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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In the Supreme Court

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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. 2026-000036

Herbert Smalls .....Petitioner,

v.

The State of South Carolina ..... Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the sufficiency of a reconstructed guilty plea transcript where: (a) the original transcript was destroyed through no fault of the State but as a result of routine record retention policies; (b) no witness with specific recollection of the plea hearing was available—the original plea judge had no memory of the proceeding, the assistant solicitor had minimal recollection, and the only eyewitness attorney could not recall critical details; and (c) the Court of Appeals relied on generic testimony about "custom and practice" to impermissibly presume a constitutional waiver of fundamental rights in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969).
2. Whether the Court of Appeals misapprehended controlling South Carolina and federal law by conflating competency to proceed with the separate requirement that a guilty plea be entered knowingly and voluntarily, ignoring the distinct burden of ensuring meaningful appellate review where a defendant has documented intellectual disability, and applying the wrong legal standard to a defendant's knowing and voluntary waiver of rights given his mild-to-moderate intellectual disability, functional illiteracy, bipolar disorder, and contemporaneous medication
3. Whether the Court of Appeals erred in concluding Petitioner failed to prove ineffective assistance of counsel where the record establishes: (a) deficient performance by counsel in failing to ensure an intellectually disabled client understood his rights and the consequences of his plea; (b) a reconstructed record so incomplete that Petitioner cannot possibly demonstrate the specific defects that would be demonstrable had a transcript existed; and (c) a reasonable probability that, but for counsel's errors, Petitioner would not have pleaded guilty given the weakness of the State's case on the murder charge and an earlier rejected manslaughter offer.

## STATEMENT OF THE CASE

In December 2007, Petitioner Herbert Smalls was indicted in Charleston County for murder and later appeared before the Honorable Roger M. Young, Sr., on August 2, 2010, where he pled guilty as indicted and received a forty-year sentence. App. p. 142–44.<sup>1</sup> Petitioner filed a timely notice of appeal; on October 14, 2010, the Court of Appeals dismissed the appeal, and the remittitur issued on November 8, 2010. App. p. 143–44. Nearly three years later, on September 20, 2013, Petitioner filed an application for post-conviction relief (PCR) alleging that trial counsel failed to file a direct appeal, to which the State responded with a return and motion to dismiss as untimely and meritless. App. p. 001, 027, 144. On March 13, 2014, Judge McDonald entered a conditional order of dismissal, Petitioner objected on March 25, 2014, and on January 16, 2015, Judge Dennis issued a final order dismissing the PCR application. App. p. 080, 085, 103–06.

Petitioner then filed a notice of appeal, asserting for the first time that mental-health conditions rendered him unable to file timely; on April 28, 2015, the South Carolina Supreme Court dismissed the appeal without prejudice and remanded for a *Ferguson* hearing to determine whether mental incompetence tolled the statute of limitations, with remittitur issuing May 14, 2015. App. p. 141, 144–45. Following a forensic psychiatric evaluation by Dr. Leonard Mulbry, the circuit court conducted a *Ferguson* hearing on December 7, 2017, and found that Petitioner’s intellectual disabilities and mood disorder impaired his capacity to meet filing deadlines, thereby entitling him to a belated PCR. App. p. 142–72. Petitioner thereafter filed a second amended PCR application on June 25, 2018,

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<sup>1</sup> The Appendix citations are to the original appendix filed in this matter.

and, on that same date, moved for reconstruction of the missing 2010 plea transcript; Judge Young granted reconstruction by order dated July 6, 2018. App. p. 182–84.

On February 9, 2021, Judge Young convened a plea-reconstruction hearing at which he, Assistant Solicitor Julie Cardillo, and co-counsel Alex Apostolou testified, while original plea counsel David Holton was medically unavailable and no longer an active member of the South Carolina Bar. App. p. 188–207, 222, 241. At the conclusion of the hearing, Judge Young found that the plea had been reconstructed “adequately” for appellate purposes and recused himself from adjudicating the PCR merits, directing that another circuit judge hear the case. App. p. 224–25, 229–31. On March 22, 2021, an evidentiary hearing on Petitioner’s PCR claims was held before the Honorable Clifton Newman, at which Petitioner, Mr. Apostolou, and former lead prosecutor Greg Voigt testified regarding counsel’s performance, Petitioner’s mental limitations, and the strength of the State’s case. App. p. 238–53, 278–80.

