# SUPREME COURT OF NEW JERSEY

DOCKET NO. 38,113

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| STATE OF NEW JERSEY, | : | **CRIMINAL ACTION** |
| Appellant, | : | On Appeal from Final Judgment of Acquittal NOV of the Superior Court |
| vs. | : | of New Jersey, Law Division, Middlesex County |
| DONALD PETTIES, | : | |
| Defendant-Respondent. | : | Sat Below: Hon. Richard F. Plechner, J.S.C., |
| | : | and a jury. |

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**BRIEF ON BEHALF OF APPELLANT STATE OF NEW JERSEY**

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## STATEMENT OF PROCEDURAL HISTORY

Middlesex County Indictment No. 01910-10-92, filed October 22, 1992, charged defendant Donald A. Petties with five counts of aggravated assault in the fourth degree, contrary to N.J.S.A. 2C:12-1b(4), by knowingly under circumstances manifesting extreme indifference to the value of human life pointing a firearm at or in the direction of Helen Petties (count one), Catherine Pearson (count two), Cassandra Edwards (count three), Jasmine Edwards (count four) and Alton Pearson (count five); two counts of possession of firearms, a .22 caliber rifle and a .25 caliber automatic handgun, with the purpose to use them unlawfully against the person of another, contrary to N.J.S.A. 2C:39-4a (counts six and seven); and possession of a weapon, a .25 caliber automatic handgun, without a permit, contrary to N.J.S.A. 2C:39-5b (count eight). (Pa1-3).[1]

A trial of the matter was held before the Honorable Richard F. Plechner, J.S.C., and a jury on August 24, 25, 26, 27 and 31, 1993. On August 26, 1993, at the close of the State's case-in-chief, defendant's motion for judgments of acquittal on counts one, six and seven were denied by the trial court. (4T43-20 to

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[1] "1T" refers to the transcript dated August 24, 1993;
"2T" refers to the transcript dated August 25, 1993 (marked "Trial");
"3T" refers to the transcript dated August 25, 1993 (marked "Trial Excerpt");
"4T" refers to the transcript dated August 26, 1993;
"5T" refers to the transcript dated August 27, 1993;
"6T" refers to the transcript dated August 31, 1993;
"7T" refers to the transcript dated November 12, 1993;
"Pa" refers to the State's appendix to its motion for leave to appeal to this Court;
"Aa" refers to Amicus's appendix.

46-7). On August 31, 1993, the jury announced the following verdict: defendant was guilty of all three weapons possession offenses (counts six, seven and eight); defendant was not guilty of aggravated assault and the lesser included offenses of simple assault and harassment against Helen Petties (count one), Cassandra Edwards (count three) and Jasmine Edwards (count four); defendant was not guilty of aggravated assault against Catherine Pearson (count two) and Alton Pearson (count five) but the jury was unable to reach agreement on the lesser included offense of simple assault against Catherine Pearson (count two) and Alton Pearson (count five). Eleven jurors voted to convict defendant of simple assault against both victims; one juror voted for acquittal. The trial court declared hung verdicts on counts two and five. (6T10-2 to 30-9).

On November 12, 1993, the trial court granted defendant's motion for judgments of acquittal notwithstanding the guilty verdicts on counts six and seven pursuant to R. 3:18-2 and dismissed both counts. (7T9-1 to 11-11). On that same date, Judge Plechner sentenced defendant on count eight to a probationary term of three years, a $1,000 fine, a $50 Violent Crimes Compensation Board penalty and a $75 Safe Neighborhood Services Fund penalty. (7T19-11 to 20).

On November 29, 1993, the State filed an application for leave to appeal with the Superior Court of New Jersey, Appellate Division, pursuant to R. 2:3-1(b)(3). (Pa4-6). On December 28, 1993, an order denying the State's application was filed by the

Honorable Warren Brody, P.J.A.D., the Honorable Edwin H. Stern, J.A.D., and the Honorable John E. Keefe, J.A.D. (Pa12).

On or about January 27, 1994, the State sought leave to appeal from the Appellate Division's order to this Court pursuant to R. 2:3-1(a) which was granted on March 22, 1994. (Aa1). On July 14, 1994, the Attorney General filed a motion for leave to appear amicus curiae in this matter. This Court granted the Attorney General's request by order filed September 13, 1994, and directed that Amicus's brief be filed within fourteen days of the filing date of the order. (Aa2).

## STATEMENT OF FACTS

On September 18, 1990, at approximately 5:30 p.m., defendant Donald A. Petties drove his gray Mustang to 160 Lawrence Street, New Brunswick, New Jersey, looking for Alton Pearson, who lived there with his mother, Catherine Pearson. Defendant parked across the street from the Pearson home, got out of his car, knocked on the front door and asked Cassandra Edwards, Alton's brother's girlfriend, if Alton lived there and if he were at home. (3T3-18 to 25, 4-5 to 5-1, 5-10 to 7-17, 39-23 to 40-3, 52-24, 53-15 to 54-25). When defendant learned that Alton was not there, he told Cassandra and Catherine that Alton was "messing around" with defendant's wife and that he "wanted to get to the bottom of everything." (3T7-18 to 23, 55-1 to 3). Defendant said he would return later with his wife. (3T8-10 to 13, 56-1 to 2).

Defendant drove away; Catherine, Cassandra and her daughter Jasmine also drove off to warn Alton that defendant was looking for him. Unable to locate Alton, Catherine, Cassandra and Jasmine returned to 160 Lawrence Street to find defendant and his wife Helen Petties sitting in the Mustang which was now parked directly in front of the Pearson house. (3T8-6 to 10-6, 10-1 to 4, 56-6 to 57-8).

Alton drove up in his car about 20 minutes later. When Alton got out of his car, defendant got out of his Mustang. The two men shook hands. Defendant then asked Alton if he knew his wife, Helen, and accused him of being seen with her. Alton

replied, "That's my friend from eight years ago." (3T10-25 to 11-5, 44-5 to 25). Cassandra, Catherine, Jasmine and Alton were but "inches" from defendant. (3T11-11 to 23). Both Cassandra and Catherine heard defendant whisper into Alton's right ear that Alton was "marked," adding "You're mine." (3T11-24 to 13-1, 35-6 to 7, 58-11). Alton replied, "Well, you're mine." (3T13-1, 58-12 to 13).

Defendant returned to his car, opened up the door and pulled out a handgun which he pointed straight at Alton's forehead for two to three seconds at a distance of only ten feet.[2] (3T13-6, 13-13 to 15, 46-9 to 47-5, 58-23 to 24). Cassandra also felt threatened because she stood so close to Alton. (3T30-11 to 14). Catherine jumped in front of the gun, begging defendant to spare her son's life. (3T59-2 to 5, 75-7 to 14).

Defendant then exchanged his handgun for a rifle which he took out of a case from the back of his Mustang. Pointing the rifle at his wife, defendant warned her that she had five seconds to get into the car or he would "blow her up." Defendant then waved the rifle at Cassandra, Catherine and Jasmine. (3T13-17 to 24, 14-4 to 14, 35-22 to 36-6, 39-5 to 9, 59-12 to 60-17).

