IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

COLBY ALLEN SMITH,

Petitioner, CASE NO.: 1D17-_____

vs. L.T. CASE NO.: 2004-CF-002421

STATE OF FLORIDA,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, COLBY ALLEN SMITH, pursuant to Florida Rule of Appellate Procedure 9.100 and 9.030(b)(3), requests this Court issue a writ of habeas corpus to prevent further violation of Petitioner's constitutional rights and correct a manifest injustice. In support thereof, Petitioner submits the following:

I. INTRODUCTION

Mr. Smith is no stranger to this Court or the trial court. *See infra* note 1 at 8. Through the years, he has filed repeated post-conviction claims seeking to challenge his conviction and sentence. Again, and again, his attempts to challenge his conviction and sentence have failed. However, undersigned counsel believes one of Mr. Smith's claims has merit that rises to the level of a manifest justice requiring this Court's intervention.

Mr. Smith's conviction and sentence cannot stand because it is the result of a true inconsistent verdict. Mr. Smith faced two counts: burglary with an assault and aggravated assault. After a jury trial, Mr. Smith was convicted of count one, burglary with an assault, but acquitted of count two, aggravated assault. The conduct that formed the basis for the enhancement in count one, and the allegations in count two, was the same conduct against the same victim. Mr. Smith received a life sentence on count one. The acquittal on count two is a true inconsistent verdict that should have limited the possible sentence against Mr. Smith to fifteen years rather than the life sentence imposed by the trial court.

As discussed more fully below, this Court can, and should, consider the merits of Mr. Smith's Petition. *Infra* at 19; 22. Mr. Smith's conviction for count one, burglary with an assault, and his life sentence, should be vacated, and this Court should remand to the trial court with direction to hold a resentencing hearing and reduce Mr. Smith's sentence to burglary, with a maximum sentence of fifteen years.

II. PRELIMINARY STATEMENT

Petitioner, COLBY ALLEN SMITH, was the Defendant/Appellant/Petitioner in the proceedings below, and will be referred to herein as "the Petitioner" or "Mr. Smith." Respondent, the State of Florida, was the prosecuting agency, Appellee, and Respondent in the proceedings below, and will be referred to herein as "the State" or "Respondent." The record consists of six appendices at tabs A, B, C, D, E, and F.

The six appendices are cited as follows: First, the Appendix to the Petition at Tab A is the Information the State relied on to charge Petitioner. This is cited as "Pet.'s App. 'A'" followed by a reference to the page number of the Information. Second, the Appendix to the Petition at Tab B, the Trial Transcript, is cited as "Pet.'s App. 'B.'" This citation is followed by references to the Transcript on appeal of the Trial Transcript with the designated "T. ____" in brackets followed by the relevant page number. The Appendix and Transcript are cited, for example, as follows: [Pet.'s App. "B", T. at 45]. Third, the Appendix at Tab C, the Verdict Form, is cited as "Pet.'s App. 'C'" followed by a reference to the page number of the Verdict Form. Fourth, the Appendix at Tab D, the Sentencing Transcript, is cited as "Pet.'s App. 'D'" followed by references to the Sentencing Transcript with the designated "T. ____" in brackets followed by the relevant page number. Fifth, the Appendix at Tab E, the Petitioner's Post-Conviction Motion raising the true inconsistent verdict argument, is cited as "Pet.'s App. 'E'" followed by reference to the page number of the motion. Sixth, the Appendix at Tab F, the Order Denying Petitioner's Post-Conviction Motion, is cited as "Pet.'s App. 'F'" followed by reference to the page number of the Order.

