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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

SAMUEL JETER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000978

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding trial counsel provided effective representation when counsel failed to move for a new trial based on inconsistent verdicts where the jury found Petitioner guilty of burglary but not guilty of the alleged crimes committed during the burglary and where counsel offered no reason for failing to make the motion?

STATEMENT OF THE CASE

On October 25, 2017, Petitioner was homeless, living on the streets in Spartanburg County, and staying with friends or relatives when he could. App. 161, ll. 1-3. Petitioner walked everywhere he went and was dressed that night for the cooler weather in a ski mask. App. 202, ll. 14-24. Petitioner had spent the evening drinking "Hurricane" beers and had drunk a twelve pack through the night. App. 201, l. 22-R. 202, l. 8. "Hurricane" beers contain 8.1% alcohol by volume. App. 202, ll. 4-5. By midnight, Petitioner was intoxicated. App. 202, ll. 9-13.

Anthony Hollis, a cousin of Petitioner's who lived on Gentry Street, had told Petitioner he could come over that evening. App. 203, ll. 2-3; App. 207, ll. 12-16. Petitioner was looking for Hollis' car, a green Crown Victoria, which he believed was parked in front of Hollis' home. App. 203, ll. 5-8; App. 209, ll. 9-10. When he saw a green Crown Victoria parked in front of a home on Gentry Street, he assumed it was where Hollis was, knocked on the door and then tried the doorknob. Id. The front door of the home was unlocked, the TV in the living room was on, and Petitioner could hear someone talking from one of the back bedrooms. App. 203, ll. 10-17.

Petitioner proceeded through the home to the back bedroom where he had heard voices and opened the door, expecting to see his cousin. App. 203, ll. 15-19. At that moment, Petitioner realized he had made a mistake and was in the wrong home. App. 203, ll. 20-22. Intoxicated, confused, and scared, Petitioner closed the door to the bedroom and began to back away thinking to himself "how [sic] I end up in the wrong house?". App. 203, ll. 24-25.

As Petitioner backed away from the bedroom doors, Sharaia Walker opened her bedroom door and yelled at Petitioner to get out of her house. App. 204, ll. 1-2. The shouting brought Alexus Walker and Katrina Walker into the hallway where Petitioner was essentially cornered.

App. 41, ll.19-20; App. 50, ll. 10-12. Sharaia retrieved her gun from her bedroom and cocked it to fire. App. 50, ll. 13-17. As Petitioner was running to get out of the house Sharaia fired her gun. App. 104, ll. 19-25. Petitioner was struck four times in the back and lost a significant amount of blood. App. 204, ll. 19-25; App. 146, ll. 12-22.

None of the gunshots struck Petitioner while he was still inside the Walker home. App. 146, ll. 6-11. There were no signs of forced entry to the Walker home. App. 149, ll. 7-17. A trail of blood led police to Petitioner, who was discovered unconscious in the neighbor's back yard. App. 213, l. 19-App. 214, l. 1. The lead investigator, Sonya McCullough, noted that according to the medical staff Petitioner had a high blood alcohol level when he arrived in the trauma bay. App. 173, ll. 4-11.

From the time Sharaia Walker saw Petitioner to the time she ultimately shot Petitioner was less than a minute. App. 50, ll. 18-21. Sharaia called 911 to report the alleged burglary and shooting incident. App. 45, ll. 5-7. She described Petitioner has having on a hoodie and a ski mask that was pulled up. She noted he was wearing jeans because "he was down and I shot him one more time, I seen that he had blue jeans on because his butt was hanging out." Her testimony indicated that the hood on the hoodie was down and that while Petitioner initially had a ski mask covering his face, he removed it during the incident. App. 53, ll. 2-18. At no point did Petitioner display any weapon, even though it was discovered that he had pepper spray in his pocket. App. 55, ll. 1-3; App. 205, ll. 14-20.

The State, represented by Spenser Smith and Sara Bozarth, called the case to trial on January 7-9, 2019, before the Honorable J. Derham Cole and a jury. Petitioner was represented by Paul Neely. App. 1. At trial the State alleged that Petitioner had entered the house with the intent to commit a robbery and that during the alleged burglary and attempted robbery he had

knocked down Katrina Walker injuring her. Sharaia, Katrina, and Alexus all testified at trial to their version of the events that occurred on the evening of October 25, 2017.

