

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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Appellate Case No. 2022-001151

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Herbert Smalls .....Petitioner,

v.

State of South Carolina, .....Respondent.

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**MOTION TO SUPPLEMENT APPENDIX**

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Pursuant to Rules 240 and 243 of the South Carolina Appellate Court Rules, counsel for Respondent moves to supplement the appendix in this case. In support of this motion, Respondent would show the following:

1. Petitioner Herbert Smalls pleaded guilty to murder in the Charleston County Court of General Sessions in 2010 and was sentenced to 40 years' incarceration by Circuit Court Judge Roger Young. Petitioner filed a timely notice of appeal, which was dismissed because the issue raised was unpreserved. The remittitur was returned to the circuit court on November 8, 2010.

2. Petitioner filed a *pro se* application for post-conviction relief (PCR) in 2013, which was dismissed as untimely. App.112. Petitioner filed a *pro se* notice of appeal and

written explanation pursuant to Rule 243(c), SCACR, on February 2, 2015. The Supreme Court remanded the case for a hearing pursuant to Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009), to determine whether the statute of limitations should be equitably tolled due to Respondent's mental incapacity. A hearing was held on December 7, 2017, before the Honorable Michael Nettles, Circuit Court Judge. At this hearing, Petitioner presented testimony from Dr. Leonard Mulbry supporting his claim. Dr. Mulbry's written psychiatric evaluation was admitted as Respondent's Exhibit #1. App.159. Judge Nettles granted relief.

Petitioner filed an amended PCR application through counsel on June 24, 2018. App.183. At the same time, Petitioner filed a motion to reconstruct the record of his guilty plea, as the transcript was lost. App.182. A reconstruction hearing was held before Judge Young on February 9, 2021. At this hearing, the State introduced as State's Exhibit #1 a "plea form." The document is essentially a summary of the case and facts relied on by the State during its recitation of the factual basis for Smalls's plea. App.194–95. According to testimony adduced at the reconstruction hearing, Smalls agreed to these facts during his plea. App.220. The factual allegations are reproduced verbatim in the PCR court's order of dismissal, but the plea form is not cited as the source of these facts, and it is not explained that Smalls agreed to these facts during his plea. App.329–30.

3. The appellate court rules provide that the appendix in a PCR appeal "shall contain the entire lower court record." Rule 243(f), SCACR (cleaned up). The appendix in this case was filed on December 9, 2022. The appendix, however, does not include State's Exhibit #1 (plea summary) from the reconstruction hearing or Respondent's Exhibit #1 (Dr. Mulbry's report) from the Ferguson hearing. Without these important exhibits, the appellate

record is incomplete and, as such, they should be included in the appendix.

4. Inasmuch as these exhibits are relevant and pertinent material under Rule 243(f), SCACR, counsel respectfully requests these exhibits be included as part of the Appendix. Counsel has attached a supplemental appendix to this motion.

WHEREFORE, as the appendix is incomplete, counsel for Respondent requests this Court grant the motion to supplement the appendix.

Respectfully submitted,

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By: \_\_\_\_\_

ATTORNEYS FOR RESPONDENT

April 16, 2025

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**PROOF OF SERVICE**

I, Susan Spencer, Legal Assistant, hereby certify that I have served the *Motion to Supplement Appendix* and *Supplemental Appendix*, both dated April 16, 2025, on Petitioner by sending an electronic copy via email to Elizabeth Franklin-Best, Esquire, counsel of record for Petitioner, to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served. This 16<sup>th</sup> day of April, 2025.



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## Susan Spencer

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**From:** Susan Spencer  
**Sent:** Wednesday, April 16, 2025 3:20 PM  
**To:** elizabeth@franklinbestlaw.com  
**Cc:** Josh Edwards  
**Subject:** Herbert Smalls v. State (2022-001151)  
**Attachments:** SMALLS Herbert - Supplemental Appendix.pdf; SMALLS Herbert - Motion to Supplement Appendix.pdf

Good Afternoon Ms. Franklin-Best,

Attached please find a Supplemental Appendix in Herbert Smalls v. State (2022-001151). Please replace the one I sent earlier with this updated copy. We noticed some additional redactions needed to be made and have made the corrections. I have also attached the Motion to Supplement the Appendix. It has not been changed. These documents will be filed today with the Court of Appeals via the AIS OneDrive system.

Thank you and have a great day.

**SUSAN SPENCER**, Legal Assistant  
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