

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

DEC 4 1985

CLERK, SUPREME COURT

By *[Signature]*  
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 86-561

CYNTHIA L. POWELL,

Respondent.

MERITS BRIEF OF RESPONDENT

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ISSUE

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?

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PRELIMINARY STATEMENT

Petitioner, State of Florida, will be referred to herein as "State". Appellee, Cynthia L. Powell, who was the Defendant in the trial court, will be referred to herein as the "Respondent".

The record on appeal, consisting of one volume of pleadings, will be referred to herein as "R", and the three volumes of trial transcript will be referred to herein as "T", followed by their respective page numbers.

STATEMENT OF THE CASE AND FACTS

The Respondent concurs with the statement of case and facts with the addition that the initial information filed by the State regarding the Respondent (R - 4) stated that ...Cynthia Lynn Powell, on or between the 30th day of August, 1993 and the 9th day of September, 1993, in the County of Duval in the State of Florida, did agree, conspire, combine or confederate with another person or persons to commit murder, contrary to the provisions of Sections 782.04 and 777.04(3), Florida Statutes. The State amended the information to state in the third count "and for the third count of this information, your informant further charges that Michael Lee Cross and Cynthia Lynn Powell, on or between the 30th day of August, 1993 and the 9th day of September, 1993, in the County of Duval in the State of Florida, did agree, conspire, combine or confederate with each other to commit murder, contrary to provisions of Sections 782.04 and 777.04(3), Florida Statutes." (underlined for emphasis). The State amended the information sheet to add Michael Lee Cross to the information to show that Michael Lee Cross and Cynthia Lynn Powell did conspire with each other and eliminated the phrase "with another person or persons" as was stated in the initial information.

### SUMMARY OF ARGUMENT

The State offered no other evidence of any type, shape or form that there were other individuals involved in this conspiracy other than the two (2) named individuals in the second amended information. There must be an agreement between two or more individuals for a conviction of conspiracy. The State must prove beyond a reasonable doubt that two or more persons in some way or manner came to an agreement to try to accomplish an unlawful plan as charged in the information. When Mr. Cross was acquitted by the jury, that left just one and only one person viable for the offense, which was the Respondent. There was not an individual or individual's name referred to in the case or in the information that the Respondent could have made an agreement with to commit murder. The answer then to the certified question presented to this Honorable Court is "Yes".

## 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?

The Rule of Consistency has been clear in the State of Florida regarding the crime of conspiracy where information filed by the State alleges that where a defendant and other individuals named as co-defendants were the sole perpetrators of the conspiracy and all but one of the co-conspirators were acquitted, then the remaining defendant must be acquitted, as well. Sparkman v. State, 528 So.2d 497 (Fla. 2nd DCA 1988); Pierce v. State, 330 So.2d 783 (Fla. 1st DCA CERT. DENIED, 341 So.2d 293 (Fla. 1976)); Filer v. State, 285 So.2d 669 (Fla. 2nd DCA 1973); and Cravero v. State, 334 So.2d 152 (Fla. 3rd DCA 1976 CERT. DENIED, 342 So.2d 1103 (Fla. 1977)). The Florida cases simply follow the statutes and definitions of conspiracy in that conspiracy is an expressed or implied agreement between two or more people to conspire, combine or confederate with each other to commit a criminal offense. Florida Statutes §777.04(3). The conspiracy cannot be committed by a single individual acting alone, to do otherwise would be contrary to the definition of conspiracy as defined in the Florida Statutes.

The Respondent on September 27, 1993 was charged by the

information with the crime of conspiracy to commit murder contrary to the provisions of Florida Statutes §782.04 and Florida Statutes §777.04(3). In that information (R - 4) the State alleged in its initial information that the Respondent did agree, conspire, combine or confederate with another person or persons to commit murder. (underlined for emphasis) However, on March 17, 1994, the State filed its second amended information (R - 48) and in that third count of the second amended information, stated that Michael Lee Cross and the Respondent did agree, conspire, combine or confederate with each other to commit murder. (underlined for emphasis) The State failed to add the key words "and others" in its second amended information. Had the State placed those two key words in its second amended information, there would probably not be an appeal pending before this Court today. The key words "and others" are essential because of the definition of conspiracy as stated in the Florida Statutes §777.04(3), in that it takes two or more people to commit the crime of conspiracy. Mr. Michael Cross was an essential element of the crime of conspiracy in that two and only two people were named in the second amended information to have committed this crime. When the jury found Mr. Cross not guilty of the crime of conspiracy, that left the Respondent to act alone in committing this crime. The jury found the Respondent guilty of conspiracy, thus, defeating the definition of conspiracy as stated in the Florida Statutes. The State did not produce any other individuals or individual who could have conspired with the Respondent to commit murder.



