SUPREME COURT OF NEW JERSEY
DOCKET NO. 38,113

STATE OF NEW JERSEY,	:	**CRIMINAL ACTION**
Plaintiff-Appellant,	:	On Appeal from Judgments of Acquittal N.O.V. of the
v.	:	Superior Court of New Jersey, Law Division,
DONALD PETTIES,	:	Middlesex County.
Defendant-Respondent.	:	Sat Below: Hon. Richard F. Plechner,
	:	J.S.C., and a jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT

SUSAN L. REISNER
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
P.O. Box 46003
Newark, New Jersey 07101

MARK H. FRIEDMAN
Assistant Deputy
Public Defender

Of Counsel and
On the Brief

DEFENDANT IS NOT CONFINED

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PROCEDURAL HISTORY

On October 22, 1992, the Middlesex County Grand Jury, in Indictment No. 01910-10-92, charged defendant with the following crimes: five counts of fourth degree aggravated assault with a firearm, one each involving Helen Petties (count one), Catherine Pearson (count two), Cassandra Edwards (count three), Jasmine Edwards (count four), and Alton Pearson (count five); possession of firearms for an unlawful purpose (counts six and seven); and possession of a weapon without a permit (count eight) (Pa 1 to 3).[1]

Defendant stood trial before the Honorable Richard F. Plechner, J.S.C., and a jury on August 24 to 31, 1994. Originally, the jury foreperson announced that the jury had acquitted defendant on all five counts of fourth degree aggravated assault as well as the lesser included offenses of harassment and simple assault on counts one, three and four, but had found defendant guilty on counts six, seven and eight and of the lesser included offense of simple assault on counts two (Catherine Pearson) and five (Alton Pearson) (6T 10-2 to 12-10). When the jury was polled, however, it was discovered that the guilt verdicts on the two lesser included offenses of simple assault were not unanimous (6T 12-22 to 18-25). The judge eventually declared a mistrial on those charges (6T 16-23 to 30-9).

On November 12, 1993, Judge Plechner granted defendant's motion for judgment of acquittal N.O.V. on counts six and seven (possession of a weapon for an unlawful purpose) and dismissed both counts (Pa 4). On the same date, he

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[1] "Pa" refers to the appendices to the State's brief in support of its motion for leave to appeal in this Court (Pa 1 to 12) or to its letter dated October 11, 1994 (Pa 14 to 18).
"Ra" refers to the appendix to this brief.
"1T" refers to the trial transcript of August 24, 1993.
"2T" refers to the trial transcript of August 25,1993.
"3T" refers to the trial transcript of August 25, 1993 (marked "Trial Excerpt").
"4T" refers to the trial transcript of August 26, 1993.
"5T" refers to the trial transcript of August 27, 1994.
"6T" refers to the trial transcript of August 31, 1994.
"7T" refers to the motion and sentencing transcript of November 12, 1993.
"1Sb" refers to the State's brief in support of its motion for leave to appeal in this Court.
"2Sb" refers to the State's letter dated October 11, 1994.
"Ab" refers to the brief of amicus curiae the Attorney General.

sentenced defendant to three years probation, a $1,000 fine, and the appropriate penalty assessments on count eight of the indictment (7T 19-11 to 20).

The State's motion for leave to appeal the order granting the directed verdicts of acquittal on counts seven and eight was filed with the Superior Court, Appellate Division, on November 29, 1994 (Pa 5 to 6). The Appellate Division denied leave to appeal in an order filed on December 28, 1994 (Pa 12). The State's motion for leave to appeal the Appellate Division's order was filed with this Court on January 27, 1994. This Court granted the motion for leave to appeal on March 24, 1994 (Ab 3 and page 1 of the appendix to that brief).

STATEMENT OF FACTS

On September 18, 1992, defendant and his wife, Helen, had been married for eleven years and lived at 501 Fisher Avenue in Piscataway (4T 49-17 to 51-13). Alton Pearson and his mother, Catherine Pearson, lived at 160 Lawrence Street in New Brunswick (3T 39-20 to 40-10 and 52-225 to 53-8). Alton described Helen Petties as "just a friend" and said that he "knew her for about eight, ten years ago" (3T 40-17 to 41-3 and 49-18 to 25). This impression was not shared by defendant: he testified that on that date he went to Alton's home to "discuss an affair him and my wife were having," a belief that Helen herself had apparently placed in his mind (4T 51-21 to 52-16).

Defendant first went to Lawrence Street to talk to Alton at about 5:30 p.m. (4T 52-17 to 53-2). At that time, Catherine Pearson was at home being visited by her granddaughter, Jasmine Edwards, and Jasmine's mother Cassandra, who was Alton's brother's girlfriend (3T 3-5 to 5-7 and 53-9 to 14). When defendant rang the doorbell, Cassandra answered the door and told defendant that Alton was not home (3T 53-15 to 54-7). Defendant then introduced himself, told Catherine and Cassandra that he wanted to talk to Alton about the alleged "messing around with his wife" and that he "wanted to get to the bottom of everything" (3T 6-11 to 7-23 and 54-22 to 55-22; 4T 52-17 to 53-15). When Catherine told him that she did not know when Alton would return, defendant said that he would return later on with his wife "so we can sit down and talk this situation out" (3T 7-24 to 8-22 and 55-23 to 56-4; 4T 53-16 to 21).[2] The entire conversation took about five minutes (3T 8-14 to 15), and both women acknowledged that defendant spoke very calmly and was "very nice to [them]" during that time (3T 19-22 to 20-1 and 62-24 to 64-9).

After defendant left Cassandra, Catherine and Jasmine drove off to look for Alton to tell him that defendant was looking for him (3T 8-23 to 9-14 and 56-5 to 18). Meanwhile, defendant went back home, picked up Helen, and returned

[2] Cassandra testified that she thought she saw Helen sitting in defendant's car when he came to the house this first time (3T 5-8 to 6-15). Catherine thought defendant was accompanied to the door by "another man" whom she had never seen before and could not identify (3T 54-8 to 21).

to Lawrence Street "to take care of the situation" (4T 53-22 to 54-18). They were sitting in the car in front of the Pearson house when Cassandra, Catherine and Jasmine returned from their unsuccessful search for Alton (3T 9-15 to 10-2 and 56-19 to 57-18). Defendant and Helen remained in their car waiting for Alton while the two women and Jasmine sat on the porch (3T 10-3 to 12; 4T 53-22 to 54-8). Alton arrived at the house about 20 to 25 minutes later (3T 10-13 to 24, 43-6 to 16, and 57-19 to 58-4). Defendant and Helen then got out of the car to speak to Alton (4T 54-23 to 55-15).

Defendant approached Alton, said that he had "heard you was messing with my wife" or "you and my wife are carrying on an affair," and that his wife had verified this allegation (3T 58-5 to 10; 4T 55-16 to 23). Alton insisted that Helen was simply "my friend from eight years ago" and nothing more (3T 10-25 to 11-10). Catherine, Cassandra and Jasmine were "inches away" (3T 11-11 to 25). Cassandra and Catherine also claimed that defendant whispered into Alton's ear that "he was marked" and "you're mine" and that Alton replied "you're mine too" (3T 11-4 to 13-1 and 58-11 to 21). Alton himself denied that any such exchange took place (3T 48-20 to 23). Defendant described the exchange as "a general conversation, kept quiet and basically talking at that time" (4T 56-3 to 6). He added, however, that:

> Well, the conversation went back and forth and leading to nowhere. So started to walk away. At that time my temper was getting kind of flared, but still in control, I walked away. said, well, I don't want to be bothered with it anymore. I said I'm through with it. I turned away and mumbling to myself talking, in my own thoughts.