Sharaia stated she was in her bedroom talking on her phone when a dark figure "poke [sic] its head into the door." App. 41, ll. 3-9. Unsure of who it was, Sharaia got up, opened her door and saw the dark figure to her left in the hallway. App. 41, ll. 9-16. According to Sharaia, the figure put his hand up to his mouth and told her to be quiet. App. 41, ll. 16-17. Sharaia began to yell, attracting the attention of her sister and mother who came into the hallway. App. 41, ll. 18-20. With all three women in the hallway, the dark figure was cornered. App. 50, ll. 10-12. As the figure began to run down the hallway, Sharaia retrieved her gun from her closet, cocked it, and fired at the figure who allegedly had knocked over Katrina and demanded money from her. App. 50, ll. 11-17; R. 51 ll. 22-25.

Alexus testified that she was awoken the night of the incident by Sharaia screaming. App. 83, ll. 1-4. She came into the hallway at the same time as her mother Katrina, saw the man by the bathroom, and then closed her door to retrieve her bat. App. 83, ll. 7-9; App. 85, ll. 5-6. When she came back into the hallway, she saw the man standing over her mother. App. 84, ll. 14-15. Alexus never heard the man demand money and did not see him shove her mother. App. 88, ll. 5-14.

Katrina also testified that Sharaia's screaming woke her up the night of the incident. App. 92, ll. 9-10. She and Alexus met in the hallway and saw the man standing by the bathroom door. App. 92, ll. 14-17; App. 93, ll. 3-5. Suddenly Katrina was on the ground, but she was not sure if she had moved toward the man or if the man had pushed her. App. 92, l. 23- App. 93, l. 3. Katrina stated that as the man stood over her, he pointed at her, and asked, "where is the

money?". App. 93, ll. 12-14. At that moment both she and the man heard a gun cock and the man took off running. App. 93, ll. 16-22.

In their respective written statements to police, Sharaia, Katrina, and Alexus never stated that Petitioner had demanded money that evening. App. 71, l. 22-App. 72, l. 6; App. 88, ll. 5-9; App. 104, l. 23-App. 105, l. 8. Further, none of the women put in their written statements that Petitioner pushed Katrina Walker to the ground. Katrina Walker's statement wrote that she was not sure if she fell or if Petitioner pushed her. Id. The women admitted that Petitioner passed a fifty-five-inch HD television and at least one purse in the living room prior to getting to Sharaia's room, and that those items along with all the other items in the home, were not touched. App. 66, ll.1-22; App. 86 l. 16; App. 87, l. 2.

During trial, Investigator McCullough admitted that she initially only sought a warrant for first degree burglary. Five days later, after interviewing the Walkers a second time, Investigator McCullough swore out the two warrants for the crimes allegedly attempted by Petitioner during the burglary. App. 176, l. 24-App. 178, l. 5. Petitioner moved for a directed verdict at the close of the State's case, arguing that the State had not established the "intent to commit a crime therein" element of burglary. App. 184, l. 8-App. 185, l. 20. The trial court denied the motion, ruling that the State had submitted evidence that Petitioner intended to commit the crime of larceny by force or intimidation based on the testimony of the Walkers. App. 187, ll. 3-24.

At trial, Petitioner argued that he had entered the Walker home by mistake. In support of this theory the defense called three witnesses to testify: Officer Billy Mabry with the City of Spartanburg Police Department, Senior Investigator Donald Stepp with the Public Defender's Office, and Petitioner. Officer Mabry testified that he noted in his report that it was cold the

night of the incident. App. 195, ll. 19-21. Investigator Stepp testified to pictures he took of numerous houses in the Beaumont Mill Village on Gentry Street that were nearly identical in construction and style to the Walker home. App. 198-199. Petitioner recounted the events of the evening and testified that he never tried to rob anyone but was "just drunk in the wrong house." App. 201-205.

During its closing argument the State argued,

> I'll talk a little bit about the law but I'm going to let the Judge do that mostly. Burglary first requires entry into a dwelling...with the intent to commit a crime therein, entry without permission...Entry with the intent to commit a crime therein. And then that either occurs at nighttime or the physical injury occurred to somebody inside the house, I believe both are present in this case, that make it a burglary first...All of the testimony is about it being at night. Katrina Walker testified about being attacked and she testified about her injuries as you've seen...Assault and battery in this case is going to require an injury to a victim or an offer or attempt to injure a victim during the commission of a robbery, burglary or theft. In this case it's a robbery, burglary and a theft, all three. And we think that he actually injured, but even the offer or attempt to injure would make him guilty of assault and battery first **if you believe he was committing a robbery or a burglary at that time.** Attempted strong armed robbery would be basically the forceful taking from a person. The statement of where's the money at would be the statement about his intention. **The common law robbery also gives you the intent that he entered that house to commit a crime.**

App. 221, l. 3-App. 222, l. 5 (emphasis added).