At first Helen refused to enter the Mustang, despite defendant's repeated orders to "get in the car." When Helen

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[2] Cassandra testified before the Grand Jury that defendant told Alton, "If I wanted to kill you, I can kill you. I'm not doing anything. I'm letting you know I want to know everything that's going on." (3T30-1 to 6). She also told the Grand Jury that the only person defendant threatened was Alton. (3T30-11 to 14).

finally complied with her husband's demand, she and defendant drove off and Cassandra went inside the house and called the police. (3T14-16 to 15-1).

Office Anthony Previte of the New Brunswick Police Department was on patrol in a marked unit when he received the radio dispatch giving a description of defendant's Mustang and license plate number FAY 81H. (2T21-3 to 5, 21-16 to 24-10). He and his partner responded to 160 Lawrence Street to find Cassandra and Catherine outside, both "visibly shaken and frightened. We spent a number of minutes just trying to calm them down." (2T24-15 to 18).

Because defendant lived in Piscataway, the description of his car and license plate number was also broadcast to the Piscataway Township Police Department. At 7:30 p.m. that evening, Officer Frank Hackler spotted defendant's car approximately one-eighth of a mile from his house. Officer Hackler stopped the car and defendant and his wife exited without incident. (2T34-11 to 12, 35-12 to 38-6). Defendant consented to a search of his car, telling the officer that there was a gun in the trunk. (2T38-18 to 19, 39-3 to 40-25). An operable .22 caliber rifle with an attached scope was recovered in the rear portion of the hatchback compartment of the Mustang. (2T22-20 to 23-3, 47-13 to 21). The rifle was empty and the safety was off. (2T48-15). Helen Petties' purse was in the front passenger compartment; inside was an operable .25 caliber semiautomatic handgun with one live round of ammunition in the chamber and six

more live rounds in the magazine which fit into the gun. (2T48-25 to 50-7, 54-4 to 9, 54-13). No permits were ever produced for either gun. (2T51-9 to 13).

At the Piscataway Township Police Department, defendant was advised of and voluntarily waived his constitutional rights and gave a tape recorded statement.[3] (4T7-3 to 11-1). Defendant admitted pulling an unloaded rifle from his car and telling Alton Pearson, "If I wanted to kill you, I can kill you but I'm not doing anything, I'm letting you know I just want to know everything what's going on." (Pa9). He also admitted possessing the handgun but claimed that he only took it out of his pocket and placed it in his wife's purse. (Pa10). Defendant did not feel that he had made any threats and claimed to have pointed the rifle up into the air. (Pa10). He admitted, however, to stating "If I wanted to kill you I could." (Pa10).

Defendant was charged with five separate counts of aggravated assault in the fourth degree by knowingly under circumstances manifesting extreme indifference to the value of human life pointing a firearm at or in the direction of Helen Petties (count one), Catherine Pearson (count two), Cassandra Edwards (count three), Jasmine Edwards (count four) and Alton Pearson (count five); two counts of possession of firearms, a .22 caliber rifle and a .25 caliber automatic handgun, with the purpose to use them unlawfully against the person of another

[3] A transcript of defendant's tape recorded statement was distributed to the jury and the tape was played in court. (4T11-14 to 23, 12-14).

(counts six and seven); and possession of a weapon, a .25 caliber automatic handgun, without a permit (count eight). Defendant's motions for judgments of acquittal on counts one, six and seven, raised at the conclusion of the State's case-in-chief, were denied by the trial court. (4T43-20 to 46-7).

Defendant testified on his own behalf. He admitted having gone twice to the Pearson home on September 18, 1992, with the express idea to confront Alton regarding his alleged affair with defendant's wife, Helen. (4T50-19 to 52-2). Defendant claimed that Alton denied knowing Helen. (4T55-19 to 21, 58-22 to 59-2). According to defendant, he returned to his car while Alton, Catherine and Helen argued with each other. Something was said to defendant; he looked up, he claimed, to see Alton "coming towards my car like he was coming towards me." (4T59-3 to 8). Alton, Catherine and Helen did not appear to be armed with a weapon. (4T74-2 to 75-12, 75-23 to 76-21).

Defendant grabbed a handgun he had placed in the console of his car "earlier that day or that morning." (4T59-9 to 17, 60-3 to 7). Defendant obtained the gun from a neighborhood friend who had "heard about the situation." (4T60-8 to 12, 69-19 to 20). Defendant did not have a permit for the handgun. (4T64-24 to 65-1, 78-24 to 79-4).

Holding the gun "to my side," defendant yelled at Alton to get away from him. (4T59-18 to 23, 67-9 to 16). Defendant denied pointing the gun at Alton, Catherine, Cassandra, Jasmine or Helen. (4T68-3 to 15).

Defendant entered his car, he claimed, but could not pull out of his parking space without hitting someone, so he got out of the car, opened the trunk, took out a rifle and "held it directly in the air." (4T68-16 to 69-25, 70-17 to 20). Defendant was "very upset" and said, "If I wanted to kill you I can kill you," which he did not consider to be a threat. (4T70-21 to 23, 80-1 to 4, 81-7 to 12, 84-1). Defendant held the rifle in the air for a "very brief" time, then put it away. According to defendant, he did not intend to use the rifle against any person or property but wanted only "to talk the situation out" as "mature adults." (4T73-5 to 19). He and Helen got back into the car and drove to Piscataway, where defendant planned to drop Helen off at their house before turning himself in to the police. (4T71-2 to 6, 71-21 to 72-1).

After consideration of all of the evidence, defendant was found guilty of possession of a .22 caliber rifle with the purpose to use it unlawfully against the person of another (count six), possession of a .25 caliber handgun with the purpose to use it unlawfully against the person of another (count seven) and possession of a .25 caliber handgun without a permit (count eight). Defendant was acquitted of aggravated assault and the lesser included offenses of simple assault and harassment against Helen Petties (count one), Cassandra Edwards (count three) and Jasmine Edwards (count five). Defendant was acquitted of aggravated assault against Catherine Pearson (count two) and Alton Pearson (count five) but the jury could not agree on the

lesser included offense of simple assault: eleven jurors voted to convict; one juror voted to acquit; and the court declared hung verdicts on counts two and five. (6T10-2 to 30-9).

Prior to sentencing, the court granted defendant's motion for judgments of acquittal notwithstanding the guilty verdicts on counts six and seven pursuant to R. 3:18-2 and dismissed both counts. (7T9-1 to 11-1).

## LEGAL ARGUMENT

### POINT I

**AS THERE WAS NO BASIS FOR THE TRIAL COURT'S UNWARRANTED INVASION OF THE JURY'S FUNCTION TO DETERMINE THE FACTS, THE DECISION TO SET ASIDE GUILTY VERDICTS ON TWO CHARGES OF POSSESSION OF FIREARMS FOR AN UNLAWFUL PURPOSE (COUNTS SIX AND SEVEN) WAS IN ERROR.**

This case presents a glaring example of a trial court impermissibly overstepping its office to assume the duties of both the jury and the judge. In granting defendant's motion to set aside the jury's verdicts of guilty on both charges of possession of a firearm for an unlawful purpose (counts six and seven), Judge Plechner disregarded the "nondelegable and nonremovable responsibility of the jury to decide the facts...it is the jury, and the jury alone, that determines the facts." State v. Ingenito, 87 N.J. 204, 211 (1981). That the trial judge believed the jury returned inconsistent verdicts does not give him license to unilaterally overturn valid convictions grounded in findings of guilt beyond a reasonable doubt. Id. at 211-212.