(4T 58-20 to 59-5). Furthermore, "[a]t that particular time, Alton, his mother and Helen, they was all arguing back and forth" (4T 59-3 to 4).

Alton, Catherine and Cassandra all testified that defendant then went to his car, opened the door, pulled out a handgun and pointed it straight at Alton (3T 13-2 to 18, 45-9 to 15, and 58-22 to 59-1).[3] Catherine then claimed that

[3] Catherine admitted that her account of the gun being pointed straight at Alton did not appear in her statement to the police, but she insisted that she told them that (3T 65-10 to 66-9). Cassandra originally told the Grand Jury

she stood between defendant and Alton and begged him not to shoot (3T 59-2 to 12). After she said this, defendant responded in a "very polite" manner, "no disrespect to you, maam....I just wanted to tell him to say away from my wife" (3T 67-9 to 20). After two or three seconds, defendant put the gun to his side and went back to his car (3T 46-20 to 47-2). Alton then told his mother "I'll be back[, d]on't worry about it" and left the scene in his car to "look for my family" (3T 47-3 to 22). He did not see anything that happened after that point (3T 49-8 to 17).

Defendant then left his car again, opened the trunk, pulled a rifle out of it and started "waving" or "swaying it back and forth" towards "everyone" still standing on the sidewalk (3T 13-24 to 14-9 and 59-13 to 60-7). At the same time, defendant allegedly ordered Helen to get into the car, and when she did not do so immediately he "told her she got five seconds to get in the car or he was going to blow her up" (3T 13-19 to 23 and 60-8 to 25). Although both Catherine nor Cassandra claimed that they did not recall defendant having made any other statement (3T 29-7 to 25 and 69-18 to 70-5), Cassandra had told the Grand Jury that when he held the rifle, he said, "[i]f I wanted to kill you, I can kill you. I'm not doing anything. I'm telling you now I want to know everything that's going on" (3T 30-1 to 10). Defendant and Helen then got into their car and left (3T 61-1 to 4). Cassandra then called the police, gave them defendant's license plate number, and told them that "a guy had two guns and he had them getting ready to shoot my brother-in-law" (3T 14-23 to 15-7 and 61-5 to 12).

Defendant's account of the events following his original conversation with Alton was, of course, significantly different from that of the Pearson family. He testified that after he decided he was "through with it" and went to his car (4T 59-3 to 8), "I look up and here's this person Alton Pearson coming

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that defendant pointed the gun at everyone, not just Alton, because everyone was "in a line" (3T 24-23 to 26-14). Both witnesses and Alton admitted on cross-examination that they had talked to each other and to other family members about the incident on several occasions between September 18, 1992 and this trial (3T 24-3 to 22, 51-3 to 15, and 66-10 to 67-8).

towards my car like he was coming towards me" or "trying to still come after me," at which point defendant started "yelling just get away from me. Just leave me alone" (4T 59-6 to 25). He admitted that he did not see Alton or anyone else carrying a weapon that evening (4T 74-9 to 79-13). Nonetheless, when he saw Alton coming he picked up a handgun that was laying on the front seat of the car, "palmed it" by his side without putting his finger on the trigger, yelled at everyone to "get away from me, just back off me," put the gun in his hip pocket, and got back into the car (4T 66-21 to 67-22 and 68-16 to 69-9). He denied pointing the handgun at Alton or anybody else (4T 67-22 to 68-15).

After he got into his car defendant noticed that the car was "blocked in" by various people and he became nervous because he could not leave without hitting someone (4T 69-10 to 14). He then got out of his car, opened the trunk, took the rifle from its case and "held it directly in the air. And I was telling just to get away from me. I don't know the exact words. Like if I wanted to do something, I could do something. Just leave me alone, let me out of here" (4T 69-15 to 70-3). He held the rifle straight up in the air very briefly, "yelled at Helen...let's go, let's get out of here," put the rifle back in the trunk, and left as soon as Helen got into the car (4T 70-15 to 71-23). He drove back to Piscataway to drop Helen off where they had left their daughter and "turn myself in" (4T 71-23 to 72-12).

Defendant denied that he possessed either of the two firearms for use against persons or property (4T 73-5 to 20 and 87-9 to 19). He claimed that he got the handgun from a friend in his neighborhood who had "heard about my situation" and had placed it in the console by the passenger seat without "giving any thought of it. I'm used to having firearms in my possession from the military. So I didn't thing anything of it" (4T 60-4 to 66-9). He placed the handgun in Helen's purse after they left Lawrence Street and later told the police that he had put it there in order to keep Helen from being arrested (4T 81-14 to 82-6 and 93-7 to 13). He did not know that the handgun was loaded (4T 88-1 to 8).

Officers Anthony Previte and Richard Rowe responded to Lawrence Street "on a report that there was a man at that location threatening the people there with guns" (2T 21-12 to 23-9). Cassandra and Catherine were both "visibly shaken and frightened" and had to be calmed down before they could give statements, although they did give Previte a description of defendant's car, it's license plate number, and the direction it took on Remsen Avenue (2T 23-22 to 26-6). Alton described himself as being "a little shocked" rather than scared by the experience (3T 50-1 to 6), and he told the police that he did not wish to file a complaint or pursue charges against defendant (2T 72-18 to 25; 3T 50-7 to 51-2; 4T 17-13 to 18-11). He had to be subpoenaed before he would testify at trial or before the Grand Jury (3T 52-2 to 10).

Defendant's car was stopped at 7:30 p.m. about an eighth of a mile from his home by Officer Frank Hackler of the Piscataway Police Department, who knew that the car and license number belonged to someone who was "wanted for a possible abduction of a female in which two guns were used" (2T 34-19 to 37-13). Defendant and Helen exited the car "without incident," and defendant not only gave Hackler consent to search the car but told him that "the gun was in the trunk of the vehicle" (2T 37-14 to 40-25; 4T 72-13 to 73-4). The .22 caliber rifle and scope, unloaded but with the safety off, was found in the hatchback compartment of the car (2T 47-13 to 48-23). The .25 caliber semi-automatic pistol, with one round in the chamber and six in the magazine, was found inside Helen's purse in the front passenger compartment (2T 49-1 to 50-11). Defendant was described as being entirely cooperative at all times (2T 52-5 to 13; 4T 15-10 to 15).

Defendant voluntarily gave a taped statement about the incident to Detective John Selesky of the New Brunswick Police Department (4T 7-2 to 12-14). Defendant readily admitted to possession of the handgun and rifle (4T 12-15 to 25) but denied that he possessed or used it to threaten anyone (Pa 17):

> Threats, I don't feel I made any threats, I pulled out the gun I held it directly in the air. I did not point it at anybody at the time, I told them if I wanted to kill you I could of but I didn't want to do nothing.

He insisted that "I thought I was mature enough to confront the two individuals and I think if they would of confronted me in the same particular situation nothing would of ever happened tonight..." (Pa 17).

