STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Clifton Newman, Circuit Court Judge

Herbert Smalls, Petitioner,
v.
State of South Carolina, Respondent.

Appellate Case No. 2022-001151

PETITION FOR REHEARING

Petitioner, by undersigned counsel, respectfully petitions for rehearing of the Court's decision filed September 3, 2025 (Op. No. 2025-UP-306), affirming the denial of post-conviction relief. Rehearing is warranted because the Court has overlooked and misapprehended controlling principles of South Carolina and federal law and key facts material to the resolution of the issues presented. See Rule 221(a), SCACR.

GROUNDS FOR REHEARING

1. **The Court misapprehended the legal standard governing reconstructed records and meaningful review, effectively presuming waiver from a silent/indeterminate record contrary to *Boykin* and *Ladson*.**

   a) Misapplication of *State v. Ladson's* "meaningful review" requirement to a missing guilty-plea transcript.

   Ladson holds that a reconstructed record must permit "meaningful appellate review," and where the record is "so incomplete as to prevent meaningful review," the remedy is reversal and

remand (there, for a new trial). The opinion acknowledges *Ladson* but treats generic testimony about "custom and practice" as sufficient in lieu of any specific recollection of the plea's content. That approach mirrors the very infirmities *Ladson* condemned: "conclusory," summary recollections without concrete content, where even basic, dispositive details cannot be known.

Here, every neutral participant with a duty to recall—the plea judge and the assistant solicitor—affirmatively had no specific memory of the plea. The sole eyewitness attorney (Apostolou) was not plea counsel, did not recall mitigation or any discussion of mental health, and could only confirm Smalls responded to a facts recitation. No witness could attest that plea counsel or the court actually addressed Smalls's intellectual disability, medication, or his ability to understand rights waived at that hearing. This is not a "meaningful" review; it is conjecture.

b) Improper reliance on "custom and practice" to fill dispositive gaps regarding constitutional colloquy and counsel's performance.

Boykin prohibits presuming waiver of trial rights from a silent record. The opinion effectively presumes the required colloquy and knowing waiver from non-specific "usual practice," even though no one could recount what was actually asked or answered. That is the error *Boykin* forbids.

The Court cites out-of-jurisdiction cases that allow "custom and practice" as permissible circumstantial evidence. But even those cases require the record, viewed as a whole, to permit a reasonable inference of an intelligent and voluntary waiver. Here, the record cannot resolve whether the court or counsel engaged with the very topics necessary to validate this plea for a person with documented intellectual disability and mood disorder. The Court never identifies specific testimony showing that Smalls actually understood the rights waived, consequences, or immigration-type or sentencing collateral impacts, nor that the judge probed medication effects. This is presumption—*Boykin*'s core prohibition.

c) The Court's prejudice analysis conflicts with *Ladson*'s directive.

The Court's opinion holds that Smalls failed to show specific prejudice from gaps in the reconstructed record. *Ladson* squarely rejected making appellants prove negative hypotheticals where the record's incompleteness itself "guarantee[s] affirmance … without a genuine review." That is the case here. Absent the plea transcript and any specific recollection, Smalls cannot possibly demonstrate the precise defect that would have been demonstrable had the transcript existed. *Ladson* places the risk of loss on the State, where meaningful review is not possible through no fault of the defendant.

Additionally, the Court misapprehended the distinct standards for competency and voluntariness and thereby applied the wrong legal test to Smalls' claim that his plea was not knowing and voluntary, given his intellectual disability.

The Court additionally overlooked *Godinez*'s distinction between competency and voluntariness. The opinion conflates competence to proceed with the separate *Boykin* requirement that a plea be "knowing and voluntary." Competency asks whether a defendant has the capacity to understand proceedings and assist counsel. The voluntariness/ knowing waiver asks whether this defendant actually understood the rights waived and consequences and whether the decision was uncoerced—particularly salient where intellectual disability, illiteracy, and mood disorder are documented.

The PCR record showed Smalls's IQ testing in the "mild-to-moderate" intellectual disability range, lifelong special education, functional illiteracy, long-term mood disorder treatment, and contemporaneous medication. No evidence shows the court or plea counsel adjusted explanation, verified comprehension beyond "yes/no" responses, or addressed

medication's cognitive effects. The Court's reliance on conclusory "custom" cannot substitute for the required individualized inquiry for a disabled defendant.

The Court also improperly treated "prior convictions" and generic courtroom experience as evidence of a knowing waiver. Experience with the criminal justice system does not establish that this plea colloquy satisfied *Boykin* for this defendant with known intellectual disability.

2. The Court additionally misapprehended and overlooked material evidence bearing on deficient performance and prejudice under *Hill/Strickland* and imposed an unduly heightened showing contrary to Premo and South Carolina precedent.

a) Counsel's performance was deficient.

Plea counsel's failure to ensure an intellectually disabled client understood Rule 5 evidence, rights waived, and consequences; failure to request or create a record addressing disability/medication; and failure to present mitigation or address mental-health concerns at the plea.