At trial, the jury acquitted defendant of the fourth degree crime of knowingly under circumstances manifesting extreme indifference to the value of human life pointing a firearm at Helen Petties (count one), Catherine Pearson (count two), Cassandra Edwards (count three), Jasmine Edwards (count four) and Alton Pearson (count five), in violation of N.J.S.A. 2C:12-1b(4). Polling the jury revealed that eleven jurors found beyond a reasonable doubt that on September 18, 1990, defendant attempted

by physical menace to put Catherine Pearson and Alton Pearson in fear of serious bodily injury, and these jurors voted to convict defendant on counts two and five of the indictment of the disorderly persons offense of simple assault, in violation of N.J.S.A. 2C:12-1a(3). (6T12-22 to 18-25). Juror Number 10 voted to acquit defendant of simple assault on both counts. (6T14-19 to 18-19). All twelve jurors agreed that defendant was guilty of counts six and seven, charging possession of a .25 caliber handgun and a .22 caliber rifle with the purpose to use them unlawfully against the person of another, in violation of N.J.S.A. 2C:39-4a. (6T19-1 to 21-9). Judge Plechner declared hung verdicts on counts two and five. (6T29-17 to 30-6).

Prior to sentencing, defendant moved for judgments of acquittal notwithstanding the guilty verdicts pursuant to R. 3:18-2 on counts six and seven on the ground that the State failed to prove that defendant possessed the weapons for an unlawful purpose. (7T3-16 to 8-1). The assistant prosecutor argued in opposition that defendant had possessed the handgun and the rifle with the unlawful purpose "to intimidate, to threaten, and to harass" but that, according to the jury's findings of not guilty on the five counts of aggravated assault, defendant did not carry out his unlawful purpose. (7T8-3 to 24).

Judge Plechner granted defendant's motion and dismissed both counts. In a roundabout decision, the judge found that his jury instruction on possession of a firearm for an unlawful purpose did not specify the unlawful purpose; that the jury's acquittal

of all counts of aggravated assault "removed" the only unlawful purpose from the case; and that the jury was improperly left to speculate as to what other unlawful act defendant may have intended. (7T9-1 to 11-11).

Amicus submits that there is no sound basis for the trial court's unwarranted invasion of the jury's fact-finding function and, therefore, Judge Plechner erred in setting aside the jury's guilty verdicts. The standard on a motion for a judgment of acquittal following the return of a verdict of guilty [R. 3:18-2] is the same as that which applies when a motion for a judgment of acquittal is made at the close of the State's case or at the end of the entire case [R. 3:18-1]: whether the State's evidence viewed in its entirety is such that a jury can properly find beyond a reasonable doubt that defendant was guilty of the crimes charged. Under this standard, the State is entitled to the benefit of all its favorable testimony and favorable inferences which can be reasonably drawn therefrom. State v. Reyes, 50 N.J. 454, 458-459 (1967); State v. Ball, 268 N.J. Super. 72, 121 (App. Div. 1993), certif. granted 135 N.J. 304, 305 (1994); State v. Brown, 239 N.J. Super. 635, 642 (1990); State v. Kluber, 130 N.J. Super. 336, 341-42 (App. Div. 1974), certif. den. 67 N.J. 72 (1975). "On such a motion the trial judge is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. Kluber, supra at 342. This appellate Court should apply the same test as the trial court to decide if Judge Plechner

erred in granting the judgments of acquittal after the jury returned guilty verdicts. State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990), certif. den. 122 N.J. 187 (1990). Review under this standard will show the evidence presented by the State was more than sufficient to find defendant guilty beyond a reasonable doubt of counts six and seven charging possession of weapons, a handgun and a rifle, for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a ("Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.").

To sustain a conviction under N.J.S.A. 2C:39-4a, the State must prove four elements: one, that defendant had a firearm; two, that defendant possessed it; three, that defendant's purpose or conscious objective was to use it against a person or property of another; and, four, that defendant intended to use it in a manner that was proscribed by law. State v. Harmon, 104 N.J. 189, 212 (1986); State v. Lopez, 213 N.J. Super. 324, 329 (App. Div. 1985), certif. den. 103 N.J. 480 (1986). Defendant has never disputed that both the .25 semiautomatic handgun and the .22 caliber rifle are "firearms" within the meaning of N.J.S.A. 2C:39-1f. Nor has he ever disputed that he was in possession of both firearms; indeed, defendant himself admitted as much at trial. Thus, the question is whether the State satisfied the third and fourth elements of the offense.

Here, the jury could easily find from the State's proofs that defendant's purpose for possessing both guns was for the

unlawful purpose to threaten, intimidate or harass Alton Pearson: defendant made veiled threats to Alton that he was "marked" and "You're mine" and emphasized his point by aiming the handgun at Alton's forehead for two to three seconds from a distance of only ten feet (3T11-24 to 13-1, 35-6 to 7, 58-11); defendant then pulled the rifle out of his car, boasting, "I could kill you if I wanted to." (Pa9). Similarly, the jury could easily find that defendant's purpose for possessing the rifle was for the unlawful purpose to threaten, intimidate or harass Helen Petties, Catherine Pearson, Cassandra Edwards and Jasmine Edwards: defendant pointed the rifle at his wife making the not-so-veiled threat to "blow her up" and then waved the rifle at Catherine, Cassandra and Jasmine. (3T13-17 to 24, 14-4 to 14, 35-22 to 36-6, 39-5 to 9, 59-12 to 60-17). See State v. Daniels, 231 N.J. Super. 555, 560 (App. Div. 1989) (eyewitness saw defendant pull razor knife out of his pocket and cut victim's head; evidence sufficient for jury to conclude that defendant's purpose for possessing the knife was for an unlawful purpose). Nothing in the State's case so much as hinted that defendant's honest purpose in possessing either firearm was "to use it for sport, precaution, or in a manner intended to cause no harm to another." State v. Harmon, supra at 211; see State v. Daniels, supra (no evidence that defendant possessed knife for lawful purpose, such as opening cardboard boxes); compare State v. Harmon, supra (evidence that defendant initially armed self with BB gun for a precautionary purpose); State v. Martinez, 229 N.J. Super. 593,

607 (App. Div. 1989) (evidence that defendant initially armed self with screwdriver for a precautionary purpose).[4]

Ironically, when originally faced with defendant's motion for judgments of acquittals on counts six and seven at the close of the State's case (4T43-20 to 45-16), Judge Plechner applied the proper standard of review and denied the motion:

> Seems to me at this point I have to take the testimony and the inferences most favorable to the State...I also think that unlawful purpose, as to that argument, that there is sufficient evidence of an unlawful purpose, presumably the purpose at the very least freightening {sic} these people with the weapons. That is all that is necessary to satisfy the requirements of the statute, if believed. And I think at this stage there's a prima facie case taking all inferences favorable to the State. So I'll deny the motion....

