

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

DERRICK MILLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000470

APPENDIX

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State of South Carolina)	
)	
County of Spartanburg)	
State of South Carolina,)	2020-GS-42-3407
)	
Plaintiff,)	
)	
v.)	Transcript
)	
Derrick Miller,)	of
)	
Defendant.)	Hearing
)	
)	
)	
)	
)	
)	
)	
)	

Date: January 6, 2021

Time: 3:21 p.m.

Location: Via Remote Video Conference for All Parties

Reported by
Amber Payne, CVR

APPEARANCES

Presiding: The Honorable J. Mark Hayes II

For the Plaintiff: Jennifer Wells, Esq.
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For the Defendant: Dan MacDonald, Esq.
Assistant Public Defender
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Spartanburg, SC 29306

Also Present: Charlotte Miller, Ashley Beeks, Martha
Smith, Probation Officer Heather Carswell, Alexander
Mende

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Hearing:

4

EXHIBITS

There were no exhibits marked during the course of this hearing.

1 PROCEEDINGS

2 THE COURT: You are Mr. Derrick Miller?

3 MR. MILLER: Yes, sir. I am.

4 THE COURT: Mr. Miller, it's a pleasure
5 meeting you. I'm sorry it has to be like
6 this, where we cannot be together face-to-
7 face. But during the time of COVID, this is
8 the way court administration is allowing us to
9 do some work.

10 I need to let you know we're making a
11 recording of everything that happens here. I
12 tell you that because I need for you to please
13 speak slowly so we all can understand you, but
14 please speak loud enough so that we all can
15 hear you.

16 If ever during this process you cannot
17 hear me or what the other people
18 participating, immediately let us know, and we
19 will speak up, as well.

20 Mr. Miller, in order to begin this
21 process, I have to administer an oath to you.
22 So if you would please raise your right hand.

23 (The witness is sworn.)

24 THE COURT: Mr. Miller, I'm not sure you can,
25 but, as best you can, slide a little bit

1 closer to the microphone; if you can.

2 THE WITNESS: (Complies.)

3 THE COURT: There you go. All right. Mr.
4 Miller, I'm going to ask you if you would
5 please listen to the solicitor. She is going
6 to announce the case for us. Please listen to
7 the solicitor.

8 MS. WELLS: Thank you, Your Honor. May it
9 please the Court.

10 Your Honor, before you is Derrick Miller.
11 He's here to enter a guilty plea on Indictment
12 Number 2020-GS-42-3407. Your Honor, that's a
13 true billed indictment for domestic violence
14 of a high and aggravated nature. That is a
15 violent charge. That is a serious charge.

16 Your Honor, outside of that, between the
17 parties we have been able to -- well, we were
18 unable to reach a negotiation, but the State
19 does have a recommendation of a sentence of 20
20 years suspended to a term of active
21 imprisonment of between 10 and 15 years and 5
22 years probation. The State is dismissing an
23 attempted murder and a kidnapping charge in
24 relation to this case.

25 And he is, obviously, represented by Mr.

1 MacDonalld, who is present here on the virtual
2 courtroom here today.

3 THE COURT: No recommendation for no contact?

4 MS. WELLS: Your Honor, we -- well, there's
5 not -- there is --

6 THE COURT: Okay.

7 MS. WELLS: -- not a permanent restraining
8 order. We have attempted to contact the
9 victim. She is -- we know that she's in the
10 area, but we did not -- she -- we -- she did
11 not ask for a permanent restraining order, so
12 the State cannot seek one on her behalf
13 without -- without her being a party to it.