Petitioner was ultimately convicted of burglary first degree but acquitted of the assault and battery and attempted common law robbery charges. App. 268, ll. 8-20. After the verdict was announced, Counsel Neely moved for a new trial based on the lack of evidence regarding the "intent to commit a crime therein" element of burglary. The trial court denied the motion. Petitioner, who had been previously served with LWOP notice, was sentenced to life without the possibility of parole. App. 270, l. 11-App. 201, l. 10.

Petitioner filed a timely notice of appeal. The parties concluded briefing on May 13, 2020. The South Carolina Court of Appeals affirmed Petitioner's conviction in an unpublished

opinion. State v. Jeter, 2021-UP-152 (S.C. Ct. App. May 5, 2021). Petitioner filed the current PCR application on June 2, 2021. App. 276-283. The State filed a return and motion for a more definite statement dated January 7, 2022. App. 284-295. An evidentiary hearing was convened before the Honorable William A. McKinnon on June 6, 2022. Petitioner was represented by Rodney Richey. The State was represented by Chelsey Marto. App. 296. At the hearing, Petitioner proceeded forward on the allegations that Counsel Neely was ineffective for failing to move for a new trial based upon the conflicting verdicts and for failing to pursue the defense of mistake.

Petitioner and Counsel Neely testified at the hearing. Petitioner testified that he was offered a plea to burglary first degree for fifteen years but rejected it because he did not commit a burglary. He admitted he would have pled to a lesser charge, such as trespassing, but never would have pled to burglary. Petitioner maintained that on the night of the incident he was intoxicated and mistakenly entered the wrong house looking for his "homeboy." App. 300, l. 1-App. 302, l. 5; App. 312, ll. 8-15. Petitioner was found not guilty of the attempted robbery and assault and battery charges. He thought Counsel Neely should have challenged the burglary conviction because he had been found "not guilty on the intent" element by being acquitted of the crimes the State alleged he entered the home to commit. App. 303, ll. 12-22; App. 306, l. 22-App. 308, l. 11. Petitioner further testified that Counsel Neely did not fully explain the plea offer to him, but he maintained that rejecting the fifteen-year deal was the right decision. App. 308, l. 12-App. 310, l. 1.

Counsel Neely testified that Petitioner turned down the plea offers and firmly held to his story that he had gone into the wrong house by mistake. App. 317, l. 11-App. 318, l. 8. Counsel Neely believed the verdicts were inconsistent but testified that "the thought to file for a new trial

based on inconsistent verdicts never crossed [his] mind." App. 320, ll. 11-25. Counsel Neely admitted that, based on the current state of the law, he did not think he would have won a motion for a new trial based on inconsistent verdicts. App. 321, ll. 9-14. He also testified that he believed Petitioner should have taken the plea offers of fifteen years since he was facing LWOP at trial. App. 317, ll. 14-25; App. 319, ll. 11-21; App. 321, ll. 6-8.

An order of dismissal was filed on July 11, 2022. App. 325-335. In the order, the PCR court found that Counsel Neely was not deficient in failing to move for a new trial based on inconsistent verdicts because the argument was without merit. The PCR court wrote "Counsel was not deficient for failing to advance an unsuccessful argument, particularly considering his PCR hearing testimony that pursuing a post-trial motion based upon conflicting verdicts was not a consideration and would not have led to a favorable outcome for the defense." Further, the PCR court found that there was no prejudice to Petitioner because the argument would not have succeeded. App. 334.

ARGUMENT

The PCR court erred in finding trial counsel provided effective representation when counsel failed to move for a new trial based on inconsistent verdicts where the jury found Petitioner guilty of burglary but not guilty of the alleged crimes committed during the burglary and where counsel offered no strategic reason for failing to make the motion.

The PCR court ruled that Counsel Neely was not deficient and that Petitioner was not prejudiced because the argument Petitioner wanted to advance, the impropriety of inconsistent verdicts, was not a meritorious argument. Respectfully, whether the argument would be successful before the trial or appellate court is not determinative of a claim of ineffective assistance of counsel. Counsel Neely failed to make a motion which reasonably could have impacted the ultimate outcome of Petitioner's case and did not offer any explanation as to why he did not make the motion. This was ineffective assistance of counsel.