LEGAL ARGUMENT

POINT I: THE ORDER GRANTING JUDGMENTS OF ACQUITTAL N.O.V. ON COUNTS SIX AND SEVEN OF THE INDICTMENT SHOULD BE AFFIRMED BECAUSE THE JURY'S VERDICTS OF ACQUITTAL OR FAILURE TO REACH A VERDICT ON COUNTS ONE THROUGH FIVE AND ALL OF THE LESSER INCLUDED OFFENSES ON THOSE COUNTS PRECLUDED THE ESTABLISHMENT OF THE ELEMENTS OF INTENT TO USE THE FIREARMS UNLAWFULLY AGAINST PERSONS THAT HAD TO BE PROVEN BEYOND A REASONABLE DOUBT TO SUSTAIN THE CONVICTIONS PURSUANT TO N.J.S.A. 2C:39-4a.

Judge Plechner granted defendant's motion for judgments of acquittal N.O.V. on the two convictions for possession of firearms for unlawful use against persons (counts six and seven of the indictment) because the jury's verdicts of acquittal on all charges of aggravated assault and on both lesser included offenses on counts one, three and five, along with their failure to reach any verdict at all on the lesser included offenses of counts two and five, "leaves the possession with unlawful purpose standing alone. And I think it can only lead to speculation on the part of the jury as to what other unlawful act may have been intended" (7T 10-10 to 17). The State's representatives attack this ruling on three fronts: first, that the jury's verdicts on counts six and seven were, in fact, not inconsistent with the acquittals or non-verdicts on the charges of unlawful use of the firearms and that the evidence permitted the jury to arrive at such a contradictory result (Ab 15; 2Sb 2); second, that if the acquittals and non-verdicts do indeed "erase the identification of the unlawful purpose" within the meaning of State v. Jenkins, 234 N.J. Super. 311, 315 (App. Div. 1989), then Jenkins itself should be overruled (Ab 24 to 25; 2Sb 2; 1Sb 7 and 10); and third, that if these verdicts are in fact legally inconsistent within the meaning of Jenkins and State v. Peterson, 181 N.J. Super. 261, 267 (App. Div.), certif. den. 89 N.J. 413 (1982), then the Peterson line of cases should be abandoned in favor of the United State's Supreme Court's approach in United States v. Powell, 469 U.S. 57, 105 S.Ct. 471 (1984), which would make even legally inconsistent verdicts under Peterson "unreviewable" by presuming that they are simply the products of jury "lenity" that need not be consistent or even rational (Ab 25

to 27; 1Sb 7 to 8 and 11).

Defendant submits that the State and amicus are wrong in every particular. The issues raised by the State's representatives cannot be addressed in a vacuum; they cannot be resolved, as they contend, by focusing solely on the fact that on paper the charges in counts one through five do not share common elements (Ab 17 to 18) or that evidence existed that might have led the jury to these disparate verdicts through "findings [that] are both rational and...consistent" (Aa 15 to 17; 2Sb 2). Instead, determination of whether or not inconsistent verdicts are fatal to convictions under the Peterson line of cases must focus on "the way the indictment was framed, the way in which the State presented its case, and the manner in which the jury was instructed...." State v. Burnett, 245 N.J. Super. 99, 106 (App. Div. 1990). When this case is viewed in that light, it becomes clear that whatever evidence the prosecutor may have been able to rely on to prove unlawful purposed, the only evidence that he did rely on was the evidence of unlawful use; to put it in his words, he asked "was there any lawful use for the firearm [?]" and answered his own question by arguing that the "only intention the evidence shows, the credible evidence, is that unlawful use" (4T 157-4 to 6). Every bit as important, Judge Plechner was clearly correct in recollecting that "I did not charge the jury as to any unlawful act other than, of course, the general charge on aggravated assault which was part of this case, and added on an unlawful act that was done with the guns" (7T 10-3 to 7). Put another way, the jury was never instructed that they could find unlawful purpose other than by reference to the active crimes that defendant had been charged with. Close concentration on the case that the State actually tried rather than the case that the State's representatives on appeal would have liked to have tried mandates that Judge Plechner's order be affirmed. In the alternative, the errors present in the jury instructions are so obviously reversible under Jenkins and State v. Harmon, 104 N.J. 189 (1986) that at minimum this Court should exercise original jurisdiction and grant defendant a new trial on counts six and seven even if it reverses the granting of the judgments of acquittal

N.O.V. R. 2:10-5.

Ordinarily, separate counts in a multi-count indictment are regarded as unitary charges and inconsistency of verdicts on the separate counts do not taint or invalidate those on which guilty verdicts are rendered. United States v. Powell, 469 U.S. 57, 105 S.Ct. 471 (1984); Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 190 (1932). The Appellate Division has repeated held both before and after Powell, however, that this rule should not be followed when "an acquittal on one count precludes the finding of one or more elements of an offense charged in another count as a matter of law." State v. Lopez, 213 N.J. Super. 324, 328 (App. Div. 1985), certif. den. 103 N.J. 480 (1986); State v. Kamienski, 254 N.J. Super. 75, 95 (App. Div.), certif. den. 130 N.J. 18 (1992); State v. Mangrella, 214 N.J. Super. 437 (App. Div. 1986), certif. den. 107 N.J. 480 (1987); State v. Mieles, 199 N.J. Super. 29, 41 (App. Div. 1985); Peterson, 181 N.J. Super. at 266-267; State v. Hawkins, 178 N.J. Super. 321 (App. Div. 1981), certif. denied 87 N.J. 382 (1981).

The relationship between proof or lack of proof of an unlawful act and the elements of unlawful use of weapons against a person is complex because while "the Penal Code defines possession to be an act" (2Sb 2), possession under N.J.S.A. 2C:39-4 is not a self-defining illegal act; except in the regulatory sphere, the legality of the possession is defined solely by whether or not the State has proven the unlawful purpose of use against another beyond a reasonable doubt. Harmon, 104 N.J. at 203-206. This Court has ruled that in general the "question is not whether [defendant] was justified in his use of the gun but whether his purpose was to commit an unlawful act." Id. at 211. It is also established that "the use of the weapon by the defendant, standing alone, would be sufficient to prove he had possessed it for an unlawful purpose" because such purpose "must exist at whatever time the State claims that the possessory offense took place." State v. Daniels, 231 N.J. Super. 555, 559-560 (App. Div. 1989), quoting from Harmon, 104 N.J. at 210 (emphasis added). Nevertheless, it was also recognized that "in many cases the reasonableness of the defendant's conduct will be presented to the jury in

defense of the substantive crimes charged. Hence, any use of a firearm may involve consideration of those limited circumstances...may resolve the question whether the purpose was to commit an act proscribed by law." Id. at 209. The inextricability of these questions is proven in those cases such as that sub judice, in which the State relies on alleged unlawful use of the weapon as its sole proof of the defendant's unlawful purpose in possessing it and the jury's rejection of the claim of unlawful use fatally undermines the State's claim that it proved unlawful purpose under N.J.S.A. 2C:39-4 beyond a reasonable doubt. Jenkins, supra.

