

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Sep 06 2023**

S.C. SUPREME COURT

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Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

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DERRICK MILLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000470

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## **ISSUE PRESENTED**

Whether the PCR court erred in finding plea counsel was not ineffective for failing to establish a direct line of communication between Petitioner and Counsel during the plea where Petitioner had questions about the plea recommendation but was unable to privately consult with counsel during the plea hearing thereby denying Petitioner his Sixth Amendment right to counsel?

## STATEMENT OF THE CASE

On November 12, 2019, officers with the Greer Police Department responded to a call of a weapon being discharged in a home. They were informed that a woman had been shot and that the shooter was still on scene. Officers arrived and encountered Petitioner, who came outside with his hands in his pockets. Officers ordered Petitioner to remove his hands from his pockets. Initially, he did not comply with the order but eventually removed his hands, along with a firearm, from his pants pockets. After receiving numerous commands, Petitioner placed the firearm on the ground, and he was taken into custody. Inside the residence, officers found Hannah Foster with a gunshot wound to her hip and leg. Foster stated that Petitioner had shot her because he did not want her to leave the residence. Petitioner's mother informed police that when she saw Foster had been shot, she attempted to call the police, but Petitioner took her phone and pushed her down to prevent her from calling for help. Petitioner waived his Miranda<sup>1</sup> rights and agreed to speak with police. He admitted to shooting Foster but said he did so because she was trying to burn his personal items, such as his clothing, which he thought was disrespectful. Police found no proof that anything had been burned in the residence. App. 11, l. 3-App. 12, l. 23.

Petitioner was originally charged with attempted murder, kidnapping,<sup>2</sup> and domestic violence of a high and aggravated nature (DVHAN). App. 5, ll. 10-24. On January 6, 2021,

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<sup>1</sup> 384 U.S. 436 (1966)

<sup>2</sup> Petitioner maintained during his PCR hearing that he had never been charged with kidnapping. App. 65, ll. 1-15; App. 74, ll. 2-4. Additionally, there is no record on the public index of Petitioner having ever been charged with kidnapping in this case. The charges reflected on the public index are attempted murder, DVHAN, possession of a weapon during the commission of a violent crime, and discharging a firearm into a vehicle, aircraft, etc. while occupied. <https://publicindex.sccourts.org/Spartanburg/PublicIndex/PISearch.aspx> search terms "Miller, Derrick".

Petitioner appeared before the Honorable J. Mark Hayes, III, to enter a guilty plea to the DVHAN charge. App. 1; App. 5, ll. 10-15. The State was represented by Jennifer Wells. Petitioner was represented by Dan MacDonald. App. 2. Due to the COVID-19 pandemic, all parties appeared via remote video conferencing. App. 4, ll. 4-9. The State recommended a sentence of twenty years suspended to a term of active imprisonment between ten and fifteen years followed by five years of probation. App. 5, ll. 16-24. Judge Hayes ultimately sentenced Petitioner to twenty years imprisonment providing that upon the service of fifteen years, the remaining five years would be suspended to probation. App. 23, ll. 12-23.

Petitioner timely filed a direct appeal of his conviction and sentence; however, the appeal was dismissed for failure to provide a sufficient explanation of any issue that could be raised on appeal as required by Rule 203(d)(1)(B)(iv) SCACR. On June 22, 2021, Petitioner filed the present PCR action. App. 27-App. 32. The State filed a return and motion for a more definite statement on November 22, 2021. App. 33-43. PCR Counsel Rodney Richey filed an amended PCR application on July 5, 2022, alleging, *inter alia*, ineffective assistance of counsel for failing to establish a line of communication between counsel and Petitioner during the plea or failing to require the plea court to establish a line of communication between counsel and Petitioner during the plea. App. 44-45.

The parties convened before the Honorable Brian M. Gibbons on February 13, 2023, for an evidentiary hearing. The State was represented by Chelsey Marto. Petitioner was represented by Counsel Richey. App. 46. Petitioner testified that during his guilty plea he was not in the same room as his lawyer and had no way to contact him during the plea. Petitioner believed, based on the South Carolina Supreme Court order regarding court operations during the Covid-19 pandemic, that a direct line of communication should have been set up between himself and

Counsel MacDonald during the plea. He had questions during the plea that he wanted to ask Counsel MacDonald because he believed the State was going to be recommending a ten-year sentence and he did not understand why it had changed to a recommendation of twenty years. However, he was told by the officers at the jail that he could not speak while the judge or others were talking and that he had to be quiet. App. 53, l. 12-App. 54, l. 22.