III. STATEMENT OF THE CASE

The State charged Mr. Smith by a two-count information. [Pet.'s App. "A"]. The information alleged as follows:

> WILLIAM P. CERVONE, STATE ATTORNEY for the Eight Judicial Circuit, prosecuting for the State of Florida, under oath alleged by information that COLBY ALLEN SMITH, in Alachua County, Florida, on or about June 10, 2004, did then and there unlawfully enter or remain in a structure, to wit: a motel room, the property of PERNISHA REJOICE WELCOME, with the intent to commit therein the offense of robbery and/or assault, and in the course of committing said burglary made an assault upon PERNISHA WELCOME, and was armed with a firearm contrary to Section 810.02(2)(a)&(b), Florida Statutes. (L8)
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> COUNT II: And WILLIAM P. CERVONE, STATE ATTORNEY for the Eighth Judicial Circuit, prosecuting for the State of Florida, under oath, further alleges, by information that COLBY ALLEN SMITH, in Alachua County, Florida, or about June 10, 2004, did then and there unlawfully, not having any intent to kill, make an assault upon PERNISHA REJOICE WELCOME in that COLBY ALLEN SMITH intentionally threatened by word or act to do violence to PERNISHA REJOICE WELCOME, coupled with an apparent ability to do so, and did some act which created PERNISHA REJOICE WELCOME a well founded fear that violence was imminent, and in committing said assault used deadly weapon, to wit: a firearm, contrary to Section 784.021 and 775.087(1), Florida Statutes. (L6).

[Pet.'s App. "A"]

Following a trial, the jury returned a verdict finding Mr. Smith guilty of burglary as charged in Count I, and further found he committed an assault during the burglary, the structure involved was a dwelling, and the structure was occupied by a human being. [Pet.'s App "C" at 1] Regarding Count II, the jury acquitted Mr. Smith of

aggravated assault. Specifically, the jury found him not guilty, even while it was presented with the option to finding him guilty of assault as a lesser included offense. [Pet.'s App. "C" at 2]

During sentencing, the State Attorney offered into evidence, without objection, Mr. Smith's prior offenses for the purposes of seeking an enhanced sentence under Florida's Prisoner Releasee Reoffender statute (hereinafter "PRR"). [Pet.'s App. "D" at 6-7] Florida's PRR Statute requires that a defendant designated as PRR eligible if convicted of a second degree felony must serve a term of imprisonment of 15 years. § 775.082(9)(a)3.c., Fla. Stat. (2003). If a defendant is convicted of a life felony, the defendant must serve life. § 775.082(9)(a)3.a., Fla. Stat. (2003). During the sentencing hearing, the trial court imposed the mandatory minimum for the life felony conviction under the PRR statute, a life sentence. [Pet.'s App. "D" at 7-8]

IV. STATEMENT OF THE FACTS

At trial, the State offered the testimony of four witnesses. [Pet.'s App. "B", T. at 23-78] Ms. Pernisha Welcome, the victim in the case, was the only non-law enforcement officer to testify. The other individuals who testified were Deputy Jacob Rush, [Pet.'s App. "B", T. at 45-58], Deputy Michel Hurlocker, *id.* at 58-66, and Ms. Amy Waas. *Id.* at 66-78. None of these witnesses were on the scene at the time of the alleged crimes.

Ms. Welcome testified that she was asleep with her boyfriend, Arnold Strong, in a hotel when three men broke through the door. [Pet.'s App. "B", T. at 24] Mr. Smith carried large amounts of money at times, and was a purported drug dealer. [Pet.'s App. "B", T. at 24] While in bed, she heard a loud "clicking sound" and then a few moments later the door was "busted" open. [Pet.'s App. "B", T. at 26] She saw three men with t-shirts wrapped around their faces and guns pointed at her and her boyfriend. [Pet.'s App. "B", T. at 26] She stated that all three of the men had guns. [Pet.'s App. "B", T. at 26-7] She stated that she recognized Mr. Smith's voice. [Pet.'s App. "B", T. at 27] Ms. Welcome was then told to lay on her stomach, and that if she moved she would be killed. [Pet.'s App. "B", T. at 26] While the two men were searching the room, the individual she recognized as Mr. Smith was "tussling with Arnold." [Pet.'s App. "B", T. at 28] Arnold got loose and the two other men ran through an adjoining room while Mr. Smith tried to run out the door but was held up because the door jammed. [Pet.'s App. "B", T. at 28] Arnold then ran behind Mr. Smith and tackled him in a nearby field. [Pet.'s App. "B", T. at 28-29] Ms. Welcome then got dressed, and ran to where Mr. Strong was with Mr. Smith. [Pet.'s App. "B", T. at 29] When she arrived, Mr. Strong had subdued Mr. Smith who was on the ground in a field. [Pet.'s App. "B", T. at 29]