The transcript is completely void of any indication that could be presented to the jury that other individuals were involved in this crime. There is no evidence or proof whatsoever that the Respondent conspired with anyone else other than Mr. Michael Cross. In Stirone v. United States, 361 U.S. 212 (1960), it was held that a conviction could not stand unless the defendant was convicted solely on the charge and the indictment. If this is true, then that raises the possibility of reversible error. United States v. Peal, 837 F.2d 975 (11th Cir. 1988).

The two cases that are the subject of this certified question, Powell and Andrews, must be dissected in order to properly evaluate the certified question. In Powell, the case did not involve conspiracy. It was a case in which an individual was convicted of using a telephone to perpetrate a crime but was acquitted of the crime itself. As we are all well aware, a conspiracy is a very unusual crime in which it requires two or more people to act in concert to commit an unlawful act. However, in the Powell case, the felony committed does not require two or more people to act in agreement.

In the Andrews decision, it does involve the crime of conspiracy. In Andrews, there were two individuals who were tried jointly for the crime of conspiracy. The two individuals, Mr. Andrews and Mr. Ford, were tried together and Mr. Ford was found not guilty of the crime of conspiracy and Mr. Andrews was found guilty. What makes this case different from the one at bar is that in Andrews, the information, charging document was constructively

amended during the jury instructions in that it stated "Now a government agent such as a confidential source or police officer cannot be a co-conspirator in so much as he is working for the government. Accordingly, in order to find one or both of the defendants guilty of the crime of conspiracy, you must find that each of them conspired with someone other than a government agent." United States v. Andrews, 850 F.2d 5557 at 5559 (11th Cir. 1988). This constructive amendment allowed the jury to allow a conviction of conspiracy for Mr. Andrews with someone else other than Mr. Ford. In the case at bar involving the Respondent, no other individual or individuals were named in the information other than Mr. Cross and the Respondent.

In the decenting opinion that followed in the Andrews decision, Judge Clark brought out the case of Hartzel v. United States, 322 U.S. 680 (1944). In the Hartzel case, there were two defendants charged with the crime of conspiracy, however, one of the co-conspirators' conviction was set aside, thereby leaving the defendant, Hartzel, acting alone in commission of the crime of conspiracy. As was stated in the decenting opinion in United States v. Andrews, 850 F.2d 1557 at 1571 (11th Cir. 1988), "the Court held that it was impossible to sustain the Petitioner's conviction upon...the conspiracy count where the trial court had set aside the convictions of the defendant's only alleged co-conspirators." The Hartzel decision is synonymous with the Respondent's case. In the Respondent's case, Mr. Cross was found not guilty by the jury, leaving the Respondent to act alone in

commission of the crime of conspiracy, which is an impossibility pursuant to the Florida Statutes and the Government Statutes, in the definition of conspiracy. In the Hartzel decision, one of the co-conspirator's conviction was set aside, which left the other co-conspirator guilty of the crime of conspiracy. To find one individual guilty of a crime of conspiracy is contrary to its definition and contrary to the crime itself. One cannot act alone in commission of a crime that requires two individuals to act in concert to facilitate the unlawful act. To do so, is a great injustice allowing one defendant partiality and unequal treatment by the Court.

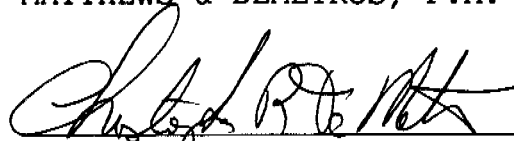
The certified question before us to be answered is yes if it regards crimes other than conspiracy. It makes common sense that one cannot commit a crime that requires two more people if one of the two is found not guilty. For cases that are inconsistent in the crimes of conspiracy, this problem is easily avoidable if the prosecutors would just add two words to their information or indictments and those words are to wit: AND OTHERS. If this was consistently done by the prosecutors then the conviction of one individual for the crime of conspiracy would be consistent.

CONCLUSION

Based on the foregoing, the Respondent respectfully requests that this Honorable Court affirm the decision of the First District Court of Appeal.

Respectfully submitted,


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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 Carolyn J. Mosley and James W. Rogers, Counsel for Petitioner, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, this 1st day of December, 1995.



COUNSEL FOR RESPONDENT