(4T45-17 to 46-7). Nothing at all in the State's evidence changed between the first and second motions for judgments of acquittal on counts six and seven. The very same standard of review applies whether this evidence is considered before or

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[4] Self-defense was suggested by defendant when he testified that he returned to his car, looked up and saw Alton Pearson "coming towards my car like he was coming towards me." (4T59-5 to 8). Raised in defendant's case, this evidence may not be considered on a motion for a judgment of acquittal, even when the motion is raised after the verdicts are returned. State v. Sugar, supra at 152-53. Moreover, the trial court refused to submit justification as a defense to the assault charges or as a lawful purpose for the possession of firearms on two grounds: first, defendant failed to give the prosecution proper notice of the defense; and, second, by defendant's own testimony he was in constructive possession of the handgun and rifle before he saw Alton "coming towards" him. Thus, in reviewing Judge Plechner's grant of defendant's motion for judgments of acquittal on counts six and seven, this Court may not consider any evidence introduced by defendant of self-defense as a lawful purpose for possessing the firearms.

after the jury returns its verdicts. State v. Kluber, supra. Judge Plechner should have again denied defendant's motion.

Instead, the trial court dismissed counts six and seven following defendant's motion for judgments of acquittal notwithstanding the guilty verdicts on the pretense that the crime of possession of a weapon for an unlawful purpose cannot exist absent a conviction for the coupled active crime. (7T9-1 to 11-11). This rationale is, in a word, illogical, and is without a valid legal foundation. That the jury acquitted defendant of aggravated assault in the fourth degree does not exonerate defendant's inappropriate possession of the handgun and the rifle. State v. Lopez, supra at 329. "The question is not whether [defendant] was justified in his use of the gun but whether his purpose was to commit an unlawful act." State v. Harmon, supra at 211 (emphasis in original); see also State v. Mieles, 199 N.J. Super. 29, 41 (App. Div. 1985), certif. den. 101 N.J. 265 (1986); State v. Bill, 194 N.J. Super. 192, 195 (App. Div. 1984). In other words, the jury could find that defendant possessed the handgun and the rifle with the unlawful purpose to intimidate, threaten or harass the victims but did not actually point the weapons and therefore did not carry out his unlawful intent. Jury verdicts based on such findings are both rational and are consistent. State v. Lopez, supra at 329-30.

"Vacation of a conviction is required only if defendant was acquitted on one count which necessarily vitiates an element of the offense for which he was convicted." State v. Mangrella, 214

N.J. Super. 437, 441 (App. Div. 1986), certif. den. 107 N.J. 127 (1987); State v. Peterson, 181 N.J. Super. 261, 267 (App. Div. 1981), certif. den. 89 N.J. 413 (1982). To sustain a conviction for possession of a firearm for an unlawful purpose under N.J.S.A. 2C:39-4a, the State must prove four elements: one, that defendant had a firearm; two, that defendant possessed it; three, that defendant's purpose or conscious objective was to use it against a person or property of another; and, four, that defendant intended to use it in a manner that was proscribed by law. State v. Harmon, supra at 212; State v. Lopez, supra at 329. To sustain a conviction for aggravated assault under N.J.S.A. 2C:12-1b(4), the State must prove two elements: one, that defendant knowingly pointed a firearm at or in the direction of another person; and, two, that defendant acted under circumstances manifesting extreme indifference to the value of human life. See State v. Mieles, supra. These two crimes share no common elements; an acquittal on one count does not preclude the finding of one or more elements of the offense charged in the other count as a matter of law. Id. at 41; State v. Lopez, supra at 329-30 (acquittal for intentional murder does not negate an essential element required for a conviction for possession of a firearm for an unlawful purpose). "There would be no inconsistency in the verdict, for the possession count related to the purpose for which defendant possessed the gun and not how he used it." State v. Mieles, supra at 41 (acquittal for possession of a weapon for an unlawful purpose does not negate an essential

element required for a conviction for aggravated assault in the fourth degree).

Factually, defendant's conviction for possession of a firearm for an unlawful purpose is utterly consistent with the jury's acquittal of aggravated assault. See State v. Mangrella, supra at 441 (acquittal on theft charge consistent with conviction for burglary charge; jury could have found that while defendant or his accomplice entered the Fotomat with purpose to commit a theft, neither took property with the purpose of depriving the owner thereof); State v. Mieles, supra at 40-41 (acquittal for possession of a weapon for the unlawful purpose of using it against another consistent with convictions for armed robbery and aggravated assault in the fourth degree; jury could have found that while defendant did not originally possess the weapon for unlawful use the difficulties between defendant and the victim triggered the aggravated assault and armed robbery); State v. Peterson, supra at 266 (acquittal for bribery consistent with conviction for official misconduct; jury could have believed that defendant sought no benefit for himself, and a conviction for official misconduct at that time did not require proof that the official accept a benefit for himself). Here, the jury could have found that defendant possessed the handgun and the rifle with the unlawful purpose to intimidate, threaten or harass the victims but did not actually point the weapons and therefore did not carry out his unlawful intent.

Direct and circumstantial evidence presented by the State

fully supports this plausible and rational interpretation of the facts: when defendant first arrived at the Pearson home, he told Cassandra and Catherine that Alton was "messing around" with Helen and that he "wanted to get to the bottom of everything." Later, when defendant returned with his wife to confront Alton, a loaded handgun and a rifle were within his ready access in his Mustang. Defendant admitted to the police that when he pulled out the rifle, he said, "If I wanted to kill you I can kill you but I'm not doing anything I'm letting you know I just want to know everything what's going on." (3T7-18 to 23, 8-10 to 13, 10-1 to 4, 13-1 to 5, 13-17 to 24, 14-4 to 9, 35-22 to 25, 36-1 to 6, 39-5 to 9, 55-1 to 3, 56-1, 57-6 to 8, 59-12 to 60-17; Pa9). "On the basis of that testimony and the absence of any evidence that the [guns were] in defendant's possession for a lawful purpose, a jury could determine that the defendant's purpose in possessing the [guns] at some point in time was with the specific intent of using [them] unlawfully against" Alton Pearson.[5] State v. Daniels, supra at 561. These same facts were not necessary, however, to establish a separate conviction for actually pointing a firearm at another person. See State v. Lopez, supra at 330

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[5] Defendant's own testimony that he placed the handgun in the console of his car "earlier that day or that morning" and had received the gun from a neighborhood friend who "heard about the situation" (4T59-9 to 17, 60-3 to 12, 69-19 to 20) bolsters the prosecution's theory that defendant's unlawful purpose in bringing the handgun with him to Alton's house was to intimidate, threaten or harass him. Amicus notes again, however, that evidence raised in defendant's case-in-chief is not to be considered in a motion for a judgment of acquittal notwithstanding a guilty verdict pursuant to R. 3:18-2. State v. Sugar, supra at 152-53.