The encounter in the hotel room was the entirety of the basis for the charges that gave rise to this case, as noted by the State in its closing argument regarding Count II, aggravated assault:

> The other crime charged is aggravated assault. And basically aggravated assault is scaring somebody; basically making them think they're going to be the subject of violence.
>
> That can be done, certainly, many ways. *In this case, it was done by pointing a gun at somebody and making them believe they were to be shot. That doesn't matter that they weren't shot. The crime is committed when that gun is pointed at you and you believe*, hey, my life may be over in the next three minutes.
>
> That's the crime of aggravated assault. *And that's what occurred here as well*.

[Pet.'s App. "B", T. at 112] (emphasis added).

Mr. Strong did not testify at the trial. Ms. Welcome was the only listed victim in the information. [Pet.'s App. "A"] There was no additional testimony regarding a second occasion that Mr. Smith allegedly assaulted Ms. Welcome beyond the initial entry into the doorway.

V. SUBSEQUENT POST-CONVICTION HISTORY

Since Mr. Smith's sentencing hearing, he has raised multiple issues on appeal, and through post-conviction motions, repeatedly seeking relief.[1] In 2010, Mr. Smith raised a claim that his trial counsel was ineffective for failing to object to an inconsistent verdict due to the acquittal on Count II negating the essential element of Count I. [Pet.'s App. "E" at 11-12] In the Order Denying Motion for Post-Conviction Relief, the trial court stated the following:

> As to ground (C), Defendant alleges that trial counsel was ineffective for failing to object and preserve for appellate review the inconsistent verdict of the jury. The verdicts are not inconsistent. At the time of the offenses, there were two people in the victim's hotel room: Pernisha Welcome and Arnold Strachan. Thus, the jury could have found that an assault was committed on Arnold Stachan even if they did not believe there was an assault committed on Pernisha Welcome. For this reason, counsel did not err by failing to object to the two verdicts. This claim is without merit.

[Pet.'s App "F" at 4].

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[1] *See, e.g.*, *Smith v. State,* 1D09-6453 (Fla. 1st DCA 2010) (*pro se* brief alleging trial court erred in denying its rule 3.850 motion based on newly discovered evidence); *Smith v. State,* 1D12-755 (Fla. 1st DCA 2012) (*pro se* brief raising five ineffective assistance of counsel claims; none of which dealt with a true inconsistent jury verdict); *Smith v. State*, 1D15-5296 (Fla. 1st DCA 2016) (*pro se* brief alleging a true inconsistent verdict pursuant to Fla. R. Crim. P. 3.800(a)); *Smith v. State,* 1D16-2497 (Fla. 1st DCA 2016) (*pro se* ineffective assistance of appellate counsel for failing to raise true inconsistent verdict; denied as untimely pursuant to Fla. R. App. P. 9.141(d)(5)); *Smith v. State,* 1D16-4473 (Fla. 1st DCA 2016) (*pro so* petition for writ of habeas corpus alleging a manifest injustice based on a true inconsistent verdict,; dismissed pursuant to *Baker v. State*, 878 So. 2d 1236 (Fla. 2004)).

Following the denial of this motion by the trial court, Mr. Smith appealed to this Court. The trial court's denial was *per curiam* affirmed. *Smith*, 1D12-755.

Since that time, Mr. Smith again raised this same issue alleging he received an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). *Smith*, 1D15-5296, as well as a claim based on an alleged manifest injustice through petitions for a writ of habeas corpus. *Smith*, 1D16-2497; *Smith*, 1D16-4473.These petitions were denied by both the trial court and this Court. Undersigned counsel submits that because Petitioner raised this issue pursuant to the incorrect rule of procedure, *Smith*, 1D15-5296 (Fla. R. Crim. P. 3.800(a)), nor attach an appendix or record evidence to support his claim. *Smith*, 1D16-2497; *Smith*, 1D16-4473. Undersigned counsel submits this Court has not had the full opportunity to evaluate this claim.