If the "prosecution had a theory of the case" (2Sb 1) that involved that claim that the jury would "hear that through the evidence that his purpose was to threaten, was to menace and was to intimidate Alton Pearson and his family" (2T 8-20 to 24), then the place where he told the jury why he felt that the evidence had actually proven that theory would be in his summation, and in particular that part of his summation where the prosecutor explained to the jury why the elements of intent to use the weapon unlawfully against persons had been established by the evidence. That part of his argument is reproduced below, and it is evident that the only evidence that the prosecutor relied upon to establish the so-called third and fourth elements of Harmon, 104 N.J. at 212, was the evidence of how defendant allegedly used the weapons in an unlawful manner (5T 156-2 to 157-8, emphasis added):

> The third element is that the defendant's purpose for a conscious objective was to use the firearm against another.
>
> Again, the State doesn't have to prove at that point the defendant's state of mind. And the State doesn't have to prove that he was going to pull the trigger. But the evidence is clear that he's used the handgun against Alson Pearson by pointing directly at Alton Pearson. And he used the rifle by brandishing at the other people outside, Jasmine Edwards, Helen Petties, Cassandra Edwards and Catherine Pearson.
>
> He did so to threaten and to intimidate Alton Pearson because he believed he was having an affair with his wife. Now, with the rifle, again, he took out the rile to intimidate the family members of Alton Pearson.

> The guns didn't remain in the car. The defendant simply lost control. And the credible evidence shows that he used the weapons against the other individuals. It's clear from the evidence that his intention, you could find when you review all the circumstances, that he meant to threaten and to intimidate. That, therefore, based on the credible evidence, The State has proven counts six and seven of the indictment. That the defendant's purpose was to use these weapons unlawfully.
>
> And ask yourselves what lawful purpose these guns could have had. What lawful purpose could those guns could have had.
>
> And that's what the fourth element is. The fourth element is that the defendant intended to use the firearm unlawfully. And I ask you, again, based on the evidence, was there any lawful use for the firearm. The only intention evidence shows, the credible evidence, is that unlawful use. He took the weapon, again, to intimidate and to threaten. That's why they were in his car that night.

The statements attributed to defendant about Alton being "mine" or "marked" or "[i]f I wanted to kill you I can kill you but I'm not doing anything" that amicus relies on so heavily in her attempts to avoid the effect of the acquittals and non-verdicts on counts one to five (Ab 15 and 20 to 21) were not even referred to by the prosecutor in the above-quoted argument. Indeed, the prosecutor did not even rely on these statements when he was arguing that the jury should convict the defendant of the aggravated assaults charged in the first five counts; instead, he relied solely on the testimony of the Pearsons and Cassandra Edwards regarding defendant's use of the weapons to prove that "[h]e had the guns to intimidate" (4T 144-19 to 22) and that this case was about aggravated assault rather than any lesser included offense:

> Now, the judge in his instructions may give you a charge for you to consider, a simple assault and a harassment. But when you review the testimony in this case, you will find that there was no simple assault and that there was no harassment. The credible evidence shows that there was a pointing of a weapon.

(4T 144-5 to 11, emphasis added).

> Now, based on the credible evidence, there is only one version that makes logical sense. And I ask you to use you common sense when you deliberate. The

> only logical version is that Catherine Pearson, Cassandra Edwards and Alton Pearson's version is credible because that's why the defendant went to 160 Lawrence Street. And he went there to intimidate and to threaten. Ant that's what the evidence shows.
>
> The evidence shows that the defendant did not commit a simple assault. He had guns. And he didn't simply go over there to harass because he had the guns. Now, he may have been polite in the beginning, but when Alton was there he lost control. He became upset. And Alton Pearson, whom he believed was having an affair with his wife, after Alton Pearson denied it, and the only way to intimidate and the only way to threaten was to point those weapons at Alton Pearson and brandish them at everyone else, Alton Pearson's family members and his wife, who he was -- at which I can logically assume he was upset with her about this so-called affair.

(4T 152-3 to 20, emphasis added).

Thus the State's claim on appeal that 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 [drove to the Pearson residence} with the purpose to assault Alton Pearson or other people" (2Sb 2) glosses over the fact that alleged "assault [on] Alton Pearson or other people" was itself the only evidence that the prosecutor relied upon in urging the jury to render the verdict on counts six and seven that it was "entitled to conclude." Once the jury rejected the prosecutor's claim that the "credible evidence shows that there was a pointing of a weapon" (4T 144-9 to 10), as it's verdicts and non-verdicts clearly show it did, it also rejected the only evidentiary basis that he suggested for the element of unlawful purpose that is necessary for convictions under N.J.S.A. 2C:39-4. To create a brand new evidentiary rationale on appeal that was barely even mentioned, much less relied upon by the trial prosecutor is to engage in the very inquiry "into the jury's thought process to determine what the jury 'really meant'" (Ab 29) that the amicus condemns Judge Plechner for doing.

Even if this Court chooses to indulge the amicus' speculation about defendant's verdict based on statements attributed to him (Ab 15 and 20), such speculation must include the very real possibility that the jury did not even accept the contention that the most incriminatory-sounding statements were even

made. Neither Alton nor defendant remembered the "you're marked/you're mine" exchange that Catherine and Cassandra testified to (3T 48-20 to 22[4];4T 56-3 to 6) and neither Catherine nor Cassandra could remember defendant saying "[i]f I wanted to kill you, I can kill you" when they were giving their direct testimony (3T 29-7 to 25 and 69-18 to 70-5). The fact that the jury acquitted defendant on count one and all lesser included offenses connected with that charge indicates that it did not accept Catherine and Cassandra's testimony that defendant had threatened to "blow up" Helen if she did not get into the car (3T 13-19 to 23 and 60-8 to 25). As for the statements about Alton "messing around" with Helen and wanting to "get to the bottom of everything" that defendant made when he first visited the Pearson home (Ab 20), it is inconceivable that they could be considered in the same league as the "exchange of stock profanities and threats" that led the defendant to return home for a gun that was mentioned in Harmon, 104 N.J. at 192, or the long-running feud punctuated by "harsh words" that precipitated defendant's arming himself in Lopez, 213 N.J. Super at 326, or the previous threats made against the defendant in Daniels, 231 N.J. Super. at 561. Defendant, of course, testified that he had no purpose, unlawful or otherwise, when he put the firearms in the car (4T 73-5 to 20 and 87-9 to 19) and only used them when he felt threatened either by Alton or by the Pearson family when they "blocked in" his car (4T 66-21 to 67-22, 68-16 to 69-9, and 69-15 to 70-3).[5] Rather than sifting through

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[4] The jury most certainly did not accept the prosecutor's contention that pointing was proved because "when [defendant] points the gun at Alton Pearson, he say you're marked" and that Alton did not remember this because he was in a "state of shock" (4T 154-11 to 16) because that contention was simply not correct. Both Catherine and Cassandra testified that the mutual "marked/mine" exchange took place before defendant returned to his car (3T 11-4 to 13-1 and 58-11 to 21) and the State has not suggested a contrary scenario on appeal (1Sb 3 to 4).

[5] As discussed in footnote 6 infra, if the procedural posture of this case causes this Court to conclude that the judgment of acquittal N.O.V. must be reversed, it has the power and, we would submit, the responsibility to recognize that the obvious applicability of Jenkins, supra to the charge in this case requires that at minimum a new trial must be granted on either or both of counts six or seven. The judge's treatment of defense counsel's request for instructions that dealt with defendant's claim of feeling threatened violated the teachings of Harmon and provide an independent basis for such a new trial.

all of the testimony the jury could have credited, it would be more in keeping with the definition of legally inconsistent verdicts set forth in Peterson, 181 N.J. Super. at 267, to focus on the evidence that the prosecutor actually did ask the jury to accept before arriving at its verdicts.

