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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2026-000036

Herbert Smalls ……Petitioner,

v.

The State of South Carolina …… Respondent.

PETITIONER'S REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, by and through counsel, respectfully submits this Reply to the State's Return and renews his request that this Court grant the writ.

ARGUMENTS

I. Reconstructed Record and *Boykin/Ladson*

The State's primary argument—that generic "custom and practice" testimony suffices to reconstruct a constitutionally adequate plea record—cannot be reconciled with *Boykin v. Alabama* and *State v. Ladson*. The plea judge expressly testified that he had "no specific recollection" of Mr. Smalls's plea, handled "approximately 100 guilty pleas per week," and "deliberately" does not remember individual pleas. The assistant solicitor likewise had no memory of the plea, could not recall whether intellectual disability, literacy, or medications were discussed, and only knew who presided and who represented Mr. Smalls from the paperwork. The only contemporaneous defense attorney present recalled no discussion of mental health and was "shocked" the case suddenly resolved by plea.

On this record, the Court of Appeals did not "review" a plea colloquy; it presumed that this plea must have conformed to the judge's usual practice. *Boykin* forbids presuming waiver of fundamental rights from a silent or conclusory record, and *Ladson* places the risk of a fatally incomplete record on the State, not on a defendant who, by definition, cannot identify the specific defect that would be revealed only by a missing transcript. The State's prejudice framing inverts *Ladson* and renders meaningful appellate review impossible in precisely the circumstance that the decision was meant to address.

II. Competency vs. Knowing and Voluntary Waiver

The State also blurs the distinct standards for competency and for a knowing, intelligent, and voluntary plea. *Godinez v. Moran* makes clear that a global finding of competency does not resolve whether a particular defendant actually understood the rights relinquished and consequences of a guilty plea. Here, the record reflects mild-to-moderate intellectual disability (IQ 48–52), functional illiteracy, a long history of special-education placement, bipolar disorder, and contemporaneous treatment with Depakote and Risperdal. Yet the reconstructed record contains no evidence that the court or counsel: (1) assessed Mr. Smalls's literacy, (2) adapted the colloquy to his limitations, (3) inquired into the cognitive effects of his medications, or (4) otherwise created a record demonstrating that this defendant understood the nature of the charge, elements, defenses, and sentencing exposure. The State's reliance on Mr. Smalls's prior convictions as a proxy for understanding only underscores the conflation of competency and actual, individualized comprehension that *Godinez* forbids.

III. Ineffective Assistance and *Hill* Prejudice

The State's defense of plea counsel rests on the same record gaps *Ladson* condemns. Lead plea counsel did not testify at the reconstruction hearing and offered no explanation for the abrupt plea. Co-counsel testified he believed the case was going to trial and was "shocked" by the plea, and the lead prosecutor conceded the murder case was not particularly strong and lacked substantial investigative work. There is no evidence that counsel undertook the heightened, disability-appropriate consultation required to ensure that an intellectually disabled, illiterate, medicated client understood his rights, options, and the consequences of a straight-up plea to murder.

Under *Hill v. Lockhart*, the question is whether there is a reasonable probability that, but for counsel's errors, Mr. Smalls would have insisted on trial. The record supports that probability: he previously rejected a manslaughter offer, his pro se filings emphasized weaknesses in the State's proof, and the State's own witnesses acknowledged the murder case's evidentiary limitations. The State's invocation of finality cannot cure a plea whose validity cannot be demonstrated from an adequate record, particularly where the defendant's disabilities heighten the need for careful, individualized explanation.

IV. *Ferguson* and the Five-Year Retention Gap

Finally, the State's position effectively nullifies this Court's equitable tolling jurisprudence in *Ferguson v. State* for intellectually disabled petitioners. Because transcripts are destroyed after five years, a petitioner who must first obtain *Ferguson* tolling reaches the merits only after the plea record has been irretrievably lost. Allowing the State to use that destruction—caused by routine policy and procedural timing—as a shield, while demanding proof of specific, transcript-dependent defects, makes *Ferguson* relief illusory for defendants like Mr. Smalls. This case squarely presents the need for guidance ensuring that fundamental constitutional protections are not defeated by routine record-retention practices in cases involving disabled defendants and delayed but meritorious collateral review.

CONCLUSION

For these reasons and those set forth in the Petition, Petitioner respectfully requests that this Court grant the writ of certiorari and order appropriate relief.

Respectfully submitted,

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