VI. BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a writ of habeas corpus pursuant to Article V, Section 4(b)(3) of the Florida Constitution, and Rules 9.100 and 9.030(b)(3) of the Florida Rules of Appellate Procedure. Appellate courts possess the inherent power to reconsider and correct rulings that have become the "law of the case" where adherence to the ruling would result in a manifest injustice. *See Strazzula v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965). Additionally, this petition raises a similar issue to another decision of a district court of appeal that was deemed a manifest

injustice, and Mr. Smith has thus been treated inconsistently warranting further review. *See, e.g., Brumit v. State*, 971 So. 2d 205 (Fla. 4th DCA 2007); *Raulerson v. State*, 724 So. 2d 641 (Fla. 4th DCA 1999).

ISSUES PRESENTED

I. Whether a true inconsistent verdict occurred in this case?

II. Whether Mr. Smith's trial counsel was ineffective for failing to preserve and argue the true inconsistent verdict issue?

III. Whether a manifest injustice occurred allowing an exception to the "law of the case" doctrine providing this Court the ability to exercise its discretion to grant this petition?

SUMMARY OF ARGUMENT

Mr. Smith was convicted of burglary to a dwelling with an assault, and the trial court sentenced him to life. The jury's acquittal on Count II, aggravated assault, resulted in a true inconsistent verdict. *Infra,* at 11-15. Therefore, the only sentence that Mr. Smith could legally receive, even as a PRR, was a fifteen-year sentence. *Id.* Mr. Smith's trial counsel did not preserve this issue for appeal, and therefore, his trial counsel was ineffective. *Infra,* at 15-18. Mr. Smith's trial counsel's ineffectiveness resulted in prejudice to Mr. Smith because he was sentenced to a life sentence which should have been unauthorized as a matter of law had this issue been raised and argued before the trial court, or preserved and argued on appeal. *Id*. Based on the foregoing, allowing Mr. Smith's life sentence to stand results in a manifest injustice. *Infra,* at 18-20. This Court has the inherent ability to consider the merits

of this claim, even though this claim was previously raised and is successive. *Id.* Further, *Baker v. State*, 878 So. 2d 1236 Fla. 2004), does not prohibit this Court from considering the merits of Mr. Smith's Petition, and should not be a basis for its dismissal. *Infra* at 21-23.Therefore, this Court should grant Mr. Smith's petition.

ARGUMENT

I. PETITIONER'S ACQUITTAL ON COUNT II, AGGRAVATED ASSAULT, RESULTED IN A TRUE INCONSISTENT VERDICT LIMITING THE MAXIMUM OFFENSE PUNISHABLE PER COUNT I, BURGLARY WITH AN ASSAULT, TO A SECOND-DEGREE FELONY PUNISHABLE BY A MAXIMUM FIFTEEN YEAR SENTENCE.

Standard of Review. A true inconsistent verdict claim is reviewed *de novo*. *Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007).

Merits. Generally, inconsistent jury verdicts are permitted in Florida. *State v. Powell*, 674 So. 2d 731, 732-33 (Fla. 1996). These verdicts are allowed because jury verdicts may be the result of the jury's lenity, and therefore, do not always speak to the guilt or innocence of the defendant. *See Conrad v. State*, 977 So. 2d 766 (Fla. 5th DCA 2008). Thus, these verdicts may arise from a jury's exercise of its "inherent authority to acquit" regardless of the facts supporting a conviction. *State v. Connelly*, 748 So. 2d 248, 252 (Fla. 1999).

The Florida Supreme Court has recognized only one exception to an inconsistent verdict, this exception is known as a "true" inconsistent verdict. *Id.* A

true inconsistent verdict occurs when a "not-guilty finding on one count negates an element on another count that is necessary for conviction." *Nettles v. State*, 112 So. 3d 782, 783 (Fla. 1st DCA 2013) (quoting *Shavers v. State*, 86 So. 3d 1218, 1221 (Fla. 2d DCA 2012)). "In fact, the only cases which reverse a conviction on the ground it is inconsistent with another not-guilty verdict returned by the same jury, deal with refusals of the jury to convict on a felony, which is the essential element of another count being tried." *State v. Perez*, 718 So. 2d 912, 915 (Fla. 5th DCA 1998).