It is also necessary, of course, to critically examine "the effect of his jury charges" when evaluating the propriety of Judge Plechner's ruling. Id. at 269. The judge was clearly correct in likening this case to Jenkins, supra, because none of the instructions that he gave to the jury would have allowed or even suggested to them that they could go beyond the charges or lesser included offenses in counts one through five in determining whether defendant's alleged purpose to use the weapons unlawfully against persons had been proven beyond a reasonable doubt (7T 10-18 to 11-7). In both his original charge (5T 26-4 to 9) and his requested recharge (5T 46-17 to 24, reproduced below), the judge equated the "unlawful purpose" element of N.J.S.A. 2C:39-4 with "an illegal act" and never so much as suggested that the purpose "proscribed by law" under

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After defendant completed his testimony, including his belief that Alton was "coming at him" before he "palmed" the handgun (4T 66-21 to 69-9) and his feeling that he was "blocked in" before he retrieved the rifle from the trunk (4T 69-10 to 70-3), Judge Plechner accepted the prosecutor's argument that self-defense should not be charged to the jury, primarily because defense counsel (who herself had been unaware that defendant would give such testimony) had not given proper notice of any intention to raise this defense pursuant to R. 3:12A (4T 108-21 to 109-10). As an alternative, defense counsel then requested that the jury be charged that defendant could not be found guilty if he was "motivated honestly by a self-protective purpose," a complete defense to N.J.S.A. 2C:39-4 under Harmon, 104 N.J. at 207 that obviously requires no prior notice under R. 3:12A (4T 109-11 to 111-5). Judge Plechner rejected this request because "it still raises the issue of self-defense" and because "he was in possession of firearms at least constructively before he even got to the scene....He had guns in the car" (4T 111-6 to 12). This ruling was clearly erroneous because this Court has already ruled that "we are unable to accept the State's position that because the defendant armed himself in advance of the episode, he cannot be heard to say that he had no criminal purpose...." Harmon, 104 N.J. at 206. Although defendant did not contend that he put the guns in the car specifically for self-protection, he did deny having any criminal purpose for having the firearms up until the time when he felt threatened, at which point his purpose for both possession and use of the firearms was "motivated honestly by a self-protective purpose" within the meaning of Harmon. As such, he was entitled to have the "self-protective purpose" language of the model charge read to the jury, as defense counsel requested (4T 110-11 to 21), and Judge Plechner's refusal to honor this request was reversible error on counts six and seven requiring a new trial even if the State's appeal of the judgments N.O.V. on counts six and seven is wholly or partially successful.

the statute could be anything short of that:

> 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 had to be for an illegal act. That's what possessing it unlawfully means.

The judge's invocation of Black's Law Dictionary in his recharge did not add anything to this instruction because that definition did nothing more than inform the jury of the perfectly obvious fact that "unlawful" meant that "which is not lawful" or is "contrary to or in defiance of the law...disregarding the law...[without] legal excuse or legal justification" (5T 44-20 to 24 and 47-5 to 19). That the judge "did not ascribe any particular illegal acts or unlawful purposes" in this charge (Ab 21) is precisely the point: the only way that the jurors could have understood what is "proscribed by law" or what is an "illegal act" is by referring back to the judge's instructions on what "acts" actually were illegal, i.e., the crimes and lesser included offenses described to them in Judge Plechner's instructions on counts one to five (5T 14-8 to 22-7 and 6T 33-7 to 7-20). A similar infirmity attaches to the amicus' argument that "the jury knew that the 'unlawful purpose' had to be found within the confines of all the evidence presented" (Ab 23); "all the evidence" cannot be equated with "unlawful purpose" under the instructions that this jury received without immediate reference back to the active crimes "proscribed by law" that "all the evidence" were supposed to prove. In fact, the judge actually discouraged the jury from looking beyond the confines of counts one to five in determining unlawful purpose (5T 47-5 to 12, emphasis added):

> Now, I think, I hope that defines unlawful for you. That is an at 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.

Thus the trial judge was correct both legally and factually in granting the motion for directed verdicts by reasoning that there was "no other unlawful act before the jury, at least none that I have charged them was unlawful" (7T 10-7 to 9).

Despite the State's contention that the "jury was entitled to conclude, based upon all of the evidence" that defendant's unlawful purpose was proven even if they believed that he "abandoned" or "simply did not assault" the Pearsons (2Sb 2), there is no credible indication in the record below that the jury ever focused on anything other than the substance of counts one to five when assessing "all of the evidence" in support of counts six and seven. Besides asking for the redefinition of "unlawful purpose" (5T 36-13), the jury only asked two other questions. One was a recharge on "the elements of aggravated assault, simple assault and harassment," i.e., the crimes and lesser included offenses contained in counts one to five (6T 3-7 to 10). The judge honored this request both as to the elements themselves (3-7 to 8-18) as well as the sequential order that the deliberations were to follow, i.e., that the jury should not consider simple assault unless they found defendant not guilty of aggravated assault and they should not consider harassment unless they acquitted defendant of simple assault (5T 18-8 to 14 and 19-19 to 25; 6T 7-17 to 20). Significantly, they had previously asked "Does acquit mean not guilty?" and "what happens if we all don't agree to guilty or not guilty?" (5T 48-5 to 12). The judge answered, correctly, by saying that acquit and not guilty "mean the exact same thing" and that the jury "cannot reach a verdict until all 12 of you agree" (5T 49-10 to 24). The jury responded to all of these instructions by acquitting defendant of all charges of aggravated assault and all charges of simple assault and harassment on counts one, three, and four, and failing to agree on the lesser included offense of simple assault on counts two and five, which automatically foreclosed consideration of the lesser included offense of harassment on those charges because of the sequential deliberation instructions previously discussed. Contrary to the amicus' assertions, a mistrial was declared and the jury discharged not because "harassment was not an indictable

offense" (Ab 24) but because the prosecutor himself eventually agreed with the judge and the defense attorney that "I'm satisfied with their verdict. I mean, I just -- I'm satisfied with the verdict the way it is. If they think they're hung, they're hung" (6T 29-14 to 16). This concession also puts paid to the amicus' already unsupported speculation that the "jurors could have...found defendant guilty of simple assault or harassment, had they deliberated further" (Ab 29). The jury indicated that "they think they're hung" because they declared as much during individual polling (6T 14-1 to 16-7 and 18-2 to 25). Since the jury either acquitted defendant or could not reach a verdict[6] on all

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[6] Defendant recognizes that the jury's failure to agree on a verdict as to simple assault on counts two and five make this case more complex than it appeared at the time leave to appeal was granted, when there was no transcript or verdict sheet to give the complete picture of the verdicts. In State v. Dancyger, 29 N.J. 76, 92 (1959), this court refused to address the question of whether the defendant's larceny conviction was legally inconsistent with the jury's failure to reach a verdict on a burglary charge because "the jury failed to return any verdict on one count. There is, therefore, nothing with which the guilty verdict may be inconsistent." Dancyger, of course, is factually distinguishable from the instant case in two respects. First, even an acquittal on the burglary count would not have supported an inconsistent verdict argument because our courts have long held that a defendant can be guilty of unlawful entry with intent to commit an offense even if the offense is not consummated. Mangrella, 214 N.J. Super. at 441; State v. Vassaluzzo, 113 N.J. Super. 140 (App. Div. 1971). Second, in this case the failure to agree was only on a lesser included offense of counts two and five; the principal charge set forth in those counts was the subject of an acquittal. Given the circumstances set forth above concerning the nature of the State's proofs at trial and the judge's instructions, Dancyger should not control this Court's disposition on count seven, which concerns the handgun that defendant was accused of having pointed at Alton and Catherine Pearson in counts two and five. Since defendant was acquitted of all charges having to do with the rifle, the judgment of acquittal N.O.V. on count six should not be affected in any way by Dancyger.