14 THE COURT: Okay. Mr. Miller --

15 MS. WELLS: We'd -- we'd love to have a no-
16 contact provision, but no permanent
17 restraining order here.

18 THE COURT: All right.

19 Mr. Miller, it is your intent to enter a
20 plea to the charge that was just announced by
21 the solicitor?

22 THE WITNESS: Yes, sir, Your Honor.

23 THE COURT: Okay. How old are you, sir?

24 THE WITNESS: Forty-six, sir.

25 THE COURT: How far did you go in school?

1 THE WITNESS: I graduated high school, sir.
2 THE COURT: All right. Presently: married,
3 single, divorced, or widowed?
4 THE WITNESS: Single.
5 THE COURT: Do you have children?
6 THE WITNESS: Yes, sir. I do.
7 THE COURT: How many?
8 THE WITNESS: A son, sir.
9 THE COURT: How old?
10 THE WITNESS: Fourteen years old.
11 THE COURT: Prior to being arrested on this
12 charge, did you have a job outside of the
13 home?
14 THE WITNESS: Yes, Your Honor. I did.
15 THE COURT: What were you doing?
16 THE WITNESS: I worked for Plastic Omnium. I
17 was a forklift driver. We did make the
18 bumpers for BMW, and, I think, they just got a
19 Volvo contract, as well. While I was there --
20 THE COURT: All right.
21 THE WITNESS: I was -- go ahead. Sorry. Go
22 ahead, sir.
23 THE COURT: Did you -- you were fixing to tell
24 me you were laid off?
25 THE WITNESS: Oh, no, sir. I was about to

1 tell you what I actually did on -- on my job,
2 sir.

3 THE COURT: Okay.

4 THE WITNESS: I --

5 THE COURT: But I --

6 THE WITNESS: I --

7 THE COURT: Tell you what, I'll -- you can do
8 that, but at the -- at the end of this
9 process. I've got a couple more questions I
10 need to ask you. I don't mean to cut you off,
11 but save that for later, okay?

12 THE WITNESS: Okay. Yes, sir.

13 THE COURT: How about military? Ever serve in
14 the military?

15 THE WITNESS: No, sir. I don't. But I come
16 from a military family.

17 THE COURT: Okay. How about -- how long have
18 you been in jail on this charge?

19 MR. MACDONALD: I can answer --

20 THE WITNESS: Four --

21 MR. MACDONALD: -- that question, Judge. He's
22 been incarcerated for 422 days.

23 THE COURT: Within the last 24 hours, have you
24 consumed any type of substance that is
25 adversely or negatively affecting your ability

1 to understand what we're doing today?

2 THE WITNESS: No, sir, Your Honor.

3 THE COURT: In the past, have you ever
4 received any substance abuse treatment for a
5 drug or alcohol problem?

6 THE WITNESS: No, sir, Your Honor.

7 THE COURT: Are you satisfied with the work
8 that Mr. MacDonald has done for you as your
9 lawyer in this case?

10 THE WITNESS: Yes, sir.

11 THE COURT: Have you made the decision to
12 enter this plea, today, freely and
13 voluntarily?

14 THE WITNESS: Yes, sir, I have.

15 THE COURT: Sir, I need for you to understand
16 that under the law you are presumed innocent
17 of this charge, and you do have a right to
18 have a jury trial on this charge. At any jury
19 trial that would take place, it would be the
20 State that has the burden of proof. They
21 would have to convince all 12 members of the
22 jury that you are, in fact, guilty beyond a
23 reasonable doubt. Do you understand that you
24 have a right to that jury trial?

25 THE WITNESS: Yes, sir, Your Honor. I do.

1 THE COURT: Do you wish to have a jury trial
2 on this charge?

3 THE WITNESS: No, sir, Your Honor.

4 THE COURT: Mr. Miller, I need for you to
5 understand that there are other very important
6 constitutional rights that you are entitled
7 to, but that you have to give up in order to
8 enter this plea. You have to give up your
9 right to confront and cross-examine the
10 State's witnesses. You also give up your
11 right to present evidence which you or your
12 lawyer might feel establishes a defense,
13 meaning you have to give up your right of
14 subpoena as well as your right to remain
15 silent. Do you understand all those rights?

16 THE WITNESS: Yes, sir, Your Honor. I do.

17 THE COURT: And you wish to give up all those
18 rights?

19 THE WITNESS: Yes, sir, Your Honor. I do.

20 THE COURT: Okay. Mr. Miller, thank you very
21 much for answering those questions.

22 If you would, please listen to the
23 solicitor. She's going to provide us the
24 facts that are behind this case. Please
25 listen to her.

1 MS. WELLS: Thank you, Your Honor. May it
2 please the Court.

3 Your Honor, on November 12th of 2019,
4 officers with the Greer Police Department were
5 dispatched to [REDACTED] Broadus Street on the
6 Spartanburg County-side of the City of Greer
7 in reference to a weapon being discharged.
8 Dispatch advised that a female had been shot,
9 and the shooter was still on the scene. When
10 officers arrived, the defendant came outside
11 with his hands in his pockets. Officers
12 ordered him to remove his hands from his
13 pockets, and he did not comply.