(defendant was out "looking for trouble" and it was the earlier possession with the intent to use the weapon against the victim, not the actual use of the weapon in self-defense, that was unlawful); cf. State v. Wilson, 128 N.J. 233, 246 (1992) (in merger context, possession with unlawful purpose occurred when defendant used weapon to threaten someone else after the murder); State v. Truglia, 97 N.J. 513, 521 (1984) (in merger context, possession with unlawful purpose occurred when defendant chased the victim with gun in hand before assaulting by pointing and discharging weapon).

Judge Plechner's conclusion that the verdicts of not guilty on the five counts of aggravated assault "removed" the only unlawful purpose charged (7T10-1 to 11-8) is untrue. Within the instruction on possession of a weapon for an unlawful purpose, the court explained,

> The fourth element is that the defendant intended to use the firearm unlawfully. The mental element of unlawful purpose requires a specific finding that the accused possessed a weapon with the conscious object, desire or specific intent to use it to commit an illegal act. That is, one proscribed by law and not for some other purpose.

(5T26-4 to 9). The judge did not ascribe any particular illegal acts or unlawful purposes, and defendant lodged no objection to the instruction. (5T30-14 to 17). After deliberations began, the jury sent out a note asking, "What is unlawful purpose?" (5T35-22 to 36-13). Judge Plechner decided, with the agreement of the parties, to read to the jury the definition of "unlawful" from Black's Law Dictionary, (5T36-16 to 44-5):

The question has been asked, "What is unlawful purpose?" So what I'm going to do, I'm going to read to you a Black's Law Dictionary definition of unlawful.

* * *

Unlawful. That which is contrary to, prohibited or unauthorized by law. That which is not lawful. The acting contrary to or in defiance of the law. Disobeying or disregarding the law. The term is equivalent to without, and I'm adding the word here, legal excuse or legal justification.

* * *

Then the fourth element is that the defendant intended to use the firearm unlawfully. The mental element of unlawful purpose requires a specific finding that the accused possessed a weapon with a conscious objective, desire or specific intent to use it to commit an illegal act. That is, one proscribed by law and not for some other purpose. In other words, it has to be for an illegal act. That's what possessing it unlawfully means.

* * *

Now, I think, I hope that defines unlawful for you. That it is an act that is contrary to or prohibited by law. The definition I read in Black's says unauthorized. I have a problem with unauthorized. So let's just take it as prohibited. Contrary to or prohibited by law. Meaning acting, an act which is acting contrary to or in defiance of the law. Also, another term is proscribed by, which means basically the same thing.

These are all terms that generally mean the same thing. That's in defiance of, that it is something prohibited by law. It's an unlawful act. It's in defiance of the law.

Am I clear? I think the term unauthorized by law could be misunderstood. So don't talk in those terms talk in terms of prohibited by, contrary to, defiance of, disobey the law or doing that which is proscribed by law.

(5T44-11 to 47-19). This portion of the instruction did not list concrete examples from the evidence of "unlawful purpose" and, again, defendant did not object. The jury was specifically told, however, that "every part of this [definition] must be taken in the context of the whole. In other words, there are four elements and you must take this in the context. And in the context of the evidence that's presented and the inferences that may reasonably be drawn from such evidence." (5T44-15 to 19) (emphasis added). Thus, the jury knew that the "unlawful purpose" had to be found within the confines of all of the evidence presented. See State v. Manley, 54 N.J. 259, 264 (1964) (it is presumed that jurors follow the trial court's charge).

The jury was not without guidance because it was also instructed on the particular illegal acts of which defendant stood accused, namely, aggravated assault and the lesser included offenses of simple assault and harassment. Thus, the jury knew to consider whether defendant "knowingly under circumstances manifesting extreme indifference to the value of human life point[ed] a firearm at or in the direction of another" (aggravated assault); whether defendant "attempt[ed] by physical menace to put another in fear of imminent serious bodily injury" (simple assault); or whether defendant "engage[d] in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person." (5T15-1 to 20-10). The jury unanimously acquitted defendant of aggravated assault on counts one through five. (6T9-24 to 11-

19). On counts two and five, eleven of twelve jurors found defendant guilty of simple assault. (6T12-22 to 18-25). One juror voted to acquit defendant of simple assault on both counts. (6T14-19 to 18-19). After brief discussion with both parties, Judge Plechner announced hung verdicts on counts two and five and would not allow the jury to continue deliberations on the lesser included offense of harassment because, the judge said, harassment was not an indictable offense. (6T22-23 to 30-9). Because the jury had no opportunity to consider the crime of harassment, that factual basis for an unlawful purpose was neither resolved nor eliminated from the case. Even had Judge Plechner specifically identified the unlawful acts of aggravated assault, simple assault and harassment within the portion of the charge addressing possession of a firearm for an unlawful purpose, the jury's verdict makes it quite clear that harassment was not "removed" from the case, and could stand as the coupled active crime to the possession offense.

To the extent that State v. Jenkins, 234 N.J. Super. 311, 315 (App. Div. 1989), requires a trial court to identify for the jury such specific unlawful purposes as may be suggested by the evidence and to instruct the jury not to convict based on its own notion of the unlawfulness of some other undescribed purpose, Amicus submits that Jenkins is wrongly decided. Jenkins requires that the jury be told with regard to the charge of possession of a weapon with an unlawful purpose that the act accomplished with the gun is unlawful, which is tantamount to a directed verdict.

In other words, once the jury finds defendant guilty of the coupled active crime, it must under Jenkins also conclude that defendant's purpose in possessing the gun was to use it unlawfully. The fourth element of N.J.S.A. 2C:39-4a as outlined in State v. Harmon, supra at 212, is thus removed from the jury's consideration, resulting in an impermissible directed verdict. "[A] court may never instruct a jury to find against a criminal defendant on any factual issue that is an element of the crime charged." State v. Anderson, 127 N.J. 191, 200 (1992); see also State v. Vick, 117 N.J. 288, 291 (1989); State v. Ragland, 105 N.J. 189, 196 (1986).

Even if this Court were to accept Jenkins' unsound premise, i.e., that when a jury acquits a defendant of all those unlawful acts which supply a factual basis for an inference of an unlawful purpose in possessing the weapon there is no factual basis left in the record to support a conviction on the possession charge, the net result is simply inconsistent verdicts which does not provide a valid reason to dismiss defendant's convictions. State v. Ingenito, supra at 211-12. "Inconsistent verdicts are, of course, a familiar phenomenon. In a criminal case, a jury's apparently inconsistent verdict is allowed to stand." City of Los Angeles v. Heller, 475 U.S. 796, 804, 106 S.Ct. 1571, 1576, 89 L.Ed.2d 806, 814 (1986); see also United States v. Powell, 469 U.S. 57, 64-65, 105 S.Ct. 471, 476-77, 83 L.Ed.2d 461, 468-69 (1984); Harris v. Rivera, 454 U.S. 339, 345, 102 S.Ct. 460, 464, 70 L.Ed.2d 530 (1981); Dunn v. United States, 284 U.S. 390, 393,

52 S.Ct. 189, 190, 76 L.Ed. 356, 358-59 (1932). A criminal jury "may return illogical or inconsistent verdicts that would not be tolerated in civil trials." State v. Crisantos (Arriagas), 102 N.J. 265, 272 (1986); accord State v. Grunow, 102 N.J. 133, 148 (1986); cf. State v. Stewart, 96 N.J. 596, 607 (1984) (jury's acquittal of gun possession and armed robbery charges not irreconcilable with Graves Act finding by the sentencing judge).