If this Court determines that Dancyger undermines the validity of Judge Plechner's order with regard to count seven, then it should not simply reverse that order and remand that count for sentencing as well as the inevitable motion for new trial and/or direct appeal that will accompany a remand. The infirmity of Judge Plechner's charge on counts six and seven under Jenkins and Harmon (see footnote 5 supra) is so obvious that "judicial housekeeping" amply justifies the exercise of original jurisdiction by this Court to order a new trial on counts six or seven immediately rather than make defendant bear the hazards of a new appeal and possible service of prison time on an invalid conviction. Cf. State v. Reed, 183 N.J. Super. 184 (App. Div. 1982). If Judge Plechner's order is to be reversed as to either or both of the N.J.S.A. 2C:39-4a counts, then it is urged that this Court nonetheless vacate the convictions on counts six and seven and remand the matter for a new trial. R. 2:10-5. Compare, for instance, State v. Robbie J. McNair, unpublished opinion, App. Div. Docket No. A-5805-87T3 (April 25, 1989) (Ra 5 to 10) (reversal of judgment of acquittal N.O.V. on N.J.S.A. 2C:39-4a count granted because of inconsistent verdicts) to State v. Robbie McNair, unpublished opinion, App. Div. Docket No. A-4779-88T4 (January 31, 1992) (Ra 11 to 20) (reversal of N.J.S.A. 2C:39-4a

of the acts "proscribed by law" that they were presented to them in counts one to five, and since neither the jury, the State, nor the trial judge ever focused or even referred to any other acts that would support a finding of "unlawful purpose," it is clear that the "acquittal on one count precludes the finding of one or more of the elements of an offense charged in a second count as a matter of law." Peterson, 181 N.J. Super. at 266.

Both of the attorneys below and the trial judge properly likened this case to State v. Jenkins, 234 N.J. Super. 311 (App. Div. 1989). As in the case at bar, in Jenkins the jury acquitted defendant of illegal use of the weapon (allegedly second degree aggravated assault) but convicted him of possession of a firearm for an unlawful purpose and without a permit. No evidence other than the accounts of the alleged shooting by defendant was adduced to prove that defendant's purpose was unlawful and the judge's charge to the jury never suggested that the unlawful purpose could be anything other than the alleged aggravated assault, thereby making it "impossible to say with any assurance what the jury thought was defendant's unlawful purpose." Id. at 314-315. Therefore, the "court may not permit the jury to convict on the basis of speculation" because "acquittal of the accompanying charge erases the identification of the unlawful purpose...." Id. at 315.

The Court in Jenkins did not order that a judgment of acquittal be entered on the N.J.S.A. 2C:39-4 charge, most likely because the defendant in that case was "convicted of the undercharge of simple assault" as well. Id. at 313. In a recent opinion, however, the Appellate Division has followed the logic of Jenkins to its necessary conclusion in a case in which a defendant was convicted of possession of a weapon for an unlawful purpose but acquitted of all of the offenses involving use of the weapon. In State v. Willie Jackson, unpublished opinion, App. Div. Docket No. A-2126-92T4 (July 11, 1994), (Ra 1 to 4), the Court held that acquittal of the N.J.S.A. 2C:39-4 count was necessary under both Jenkins and Peterson "because where, as here, a jury finds a

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conviction in same case because of Jenkins error in the jury instructions).

defendant not guilty on a count of an indictments which forms an element of the offense for which he was found guilty, such a verdict is not only inconsistent, but the jury has found an essential element of the offense has not been established." Id. at 4 (Ra 4). Defendant's case, like Jackson, is, if anything, a better case in which to apply Jenkins than Jenkins itself because the jury was given every conceivable unlawful purpose that the trial judge or the attorneys could glean from the evidence in the form of instructions on counts one to five and the lesser included offenses of those counts and either acquitted defendant or could not reach a verdict as to any of them.

Amicus' contention that Jenkins should be overruled because it allegedly requires that "once the jury finds defendant guilty of the coupled active crime, it must...also conclude that the defendant's purpose in possessing the gun was to use it unlawfully," which would perforce "remove [the element of unlawful purpose] from the jury's consideration, resulting in an impermissible directed verdict" (Ab 24 to 25) is so thoroughly baseless as to be absurd. In fact, Jenkins does not require a jury to convict defendant under any particular reading of the facts of a case; it only requires a trial judge to inform the jury of any unlawful purpose that the evidence can support even if it is not the subject of a separate count of the indictment:

> A jury is not qualified to say without guidance which purposes for possessing a gun are unlawful under N.J.S.A. 2C:39-4a and which are not. For that reason, because a conviction for a coupled active crime cannot be counted on to supply the unlawful purpose, a jury instruction on a charge of gun possession for unlawful purpose must include an identification of such unlawful purposes as may be suggested by the evidence and an instruction that the jury may not convict based on their own notion of the unlawfulness of some other undescribed purpose.

Id. at 316. In footnote one of the opinion (id. at 316), the Court specifically cautions the "[w]e do not suggest that proof of unlawful use of the gun is alone sufficient to convict" (the very suggestion that amicus accuses it of making) and in fact it does not; at best it echoes the instruction that "use of the weapon by a defendant, standing alone, would be sufficient to prove he had

possessed it for an unlawful purpose" approved in Daniels, 231 N.J. Super. at 559-560, without doing violence to the teaching of Harmon, 104 N.J. at 191-192, that "unlawful purpose" requires the jury to find that "the accused possessed a weapon with the 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." The alternative is to adopt amicus' position that the jury be allowed "to convict based on its own notion of the unlawfulness of some other undescribed purpose" (Ab 24), a suggestion that is so at odds with settled law and basic notions of fundamental fairness and notice as to represent a denial of due process of law per se. To allow a jury to convict a defendant of a second degree Graves Act crime based on "its own notion of the unlawfulness of some other undescribed purpose" not charged in the indictment or suggested in the judge's charge is a far worse form of "pure speculation" on the defendant's guilt under N.J.S.A. 2C:39-4 than any act this Court could be accused of doing in affirming the order entered below (Ab 29).

If all else fails, the State's representatives argue that if this Court accepts the reasoning of Jenkins (as it clearly should) and acknowledges its applicability to this case, it should nonetheless reverse the judgments of acquittal N.O.V. by reversing the Peterson line of cases itself in favor of the theory embraced by the United States Supreme Court in Powell, supra (Ab 25 to 27; 1Sb 7 to 8). Powell, 469 U.S. at 66, holds that a defendant cannot raise a claim of legally inconsistent verdicts in federal court even where the defendant's acquittal on one count precludes the finding of one or more elements of another crime for which defendant is convicted because 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." As noted at the outset of this argument, New Jersey cases decided both before and after Powell have adhered to the rule in Peterson, 181 N.J. Super. at 266, that inconsistent verdicts are not unreviewable "where an acquittal on one count precludes the finding of one or more elements of an offense charged in a second count as a matter of law"; even

Lopez, 213 N.J. Super. at 328-329, which the State claims "has reached the opposite conclusion from Jenkins" (1Sb 8), invokes the Peterson rule while citing to Powell. Only Burnett, 245 N.J. Super. at 106-110, rejects the Peterson rule in cases where verdicts are legally inconsistent because that Part felt that this Court "would apply that rationale to these circumstances."[7] This Court should not adopt Powell wholesale; it should retain the Peterson rule and find that it controls the case at bar because it is far more compatible with this Court's precedents than Powell.