By order filed August 2, 2022, Judge Newman denied PCR and dismissed the application with prejudice, finding Petitioner had not proven deficient performance, involuntariness of his plea, prejudice, or incompetency at the time of the plea, and expressly declining to rule on the sufficiency of the reconstructed transcript on the ground that “this is not an issue before the Court.” App. p. 326–33. Petitioner then timely sought certiorari to the South Carolina Supreme Court, which accepted review in appellate case number 2022-001151. App. p. 7. This Court then transferred the case to the court of appeals who, after oral argument, issued its opinion denying Petitioner relief. After a timely filed petition for rehearing, this petition for a writ of certiorari timely follows.

## RELEVANT FACTS

On April 25, 2007, James Stewart was fatally shot on Rivers Avenue in Charleston. Police developed evidence against Herbert Smalls through a co-defendant's statement implicating both men in the murder. Smalls was arrested on June 9, 2007, and held without bond. Due to Smalls's prior 1997 convictions for armed robbery and assault and battery with intent to kill, the State served notice of intent to seek life without the possibility of parole (LWOP) on both pending charges—murder and attempted armed robbery.

The record establishes that Petitioner has suffered from mental health challenges and intellectual disability since childhood. For example, IQ testing showed Petitioner's intellectual capacity in the "mild-to-moderate" intellectual disability range, with scores between 48–52 when tested at age fifteen. The record also shows a lifelong history of special education accommodations, functional illiteracy requiring adapted written communication and long-term treatment for bipolar disorder. At the time of his plea, he was taking Depakote and Risperdal medications. He also had a head injury in childhood that contributed to truncated schooling

At the *Ferguson* hearing in December 2017, the circuit court there found Petitioner's "intellectual deficiencies and mood disorder would impair his capacity to recognize deadlines, execute a legal document and meet the deadlines for executing the legal instruments" and characterized him as "a moderately retarded individual who is heavily medicated on Depakote and Risperdal." App. 171.

On August 2, 2010, Petitioner pleaded guilty to murder before the Honorable Roger M. Young. He was represented by attorney David Holton. The guilty plea was in exchange

for dismissal of the attempted armed robbery charge, withdrawal of the LWOP notice, and the right to plead "straight up." Petitioner was sentenced to forty (40) years' incarceration.

Petitioner's appeal from his conviction was summarily dismissed on error preservation grounds on November 8, 2010. Petitioner did not file a timely post-conviction relief application, leading to a decade-long procedural odyssey involving a *Ferguson* hearing on mental incapacity tolling the statute of limitations.

When PCR counsel requested the transcript of the August 2, 2010, plea hearing in 2018, the transcript had been destroyed. The delay in seeking the transcript occurred because: (1) the initial PCR application was dismissed as untimely; (2) the Supreme Court did not remand for a *Ferguson* hearing until April 28, 2015; (3) an order for a full evidentiary hearing was not entered until February 2, 2018—well beyond the five-year retention period for court reporter transcripts under Rule 607(i), SCACR.

A reconstruction hearing was convened on February 9, 2021, before the Honorable Roger M. Young. Judge Young, who presided over the original plea, expressly testified that he "had no specific recollection of the plea," could speak only to his routine practice rather than what actually occurred in Petitioner's case, and had no memory of why he imposed a forty-year sentence. He further acknowledged that he handles approximately 100 guilty pleas per week and, "as a matter of self-preservation," deliberately forgets individual pleas, explaining that "[n]obody remembers a specific thing; they just remember what we usually do." App. p. 188–207.

Assistant Solicitor Julie Cardillo likewise testified that she did not recall the plea or the guilty plea hearing, could not remember that Judge Young took the plea or that Mr. Holton served as defense counsel, and knew those facts "only from the paperwork." She

admitted she was about thirty weeks pregnant at the time and “would have been more of a second sit back and help as little as [she] could,” and she could not say whether there was any mention of mental disability or whether the court made the specific inquiries required by constitutional law. App. p. 188–207.

Attorney Alex Apostolou, Petitioner’s co-counsel on the attempted armed robbery charge, was the only witness with any contemporaneous presence at the plea. He did not recall any mental-health issues being discussed and could only confirm that Petitioner “agreed with the facts” after the solicitor’s recitation. Apostolou testified that he was “shocked” to see Petitioner plead guilty because he had previously spoken with counsel under the assumption the case was proceeding to trial. App. p. 278–80, 285–86.

Plea counsel, David Holton, was unavailable to testify at the reconstruction hearing due to medical issues, is no longer a member of the South Carolina Bar, and therefore provided no testimony regarding what was actually discussed with or explained to Petitioner in connection with the plea. App. p. 243, 256–58.