Petitioner testified that he was very confused during the plea hearing because he had discussed the plea offer with Counsel MacDonald the day before the plea and he had accepted the ten-year offer, but on the following day in court the recommendation was for a twenty-year sentence. App. 55, l. 2-App. 57, l. 17. Petitioner stated that he wanted to go to trial but due to the pandemic, trials were not being held. He had been in custody for fourteen months at the time of his guilty plea and had been told a trial would not happen anytime soon. App. 60, l. 10-App. 61, l. 15. Petitioner testified he thought he was constructively denied counsel because he could not communicate privately with Counsel MacDonald during the plea hearing. App. 62, l. 25-App. 63, l. 19. Petitioner testified that if Counsel MacDonald had represented him effectively then he would have taken the case to trial. App. 64, ll. 3-11.

On cross-examination, Petitioner testified that he had asked Counsel MacDonald about splitting the ten-year plea offer to five years of active time and five years on probation, but he never heard back on that request. App. 67, ll. 4-9. Petitioner stated he agreed with the plea recommendations during the plea hearing because he could not confer with his lawyer about the plea. He conceded that he did not ask the court if he could speak to his lawyer during the plea and was not explicitly told by the court that he could not speak with his lawyer but stated he was also never advised that he could speak privately with his lawyer during the hearing. He stated he

did not tell the court that he was confused about the plea recommendation because he was expecting Counsel MacDonald to say something. App. 68, l. 22-App. 69, l. 20.

Counsel MacDonald testified that he was either in his office or the jury assembly room at the courthouse during the plea hearing and confirmed he was not in the same room with Petitioner. App. 76, ll. 17-20. He confirmed that the only line of communication was the main Webex call that everyone was on, including the solicitor and judge. When asked if there was a direct line of communication between himself and Petitioner, Counsel MacDonald stated that Petitioner would have had to ask for a jail cellphone to contact him and he was unsure if Petitioner even knew that he could make a request for a cellphone. He also was unsure if the plea court was required to establish a line of communication between himself and Petitioner during the virtual hearing. App. 77, ll. 2-21.

Counsel MacDonald agreed that it would have been beneficial for there to be a direct line of communication between Petitioner and himself during the plea, particularly considering the testimony Petitioner had provided at the PCR hearing. App. 77, l. 22-App. 78, l. 1. He explained that the State had offered a negotiated plea offer to ten years or a recommended plea offer for ten to fifteen years, and that Petitioner had accepted the recommended deal in the hopes the judge would go lower than ten years active time. App. 78, l. 2-App. 79, l. 17. Counsel MacDonald testified that Petitioner “flip-flopped” on whether he wanted to go to trial. There were times where “he was insistent on wanting a jury trial” and other times when Petitioner wanted a plea. App. 80, l. 21-App. 81, l. 9.

On cross-examination, Counsel MacDonald testified he could not recall if Petitioner was confused during the plea hearing. He stated Petitioner did not say much during the hearing. Counsel MacDonald again stated that he did not know if Petitioner was even aware that he could

request a phone from the jail to speak with him and he did not think the plea court instructed Petitioner in any way about privately speaking with him during the plea. App. 82, ll. 1-22.

The PCR court took the matter under advisement. App. 89, ll. 18-20. An order of dismissal was filed on March 17, 2023, finding that Petitioner had failed to meet his burden of proof and denying his claims. App. 91-102. Regarding the failure to establish a line of communication, the PCR court ruled that any failure was non-prejudicial because Petitioner never asked to speak to counsel during the plea and was not expressly denied the opportunity to speak to counsel during the plea. The PCR court ruled that the plea transcript reflected Petitioner's plea was knowingly, intelligently, and voluntarily entered and that even if there had been a denial of communication, there had been no showing of prejudice. App. 101.

## ARGUMENT

The PCR court erred in finding plea counsel was not ineffective for failing to establish a direct line of communication between Petitioner and Counsel during the plea where Petitioner had questions about the plea recommendation but was unable to privately consult with counsel during the plea hearing thereby denying Petitioner his Sixth Amendment right to counsel.

Petitioner was unable to privately and openly communicate with his counsel during his guilty plea. This occurred because neither counsel, nor the plea court, ensured that a private line of communication existed between Petitioner and counsel. Further, no one instructed Petitioner that he had the ability to request a private line of communication with his counsel. This was violation of Petitioner's Sixth Amendment right to counsel as he was denied access during a critical stage of the proceedings against him. Further, it was a violation of our Supreme Court's administrative order directing the operation of courts in this state during the coronavirus pandemic.