14 He then produced a firearm from his pants
15 pocket and began walking towards officers.
16 After multiple commands, the defendant finally
17 placed the weapon on the ground. This is a
18 Kel-Tec 9-millimeter pistol.

19 Officers found Hannah Foster (phonetic)
20 in the residence. She had a gunshot wound to
21 her hip and leg. Ms. Foster stated that Mr.
22 Miller shot her, because he did not want her
23 to leave the residence. She was transported
24 to Spartanburg Regional for treatment.

25 Mr. Miller's mother stated that when she

1 saw Ms. Foster was shot, she tried to call the
2 police, and that Mr. Miller took her phone and
3 pushed her down. Mr. Miller waived Miranda.
4 He agreed to speak with law enforcement. He
5 objected to being charged with attempted
6 murder, telling officers that, "Getting shot
7 in the leg might hurt like hell, but it wasn't
8 going to kill anyone."

9 Miller stated that Foster was trying to
10 burn his personal items. He thought that was
11 disrespectful. So he -- his intent was to
12 shoot Foster if she attempted to burn his
13 items. And, in his mind, she had -- she had
14 carried out that. There was no -- I -- my
15 read of it, and my understanding from talking
16 with law enforcement, is there was no proof
17 that she had actually burned anything, but he
18 felt like that he should shoot her because she
19 threatened to burn his things.

20 He said he admitted to shooting Ms.
21 Foster, and said that she was shocked that he
22 had shot her. And he said, "I told you not to
23 do anything to my -- to my things."

24 So, Your Honor, those are some of the
25 facts the State would rely upon at a trial in

1 this case.

2 THE COURT: Mr. Miller, do you believe that as
3 she stated the facts to me that the solicitor
4 is substantially correct?

5 THE WITNESS: Yes, sir, Your Honor. I do.

6 THE COURT: All right. And, Mr. Miller, do
7 you understand that on this charge that I am
8 not bound by a recommendation made by the
9 State?

10 THE WITNESS: Yes, sir. I -- I do.

11 THE COURT: And that on this charge I could
12 sentence you up to 20 years at the Department
13 of Corrections? Do you understand that?

14 THE WITNESS: Yes, sir. I do.

15 THE COURT: Do you also understand that this
16 particular charge that you're pleading to
17 today, that it is classified as both a violent
18 and also as a serious offense under the law?

19 THE WITNESS: Yes, sir. I do.

20 THE COURT: And you've been able to talk to
21 your lawyer as to the consequences and
22 ramifications of this offense being classified
23 as both violent and serious?

24 THE WITNESS: Yes, sir. I have.

25 THE COURT: And you still wish to enter this

1 plea?

2 THE WITNESS: Yes, sir. I do.

3 THE COURT: Mr. Miller, are you in fact guilty
4 of this domestic violence of a high and
5 aggravated nature charge?

6 THE WITNESS: Yes, sir. I am.

7 THE COURT: Mr. Miller, have all of your
8 answers to my questions today been truthful
9 and honest?

10 THE WITNESS: Yes, sir. They have.

11 THE COURT: Okay. Thank you.

12 Mister -- Mr. Miller, if you would, tell
13 me what your address is; I'm not showing it on
14 the sentencing sheet.

15 THE WITNESS: I live at [REDACTED] Broadus Street in
16 Greer, South Carolina; that's 29651.

17 THE COURT: Okay. Thank you, sir. (To Ms.
18 Wells) And has discovery been shared with the
19 defense?

20 MS. WELLS: It has, Your Honor.

21 THE COURT: And the prior record?

22 MS. WELLS: Your Honor, he has a 1999
23 resisting arrest, 2001 malicious injury to
24 personal property and CDV first offense, 2003
25 driving under suspension, simple possession of

1 marijuana, 2008 hindering officers, 2011
2 arson, 2013 cruelty to children, and 2014
3 driving under suspension.

4 THE COURT: And anything else you need to tell
5 me from the victim?

6 MS. WELLS: Your Honor, I can tell you that
7 the State made every effort to comply with the
8 victim's bill of rights. We left messages.
9 I think that this -- that Miss -- that this
10 victim is somewhat transient and that it
11 sounds that we -- we have just had a hard time
12 -- she's in the area; we know that. We were
13 having messages relayed, but we were not able
14 to get her input for anything -- for this
15 hearing today.