In Dunn, 234 U.S. at 393, the Supreme Court enunciated the general rule that "[c]onsistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." The basic rationale for this rule was:

> 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

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[7] Contrary to this dicta in Burnett, 245 N.J. Super. at 109, State v. Crisantos, 102 N.J. 265, 272 (1986) does not represent a rejection of the Peterson line of cases and does not stand for the proposition that "the New Jersey Supreme Court has fully embraced the Dunn and Powell rationale." The portion of Crisantos relied on by the State was part of a longer paragraph of dicta meant to support the holding that "the fact that the jury in this case convicted appellant of felony murder does not necessarily mean that it would have returned the same verdict if [passion/provocation] manslaughter had also been charged." Id. at 273. See also State v. Grunow, 102 N.J. 133, 146 (1986). In other words, the case stands for the proposition that an improper or non-charge on a lesser included offense will vitiate a conviction for murder even if the jury convicts on a different lesser included offense that is based on a reckless state of mind.

This Court has never ruled on a Powell-type case in which the jury acquitted a defendant on a charge in one count of an indictment that constitutes an element of the greater charge contained in a separate count on which the same jury rendered a guilty verdict. Indeed, this Court has given indications that it considers the Powell/Peterson disparity to be very much a live issue. In State v. Bullock, 136 N.J. 149, 157 (1994), the Appellate Division's ruling granting the defendant a judgment of acquittal N.O.V. for misconduct in office was reversed but the case was remanded for consideration of "defendant's further argument for reversal based on his acquittal of the underlying charges of armed robbery, kidnapping, terroristic threats, and aggravated assault." Since that was the very "argument" rejected in Burnett, supra, it cannot be said with any confidence that this Court "has fully embraced the...Powell rationale."

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.

Id. at 393-394. See also United States v. Dotterweich, 320 U.S. 277, 279, 64 S.Ct. 134, 135 (1943). Although Powell, 469 U.S. at 63, declared that Dunn "is not a case where a once-established principle has gradually been eroded by subsequent opinions of this Court," the reason that the Court granted certiorari in the case was to review what was by then a long-standing exception to Dunn involving compound felonies, i.e., "[w]hen the prosecution tries its case on the theory that the felony of which the defendant is subsequently acquitted, is the predicate felony for the telephone facilitation counts convictions of the latter must be reversed for lack of sufficient evidence." United States v. Powell, 719 F.2d 1480 (9th Cir. 1983) (rehearing), reversed 469 U.S. 57, 105 S.Ct. 471 (1984). This exception had been accepted at least in theory by a number of circuits by the time that Powell was decided.[8]

The rationale for departing from Dunn in these circumstances was best expressed in the Third Circuit's opinion in Hannah, 584 F.2d at 30:

> {T]he rule of [Dunn] should not be applied unless the reason for the rule is also present....
>
> As has been previously observed, because of the interdependent Count III-Count I theory presented by the government at trial, we cannot conclude that "[e]ach count in [this] indictment is regarded as if it was a separate indictment." An appellate court may properly review a criminal case on the government's appeal only on the theory submitted to the jury at trial by the prosecution....This case...was presented to the jury on a very limited basis: that the 'acts constituting a felony' under . 843(b) in Count III were the very same acts that constituted the conspiracy alleged in Count I. Because the jury found Hannah not guilty of conspiracy, the felony relied upon by the government to satisfy the felony requirement of . 843(b), the government's case in Count III was

[8] See United States v. Brooks, 703 F.2d 1273, 1278 (11th Cir. 1983); United States v. Berardi, 675 F.2d 894 (7th Cir. 1982); United States v. Bailey, 607 F.2d 234, 245 (9th Cir. 1979); United States v. Hannah, 584 F.2d 27 (3rd Cir. 1978); United States v. Daigle, 149 F.Supp. 409, 414 (D.D.C. 1957), affirmed 248 F.2d 608 (C.A.D.C. 1957).

> insufficient as a matter of law. Accordingly, we will not apply the permissible inconsistent verdict rule to reinstate Hannah's conviction.

Hannah was one of the cases relied on in Peterson, 181 N.J. Super. at 266, for creation of the rule that inconsistent verdicts can be reviewed when "an acquittal on one count precludes the finding of one or more elements of [another] offense," although in Peterson, as in practically every other case that mentions its rule in dicta, the case itself was held to be "clearly indistinguishable" from Hannah and its progeny based on the elements of the offenses in question, the nature of the State's case, and, most significantly, the "effect of [the] jury charges."[9] Id. at 267-269.

Powell eliminated this exception in federal criminal appeals[10] even in cases in which "the verdicts cannot rationally be reconciled" given the way the

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[9] The only area in which the Hannah/Peterson rule has actually borne fruit for defendants is conspiracy prosecutions. In Hawkins, 178 N.J. Super. at 322-323, Dunn was distinguished because "[i]f all but one of the named coconspirators are acquitted, a conviction of the remaining one cannot logically stand....If a jury finds that the State failed to prove beyond a reasonable doubt that Doe conspired with Roe, logic defies an explanation of how it can find proof beyond a reasonable doubt that Roe conspired with Doe." A similar theory prevailed in the federal courts as well, at least prior to Powell. See Hartzel v. United States, 322 U.S. 680, 681 n. 1, 64 S.Ct. 1233, 1234 (1944); United States v. Morales, 677 F.2d 1, 3 (1st Cir. 1982) (Dunn does not apply when "a jury's acquittal on substantive counts operates as an acquittal on the underlying conspiracy count where the acquittal on the substantive counts constitutes a determination that no overt act in support of the conspiracy took place").

[10] Powell "address[ed] the problem only under our supervisory powers over the federal criminal process," citing to Harris v. Rivera, 454 U.S. 339, 102 S.Ct. 460 (1981) as authority for the proposition that "nothing in the Constitution would require [a defendant to receive a new trial because of inconsistent verdicts]." Powell, 469 U.S. at 65. Harris would be a poor precedent to base a state constitutional ruling on for two reasons. First, the case was decided by summary disposition at the same time that certiorari was granted, meaning that the case was decided "without benefit of oral argument and full briefing, and...with only limited access to, and review of, the record...." Harris, 454 U.S. at 349 (Marshall, J., dissenting). Second, although the Court stated that the "questions presented by the certiorari petition concern the constitutionality of inconsistent verdicts in a nonjury criminal trial," id. at 340, the actual holding was that there is "no federal requirement that a state trial judge explain his reasons for acquitting a defendant" of one charge while acquitting him of another. Id. at 344, emphasis added. This holding is at least facially at odds with this Court's ruling (albeit in the unique setting of a capital case) that although "the general theory is that...judges are presumed to know the law," in cases involving issues of "great importance and of sufficient complexity, a reviewing court will want to know that the lower court understood and applied the correct principles of law." State v. DiFrisco, 118 N.J. 253, 276-277 (1990).

case was tried and the jury was charged. 469 U.S. at 69. It rejected the exception to Dunn carved out in Hannah and its progeny even "when the trial judge instructs the jury that it must find the defendant guilty of the predicate offense to convict on the compound offense" because even inconsistent verdicts rendered in the wake of such an instruction "still are likely to by the result of mistake, or lenity....[T]he 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." Id.