“The Sixth Amendment right to counsel protects the integrity of the adversarial system of criminal justice by ensuring that all persons accused of crimes have access to effective assistance of counsel for their defense.” State v. Quattlebaum, 338 S.C. 441, 446, 527 S.E.2d 105, 107–08 (2000). “Although the Sixth Amendment right to counsel is distinguishable from the attorney-client privilege, the two concepts overlap in many ways. The right to counsel would be meaningless without the protection of free and open communication between client and counsel.” Id.

The right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages. State v. Register, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996). This right “has long been held to mean the right to effective assistance of counsel.” McKnight v.

State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) *citing* McMann v. Richardson, 397 U.S. 759 (1970). “Courts have interpreted this language to mean prejudice will be presumed if counsel is denied at a critical stage of the trial.” Id. Therefore, “[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” Id. *quoting* Strickland v. Washington, 466 U.S. 668, 692 (1998). “Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful.” United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978).

Important to the instant case is the Operation of the Trial Courts During the Coronavirus Emergency order originally issued by our Supreme Court on April 3, 2020. At the time of Petitioner’s guilty plea, Amended Order 2020-12-16-01 was in effect. That order stated, in relevant part,

Guilty pleas may be conducted as specified by section (c)(3)<sup>3</sup> above. However, a guilty plea by remote communication technology will not be conducted unless both the defendant and prosecutor consent. If the defendant will participate by remote communication technology, **the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea.** If the defendant’s counsel will participate by remote communication technology, **the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary.**

Operation of Trial Courts During the Coronavirus Emergency, Order 2020-12-16-01, section (d)(3) (emphasis added).

Our Supreme Court took great care to protect a defendant’s Sixth Amendment right to counsel during the pandemic by mandating that a defendant entering a guilty plea via remote technology 1) make a knowing and intelligent waiver of the right to be physically present in

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<sup>3</sup> Section (c)(3) of the order allows hearings on motions or other matters to be held via remote communication technology.

court and physically present with their counsel, and 2) have the ability to consult privately with their counsel during the plea hearing. While the order states that the plea court must ensure that the defendant has the ability to privately consult with counsel, it is ultimately the responsibility of counsel to ensure that he can privately communicate with his client during all critical stages of representation. Counsel MacDonald was deficient in failing to bring to the court's attention the inability for he and Petitioner to privately communicate during the plea hearing and for not being aware of the administrative order requiring a private line of communication.

The transcript of the plea hearing is devoid of any determination by the court that Petitioner was freely and knowingly waiving his right to be present and his right to be present with counsel. Further, at no point prior to or during the plea hearing was Petitioner advised that should he need to consult with his counsel, a private line of communication would be established. The PCR court found the inability of Petitioner to communicate with counsel was non-prejudicial because the plea transcript reflected that Petitioner's plea was freely, knowingly, voluntarily, and intelligently entered. However, the PCR court wholly failed to consider the testimony elicited during the PCR hearing. As the appellate courts of this state have repeatedly held, "the voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984) (emphasis added).

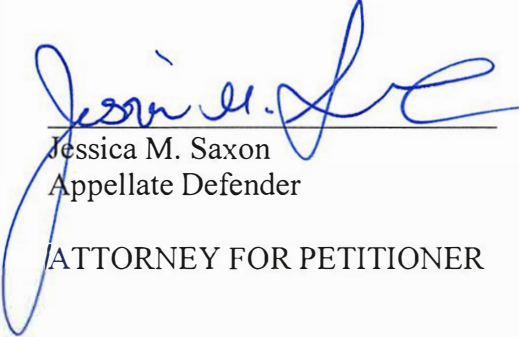
Further, the PCR court found that because Petitioner had not attempted to speak privately with counsel during the plea hearing that he could not have suffered prejudice. The court went on to state that "even if there was a denial of communication, there has been no showing of prejudice." App. 101. The analysis of the PCR court failed to consider that by denying

Petitioner private communication with his counsel during a critical, if not the most critical stage of Petitioner's case, Petitioner's right to counsel was violated and therefore prejudice would, and should, be presumed.

The record does not support the ruling of the PCR court. Counsel MacDonald was deficient in failing to ensure that Petitioner had the ability to communicate with him privately during the plea hearing. Since Petitioner could not freely and privately communicate with Counsel MacDonald, he was denied his Sixth Amendment right to counsel. Further, both the plea court and Counsel MacDonald violated our Supreme Court's administrative order that was active during the pandemic. Petitioner was denied access to counsel during a critical stage in the proceedings against, thus prejudice is presumed. The PCR court's denial of relief should be reversed.

**CONCLUSION**

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



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Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 6<sup>th</sup> day of September, 2023.