There is no federal or state constitutional right to consistent verdicts. United States v. Powell, supra, 469 U.S. at 65, 105 S.Ct. at 477, 83 L.Ed.2d at 469; State v. Burnett, 245 N.J. Super. 99, 108-9 (App. Div. 1990). "The responsibility of the jury in the domain of factual findings, and ultimate guilt or innocence, is so pronounced and preeminent that we accept inconsistent verdicts that accrue to the benefit of a defendant." State v. Ingenito, supra at 211-12. "The general rule is that inconsistent verdicts will be left to stand as a hallmark to the jury's 'assumption of power which they had no right to exercise but to which they were disposed through lenity.'" United States v. Uzzolino, 651 F.2d 207, 213 (3 Cir. 1981), cert. den. 454 U.S. 865, 102 S.Ct. 327, 70 L.Ed.2d 166 (1981), citing Dunn v. United States, supra, 284 U.S. at 393, 52 S.Ct. at 190, 76 L.Ed. at 359.

Inconsistent verdicts are acceptable because each count of an indictment is regarded as a separate indictment which the State must prove beyond a reasonable doubt. State v. Millet, 272 N.J. Super. 68, 96 (App. Div. 1994); State v. Kamienski, 245 N.J. Super. 75, 95 (App. Div. 1992), certif. den. 130 N.J. 18 (1992).

A criminal defendant is afforded protection against jury irrationality or error by the independent review of the evidence supporting the conviction [United States v. Powell, supra, 469 U.S. at 67, 105 S.Ct. at 478, 83 L.Ed.2d at 470] and such verdicts are permitted "so long as the evidence was sufficient to establish guilt on the substantive offense beyond a reasonable doubt." State v. Kamienski, supra at 95. This review is independent of the jury's determination that evidence on another count was insufficient. United States v. Powell, 469 U.S. at 67, 105 S.Ct. at 478, 83 L.Ed.2d at 470; United States v. Vastola, 989 F.2d 1318, 1331 (3 Cir. 1993).

Looking at both sides of the evidence, it is clear that the State proved defendant's guilt of possession of a handgun and of a rifle for unlawful purposes beyond a reasonable doubt. The prosecution's witnesses testified that defendant confronted Alton Pearson regarding the purported affair with defendant's wife, threatened him, and backed up his threats by pointing a loaded handgun directly at his head. Defendant also aimed a rifle at Alton, warning "I could kill you if I want to," and pointed the rifle at his wife, threatening to blow her up. Defendant also waved the rifle at Catherine, Cassandra and Jasmine. Defendant himself testified that he came armed with a handgun given to him by a friend who had "heard about the situation" and that he had a rifle in the back of his car. This evidence overwhelmingly proves beyond a reasonable doubt defendant's guilt of possession of weapons for an unlawful purpose because defendant had both a

handgun and a rifle; defendant possessed both firearms; defendant's purpose or conscious objective was to use them against the person of another, and defendant intended to use them in a manner that was proscribed by law. State v. Harmon, supra at 212.

That substantially identical facts could have also supported a finding of guilt beyond a reasonable doubt of the predicate offenses of aggravated assault, simple assault or harassment does not result in irreconcilable verdicts. See State v. Ingenito, supra at 212 (a jury has the prerogative of returning a verdict of innocence in the face of overwhelming evidence of guilt and may refuse to return a verdict in spite of the adequacy of the evidence). Indeed, it is "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." United States v. Powell, supra, 469 U.S. at 65, 105 S.Ct. at 476, 83 L.Ed.2d at 468; accord, State v. Crisantos (Arriagas), supra at 272; State v. Ingenito, supra at 204; State v. Burnett, supra. "[M]erely because the defendant enjoyed the benefit of leniency as to one charge, he should not be immunized from criminal liability on another charge based on substantially identical facts." State v. Hughes, 215 N.J. Super. 295, 300 (App. Div. 1986). The State is precluded from challenging the acquittals, and "it is hardly satisfactory to allow the defendant to receive a new trial on conviction as a matter of course." United States v. Powell,

supra, 469 U.S. at 65, 105 S.Ct. at 477, 83 L.Ed.2d at 469. Defendant is not entitled to a windfall by reversing his fairly obtained and properly supported convictions. State v. Ortiz, 253 N.J. Super. 239, 246 (App. Div. 1992), certif. den. 130 N.J. 6 (1992).

Because the trial court immediately declared the jury deadlocked on counts two and five and did not allow deliberations to continue on the lesser included offenses of simple assault and harassment, it would be pure speculation for this Court to conclude that the jury would have unanimously voted to acquit defendant of both of these offenses. The jurors could have just as easily found defendant guilty of simple assault or harassment, had they deliberated further. (Indeed, the latter possibility seems most likely given the willingness of eleven of the jurors to convict defendant of simple assault). This being so, it is beyond the province of this Court to inquire into the jury's thought process to determine what the jury "really meant." United States v. Powell, supra, 469 U.S. at 68, 105 S.Ct. at 478, 83 L.Ed.2d at 470.

Jury instructions specifying the particular unlawful acts that may support a conviction for possession of a weapon for an unlawful purpose, as required by State v. Jenkins, will not necessarily forestall a finding of inconsistent verdicts.

> This problem is not altered when the trial judge instructs the jury that it must find the defendant guilty of the predicate offense to convict on the compound offense. Although such an instruction might indicate that the counts are no longer independent, if

> inconsistent verdicts are nevertheless reached those verdicts still are likely to be the result of mistake, or lenity, and therefore are subject to the Dunn rationale. Given this impasse, the factors detailed above -- the Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity -- suggest that the best course to take is simply to insulate jury verdicts from review on this ground.

United States v. Powell, supra, 469 U.S. at 68-69, 105 S.Ct. at 478-79, 83 L.Ed.2d at 471. Judge Plechner erred, therefore, in relying on State v. Jenkins to grant defendant's motion for judgments of acquittal on counts six and seven.

In sum, the trial court impermissibly assumed the jury's fact-finding duty and superimposed its judgment based on its own wrongful notion of inconsistent verdicts. Twelve jurors unanimously found defendant guilty beyond a reasonable doubt of two counts of possession of a weapon for an unlawful purpose and nothing about their verdicts undermines the validity of those findings. Defendant's convictions on counts six and seven should be reinstated by this Court.

## CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to reverse the decision of the trial court granting defendant's motion for judgments of acquittal notwithstanding the guilty verdicts and to reinstate the jury's findings of guilty on counts six and seven of the indictment.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

DATED: September 27, 1994

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## STATEMENT OF PROCEDURAL HISTORY

Middlesex County Indictment No. 1910-10-92 was filed on October 22, 1992. It charged defendant with five counts of aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(4), two counts of possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a), and unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b). (Pa1-3).

