspirator was acquitted)[2]; South Carolina v. Alexander, 401 S.E. 2d 146, 150

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[2] See, also, Chad W. Coulter, "The Unnecessary Rule of Consistency in Conspiracy Trials," 135 U. Pa. L. Rev. 223 (1986), cited with approval in Campbell at 1098-1099, n 2.

(S.C. 1991) (defendant's conviction upheld against a challenge that jury rendered inconsistent verdicts on different counts of multi-count indictment); Milam v. Georgia, 341 S.E. 2d 216, 218 (Ga. 1986) (same); Ohio v. Hicks, 538 N.E. 2d 1030, 1037 (Ohio 1989) (same); Massachusetts v. Harrison, 517 N.E. 2d 494 (Mass. App. Ct. 1988) (same); Wade v. Arkansas, 716 S.W. 2d 194, 195 (Ark. 1986) (same); Tilden v. Delaware, 513 A. 2d 1302, 1304-1307 (Del. 1986) (same)[3]; New Hampshire v. Brown, 565 A. 2d 1035, 1039-1040 (N.H. 1989); Vermont v. Carpenter, 580 A.2d 497, 500 (Vt. 1990); Ransom v. United States, 630 A. 2d 170, 172 (D.C. App. 1993); Utah v. Stewart, 729 P.2d 610, 611-614 (Utah 1986) (defendant's murder conviction upheld in joint trial in which two co-defendants were acquitted); and Sauceda v. Texas, 739 S.W.2d 375 (Tex. App. 1987) (defendant's conviction upheld against a challenge that jury rendered a verdict that was inconsistent with its special issue finding).

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[3] The Tilden court stated at 1306:

> Inconsistent verdicts may take the form of acquittal of a predicate offense but conviction of a compound offense; or conviction of a lesser included offense which implicitly results in an acquittal of a more serious offense the aggravating element of which is required for the conviction of a related compound offense. *** The rationale underlying the principle of verdict consistency is that the convictions must be logically responsive to integrated counts in a multicount indictment. But this is not the prevailing view. *** If the inconsistency can be explained in terms of jury lenity, the convictions may stand.

To summarize, a guilty verdict should not be set aside merely because it is inconsistent with a verdict of acquittal against the same or different defendants in separate or joint trials. There are at least seven reasons supporting this proposition:

1. An acquittal is not subject to review, nor is it susceptible to interpretation.

2. Since juries have unreviewable power to exercise lenity, it cannot be presumed that an acquittal is the equivalent of a verdict of innocence.

3. Courts are not clairvoyant; they cannot divine the reasons for a jury acquittal.

4. Speculation about jury deliberations is unwise.

5. Evidentiary review safeguards against erroneous guilty verdicts.

6. The government has no recourse to correct erroneous acquittals.

7. Assuming the validity of an acquittal to justify invalidating a guilty verdict is unfair to the government.

There can be no doubt in the instant case of Powell's guilt. The evidence was overwhelming. To prove its case, the State relied on Powell's conduct--numerous telephone conversations with Cross during which she wore gloves, took notes, and discussed a suicide note; procurement, or attempted procurement, of items needed to commit murder, such as a gun, getaway vehicle, razor blade, pills, gloves; acquisition of knowledge required to commit murder; suicide notes written for the victim to copy in her own handwriting; murder plan reduced to writing, which included a "shopping" list. (T. 47, 51-52, 56-74, 89-90, 97-98, 102, 118,

128-129, 133-134, 142-143) The State further relied on Powell's admissions. She admitted she intended to kill L' M. , and that her boyfriend had asked her to do it. (T. 104, 124, 197-198, 204, 221, 223)

By finding Powell guilty, the jury clearly articulated its certainty of the existence of a criminal agreement between Powell and Cross and Powell's participation in that agreement. Had Powell been tried separately, she could not have challenged the verdict on the ground raised here. The result should be no different merely because she was tried jointly. If the province of the jury is invaded when a guilty verdict is set aside in separate trials because of inconcistent verdicts, Potts, 430 So. 2d at 903, a fortiori, it is invaded when the same thing happens in a joint trial.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to quash the decision of the First District and reverse the trial court's order arresting the judgment for conspiracy to commit murder.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Carolyn J. Mosley

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

James W. Rogers

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to (1) Christopher R. DeMetros, attorney for respondent, 7952 Normandy Boulevard, Jacksonville, Florida, 32221 this 7th day of November, 1995.