In this case, the charged offenses of Count I, burglary with an assault, and Count II, aggravated assault, had interlocking elements. To prove a burglary with an assault, the State had to prove that Mr. Smith committed a burglary, as detailed in section 810.02(a), Florida Statutes, and made "an assault or battery upon any person". 810.02(2)(a), Fla. Stat. Mr. Mr. Smith was charged with "unlawfully enter[ing] or remain[ing] in a structure, to wit: a motel room, the property of PERNISHA REJOICE WELCOME, with the intent to commit therein the offense of robbery and/or assault, a*nd in the course of committing said burglary made an assault upon PERNISHA WELCOME*, and was armed with a firearm[.]" [Pet.'s App. "A"] (emphasis added). No other individual was named in the information.

To prove aggravated assault, the State had to prove an assault occurred with "a deadly weapon without intent to kill"; or "with an intent to commit a felony".

section 810.02(a), Florida Statutes. Mr. Smith was charged with aggravated assault by making an "assault upon PERNISHA REJOICE WELCOME in that COLBY ALLEN SMITH intentionally threatened by word or act to do violence to PERNISHA REJOICE WELCOME, coupled with an apparent ability to do so, and did some act which created PERNISHA REJOICE WELCOME a well founded fear that violence was imminent, and in committing said assault used deadly weapon, to wit: a firearm." As part of the verdict form, the jury was provided the opportunity to select the lesser included offense of "assault" for Count II. [Pet.'s App. "C" at 2] It did not. Rather, it acquitted Mr. Smith on Count II. *Id.*

The basis for both charges arose from the same factual basis; specifically, Mr. Smith's alleged entry into the hotel room with three other men all brandishing firearms. [Pet.'s App. "B" at T. 24-29] No other event occurred that was a separate aggravated assault, as even noted by the State in its closing argument. [Pet.'s App. "B" at T. 112] Because the jury returned a verdict acquitting Mr. Smith of the aggravated assault, his acquittal resulted in a true inconsistent verdict and negated the possibility of Mr. Smith receiving an enhanced sentence for a burglary *with an assault*. Therefore, the maximum sentence Mr. Smith could receive was fifteen years.

When Mr. Smith raised this issue in his post-conviction motion, the trial court denied it on the following grounds:

> Defendant alleges that trial counsel was ineffective for failing to object and preserve for appellate review the inconsistent verdict of the jury. The verdicts are not inconsistent. *At the time of the offenses, there were two people in the victim's hotel room: Pernisha Welcome and Arnold Strachan. Thus, the jury could have found that an assault was committed on Arnold Stachan even if they did not believe there was an assault committed on Pernisha Welcome.* For this reason, counsel did not err by failing to object to the two verdicts.

[Pet.'s App. "F" at 4] (emphasis added).[2]

This argument cannot stand when reviewed in light of the trial transcript, and the fact that a defendant can only be charged, convicted and sentenced in accordance with the limitations imposed by the charging document. [cite]

It is a well-established rule that "[w]here an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged[.]" *Long v. State*, 92 So. 2d 259, 260 (Fla. 1957). Since its inception, "Florida courts have consistently applied this rule[.]" *Morgan v. State*, 146 So. 3d 508, 512 (Fla. 5th DCA 2014) (citations omitted). This is so because, "a criminal defendant is entitled to a trial on the charges contained in the information and may not be prosecuted for uncharged offenses, even if they are of the same general character or constitute alternative ways of committing the charged offense." *Id*.

Had Mr. Smith, on another occasion, brandished a firearm threatening Ms. Welcome, then there *may* be a basis for the State to argue that the verdict was not

[2] It appears the trial court referred to the other person in the room with Ms. Welcome by the wrong last name.

truly inconsistent. However, these are not the facts of this case as evidenced by the trial transcript. [Pet.'s App. "B"] The argument relied on by the trial court cannot stand as a basis for denying Mr. Smith relief. Based on the foregoing, a true inconsistent verdict occurred in this case.