Trial commenced before the Honorable Richard F. Plechner, J.S.C., and a jury on August 23, 1993. On August 31, 1993, the jury returned its verdict: defendant was convicted of all of the possessory offenses, defendant was acquitted of three of the assault charges, and the jury was unable to reach a verdict on the remaining assault charges.

After the verdicts were rendered, defendant filed a Notice of Motion for judgments of acquittal notwithstanding the verdicts concerning the charges that he violated N.J.S.A. 2C:39-4(a). This motion was heard by Judge Plechner on November 12, 1993, and the court not only granted the motion, but dismissed the pertinent counts of the indictment. (Pa4). The court that same day then sentenced defendant on the remaining count of unlawful possession of a weapon to a three-year, probationary term and a $1000 fine.[1]

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[1]As of this writing, the Judgment of Conviction has not been prepared.

On November 29, 1993, the State filed an application for leave to appeal with the Appellate Division. (Pa5). The application was denied on December 23, 1993, by the Honorable Warren Brody, P.J.A.D., and the Honorable Edwin H. Stern and John E. Keefe, JJ. A.D. (Pa12).[2]

The State then filed an application for leave to appeal with this Court on . That application was granted on March .

[2]The court decided the application on December 22, 1993, and filed the decision on December 28, 1993, but we did not receive it in our office until January 12, 1994 (the stamp erroneously reads "Jan 12 7 51 AM '93").

## STATEMENT OF FACTS

On September 18, 1990, defendant decided to visit Alton Pearson, whom defendant thought was sleeping with his wife. Around 5:30 p.m., while Cassandra Edwards was sitting in the living room of Alton's house at 160 Lawrence Street, defendant drove past the house and returned and parked. (3T4-16 to 20; 3T5-11 to 12).[3] Then, defendant exited the car, approached the house, and asked Edwards whether Alton lived there. (3T5-12 to 14; the identification of defendant is at 3T6-16 to 7-3). Edwards acknowledged that defendant did live there, but when asked, said that he was not at home. (3T6-13 to 15). Defendant then said that Alton was having an affair with defendant's wife, and defendant wanted to resolve any problems. (3T7-21 to 23).

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[3]Citations to the record:
T = transcript of August 24, 1993
2T = transcript of August 25, 1993
3T = transcript of witnesses Edwards, Alton Pearson, and Catherine A. Pearson; this transcript fits between 2T16-17 and 2T16-20
4T = transcript of August 26, 1993
5T = transcript of August 27, 1993
6T = transcript of August 31, 1993
7T = transcript of November 12, 1993

Defendant left after that conversation. (3T8-16 to 22).

Edwards also left, to find Alton. She was unsuccessful, however, so she returned home, only to find defendant and his wife sitting in a car in front of 160 Lawrence Street. (3T819 to 20, 24 to 25; 3T99 to 18). Defendant was awaiting Alton's arrival. (3T10-2).

Less than 20 minutes later, Alton arrived. (3T10-13 to 14, 22 to 24). Alton exited his car, and defendant and his wife exited their car. The two men shook hands, and defendant asked Alton whether Alton knew defendant's wife. Alton replied that he knew her seven or eight years previously. (3T11-1 to 5; 3T12-1). Defendant then whispered to Alton that he was a marked man and added, "You're mine." (3T12-1; 3T12-22 to 13-1).[4] Defendant then re-entered his car, retrieved a handgun,[5] and pointed it at Alton. (3T13-1 to 9).

While the spectators froze, defendant again re-entered his car, replaced the handgun, and retrieved a rifle. (3T13-10 to 12, 17 to 19).[6] Defendant pointed the rifle at his wife and told her that she had five seconds to enter the car or he would kill

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[4]Alton testified that he did not remember such an exchange. (3T48-20 to 23). He also testified that he did not see a rifle that night. (3T47-17 to 18).

[5]An Armi Tanfoglio Giuseppe model GT27 .25 caliber, which was operable. See 2T32-20 to 25.

[6]A Marlin Glenfield model 60 .22 caliber, which was operable. See 2T32-20 to 25.

her. (3T13-21 to 23). The, waving the rifle, defendant pointed it at everybody who was present, including Edwards, her daughter, and other relatives. (3T14-6 to 9).

The five seconds had elapsed, but defendant's wife did not re-enter the car, despite repeated demands by defendant. Finally, Edwards told defendant's wife to enter the car, and she did. (3T14-16 to 18, 21 to 23). Edwards then called the police department. (3T14-23 to 24).

## LEGAL ARGUMENT

### POINT I

IN THIS PARTICULAR CASE, THE JURY WAS ABLE TO FIND THAT DEFENDANT POSSESSED THE WEAPONS FOR AN UNLAWFUL PURPOSE EVEN AS IT FOUND THAT THE PURPOSE WAS NOT IMPLEMENTED

Generally, verdicts need not be consistent. It has been the law since at least 1932, when Dunn v. United States, 284 U.S. 390 (1932), was decided, that so long as the government adduced enough evidence to support the verdict, a nominally inconsistent, not-guilty verdict is legally meaningless. We of course follow this rule in New Jersey. State v. Crisantos, 102 N.J. 265, 272 (1986). And see also, e.g., State v. Ingenito, 87 N.J. 204, 211-212 (1981); State v. Dancyger, 29 N.J. 76, 92-93 (1959), cert. den. 360 U.S. 903 (1959) (jury's failure to resolve a burglary charge did not require the vacation of a larceny charge); State v. Kamienski, 254 N.J. Super. 75 (App. Div. 1992), certif. den. 130 N.J. 18 (1992) (acquittal on charge of conspiracy to commit

murder does not require vacation of murder conviction); State v. Ortiz, 253 N.J. Super. 239 (App. Div. 1992), certif. den. 130 N.J. 6 (1992) (acquittal on charge of possession of drugs does not require vacation of conviction of distribution of those same drugs); State v. Burnett, 245 N.J. Super. 99 (App. Div. 1990) (acquittal on charges of theft, possession of drugs, and possession of drugs with intent to distribute does not require vacation of conviction of conviction for misconduct in office, where the basis for the misconduct are the theft and possessory offenses); State v. Mangrella, 214 N.J. Super. 437 (App. Div. 1986), certif. den. 107 N.J. 127 (1987) (acquittal on charge of theft does not require vacation of burglary conviction, because the jury could have found that the defendant had a purpose to steal when he entered, but did not steal); State v. D'Arco, 153 N.J. Super. 258 (App. Div. 1977) (acquittal on charge of conspiracy to commit misconduct in office does not require vacation of misconduct conviction), and State v. Still, 112 N.J. Super. 368 (App. Div. 1970), certif. den. 57 N.J. 600 (1971) (acquittal on charge of attempt to commit sodomy does not require vacation of conviction for assault with intent to commit sodomy).

Defendant, however, successfully convinced the trial court that the relationship between the crimes charged in the instant case is unique. Specifically, defendant convinced the trial court to follow State v. Jenkins, 234 N.J. Super. 311 (App. Div.