Carolyn J. Mosley
Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 86-561

CYNTHIA L. POWELL,

Respondent.
_____/

APPENDIX

Copy of opinion of First District court of Appeal in the instant case

protect victims of domestic abuse from future violent acts, to prevent future abusive criminal conduct, and to assist in rehabilitation, we agree that the special condition imposed here is invalidly broad.

The United States Supreme Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights" and that "[t]he First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life.' " *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545, 107 S. Ct. 1940 (1987), *quoting Roberts v. United States Jaycees*, 468 U.S. 609, 619-620, 104 S. Ct. 3244 (1984). Nevertheless, the Florida Supreme Court has determined that the "constitutional rights of probationers are limited by conditions of probation which are desirable for purposes of rehabilitation," *Biller v. State*, 618 So. 2d 734 (Fla. 1993), and that "[a] trial court has the authority to impose any valid condition of probation which would serve a useful rehabilitative purpose." *Hines v. State*, 358 So. 2d 183, 185 (Fla. 1978). Thus, trial courts have broad discretion to impose various conditions of probation, but a condition of probation cannot be imposed if it is not reasonably related to rehabilitation. *Nank v. State*, 646 So. 2d 762 (Fla. 2d DCA 1994); *Coulson v. State*, 342 So. 2d 1042, 1043 (Fla. 4th DCA 1977).

The court in *Biller* ruled that, in determining whether a condition of probation is reasonably related to rehabilitation, a condition is invalid "if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." *Biller*, 618 So. 2d at 734-735, *quoting Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. 2d DCA 1979). The *Biller* court made it clear that all *Rodriguez* factors must be present to hold a special probation condition invalid when it stated that "a special condition of probation, when challenged on grounds of relevancy, will only be upheld if the record supports *at least one* of the circumstances outlined in *Rodriguez*." *Biller*, 618 So. 2d at 735 (emphasis added).

We conclude that the special condition of probation imposed below meets all three *Biller* criteria and is, therefore, invalid. *Biller*, *id.*; *Brodus v. State*, 449 So. 2d 941 (Fla. 2d DCA 1984). In *Brodus*, the court struck a condition of probation which provided that the defendant "must not live with [a] member of [the] opposite sex that is not [a] relative. . . ." 449 So. 2d at 942. The *Brodus* court found that this probation condition was invalid under all three *Rodriguez* criteria. Admittedly, the instant case appears distinguishable from *Brodus*, since the defendant in *Brodus* had been placed on probation following a conviction for possession of marijuana, a crime totally unrelated to the probation condition. However, any connection between the condition of probation here and Stephens' domestic violence criminal offenses is merely superficial. The record here reflects that, since 1992, Stephens' criminal acts towards his girlfriend have occurred when they were not living together. Thus, there is no evidence to establish that his violent behavior is related to his cohabitation with the victim. Because cohabitation with a female is not rationally related to his criminal conduct, the condition prohibiting cohabitation is an overly broad special condition of probation under the first *Biller* criteria. Similarly, the condition of probation at issue also is not reasonably related to future criminality under the third *Biller* criteria.

As to the second *Biller* criteria, the condition of probation imposed below clearly covers conduct which is not necessarily in itself criminal. Living with a member of the opposite sex with whom one is not married or related by blood or marriage does not necessarily constitute a violation of the law. *Brodus*, 449 So. 2d at 942; *Mays v. State*, 349 So. 2d 792 (Fla. 2d DCA 1977). In addition, as worded, the challenged condition cannot be viewed as simply a requirement that appellant is to abide by the law,[1] because it also prohibits the so-called "innocent roommate" situation discussed in *Brodus*. *Id.* *Compare*, *Miller v. State*, 520 So. 2d 80 (Fla. 1st DCA 1988).

Accordingly, the special condition imposed below as the tenth condition of probation is invalid under *Biller*. We REVERSE and REMAND with the instruction that the order of probation be amended in accordance with this opinion. (MICKLE, J. CONCURS; WEBSTER, J., CONCURS IN RESULT.)

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[1]Section 798.02, Florida Statutes (1993), prohibits any man and woman, who are not married to each other, from "lewdly and lasciviously" associating and cohabitating with each other.

* * *

Criminal law—Conspiracy to murder—Verdicts—Order arresting judgment following defendant's conviction of conspiracy to commit murder while her sole co-conspirator was acquitted is affirmed—Although inconsistent verdicts in criminal cases are generally permissible, where all named co-conspirators are tried together and no unidentified co-conspirators are alleged, an acquittal of all co-conspirators but one requires acquittal of the remaining defendant—Question certified: Does the "rule of consistency" exception, as it relates to a jury verdict in a single case and trial where all but one of the co-conspirators are acquitted, remain viable in Florida following the decisions in *United States v. Powell* and *United States v. Andrews*, the latter of which overruled federal case law upon which the Florida exception was originally based?