16 THE COURT: And -- and no -- anything like
17 medical bills, restitution, or anything like
18 that?

19 MS. WELLS: We -- we have -- we don't have
20 that, Your Honor.

21 THE COURT: All right. Thank you. Yes, sir,
22 Mr. MacDonald.

23 MR. MACDONALD: Thank you, Judge. Judge, if
24 there are any sort of bills that the solicitor
25 is able to recover, we're open to keeping

1 restitution open for a period of time if -- if
2 that is -- if necessary.

3 Mr. Miller also advises me that he is
4 fine with a no-contact order as part of the
5 plea, that he has ended any sort of
6 relationship with this victim, and it's -- and
7 will not be having any future contact with
8 her.

9 Judge, Mr. Miller is 46 years old, and
10 he's spent 422 days incarcerated on this
11 charge. His father, I believe, is present,
12 and does want to speak at the appropriate
13 time. I just wanted to let you know that. If
14 he does get out, he will be living in Greer
15 with his mother.

16 He graduated from Greer High School in
17 1992, and before this arrest, he worked full
18 time at Plastics Omnium making bumpers and
19 driving a forklift. And this was for BMW.
20 They also have a Volvo contract. And he's --
21 he's -- hopefully, he can get that job back,
22 but he does not know if he will be able to,
23 given how long he's been off the job there.
24 But he is hopeful, because he did work
25 full-time there for a long period of time.

1 And so he's hopeful that they might be willing
2 to take him back.

3 But, Judge, Mr. Miller describes his
4 relationship with the victim as a toxic
5 relationship, so breaking it off was a good
6 thing for both parties, and ensuring that
7 there will be any -- no future contact.

8 I spoke with Mr. Miller, and he said that
9 he'd take anger management classes to better
10 himself. He's never had any drug or alcohol
11 issues, and he remains to not have any drug or
12 alcohol issues. He's had 422 days, Judge, to
13 sit in jail and think about this.

14 And he has one son, [REDACTED]
15 [REDACTED], who's 14 years old and in middle school
16 right now. He's very involved in his life.
17 His son currently plays basketball and wants
18 to play football in high school. Mr. Miller
19 wanted to see his son graduate from high
20 school and see him grow up. He understands
21 that right now that -- that might not be a
22 possibility, and that probably is the -- the
23 one most upset moments I've seen when he's had
24 to come to that realization. He writes to his
25 son, [REDACTED], on a frequent basis from the

1 jail. He does not speak to him over the
2 phone. He sticks to writing. I -- I don't
3 know. He gets choked up when talking about
4 him, so I know he cares deeply about his son,
5 and I know he wants to be involved in his
6 son's life, Judge.

7 I know the State, in this case, is
8 recommending a 10 to 15 year sentence, Judge.
9 We're asking for mercy, and something lesser
10 than that sentence. Mr. Miller understands
11 that this is a serious crime, and that he will
12 be looking at some incarceration as a result
13 of this. We're asking for a split sentence of
14 incarceration followed by probation. And
15 we're asking for a merciful sentence and one
16 more chance at being able to get out and be a
17 productive member of society.

18 Judge, as you heard, he -- he was working
19 full-time and was very involved in his son's
20 life, and he wants to continue to do that.

21 Judge, Mr. Miller does want to speak to
22 you also at the appropriate time, but if you
23 look at his record, he has -- in the last ten
24 years, he's got three convictions. Two of
25 them are misdemeanors and one for arson, but

1 in the last five he stayed out of trouble
2 besides this charge. Judge, we're asking for
3 mercy in this case, and I'll defer to Mr.
4 Miller's father, if he's present, and then
5 just --

6 THE COURT: Well, can -- can you tell us his
7 name? Is it Charlotte Miller? Is he
8 appearing as Charlotte?

9 MR. MACDONALD: That -- I would assume so,
10 Judge.

11 THE WITNESS: Your Honor, if I may speak.
12 That's -- that's my brother, and Charlotte is
13 my niece.

14 THE COURT: Okay. Well, thank you for sharing
15 that with us. We're just -- these people show
16 up based upon the technology that they're
17 using just to appear, so it might be that he
18 is using Charlotte -- Charlotte Miller's
19 technology. But then you think that is --
20 most likely would be your dad?