An evidentiary hearing was then held on March 22, 2021, before the Honorable Clifton Newman. The PCR court denied relief and dismissed Petitioner’s application with prejudice, stating that it would “respect” Judge Young’s reconstruction order and lacked “authority to set aside” that order. App. p. 238–42. The court further found that Petitioner failed to present evidence establishing deficient performance by counsel, failed to show that his plea was involuntary, failed to demonstrate prejudice arising from counsel’s conduct, and failed to prove incompetency at the time of the plea. App. p. 238–42, 326–33. Notably, the PCR court made “no ruling regarding the sufficiency of the plea transcript

reconstruction” and expressly stated that “this is not an issue before the Court during this PCR proceeding.” App. p. 241–42, 326–33.

The Court of Appeals affirmed. The court held the following: (1) The reconstructed record was “sufficiently reconstructed” based on testimony regarding Judge Young’s “custom and practice”, (2) Reliance on “custom and practice” evidence is permissible under federal precedent, (3) Petitioner failed to identify a specific appellate claim that could not be reviewed due to the record’s inadequacy, (4) Petitioner’s *pro se* motions filed years before the plea showed he was aware of the weakness of the State’s case, (5) Petitioner failed to prove ineffective assistance of counsel, and (6) Petitioner had strategic reasons to plead guilty given LWOP exposure on both charges.

The Court of Appeals did not address whether the separate, distinct standards for competency and knowing/voluntary waiver were properly applied to a defendant with documented intellectual disability.

## ARGUMENT

- I. **The Court of Appeals erred in affirming the sufficiency of a reconstructed guilty plea transcript where: (a) the original transcript was destroyed through no fault of the State but as a result of routine record retention policies; (b) no witness with specific recollection of the plea hearing was available—the original plea judge had no memory of the proceeding, the assistant solicitor had minimal recollection, and the only eyewitness attorney could not recall critical details; and (c) the Court of Appeals relied on generic testimony about “custom and practice” to impermissibly presume a constitutional waiver of fundamental rights in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969).**

In *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), the United States Supreme Court established that a trial court must affirmatively disclose that a defendant understands the

consequences of a guilty plea and is voluntarily entering it. The Court cannot presume or infer such a waiver from a silent record. This principle is foundational and inviolable.

The Court of Appeals' reliance on generic "custom and practice" testimony to fill the gaps created by the destroyed transcript is precisely what *Boykin* prohibits. No witness could testify that the specific colloquy required by constitutional law actually occurred. The plea judge had no memory. The assistant solicitor had no memory. The only eyewitness attorney could not recall whether mental health or medication effects were discussed.

The Court of Appeals effectively presumed that Judge Young followed his standard procedure in this specific case; that the required constitutional colloquy was given to this defendant; that the defendant understood his rights and the consequences, and that no issues regarding intellectual disability or medication were raised or needed to be addressed. Each of these presumptions violates *Boykin's* core mandate.

South Carolina law, as articulated in *State v. Ladson*, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007), requires that any reconstructed record be sufficient to permit "meaningful appellate review," and holds that when a record is "so incomplete as to prevent meaningful review," the appropriate remedy is reversal and remand for a new trial. The Court of Appeals recognized *Ladson* but failed to apply its central teaching that conclusory, summary recollections lacking concrete content cannot sustain appellate scrutiny. In this case, every neutral participant with a duty to recall the proceedings—specifically, Judge Young and Ms. Cardillo—affirmatively disclaimed any specific memory of what transpired during the plea. As a result, no witness could state whether the court addressed Petitioner's intellectual disability, whether the court inquired into the effects of Petitioner's medications on his cognitive functioning, whether the judge or counsel adjusted their explanations to

accommodate a client with documented illiteracy and mild-to-moderate intellectual disability, whether the court verified Petitioner's comprehension in any manner beyond perfunctory "yes" or "no" responses, whether counsel ever discussed discovery or explained the theory of the case to Petitioner, or what, if anything, counsel presented in mitigation. Such a record does not allow for "meaningful" appellate review; it invites speculation. It embodies precisely the kind of infirmity *Ladson* condemned and therefore compels reversal and remand.

*Ladson* places the risk of loss on the State where meaningful review is not possible through no fault of the defendant. The Court of Appeals held that Petitioner "failed to show prejudice flowing from the inadequate record" and must "identify a specific appellate claim that this court would be unable to review effectively."