STATE OF FLORIDA, Appellant, v. CYNTHIA LYNN POWELL, Appellee. 1st District. Case No. 94-1657. Opinion filed September 5, 1995. An appeal from the Circuit Court for Duval County. Aaron Bowden, Judge. Counsel: Robert A. Butterworth, Attorney General; Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellant. Christopher R. DeMetros, Jacksonville, for Appellee.

(LAWRENCE, J.) The State seeks reversal of a final order arresting judgment following Cynthia Lynn Powell's conviction of conspiracy to commit murder. The trial judge felt compelled to grant Powell's motion based upon this court's decision in *Pearce v. State*, 330 So. 2d 783 (Fla. 1st DCA), *cert. denied*, 341 So. 2d 293 (Fla. 1976), while expressing his view that the principle of law involved is incorrect. We likewise affirm the trial court's order because of our decision in *Pearce*, but do so reluctantly for the reasons expressed in this opinion. We consider the issue involved to be one of great public importance and we thus certify a question to the supreme court.

Powell and her boyfriend, Michael Cross, were jointly charged with conspiring to murder the victim of an alleged sexual battery. Cross previously had been charged with committing the sexual battery, and was in jail awaiting trial at the time he and Powell were charged with the conspiracy count in the instant case. The amended information charged that the two "did agree, *conspire*, combine or confederate *with each other* to commit Murder contrary to the provisions of Sections 782.04(1)(a) and 777.04(3), Florida Statutes." (Emphasis added.) At trial, the jury acquitted Cross, but Powell was convicted as charged. Powell moved to arrest judgment, arguing that the jury verdict was inconsistent and that she was entitled to discharge. The trial court granted the motion, resulting in this appeal by the State.

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The general rule that inconsistent verdicts in criminal cases are permissible was established long ago in *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932). Then, in 1961, the Fifth Circuit Court of Appeals in *Herman* carved out an exception to the general rule. This exception provided that,

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Faced with *Powell*, the Eleventh Circuit, sitting en banc in *Andrews*, receded from its holding in *Herman*, saying:

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While the underlying federal case law has changed, the parties and our independent research reveal no Florida case which addresses this issue in light of *Powell* and *Andrews*. Therefore, based upon our decision in *Pearce*, we must affirm. At the same time, we doubt the continued viability of the "consistency rule" in Florida, since its underpinnings have been removed. Accordingly, we certify the following question to the supreme court as one of great public importance:

> DOES THE "RULE OF CONSISTENCY" EXCEPTION, AS IT RELATES TO A JURY VERDICT IN A SINGLE CASE AND TRIAL WHERE ALL BUT ONE OF THE CO-CONSPIRATORS ARE ACQUITTED, REMAIN VIABLE IN FLORIDA FOLLOWING THE DECISIONS IN *POWELL*[1] and *ANDREWS*,[2] THE LATTER OF WHICH OVERRULED FEDERAL CASE LAW UPON WHICH THE FLORIDA EXCEPTION WAS ORIGINALLY BASED?

(WOLF and WEBSTER, JJ., CONCUR.)

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[1]*United States v. Powell*, 469 U.S. 57, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984).

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Workers' compensation—Wage loss benefits—Seventy-eight-week limitation on wage loss eligibility set forth in section 440.15(3)(b)4.d.(III), Florida Statutes (1991), provides for cumulative limitation on eligibility which is not confined to uninterrupted period immediately after maximum medical improvement, or uninterrupted period commencing when claimant first seeks wage loss benefits—Section 440.15(3)(b)4.d. does not violate constitutional guarantees of access to courts, due process, or equal protection as statute is scrutinized under rational basis test—Language in federal Americans with Disabilities Act finding that disabled individuals are a discrete and insular minority does not justify use of heightened scrutiny of statute's constitutionality

WINN DIXIE and CRAWFORD & COMPANY, Appellants, v. JEANNIE A. RESNIKOFF, Appellee. 1st District. Case No. 94-2152. Opinion filed September 5, 1995. An appeal from Order of the Judge of Compensation Claims. Douglas Brown, Judge. Counsel: M. Kemmerly Thomas and Mary E. Cruickshank of McConnaughhay, Roland, Maida & Cherr, Tallahassee, for Appellants. Jerold Feuer, Miami, and John F. Law, Jr., Panama City, for Appellee.