As discussed more fully below, Mr. Smith's trial counsel was ineffective for failing to object and preserve these grounds for review, and allowing this judgment and sentence to stand would result a manifest injustice

II. PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THIS ISSUE BEFORE THE TRIAL COURT AND PRESERVE THE TRUE INCONSISTENT VERDICT FOR APPELLATE REVIEW

Standard of Review. In establishing an ineffective assistance claim, there are two components: deficient performance (which asks whether counsel's tactics were reasonable under the circumstances) and prejudice. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, *Strickland* sets forth the two pronged test: (1) whether counsel's performance was deficient, and (2) whether the deficiency prejudiced the defense. *Id.* at 688.

Merits. "[T]he failure to preserve an issue for appellate review may be sufficient to constitute ineffective assistance of counsel, provided that the requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), are met." *Merkison v. State,* 1 So. 3d 279, 280-81 (Fla. 1st DCA

2009). Here, the requirements of Strickland have been met by Mr. Smith's trial counsel's failure to raise this issue before the trial court and preserve the true inconsistent verdict for appellate review.

First, his failure to argue this issue and thus preserve this issue was deficient performance because Mr. Smith's trial counsel should have known a true inconsistent verdict occurred in this case based on the charging document, the testimony and evidence adduced at trial, and the State's purported reason it proved the aggravated assault as detailed in its closing argument. [Pet.'s App. "A"; "B", T. at 24-29; 112] Competent counsel would have preserved this issue for appellate review. *See, e.g., Starling v. State*, 152 So. 3d 868, 868 (Fla. 1st DCA 2014); *Nettles v. State*, 112 So. 3d 782, 783 (Fla. 1st DCA 2013). Failing to do so was deficient performance. Second, this deficient performance prejudiced the defendant because this issue was not raised on direct appeal, and based on the foregoing arguments, would have resulted in a reduction of his sentence from life to fifteen years. Had this issue been argued, Mr. Smith's case would have resolved in a similar manner as two cases addressing this exact claim before this Court on direct appeal. *See, e.g., Starling*, 152 So. 3d at 868; *Nettles*, 112 So. 3d at 783.

In *Starling*, the defendant was charged with robbery with a firearm. 152 So. 3d at 868. He was convicted as charged; however, the jury returned a special verdict form finding that he did not actually possess a firearm during the commission of the

offense. *Id.* The trial court subsequently reduced his conviction from robbery with a firearm to the lesser included offense of robbery with a weapon. *Id.* He appealed his conviction of robbery with a weapon arguing the verdict and his conviction were legally inconsistent. *Id.* On appeal, the court stated that the trial court's

> inclination to reduce the offense was correct. The problem is, however, that the *only* weapon referenced in the record as being involved in the crime was the firearm allegedly wielded by Appellant, which the jury affirmatively concluded Appellant did not possess. We cannot reconcile Appellant's reduced conviction for robbery with a weapon with the jury's specific finding that he did not possess the only weapon referenced in the record.

Id. at 868-69 (emphasis added).

The court found this was a circumstance that raised a "true" inconsistent verdict, and it remanded the case to the trial court to reduce the defendant's conviction from robbery with a weapon to simple robbery for resentencing. *Id.* at 869.

In *Nettles,* the defendant was convicted and sentenced for carjacking with a firearm and robbery with a firearm. 112 So. 3d at 782. At trial, the jury found the defendant guilty as charged with respect to each offense, but found that he did not possess a firearm with respect to the carjacking with a firearm and robbery with a firearm charge. *Id.* The defendant moved for the trial court to adjudicate him guilty of carjacking and robbery, but the trial court denied his motion, and he was adjudicated guilty in accordance with the jury's verdict, both first degree felonies

punishable by life. *Id.* at 783. The First District held the trial court erred in adjudicating him guilty of carjacking with a firearm and robbery with a firearm. Id. This Court reversed the judgment of conviction and vacated the sentences with direction to adjudicate him guilty of the lesser included offenses on each count, carjacking and robbery. *Id.*

Based on the foregoing, Mr. Smith's trial counsel deficient performance meets the standard as set forth in *Strickland,* and therefore, the lone issue is whether this Court, through its inherent authority is willing to revisit the law of the case and find this is a manifest injustice.