21 THE WITNESS: No. That's my brother, sir.

22 THE COURT: Your brother?

23 MR. MACDONALD: Judge, I --

24 THE WITNESS: You're going to ask your --

25 MR. MACDONALD: -- may have been mistaken. It

1 may be his brother that's here to -- to speak
2 on his behalf. I -- Mr. Cheek had organized
3 getting his family member on to the Webex, and
4 so I --

5 THE COURT: Well --

6 MR. MACDONALD: -- I may have been mistaken.
7 I'm just talking on his behalf.

8 MS. MILLER: I'm sorry.

9 THE COURT: Do you know Ms. Beeks, Mr.
10 MacDonald?

11 MR. MACDONALD: I do not, Judge.

12 THE COURT: But they want -- the person who's
13 appearing as Charlotte Miller. (To Ms.
14 Miller) Just tell us your name.

15 MS. MILLER: Yes. This is Charlotte Miller.
16 I'm his niece, but I'm --

17 THE COURT: Right.

18 MS. MILLER: I'm his niece.

19 THE COURT: You're going to speak on his
20 behalf?

21 MS. MILLER: No. His -- his brother, Anthony
22 Miller, should be on here, too. But it should
23 be under "Ashley" --

24 THE COURT: Yeah.

25 THE COURT: -- "Ashley Beeks."

1 THE COURT: All right. Are you going to
2 speak, as well, Ms. Charlotte Miller?

3 MS. MILLER: No, Your Honor.

4 THE COURT: Okay. Thank you very much. All
5 right. And -- all right.

6 Now we have Ashley Beeks with us. (To
7 Ms. Beeks) If you would, just identify --
8 give us your full name as to who's going to be
9 speaking, so that we can have -- so the court
10 reporter can write it down.

11 MS. BEEKS: Yes. My name is Ashley Beeks.
12 I'm the niece of Derrick Miller.

13 THE COURT: All right. And you're going to
14 speak on his behalf?

15 MS. BEEKS: No. I'm not going to speak on his
16 behalf. I have his mother, Martha Smith,
17 here, but neither one of us will be speaking
18 on his behalf today.

19 THE COURT: Okay. Well, thank y'all for
20 joining us.

21 MS. BEEKS: Yes. Thank you, Your Honor.

22 THE COURT: Anybody that you want us to look
23 for Mr. MacDonald?

24 MR. MACDONALD: No, Your Honor. I apologize.
25 I -- I -- I was -- there's a miscommunication.

1 I guess they were just here in support. Thank
2 you.

3 THE COURT: Oh. Thank y'all for -- thank
4 y'all for showing up for support. Thank you
5 very much.

6 All right. Mr. Miller -- Mr. Derrick
7 Miller, is there -- do you agree with the
8 statements that were just made by your lawyer?

9 THE WITNESS: Yes, Your Honor. I do.

10 THE COURT: Mr. Miller, is there anything else
11 that you would like to say or want me to know
12 or consider?

13 THE WITNESS: No, Your Honor. Not at this
14 time.

15 THE COURT: Okay. Well, I appreciate that
16 sentiment, but, Mr. Miller, this is -- there's
17 not another time where you have the
18 opportunity to speak to me about the sentence,
19 and so is there anything that you can think of
20 that you want to share with me?

21 THE WITNESS: Oh, I'm sorry. I didn't know
22 you were giving me the opportunity to speak.

23 Yes, Your Honor. I would just like to
24 say that I would like to be a part of my son's
25 life again, and I'd like to see him graduate.

1 I wouldn't want to miss that, as well as, you
2 know, be there for him during -- during those
3 times that -- that he needs me right now as a
4 father figure.

5 And I would like to say that, you know,
6 Your Honor, I am sorry for what I did. That I
7 made a -- I got out of character and made a
8 terrible mistake. And I'd like to apologize
9 for that, sir.

10 THE COURT: Thank you, Mr. Miller.

11 THE WITNESS: Yes, sir.

12 THE COURT: I find that there is a
13 substantial, factual basis for the plea and
14 that the defendant's decision to enter the
15 plea has been made freely, voluntarily,
16 nominally, and intellectually by him.