This inverts *Ladson's* burden. *Ladson* rejected making appellants prove negative hypotheticals where the record's incompleteness itself "guarantee[s] affirmance ... without a genuine review." Absent the plea transcript and any specific recollection, Petitioner cannot possibly demonstrate the precise defect that would be demonstrable had the transcript existed. Yet that is precisely what the Court of Appeals required. *Ladson* was not a suggestion; it was a mandate. When a record is so incomplete that appellate review becomes guesswork, the remedy is reversal. The Court of Appeals acknowledged *Ladson* while gutting its holding.

The Supreme Court's tolling decision in *Ferguson v. State*, 382 S.C. 615, 677 S.E.2d 600 (2009), preserved Petitioner's right to merits review. The Court of Appeals' framework nullifies that right by imposing an impossible burden: prove a specific constitutional violation without the evidence necessary to prove it.

The Court of Appeals' decision effectively reads *Boykin* out of South Carolina law for any guilty plea more than five years old. This cannot be reconciled with the fundamental constitutional principle that waivers of constitutional rights cannot be presumed.

**II. The Court of Appeals misapprehended controlling South Carolina and federal law by conflating competency to proceed with the separate requirement that a guilty plea be entered knowingly and voluntarily, ignoring the distinct burden of ensuring meaningful appellate review where a defendant has documented intellectual disability, and applying the wrong legal standard to a defendant's knowing and voluntary waiver of rights given his mild-to-moderate intellectual disability, functional illiteracy, bipolar disorder, and contemporaneous medication.**

In *Godinez v. Moran*, 509 U.S. 389, 400 (1993), the United States Supreme Court expressly differentiated the standard for competency to proceed from the standard governing a knowing and voluntary waiver of rights. Competency to proceed concerns only whether the defendant possesses sufficient present ability to understand the nature of the proceedings and to assist counsel, a relatively modest threshold. By contrast, a knowing and voluntary waiver of rights requires a determination that the defendant actually understood the specific rights being relinquished, comprehended the consequences of abandoning those rights, and acted free from coercion in doing so. For a defendant with a known intellectual disability, this latter inquiry mandates an individualized, searching assessment that is specifically calibrated to the defendant's cognitive limitations, rather than reliance on a generalized or perfunctory finding of competency.

The reconstructed record demonstrates that Petitioner suffers from mild-to-moderate intellectual disability, reflected in an IQ range of approximately 48 to 52, is functionally illiterate, has a lifelong diagnosis of bipolar disorder, was under the influence of psychotropic medications including Depakote and Risperdal at the time of the proceedings,

and has been enrolled in special education programs since childhood. Despite these significant cognitive and educational limitations, no testimony in the record indicates that the court or counsel confirmed Petitioner's literacy level, that the plea colloquy was adapted or simplified to account for disability-appropriate communication, or that the court inquired into the timing, dosage, or cognitive effects of Petitioner's prescribed medications. Likewise, nothing in the record shows that the court or counsel took steps to ensure that Petitioner actually understood the nature of the charges, the essential elements of each offense, any available defenses, or the scope of potential sentence exposure, nor is there any indication that the court created a developed record permitting meaningful appellate review of voluntariness beyond Petitioner's generic "yes" or "no" responses.

Under these circumstances, the routine "custom and practice" of accepting guilty pleas through standard-form colloquies is constitutionally inadequate for a defendant with Petitioner's documented disabilities. Instead, the trial court was required to conduct an individualized, searching inquiry commensurate with Petitioner's cognitive and communicative limitations, so that any waiver of rights could be deemed knowing, intelligent, and voluntary.

The Court of Appeals pointed to Petitioner's prior convictions as evidence he would understand the plea process. This reasoning conflates competency (general capacity to understand) with actual understanding of this plea in this case. Experience with the criminal justice system does not establish that a defendant with known intellectual disability actually understood the grave and permanent consequences of waiving a jury trial, the right to confront witnesses, the right to present a defense, and the right to appeal. Each guilty plea requires an individualized colloquy proportionate to each defendant's capacity.