Powell's unyielding rule "that inconsistent verdicts should not be reviewable" under any circumstances should not be adopted by this Court because the underlying premises of that rule do not withstand rational scrutiny any more than does a guilty verdict that "cannot rationally be reconciled" with an acquittal on an offense which constitutes an element of the conviction offense. In particular, other than the fact that there might be sufficient evidence to support the guilty verdict if that verdict is considered in isolation, Powell presents no convincing rationale for why it assumes that it is the State "whose ox has been gored," i.e., why it must be assumed that the acquittal is "the result of lenity" rather than that the conviction is the result "of some error that worked against [defendant]." Id. at 65-66. The State's only contribution to this debate in the case sub judice is the assertion that "[a]necdotal evidence in this kind of case is that juries often acquit of aggravated assault while convicting of possession of a gun for an unlawful purpose, and we suspect that they reach those verdicts precisely because they erroneously believe that the assault is the more serious offense" (1Sb 11). It should go without saying that "insulat[ing] jury verdicts from review" because of the courthouse equivalent of back-fence gossip about how occasionally a "jury mistakenly allocated its lenity" is at best difficult to defend rationally. Id. If "lenity" is to be equated with a jury ignoring the evidence and the judge's instructions to spare a defendant from conviction for a "more serious offense,"

then the unexplained assumption of "lenity" is inconsistent with the assumption that jurors "take an oath to follow the law as charged, and they are expected to follow it," Powell, 469 U.S. at 66, and is impossible to reconcile with the rule that in non-capital cases jurors are never to be informed what a defendant's potential sentencing exposure will be if he is convicted of one or more crimes. State v. Reed, 211 N.J. Super. 177 (App. Div. 1986), certif. denied 110 N.J. 508 (1988).

The Powell Court's definition of "lenity" appears to be the rather circular concept 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." 469 U.S. at 65. So stated, this concept is a pseudonym for "nullification," which this Court has defined as "the power to nullify the law by acquitting those believed by the jury to be guilty." State v. Ragland, 105 N.J. 189, 205 (1986) (emphasis in original). In the same opinion, this Court went on to say that nullification "is an unfortunate but unavoidable power [that] should not be advertised, and, to the extent constitutionally permissible, it should be limited." Id. at 211. Under the above-quoted definition of "lenity" in Powell, however, the conviction for the greater offense is an integral part of the same "unfortunate but unavoidable power" that produced the acquittal on the lesser offense. It is a perverse application of Ragland to hold that acquittals based on nullification "should be limited" but that convictions arising from the same jury's verdict "should not be reviewable" under Powell based on the anti-rational assumption that "the jury mistakenly allocated its lenity" (1Sb 11) even if the record provides powerful support for the argument that "the verdict was not the product of lenity, but of some error that worked against them." Powell, 469 U.S. at 66.

Dismissing appellate inquiry into anti-rational jury verdicts of guilt because "such inconsistencies often are a product of jury lenity," 469 U.S. at 66, impermissibly denigrates acquittals that the Court has recognized are the products of the jury's role "as the conscience of the community and the

embodiment of the common sense and feelings reflective of society as a whole." State v. Ingenito, 87 N.J. 204, 213 (1981). This Court should not follow the lead of the United States Supreme Court by, in effect, punishing a defendant who has been the beneficiary of unexplained "lenity" by holding that a conviction for a greater offense that is rendered by the same jury for no rational discernable reason "should not be reviewable." Powell, 469 U.S. at 66. Ragland and Ingenito contradict such a holding by showing greater respect for "the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." Powell, supra.

By the same token, it would be nothing short of bizarre to allow "the fact that the Government is precluded from challenging the acquittal" to contribute to a ruling that "the best course to take is simply to insulate jury verdicts from review" on the basis of legal inconsistency. Id. at 66 and 69. It is well to remember that the reason the State is so "precluded" is the "underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, [that] the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 223 (1957). To treat this concept as nothing more than a "hardly satisfactory" absence of verisimilitude that justifies "insulat[ing inconsistent] jury verdicts [of guilt] from review" is little more than unworthy denigration of the Double Jeopardy Clause itself. In any case, this very appeal challenges the validity of this prong of Powell's reasoning by highlighting the fact that the State is not "precluded from challenging the acquittal" when it is rendered by the trial judge after trial pursuant to R. 3:18-2. See R. 2:3-1(b)(3); State v. Kleinwaks, 68 N.J. 328 (1975). At least to that extent, the State as well as the defendant "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." Powell, 469 U.S. at 67.

Finally, the Peterson rule should not fall victim to the perennial bogeyman that review of inconsistent verdicts "would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." Powell, 469 U.S. at 67; Ab 29. Examination of a legally inconsistent guilty verdict is no more an invasion of the jury's deliberations than is, for example, reversing a jury's conviction on one offense based on an error in a judge's instructions on another offense that the jury did not convict on and, perhaps, did not even consider. See Crisantos, 102 N.J. at 273 (holding that felony murder conviction can be reversed based on error in passion/provocation murder charge even though that offense is not a lesser included offense of felony murder); Grunow, 102 N.J. at 146-147 (reversing conviction for aggravated manslaughter based on erroneous charge on passion/provocation manslaughter). Allowing inconsistent verdicts to be analyzed "in conjunction with the theory of the prosecution advanced at trial" (Hannah, 584 F.2d at 29) as well as "the effect of [the] jury charges" (Peterson, 181 N.J. Super. at 269) is far more rational and does far less violence to the role of the jury as "conscience of the community" than does insulation of a jury's verdict from review based on ill-explained and ill-conceived assumptions about inconsistent verdicts being nothing more than "the product of lenity."

To reject the unequivocal (also unequivocally brutal) ruling of Powell is, of course, to swim against the tide to some extent. This Court, however, has never been shy about standing up for what it believes to be the right course in the face of contrary authority even by "the vast majority of courts," pausing only long enough to note that "[o]ur contrary conclusion invites the question: how could so many have been so wrong for so long?" State v. Anderson, 127 N.J. 191, 202 (1992). In that case, this Court found that the determination of materiality in perjury cases is a question of fact to be resolved by the jury despite acres of contrary opinion, including a United States Supreme Court case, holding that the question was one of law to be decided by the judge. That

fact alone did not cause this Court to tarry for very long:

> When called on to apply a long-established rule of law, courts sometimes become afflicted with a certain inertia. The resultant ennui can blind courts to the desirability of reassessing the rule's value and underlying rationale. this appeal is centered on just such a long-established and essentially unchallenged rule....What those many jurisdictions [adhering to the old rule] have not done, however, is scrutinize the reasoning behind the rule.

Id. at 193-194. Once this Court critically examines the "reasoning behind the rule" in Powell it will find it wanting in the face of the greater persuasiveness of reasoning behind the exception to Dunn set forth in Hannah and Peterson. The latter cases, as well as Jenkins, supra, should be reaffirmed by this Court and applied to the case at bar. The ultimate result of this analysis should be affirmance of Judge Plechner's order granting judgments of acquittal N.O.V. on the charges of possession of firearms for unlawful use against persons.

CONCLUSION

For all of the foregoing reasons, it is urged that the judgments of acquittal N.O.V. on counts six and seven of the indictment be affirmed. In the alternative, it is urged that this Court exercise its original jurisdiction to grant defendant a new trial on those charges and remand the case for further proceedings.

Respectfully submitted,

SUSAN L. REISNER
Public Defender

BY:_____
MARK H. FRIEDMAN
Assistant Deputy
Public Defender

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