1989), and the Appellate Division evidently agreed that Jenkins governed, inasmuch as that court denied leave to appeal. We suggest, however, that Jenkins is a case which should be repudiated, because it disregards, and even blatantly violates, the settled law of inconsistent verdicts.

In Jenkins, a Part of the Appellate Division noted that usually, when a defendant is charged with possession of a weapon with the purpose to use it unlawfully, and he indeed points or uses the weapon unlawfully to commit an assault or other crime, then his conviction of that assault or other crime establishes the unlawful purpose for which the defendant had the weapon. The Part, however, then committed a basic error in logic.

Citing not one case interpreting the law of inconsistent verdicts, the Part concluded that if a proposition is true, then the proposition's exact opposite must also be true. Accordingly, the Part concluded that if the defendant is found not guilty of committing the assault or other crime, then the acquittal "erases the identification of the unlawful purpose." 234 N.J. Super. at 315. Because a jury cannot be permitted to speculate why a defendant possessed a weapon, it cannot then return a verdict of guilty to possession of a weapon with the purpose to use unlawfully unless the jury has been specifically told what the unlawful purpose is. Id. at 316.

This approach finds some support in State v. Peterson, 181

N.J. Super. 261 (App. Div. 1981), certif. den. 89 N.J. 413 (1982). There, the court accepted the proposition that an acquittal of charges lodged by one count of the indictment will require an acquittal of charges lodged by other counts if all of the counts share a common element. 181 N.J. Super. at 267-266. Defendant relied upon Peterson when he opposed our application for leave to appeal, and he will likely cite it again. Nevertheless, Peterson is plainly no longer a valid case, and even if it is a valid case, it does not govern the instant pair of crimes.

Another Part of the Appellate Division recently repudiated the holding in Peterson, concluding instead that actual inconsistency is permitted by this Court's decisions in Crisantos, Ingenito, and State v. Ragland, 105 N.J. 189 (1986). State v. Burnett, supra. Moreover, in State v. Ortiz, 253 N.J. Super. 239 (App. Div. 1992), yet another Part of the Appellate Division accepted the holding of Peterson yet nevertheless concluded that Ortiz' acquittal of possession of drugs did not require the vacation of his convictions for distributing those same drugs.

If under Peterson a defendant who has been found by a jury not to have possessed drugs can be nevertheless found to have sold them, then surely a defendant who has been found not to have assaulted a person can nevertheless be found to have carried a

weapon with the purpose to assault that person. Thus, we see that the logic espoused in Jenkins is simplistic, and wrong. There is no such thing as "eras[ure];" the only question is whether there is evidence to support the verdict.

We emphasize too that another Part of the Appellate Division has reached the opposite conclusion from Jenkins given virtually identical facts. In State v. Lopez, 213 N.J. Super. 324 (App. Div. 1985), certif. den. 103 N.J. 480 (1986), Lopez retrieved a gun from his home because he wanted to be armed when he next encountered Matias, with whom defendant had been feuding. When the two men next did meet, Matias shot Lopez but Lopez used his own gun to retaliate and killed Matias. At trial, Lopez claimed that he acted in self-defense and was acquitted of murder. Nevertheless, he was convicted of possession of the gun with the purpose to use it unlawfully. On appeal, he asserted that the verdicts were inconsistent.

The Appellate Division affirmed. It observed that murder and possession with the purpose to use unlawfully share no common elements, so that the murder acquittal did not in any way affect the possession-with-the-purpose-to-use-unlawfully prosecution. Moreover, even although Lopez might have killed in self-defense, it was reasonable for the jury to conclude that his possession of the gun was for an unlawful purpose if Lopez was affirmatively seeking trouble.

In any event, it is inconceivable that under the facts of this case, the evidence reflects such an "eras[ure];" it is inconceivable that under the facts of this case the jury did not understand the unlawful purpose to be an assault upon, at the least, Alton Pearson. After all, the jury heard defendant's statement to New Brunswick Detective John Selesky, and in that statement defendant quite explicitly explained that he intended to confront Pearson, that defendant brought a rifle with him, and that defendant wielded the rifle in an attempt to frighten Pearson. (See Pa5; Pa7-11). It is simply preposterous to suggest, as the trial judge evidently did in this case, that the jury by not finding an assault beyond a reasonable doubt necessarily found no unlawful purpose.

We can understand that if defendant were found in a car with a weapon (or even an arsenal) and charged only with a violation of N.J.S.A. 2C:39-4(a), the jury would indeed be required to guess what his purpose was. In this case, however, the State presented a theory of the case.

In his opening statement, Assistant Prosecutor Koch told the jury that defendant took the loaded rifle and the loaded handgun and went to 160 Lawrence Street specifically to confront Alton Pearson. (2T6-5 to 11). In his closing statement, Koch revisited this theme, emphasizing that defendant intended to use the weapons to confront Pearson and other family members. In

both addresses, Koch even assigned a motive for defendant's behavior: defendant believed that Pearson was having an affair with defendant's wife. (2T26-5 to 11; 4T156-2 to 157-8). Especially after hearing defendant's statement, the jury was entitled to conclude that there was no assault, but it was equally entitled to conclude that defendant had the purpose to assault.

In essence, defendant is arguing that if he did not commit the assault, then he did not act unlawfully, and at that moment could not have had an unlawful purpose. Indeed, trial counsel made this argument when she asserted, "[The] unlawful purpose has to exist at the time of the act." (7T18 to 19). What trial counsel ignored, however, and what defendant continues to ignore, is that the Penal Code defines possession to be an act. N.J.S.A. 2C:2-1(c). Thus, so long as the jury could find that the possession for the unlawful purpose existed before defendant reached Alton Pearson's house, the jury can return a verdict of guilty for a violation of N.J.S.A. 2C:39-4. See, e.g., State v. Truglia, 97 N.J. 513 (1984).

In the instant case, of course, the jury was entitled to conclude, based upon all of the evidence adduced by the State, that defendant took two firearms, placed them in his car, and with the purpose to assault Alton Pearson or other people drove with the weapons to Pearson's house. The jury was equally

entitled to conclude that defendant had abandoned this purpose by the time he reached Pearson's house, or the jury was equally entitled to conclude that Pearson, although he continued to desire to assault Pearson, simply did not assault him. Either of these alternatives, however, nevertheless permits the verdict that defendant did at some time on October 18, 1990, possess the two firearms with the unlawful purpose of assaulting Pearson. Jenkins is wrong because it does not permit such simultaneous conclusions.

## CONCLUSION

In our view, the evidence before the jury permitted it to conclude that defendant intended to confront Alton Pearson at 160 Lawrence Street, and that defendant intended to use a gun (or rifle) to emphasize his concerns. Such an intended use of a firearm is of course illegal, even if defendant eventually abondoned this intention to use the firearms in this manner, and the trial court should not have granted a judgment of acquittal. Because there was ample evidence to support the conclusion that defendant possessed the weapons with an unlawful purpose, the convictions should be reinstated.

Respectfully submitted,

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January 27, 1994