III. ALLOWING THIS JUDGMENT AND SENTENCE TO STAND RISES TO THE LEVEL OF A MANIFEST INJUSTICE AND THIS COURT IS NOT BOUND BY THE LAW OF THE CASE AND MAY GRANT THIS PETITION

The doctrine of the law of the case requires that "questions of law actually decided on appeal govern the case in the same court and the trial court, through all subsequent stages of the proceeding." *See State v. McBride*, 848 So. 2d 287, 289 (Fla. 2003); *Fla. DOT v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). This doctrine "is limited to rulings on questions of law actually presented and considered on a former appeal." *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061 (Fla. 1983). These rulings are then, necessarily, "except in exceptional circumstances, no longer open for

discussion or consideration in subsequent proceedings in the case." *Greene v. Massey*, 384 So. 2d 24, 28 (Fla. 1980).

Courts generally lack discretion to change the law of the case. *State, Dep't of Revenue v. Bridger*, 935 So. 2d 536, 538 (Fla. 3d DCA 2006). However, there are two exceptions to this doctrine. *Juliano*, 801 So. 2d at 106. One of those two exceptions occur when an erroneous ruling that has become the law of the case and allowing that ruling to stand results in a manifest injustice. *Id.* Thus, this Court has the power to "reconsider and correct erroneous rulings in exceptional circumstances, where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case." *Walls v. State*, 213 So. 3d 340, 347 (Fla. 2016), *reh'g denied*, SC15-1449 (Fla. Jan. 9, 2017) (J., Parentie, concurring) (citing *State v. Owens*, 696 So. 2d 715, 720 (Fla. 1997)).

A manifest injustice results when a defendant is convicted of an offense for which the defendant could not have been convicted as a matter of law. *See Miller v. State*, 988 So. 2d 138, 139 (Fla. 1st DCA 2008). Courts have found a manifest injustice when application of the law of the case doctrine results in a harsher sentence for the defendants, *Green v. State*, 813 So. 2d 184, 85 (Fla. 2d DCA 2002), and when a true inconsistent verdict result causes a defendant to receive a conviction and subsequent sentence he could not receive as a matter of law. *See Davis v. State*, 197 So. 3d 615, 616 (Fla. 5th DCA 2016) ("[T]he verdicts and special findings were

inconsistent. Failure to correct Davis's convictions, which resulted in consecutive life sentences, would constitute a manifest injustice.") (internal citations omitted), *review granted*, SC16-1738, SC-1739, (reviewing inter-district conflict regarding the proper reduction in conviction and sentence).

Florida's courts of appeal have granted habeas relief to avoid a manifest injustice when criminal defendants who raised identical issues on appeal were treated inconsistently. *See, e.g., Brumit v. State*, 971 So. 2d 205 (Fla. 4th DCA 2007); *Zeno v. State*, 910 So. 2d 394 (Fla. 2d DCA 2005), *disapproved on other grounds*, 980 So. 2d 1038; *Raulerson v. State*, 724 So. 2d 641 (Fla. 4th DCA 1999). Recently, the Fifth District decided the matter of *Davis*. If Mr. Smith's claim is not considered, he would be treated inconsistently from Mr. Davis.

In *Davis*, the petitioner requested the Fifth District grant a writ of habeas corpus regarding his life sentences arising from two separate cases. *Id.* In both cases, the petitioner was charged with robbery with a firearm; however, the court found that "Neither the information nor the evidence presented in Davis's trials alleged that he used any weapon other than a firearm." *Id.* In both cases, separate juries returned verdicts of guilty of robbery with a deadly weapon but "made special findings that he did not possess a firearm during the commission of the crimes." *Id.*

In its *per curiam* decision, the Fifth District granted the petition and held that "it was error to list robbery with a deadly weapon as a lesser-included offense on the

verdict forms" and "the verdicts and special findings were inconsistent." *Id.* (citing *Starling*, 152 So. 3d at 868; *Nettles*, 112 So. 3d at 783). Thus, the court held that a "[f]ailure to correct Davis's convictions, which resulted in consecutive life sentences, would constitute a manifest injustice." *Id.* The Fifth District granted the petition and remanded for entry of a corrected judgment. *Id.*

Based on the foregoing, this Court should exercise its inherent authority to correct this erroneous ruling and grant Mr. Smith's petition.