The PCR and reconstruction records show that plea counsel (Holton) was unavailable due to medical issues; no witness recalled any mitigation or mental-health colloquy; the prosecutor acknowledged the homicide case was weak; Apostolou was "shocked" by the sudden change to a plea; and the plea judge had no memory why he imposed 40 years. On this record, crediting conclusory "excellent lawyer" references while disregarding the absence of any concrete evidence that counsel actually performed the constitutionally required tasks for a disabled client is error. The failure to adapt counsel's advice and the court's colloquy to Smalls's limitations and medications is itself deficient performance, independent of "competency."

The Court discounts Smalls's testimony about not reviewing Rule 5 discovery by attacking credibility, but overlooks corroborating circumstances: (1) petitioner's functional illiteracy

(necessitating adapted explanation and documentation), (2) the absence of any plea-hearing proof that the judge or counsel addressed disability, (3) the lead prosecutor's testimony that the case file lacked investigative supplements and that the case was weak, and (4) Apostolou's testimony that Smalls had rejected an earlier manslaughter offer because he "didn't do the murder," followed by an abrupt turn to a straight-up plea. Those facts support, not undermine, deficient performance.

b) The Court applied an outcome-determinative hindsight gloss that contradicts *Hill* and *Padilla*.

The correct question here was whether there was a reasonable probability that, but for counsel's errors, Smalls would have rejected the plea and insisted on trial, and whether that would have been rational given the circumstances. Here, the record supports the conclusion that the prosecutor conceded the murder case was "not particularly strong," lacking substantial investigation, identification failed during an attempted show-up, and there was no physical evidence tying Smalls to the murder—while the attempted armed robbery was stronger. An earlier manslaughter offer was reportedly extended and rejected—showing Smalls's initial willingness to go to trial and his claim of innocence. The LWOP leverage cut both ways; it heightened counsel's duty to ensure any waiver was truly informed for a disabled client and to preserve a contemporaneous record of that individualized inquiry. On this record, a rational defendant could choose a trial where the State's case is weak and key identification is uncertain, especially if fully informed in disability-appropriate terms. The opinion's reliance on "stability" and "finality" of pleas (*Blackledge*, *Premo*) does not override *Hill*'s prejudice standard or *Boykin*'s individualized waiver requirement. Finality assumes a valid plea; it does not substitute for it.

3. **The Court incorrectly treated the reconstruction order as if it bound the PCR court and this Court on sufficiency, contrary to the nature of interlocutory orders and the scope of appellate review.**

Both parties agreed that the reconstruction sufficiency order was not immediately appealable. That does not elevate it to preclusive status. The PCR court's statement that it "respects" the order but lacks "authority to set [it] aside" reflects a misapprehension; the adequacy of the reconstructed record is a predicate legal question this Court must decide *de novo* to determine whether meaningful review is possible. By accepting the order as effectively determinative, the Court avoided the *Ladson*/*Boykin* analysis and shifted the risk of loss to the disabled defendant.

4. **The Court overlooked the procedural posture and burden-allocation problem created by the State-caused (but not bad-faith) transcript loss after the five-year retention period and failed to apply a remedial rule that protects meaningful review.**

The plea transcript was destroyed due to routine retention limits, but only after the Supreme Court tolled limitations under *Ferguson* and authorized a belated PCR on the merits. That equitable tolling preserved the right to merits review. Placing the risk of transcript unavailability and the impossibility of specific-defect proof on Smalls nullifies *Ferguson*'s remedy. In this posture, *Ladson*'s meaningful-review rule should be applied robustly: where the State's record custody practices and timing foreclose any meaningful, specific merits review, reversal and remand for trial is the appropriate remedy. Anything less guts the Supreme Court's tolling decision and effectively extinguishes the preserved right.

5. **The Court's reliance on Apostolou's generic statements and the judge's "checklist" testimony cannot supply the constitutionally required, individualized inquiry for a defendant with documented intellectual disability.**

Even accepting "custom and practice" as circumstantial evidence, the record still lacks any basis to find the court or counsel: (1) confirmed literacy level and adapted the colloquy; (2) explained charges, elements, and defenses in disability-appropriate terms; (3) probed medication timing and cognitive effects; (4) ensured the client actually understood the sentencing exposure and the effect of LWOP leverage on separate charges; and (5) created a record that would allow appellate courts to test voluntariness beyond generic "yes/no." For disabled defendants, that individualized inquiry is not optional. On this record, it is absent.

CONCLUSION

This Court should grant rehearing.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, SC 29204
(803) 445-1333
elizabeth@franklinbestlaw.com

Counsel for Petitioner

Dated: September 19, 2025

CERTIFICATE OF SERVICE

Counsel hereby certifies she has served a copy of this petition for rehearing on Josh Edwards, of the South Carolina Attorney General's Office, on this date, September 19, 2025, at jedwards@scag.gov.

/s/ Elizabeth Franklin-Best