In State v. Alexander, 303 S.C 337, 401 S.E.2d 146 (1991), this Court abolished the rule prohibiting inconsistent verdicts in criminal cases in South Carolina. However, this Court did not distinguish between factually inconsistent verdicts and legally inconsistent verdicts. As the Supreme Court of Iowa noted in State v. Halstead,

> The problem of inconsistent verdicts has plagued courts for some time. At common law, inconsistent verdicts were invalid and set aside. In the United States, however, the approach to inconsistent verdicts has varied, depending on the nature of the alleged inconsistency and the jurisdiction involved. At the outset, it is important to note that the term "inconsistent verdicts" is often used in an imprecise manner and may include a wide variety of related, but nonetheless distinct, problems. A jury verdict may be deemed inconsistent based upon inconsistent application of facts or inconsistent application of law. For example, in a vehicular manslaughter case, the conviction of a defendant for the death of one passenger in the car but acquittal on a charge related to another passenger is "factually inconsistent." There is no legal flaw in the jury's verdict, but the verdicts seem inconsistent with the facts. On the other hand, the conviction of a defendant of a compound crime when he or she is acquitted on all predicate offenses is said to be "legally inconsistent." In these cases, the jury verdict is

> inconsistent as a matter of law because it is impossible to convict a defendant of the compound crime without also convicting the defendant of the predicate offense.

791 N.W.2d 805, 807 (Iowa 2010) (internal citations removed). Additionally, the rule prohibiting inconsistent verdicts in civil cases still stands. See Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc. 339 S.C. 285, 529 S.E.2d 45 (2000). The Maryland Supreme Court has observed that where inconsistent verdicts are not tolerated in the civil context, the case against them was even stronger in the criminal context because the criminal law affords greater protections for a defendant than is given to either side of a civil trial. Price v. State, 405 Md. 10, 25-28, 949 A.2d 619, 628-630 (2008). It stands to reason that this issue has not been fully settled in South Carolina and could be ripe for challenge in the correct case.

Petitioner's case offered an opportunity to challenge the holding in State v. Alexander, *supra*, but Counsel Neely failed to do so because "it never crossed his mind." This Court has held that where counsel articulates a valid reason for using or not using a certain strategy, the conduct at issue will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). However, this Court has also held that trial counsel's decision to employ (or not employ) a certain strategy must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if *the reasons given for the strategy are not sound.* Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017) (emphasis added). Importantly, Counsel Neely did not testify that he considered the merits of the argument or whether it would be beneficial to Petitioner to make the argument, he simply did not consider the motion. This was not a valid strategy to excuse the failure to challenge the legally and factually inconsistent verdicts returned in Petitioner's case. This was deficient performance.

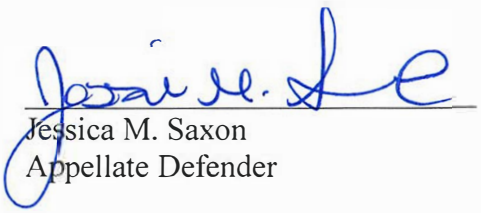
The PCR court ruled that Petitioner had not shown prejudice because it determined that even if counsel had made the motion, it would not have been successful and therefore would not have had any impact on Petitioner's trial. Respectfully, the PCR court had no ability to determine whether the trial court would have granted the motion or whether the appellate courts would have considered an argument against inconsistent verdicts if the motion had been made and denied. Petitioner was prejudiced because he was never given the opportunity to pursue a valid claim after trial that the conviction for burglary should not be allowed to stand when the jury did not convict him of the crimes that the State alleged intended to commit when he entered the Walker home.

"To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) (citing Strickland v Washington, 466 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Strickland 466 U.S. at 695 (1984). A PCR applicant is entitled to relief based on ineffective assistance of trial counsel if he can establish that counsel's performance was deficient, and that this deficiency prejudiced his defense. Id.; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

Petitioner has established both deficient performance and prejudice. Counsel Neely provided ineffective assistance of counsel and the PCR court's holding should be overturned.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully request this Court grant the petition for writ of certiorari to allow full briefing of this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of January, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

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SAMUEL JETER,

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Samuel Jeremiah Jeter states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge William A. McKinnon, which was held on June 6, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Samuel Jeremiah Jeter.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of January, 2023

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Jessica M. Saxon
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ATTORNEY FOR PETITIONER

This 6th day of January, 2023.