17 On this case, it will be a 20-year
18 sentence at the State Department of
19 Corrections. I will suspend that upon the
20 service of 15 years followed by 5 years of
21 supervision. He gets credit for the 422 days.
22 I've indicated on the sentencing sheet there's
23 not to be any contact with the victim.

24 Once -- he will need some type of anger
25 management program, as well as I've indicated

1 needs -- will need to prepare a mental health
2 evaluation, as well as comply with any type of
3 the mental health orders that might be issued.
4 I've also executed an order prohibiting him
5 from being in possession of any type of
6 firearm.

7 Good luck to you, Mr. Miller.

8 THE WITNESS: Okay. Thank you, sir.

9 MS. WELLS: Thank you, Your Honor.

10 PROBATION OFFICER CARSWELL: Your Honor, Agent
11 Carswell here. Did you specify if he had to
12 comply with the domestic violence conditions?

13 THE COURT: Is that automatic with these
14 cases?

15 PROBATION OFFICER CARSWELL: It is, but we
16 still like to have it on the sentencing
17 sheet --

18 THE COURT: Okay. I'll put it on there.

19 PROBATION OFFICER CARSWELL: Thank you.

20 THE COURT: (To Mr. Miller) You have to
21 comply with the rules related to your domestic
22 violence supervision. Thank you, sir.

23 THE WITNESS: Thank you.

24 (Whereupon the within hearing was
25 concluded at 3:41 p.m.)

1 (*This transcript may contain quoted material.
2 Such material is reproduced as read or quoted
3 by the speaker.)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

CERTIFICATE

Be it known that Amber J. Payne took the foregoing proceeding and hereby attests:

that I was then and there a notary public in and for the State of South Carolina-at-large;

that the deponent/witness was first duly sworn to testify to the truth, the whole truth, and nothing but the truth, concerning the matter in the controversy aforesaid;

that the foregoing transcript represents a true, accurate, and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

that I am neither a relative nor an employee of any of the parties hereto, nor of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

that, if a recording of an event was supplied by another party for purposes of transcription and I was not present during that event, the foregoing pages were transcribed to the best of my skill and ability; additionally, any identifications of speakers were provided to me by the party supplying the recording;

that, in the event of a nonappearance by the witness, the foregoing details for the nonappearance are accurate.

In witness thereof, I have hereunto affixed my signature and title.

Amber J. Payne, CVR

Date: 7/20/2021
 Notary public for South Carolina
 My commission expires August 12, 2029

FORM 5

STATE OF SOUTH CAROLINA)
)
 County of Spartanburg)
)
)
)
 Full name and prison number (if any) of Applicant)
Derrick Miller 384656)
 v.)
)
)
 State of South Carolina)
)
)
)
)

IN THE COURT OF COMMON PLEAS,

2021-CP-42- 01964

**APPLICATION FOR
POST-CONVICTION RELIEF**

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention South Carolina State Prison
2. Name and location of Court which imposed sentence Court of General Sessions
Spartanburg County
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offense(s) which sentence was imposed:
 - (a) 2019A2320501353
 - (b) _____

CLERK OF COURT
SPARTANBURG COUNTY
ANNY W. COX

2021 JUN 22 PM 4: 4

FILED

- (c) _____
- 5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 15 years and probation
 - (b) _____
 - (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere _____
- 7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
- 8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Denied, remittitur sent
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. May 13, 2021
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Petition for rehearing denied, substitution of counsel denied, Rule 221(b) SCACR
 - ii. _____
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) _____
- (b) _____

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(c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) False Wrong Evidence, got expert tested
- (b) Involuntary Guilt, Alibi, Ineffective Assistance of Counsel
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Brady Material Body Cameras, Monitors, Discovery, Lighter was never introduced
- (b) _____
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. Petition for review and services for appointment of additional attorney for appeal of habeas
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - iv. _____

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(c) the disposition thereof:

- i. denied, remittitur sent
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. May 13, 2021
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. remittitur sent, Rule 221(b) SCACR
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. Wrong Evidence
- ii. Involuntary Guilty Plea
- iii. _____

(b) the proceedings in which each ground was raised:

- i. Petition for rehearing, explanation for appeal, letter to clerk of court of Appeals
- ii. _____
- iii. _____