(ALLEN, J.) The employer/servicing agent appeal a workers' compensation order by which the claimant was awarded wage loss benefits. They contend that the 78 week limitation on wage loss eligibility under section 440.15(3)(b)4.d.(III), Florida Statutes (1991), should have been applied in an uninterrupted consecutive manner so as to preclude the award. On cross-appeal the claimant contends that section 440.15(3)(b)4.d. offends constitutional guarantees of access to the courts, due process, and equal protection. We conclude that the 78 week limitation in section 440.15(3)(b)4.d. was properly applied as a cumulative limit on wage loss eligibility.

Section 440.15(3)(b)4. provides:

> The right to wage-loss benefits shall terminate upon the occurrence of the earliest of the following:
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> b. For injuries occurring on or before July 1, 1980, 350 weeks after the injured employee reaches the date of maximum medical improvement.
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> c. For injuries occurring after July 1, 1980, but before July 1, 1990, 525 weeks after the injured employee reaches maximum medical improvement.
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> d. For injuries occurring after June 30, 1990, the employee's eligibility for wage-loss benefits shall be determined according to the following schedule:
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> (III) Seventy-eight weeks of eligibility for permanent impairment ratings greater than 6 and up to and including 9 percent.

The employer/servicing agent argue that the 78 weeks of eligibility under section 440.15(3)(b)4.d(III) should commence immediately upon the attainment of maximum medical improvement and expire 78 calendar weeks thereafter, without interruption and without regard to whether the claimant was otherwise entitled to wage loss benefits for that entire period of time. In declining to adopt this interpretation of the statute, the judge contrasted the general grant of eligibility in section 440.15(3)(b)4.d with the more specific language in section 440.15(3)(b)4.b and c, which expressly terminates the right to wage loss benefits upon the expiration of a certain number of weeks after maximum medical improvement. Based on this

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 86-561

CYNTHIA L. POWELL,

Respondent.
_____/

APPENDIX

Copy of opinion of First District court of Appeal in the instant case

protect victims of domestic abuse from future violent acts, to prevent future abusive criminal conduct, and to assist in rehabilitation, we agree that the special condition imposed here is invalidly broad.

The United States Supreme Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights" and that "[t]he First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life.' " *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545, 107 S. Ct. 1940 (1987), *quoting Roberts v. United States Jaycees*, 468 U.S. 609, 619-620, 104 S. Ct. 3244 (1984). Nevertheless, the Florida Supreme Court has determined that the "constitutional rights of probationers are limited by conditions of probation which are desirable for purposes of rehabilitation," *Biller v. State*, 618 So. 2d 734 (Fla. 1993), and that "[a] trial court has the authority to impose any valid condition of probation which would serve a useful rehabilitative purpose." *Hines v. State*, 358 So. 2d 183, 185 (Fla. 1978). Thus, trial courts have broad discretion to impose various conditions of probation, but a condition of probation cannot be imposed if it is not reasonably related to rehabilitation. *Nank v. State*, 646 So. 2d 762 (Fla. 2d DCA 1994); *Coulson v. State*, 342 So. 2d 1042, 1043 (Fla. 4th DCA 1977).

The court in *Biller* ruled that, in determining whether a condition of probation is reasonably related to rehabilitation, a condition is invalid "if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." *Biller*, 618 So. 2d at 734-735, *quoting Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. 2d DCA 1979). The *Biller* court made it clear that all *Rodriguez* factors must be present to hold a special probation condition invalid when it stated that "a special condition of probation, when challenged on grounds of relevancy, will only be upheld if the record supports *at least one* of the circumstances outlined in *Rodriguez*." *Biller*, 618 So. 2d at 735 (emphasis added).

We conclude that the special condition of probation imposed below meets all three *Biller* criteria and is, therefore, invalid. *Biller*, *id.*; *Brodus v. State*, 449 So. 2d 941 (Fla. 2d DCA 1984). In *Brodus*, the court struck a condition of probation which provided that the defendant "must not live with [a] member of [the] opposite sex that is not [a] relative. . . ." 449 So. 2d at 942. The *Brodus* court found that this probation condition was invalid under all three *Rodriguez* criteria. Admittedly, the instant case appears distinguishable from *Brodus*, since the defendant in *Brodus* had been placed on probation following a conviction for possession of marijuana, a crime totally unrelated to the probation condition. However, any connection between the condition of probation here and Stephens' domestic violence criminal offenses is merely superficial. The record here reflects that, since 1992, Stephens' criminal acts towards his girlfriend have occurred when they were not living together. Thus, there is no evidence to establish that his violent behavior is related to his cohabitation with the victim. Because cohabitation with a female is not rationally related to his criminal conduct, the condition prohibiting cohabitation is an overly broad special condition of probation under the first *Biller* criteria. Similarly, the condition of probation at issue also is not reasonably related to future criminality under the third *Biller* criteria.