**III. The Court of Appeals erred in concluding Petitioner failed to prove ineffective assistance of counsel where the record establishes: (a) deficient performance by counsel in failing to ensure an intellectually disabled client understood his rights and the consequences of his plea; (b) a reconstructed record so incomplete that Petitioner cannot possibly demonstrate the specific defects that would be demonstrable had a transcript existed; and (c) a reasonable probability that, but for counsel's errors, Petitioner would not have pleaded guilty given the weakness of the State's case on the murder charge and an earlier rejected manslaughter offer.**

The reconstructed record and PCR record demonstrate that plea counsel's performance fell below constitutional standards. Plea counsel, Mr. Holton, was unavailable at the reconstruction hearing due to medical issues and is no longer practicing law, leaving the court without his explanation or justification for the abrupt plea decision. Co-counsel, Mr. Apostolou, testified that he was "shocked" by the sudden turn to a plea, having believed the case was proceeding to trial, which underscores the lack of strategic deliberation or client-centered consultation. The lead prosecutor further conceded that the murder case was "not particularly strong" and lacked substantial investigative work, highlighting that the decision to plead guilty was made in the face of a demonstrably weak prosecution case. Critical evidence against Petitioner was unreliable: identification failed during a show-up procedure, witness statements were inconsistent, and no physical evidence connected Petitioner to the homicide. Moreover, no witness could testify that either counsel or the court made any effort to adapt communication methods or verify understanding in light of Petitioner's documented intellectual disability and illiteracy, leaving no record that Petitioner comprehended the plea or its consequences. Co-counsel also testified that plea counsel was experiencing personal "troubles," had shut down his law practice, and effectively disappeared from the case, circumstances that further undermine any presumption of reasonable professional performance.

On this record, any conclusion that plea counsel's representation remained within "the range of competence demanded of attorneys in criminal cases" is untenable. Counsel's failure to ensure that an intellectually disabled, medicated, and illiterate client actually understood his constitutional rights and the consequences of relinquishing them constitutes deficient performance under prevailing professional norms, wholly apart from any separate

Under *Hill v. Lockhart*, 474 U.S. 52, 56 (1985), the prejudice inquiry turns on whether there exists a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and instead would have insisted on going to trial. Here, the record supports precisely that conclusion. An earlier manslaughter offer was reportedly extended and rejected by Petitioner, demonstrating both his willingness to proceed to trial and his continued assertion of innocence. The State's murder case was notably weak, as it lacked physical evidence and reliable identification linking Petitioner to the crime. Although the attempted armed robbery charge was stronger, Petitioner faced a potential life-without-parole sentence on both charges, which made the decision whether to plead or proceed to trial especially consequential. Petitioner's own pro se filings further reflect that he recognized and articulated the evidentiary weaknesses in the State's case.

On these facts, a rational, fully informed defendant could reasonably elect to go to trial where the prosecution's primary case is weak, and the key identification evidence is uncertain. The life-without-parole exposure did not merely operate as leverage in favor of a plea; it also heightened counsel's obligation to ensure that any waiver of trial rights by this intellectually disabled client was genuinely informed and voluntary, rather than the product of misunderstanding or unexamined pressure to abandon a viable trial option.

The Court of Appeals relied on finality and stability of pleas and strategic justification for the plea bargain. But *Hill's* prejudice standard is not outcome-determinative. The question is not whether a rational defendant *might* accept the plea, but whether this defendant, fully informed in disability-appropriate terms with competent counsel, would have accepted it or insisted on trial. The opinion's reliance on "stability" and "finality" does not override *Hill's* prejudice standard or *Boykin's* individualized waiver requirement. The State invokes 'finality' as though it were a talisman that wards off constitutional scrutiny. But finality presumes validity. A guilty plea obtained in violation of *Boykin*, without effective counsel, from a defendant who may not have understood what was happening, has no legitimate claim to finality.

The Supreme Court's decision to toll the statute of limitations under *Ferguson* was equitable and remedial. It preserved Petitioner's right to merits review of his constitutional claims. The Court of Appeals' decision—holding that Petitioner cannot meet his burden because he cannot prove the specific defect from an incomplete record—effectively extinguishes that preserved right.

Where the State's record retention practices and procedural timing foreclose meaningful, specific merits review through no fault of the defendant, reversal and remand for trial is the appropriate remedy. Anything less nullifies the Supreme Court's tolling decision.

#### **IV. Why the Court Should Grant the Writ.**

This case raises an important question for South Carolina, especially given the current policy of only requiring transcript record retention for 5 years. It is increasingly easy to ensure the preservation of transcripts beyond this time frame and this Court should

direct some new guidance on this issue that recognizes advances in technology that make the preservation of records a simple matter. This 5- year retention policy, combined with South Carolina’s PCR procedures, creates a gap for defendants like Smalls—who successfully obtain tolling via *Ferguson*—but then are denied meaningful review because records are destroyed rendering *Ferguson* relief largely illusory.

### CONCLUSION

This Court should grant the writ.

Respectfully submitted,

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