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16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Not able to be discovered, due to size, lighter as a deadly weapon
- (b) Lawyer did not make all available defenses known to defendant. Lawyer not adversarial
- (c) Protection of Persons and Property Act, Self-defense Law Material not made available by lawyer before trial

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? _____
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

No I filed all motions and petitions after Notice of Appeal, I did not reach my lawyer 5 months

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Daniel James MacLennan IV 366 N. Church St. #3000 Spartanburg S.C 29303
 - ii. _____
 - iii. _____

- (b) the proceedings at which each such attorney represented you:
 - i. Filing Notice of Appeal
 - ii. _____
 - iii. _____

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19. State clearly the relief you seek in filing this application:

Vacation of Sentence, Dismissal

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Spartanburg)

VERIFICATION

I, Derrick Miller, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Derrick Miller

SWORN to and subscribed before me this 1 day of July, 2021.

Melissa Quigley (L.S.)
Notary Public

My Commission Expires: 12-01-2025

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Derrick Miller, #384656,
Applicant,

Case No. 2021-CP-42-01964

v.

**RETURN AND MOTION FOR A
MORE DEFINITE STATEMENT**

State of South Carolina,
Respondent.

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SPARTANBURG COUNTY
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NOW COMES Respondent, moving for a more definite statement and making its return to the post-conviction relief (hereafter "PCR") application filed on June 22, 2021 by Derrick Miller (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. Applicant was charged with domestic violence of a high and aggravated nature (2020-GS-42-3407). Applicant was represented by Daniel MacDonald, Esquire. Assistant Solicitor Jennifer Wells of the Seventh Circuit Solicitor's Office prosecuted the case. On January 6, 2021, Applicant appeared before the J. Mark Hayes, II, circuit court judge, and pled guilty as charged on the domestic violence charge. Additional charges consisting of attempted murder and kidnapping were dismissed as a part of the plea agreement. The State recommended a sentence consisting of twenty years', suspended to a term of active imprisonment between ten and fifteen years' with five years' probation. Judge Hayes sentenced Applicant to twenty years' imprisonment, suspended upon service of fifteen years' followed by five years' probation.

Applicant filed a timely notice of appeal on January 11, 2021, which was dismissed by the South Carolina Court of Appeals for failure to provide a sufficient explanation, as required by Rule 203(d)(1)(B)(iv), SCACR. Applicant subsequently filed two petitions, which the Court construed as petitions for rehearing on March 19, 2021 and March 22, 2021, respectively. These were denied on May 13, 2021. Applicant subsequently filed a motion for bail and motion to substitute counsel, which were both denied on June 16, 2021. The remittitur was issued on June 28, 2021.

II. Statement of Facts

On November 12, 2019, officers were dispatched in reference to a weapon being discharged. (Tr. 11). Dispatch advised a female was shot and the shooter was on scene. (Tr. 11). When officers arrived, Applicant came outside with his hands in his pockets and refused to comply when officers ordered him to remove his hands from his pockets. (Tr. 11). Applicant produced a firearm from his pants and began walking towards the officer. (Tr. 11). After multiple commands, Applicant put the weapon on the ground. (Tr. 11).

Officers found the victim in the home with a gunshot wound to her hip and leg. (Tr. 11). The victim stated that the Applicant shot her because he did not want her to leave the residence. (Tr. 11). She was transported to the hospital for treatment. (Tr. 11).

Applicant's mother stated that when she saw the victim was shot, she tried to call the police, but Applicant took her phone and pushed her down. (Tr. 11-12). Applicant waived *Miranda* and agreed to speak to law enforcement. (Tr. 12). Applicant objected to being charged with attempted murder, stating that being shot in the leg might hurt, but will not kill anyone. (Tr. 12). Applicant stated that the victim was trying to burn his personal items, which he found to be disrespectful. (Tr. 12). Applicant stated his attempt was to shoot the victim if she attempted to

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burn his items, which he thought she had, though there was no proof she actually burned anything (Tr. 12). Applicant admitted to shooting the victim, and said the victim was shocked he shot her. (Tr. 12). In response, he said "I told you not to do anything to my – to my things." (Tr. 12).

III. Current Action before the Court

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons:¹

1. "Wrong Evidence."
 - a. *Brady* material.
2. Involuntary guilty plea.
3. Ineffective assistance of counsel.