IV. *BAKER* DOES NOT PROHIBIT THIS COURT FROM CONSIDERING THE MERITS OF MR. SMITH'S PETITION

In *Smith v. State*, 1D16-4473, Mr. Smith filed a petition for writ of habeas corpus alleging a manifest injustice due to the true inconsistent verdict at issue. This petition was very short, and did not include either an appendix, nor any record evidence. This Court dismissed Mr. Smith's petition with a citation to *Baker v. State*, 878 So. 2d 1236 (Fla. 2004). Undersigned counsel submits *Baker* is inapplicable to the matter before it, and this Court should not dismiss Mr. Smith's current petition on this precedent.

In *Baker*, the Florida Supreme Court was identifying the proper procedure when a prisoner seeks post-conviction relief before the Florida Supreme Court when relief can still be sought pursuant to Florida Rule of Criminal Procedure 3.850. 878 So. 2d at 1236. The Court held that where relief can appropriately be sought pursuant

to Florida Rule of Criminal Procedure 3.850, the proper means to deal with these claims is to dismiss each as unauthorized petitions. *Id.* at 1246. Importantly, in this decision, Chief Justice Anstead addressed the importance of the writ of habeas corpus in a special concurrence, which speaks directly to this issue:

> I write separately to sound a note of caution and reminder that in our attempts to efficiently regulate a system for addressing postconviction claims we must constantly keep in mind that we are dealing with the writ of habeas corpus, the Great Writ, which is expressly set out in Florida's Constitution. That writ is enshrined in our Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many centuries. **This Court will, of course, remain alert to claims of manifest injustice, as will all Florida courts.** As we reaffirmed in *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999), "we will continue to be vigilant to ensure that no fundamental injustices occur."
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> We must also be mindful of the concerns expressed by Justice Overton in *Harvard*:
>
> > Habeas corpus jurisdiction is basic to our legal heritage. It is so basic that the authors of our habeas corpus jurisdiction made it unique with regard to this Court because it states that habeas corpus jurisdiction may not only be exercised by the entire Court, but it may also be exercised by a single justice. It is the only jurisdictional provision that gives authority to an individual justice. The provision also takes particular care to address the problem of resolving substantial issues of fact, a concern of the majority, by allowing the Court or any justice to make the writ returnable to "any circuit judge."
>
> *Id.* at 1025 (Overton, Senior Justice, dissenting).
>
> With these concerns in mind, I concur with the basic premise of the majority opinion that postconviction claims that would ordinarily be

> subject to the strictures of rule 3.850 in the trial courts are not relieved of those strictures by filing the same claims in this Court.

Id. at 1246 (C.J., Anstead, specially concurring) (J., Pariente and J. Lewis concur) (emphasis added).

Citing to *Baker* as a means for dismissing a writ of habeas corpus, particularly when the alleged claim is time barred pursuant to Florida Rule of Criminal Procedure 3.850, is an improper basis for dismissal. *See Wilson v. Crosby*, 2006 U.S. Dist. LEXIS 97351, *18, 2006 WL 3219602 (N.D. Fla. July 20, 2006). Based on the foregoing, Petitioner submits that this Court should address his claim on the merits, and not dismiss his petition for writ of habeas corpus pursuant to *Baker*.

NATURE OF RELIEF SOUGHT

WHEREFORE, Petitioner, COLBY ALLEN SMITH, request this Court, issue an order, pursuant to Rule 9.100(h), Florida Rule of Appellate Procedure, directing the Respondent to show cause why this Petition for Writ of Habeas Corpus should not be granted reversing Petitioner's conviction, judgment, and sentence, and remanding to the trial court for resentencing directing the trial court to enter a judgment and sentence for burglary without the enhancement for assault and sentence Petitioner in accordance.

Respectfully submitted,

s/ Rocco J. Carbone, III
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail to the Office of the Attorney General at crimapptlh@myfloridalegal.com on this 23rd day of August 2017.

Respectfully submitted,

/s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Fla. R. App. P. 9.210.

Respectfully submitted,

s/ Rocco J. Carbone, III
Rocco J. Carbone, III