IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CYNTHIA L. POWELL,

Respondent.

CASE NO. 86-561

REPLY BRIEF OF PETITIONER

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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 STATS V. POWELL, 469 U.S. 57 (1984) AND UNITED STATS 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?

Powell distinguishes United States v. Powell, 469 U.S. 57 (1984) on the ground that the instant case involves a conspiracy, whereas Powell did not. (A.B. 6) True, Powell did not address the rule of consistency as it pertains to inconsistent jury verdicts for codefendants at a single trial. It did, however, address the rule with respect to a sole defendant at a single trial. The government conceded that the defendant received inconsistent jury verdicts (two acquittals and one guilty verdict). The inconsistent guilty verdict was upheld by a unanimous supreme court, which stated that an inconsistent verdict means only that; it does not equate to insufficient

evidence to convict.[1] No rational reason exists to treat inconsistent jury verdicts differently merely because two defendants, instead of one, are involved.

Powell distinguishes United States v. Andrews, 850 F. 2d 1557 (11th Cir. 1988) on the ground that the charging document in the instant case listed only two conspirators, whereas the charging document in Andrews was constructively amended to include other unnamed conspirators. (A.B. 6-7) Powell has misread Andrews, which states, in pertinent part:

> NO CONSTRUCTIVE AMENDMENT
> *** Andrews contends that these isolated statements of the district court constructively 'amended' the indictment in violation of his due process rights. According to Andrews, this supposed amendment would

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[1] "Second, respondent's argument that an acquittal on a predicate offense necessitates a finding of insufficient evidence on a compound felony count simply misunderstands the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper--the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily--and erroneously--argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel--which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict--are no longer useful." Powell, 469 U.S. at 68.

> have allowed the jury to convict him of conspiracy with someone other than Ford. *** No such amendment occurred in the instant case. The government never argued anything other than a conspiracy between Ford and Andrews. The district court's instructions, although perhaps ambiguous in part, did not impermissibly expand the scope of the indictment. Andrews was not tried for an offense different from the offenses alleged in the indictment. The Herman issue is properly before us. [citations omitted]

Id., at 1558-1560.

In arguing that Andrews is distinguishable from the instant case, Powell has focused on the first argument that was made by the defendant in Andrews (jury instructions constructively amended indictment). However, Powell has overlooked the fact that this argument was soundly rejected by the Eleventh Circuit. Indeed, had there been a constructive amendment of the indictment, the defendant's conviction would have been reversed, and there would have been no need to address the Herman issue. The issue presented here is identical to the second issue raised in Andrews ("This case concerns an inconsistency between jury verdicts finding one alleged co-conspirator guilty and the other not guilty in a joint trial"). Id., at 1558.

Powell contends that the instant case is like Hartzel v. United States, 322 U.S. 680 (1944). She is mistaken. Hartzel states:

> [T]he trial judge set aside Mecartney's conviction on a motion for a new trial on the ground that there was no evidence that he had any active part in the distribution of the pamphlets produced by petitioner. Soller's conviction was set aside by the court below on the ground that there was no proof that he knew what use petitioner made of the pamphlets. Mecartney and Soller were the only co-conspirators of petitioner named in the indictment and the setting aside of their convictions makes it impossible to sustain petitioner's conviction upon the basis of count 7, the conspiracy count.

Id., at n 3, 682.

When the government fails to present evidence from which, if believed, the jury could find beyond a reasonable doubt that the two named persons conspired with each other to commit a crime, then, of course, both persons must be acquitted. This is a legal issue for the court, totally independent of the jury's verdicts. Hartzel is illustrative. In the instant case, there can be no question but that the State presented evidence from which, if believed, the jury could find beyond a reasonable doubt that Powell and Michael Cross conspired with each other to murder an alleged rape victim. If the State had not presented a prima facie case, then the trial judge would have had no recourse but to grant the defense motion for judgment of acquittal as to both Powell and Cross. Only under that scenario would Hartzel be analogous.

The State's interpretation of Hartzel finds support in U.S. v. Bucuvalas, 909 F. 2d 593, 596-597 (1st Cir. 1990):

> [T]he Hartzel decision ... did not involve inconsistent jury verdicts. Instead, the 'only co-conspirators of petitioner named in the indictment' had their convictions set aside by judges due to insufficient evidence. It has been, and remains, the law that where the evidence against all of an individual's alleged co-conspirators is deemed legally insufficient, the evidence against that individual is by definition also insufficient. *** A court's determination that there is insufficient evidence to convict cannot be equated with a jury's determination that a defendant, for whatever reason, should be acquitted. Accordingly, rather than there being any 'conflict between Powell an Hartzel,' the Court's emphasis in Powell on the sufficiency of the evidence fully embraces the Hartzel ruling. [citations omitted]

The issue in the instant case is whether, notwithstanding the presentation of a prima facie case and the return of a guilty verdict, the defendant, nevertheless, should be discharged because of what happened to the co-defendant (unexplained jury acquittal).

Powell contends that the problem of inconsistent jury verdicts would be resolved by the State adding to the charging document the words "and others." (A.B. 8) That simply is not true. The State cannot arbitrarily add language to a charging document. If the only evidence the State has proves a conspiracy

between two known persons, it cannot accuse the defendant of conspiring with other unknown persons.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to Christopher R. Demetros, attorney for respondent, 7952 Normandy Boulevard, Jacksonville, Florida, 3221 this 19th day of December, 1995.

Carolyn J. Mosley
Assistant Attorney General

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