As to the second *Biller* criteria, the condition of probation imposed below clearly covers conduct which is not necessarily in itself criminal. Living with a member of the opposite sex with whom one is not married or related by blood or marriage does not necessarily constitute a violation of the law. *Brodus*, 449 So. 2d at 942; *Mays v. State*, 349 So. 2d 792 (Fla. 2d DCA 1977). In addition, as worded, the challenged condition cannot be viewed as simply a requirement that appellant is to abide by the law,[1] because it also prohibits the so-called "innocent roommate" situation discussed in *Brodus*. *Id. Compare*, *Miller v. State*, 520 So. 2d 80 (Fla. 1st DCA 1988).

Accordingly, the special condition imposed below as the tenth condition of probation is invalid under *Biller*. We REVERSE and REMAND with the instruction that the order of probation be amended in accordance with this opinion. (MICKLE, J. CONCURS; WEBSTER, J., CONCURS IN RESULT.)

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[1]Section 798.02, Florida Statutes (1993), prohibits any man and woman, who are not married to each other, from "lewdly and lasciviously" associating and cohabitating with each other.

* * *

Criminal law—Conspiracy to murder—Verdicts—Order arresting judgment following defendant's conviction of conspiracy to commit murder while her sole co-conspirator was acquitted is affirmed—Although inconsistent verdicts in criminal cases are generally permissible, where all named co-conspirators are tried together and no unidentified co-conspirators are alleged, an acquittal of all co-conspirators but one requires acquittal of the remaining defendant—Question certified: Does the "rule of consistency" exception, as it relates to a jury verdict in a single case and trial where all but one of the co-conspirators are acquitted, remain viable in Florida following the decisions in *United States v. Powell* and *United States v. Andrews*, the latter of which overruled federal case law upon which the Florida exception was originally based?

STATE OF FLORIDA, Appellant, v. CYNTHIA LYNN POWELL, Appellee. 1st District. Case No. 94-1657. Opinion filed September 5, 1995. An appeal from the Circuit Court for Duval County, Aaron Bowden, Judge. Counsel: Robert A. Butterworth, Attorney General; Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellant. Christopher R. DeMetros, Jacksonville, for Appellee.

(LAWRENCE, J.) The State seeks reversal of a final order arresting judgment following Cynthia Lynn Powell's conviction of conspiracy to commit murder. The trial judge felt compelled to grant Powell's motion based upon this court's decision in *Pearce v. State*, 330 So. 2d 783 (Fla. 1st DCA), *cert. denied*, 341 So. 2d 293 (Fla. 1976), while expressing his view that the principle of law involved is incorrect. We likewise affirm the trial court's order because of our decision in *Pearce*, but do so reluctantly for the reasons expressed in this opinion. We consider the issue involved to be one of great public importance and we thus certify a question to the supreme court.

Powell and her boyfriend, Michael Cross, were jointly charged with conspiring to murder the victim of an alleged sexual battery. Cross previously had been charged with committing the sexual battery, and was in jail awaiting trial at the time he and Powell were charged with the conspiracy count in the instant case. The amended information charged that the two "did agree, *conspire*, combine or confederate *with each other* to commit Murder contrary to the provisions of Sections 782.04(1)(a) and 777.04(3), Florida Statutes." (Emphasis added.) At trial, the jury acquitted Cross, but Powell was convicted as charged. Powell moved to arrest judgment, arguing that the jury verdict was inconsistent and that she was entitled to discharge. The trial court granted the motion, resulting in this appeal by the State.

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Workers' compensation—Wage loss benefits—Seventy-eight-week limitation on wage loss eligibility set forth in section 440.15(3)(b)4.d.(III), Florida Statutes (1991), provides for cumulative limitation on eligibility which is not confined to uninterrupted period immediately after maximum medical improvement, or uninterrupted period commencing when claimant first seeks wage loss benefits—Section 440.15(3)(b)4.d. does not violate constitutional guarantees of access to courts, due process, or equal protection as statute is scrutinized under rational basis test—Language in federal Americans with Disabilities Act finding that disabled individuals are a discrete and insular minority does not justify use of heightened scrutiny of statute's constitutionality

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