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Attached to and incorporated herein are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the direct appeal records, the plea transcript, and the current PCR application. Respondent reserves the right to amend this return upon receipt of additional relevant information.

IV. Argument

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013)

¹ Respondent contends that, due to poor copy quality, some words were rendered illegible and, thus, have not been transcribed in this return.

(“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v.*

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Reeves, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "strong presumption" of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Respondent requests a more definite statement concerning what exactly Counsel did that was ineffective. Still, the ineffective assistance of counsel allegations probably raise questions of

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fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (“Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.”).

Invalid Guilty Plea

Applicant also implies in his application that his plea was invalid. For a guilty plea to be valid, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against his. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). Further, an applicant can attack the voluntary, knowing and intelligent character of a guilty plea entered on advice of counsel by showing counsel’s advice in taking the plea fell below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 629 S.E.2d 353 (2006). “That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant’s lawyer withstand retrospective examination in a post-conviction hearing.” *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Rather, “whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel’s advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.” *Id.* at 771.

Respondent contends that the plea was entered freely, knowingly, intelligently, and voluntarily. Applicant stated he intended to enter a plea to the charge as announced by the prosecutor. (Tr. 6). Applicant stated he did not take any substance affecting his ability to

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understand the plea process, was never treated for substance abuse issues. (Tr. 8-9). Applicant stated he was satisfied with Counsel and that he was entering the plea freely and voluntarily. (Tr. 9). Applicant stated that he understood by entering the plea he was waiving his right to a trial where he is presumed innocent and all twelve members would have to find him guilty beyond a reasonable doubt. (Tr. 9-10). Applicant waived his right to call and confront witnesses, to present evidence establishing a defense, the right to subpoena, and the right to remain silent. (Tr. 10). Applicant agreed to the facts, stated he understood Judge Hayes was not bound to the State's recommendation as to sentencing, and that he could face up to twenty years' imprisonment. (Tr. 13). Applicant stated that he understood the charge pled to was classified as both violent and serious and that he talked to Counsel about the consequences and ramifications of the classifications. (Tr. 13). Applicant stated he still wanted to plead, that he was in fact guilty of the charge pled to, and all his answers to the questions were truthful and honest. (Tr. 14). Accordingly, the State contends that the plea was freely, knowingly, intelligently, and voluntarily entered and cannot be withdrawn now.

Still, the involuntary plea allegation probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) ("Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.").

Brady Violation

Prosecutorial misconduct is most commonly found within the confines of a *Brady*²

² *Brady v. Maryland*, 373 U.S. 83 (1963).

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violation. *Brady* violations occur if four conditions are met: “the evidence was favorable to the accused”, “it was in the possession of or known to the prosecution”, “it was suppressed by the prosecution”, and “it was material to guilt or punishment.” *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Whether a *Brady* violation is material and, thus, sufficient to warrant relief, is contingent on where there is a “reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial.” *Id.* at 325. Further, whether a mistrial is warranted remains contingent on “(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the court.” *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (quoting *United States v. Anwar*, 428 F.3d 1102, 1112 (8th Cir. 2005)).

Applicant claims a *Brady* violation occurred, but does not specifically state what happened that constitutes a *Brady* violation. Thus, a more definite statement is needed. An evidentiary hearing is requested because there are likely questions of fact the record does not conclusively refute.

V. Motion for a More Definite Statement

Respondent moves for a more definite statement regarding Applicant's allegations. Applicant alleges that plea counsel was constitutionally ineffective, the plea is invalid, and a *Brady* violation occurred. However, he does not explain exactly what happened that entitles him to relief. Applicant fails to set forth with specificity any facts and circumstances upon the claim is based. The Uniform Post-Conviction Procedure Act requires that applicants must “specifically set forth the grounds upon which the application is based.” Section 17-27-50 of the Code of Laws of South Carolina (1976). In a PCR application, it is incumbent upon applicants to make at

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least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). The Supreme Court of South Carolina has provided that:

[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of counsel is insufficient.

Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974).

Furthermore, Rule 8(a), SCRPC, requires all civil pleadings include "a short and plain statement of the facts showing that the pleader is entitled to relief." Respondent moves pursuant to Rule 12(e), SCRPC, to require Applicant to provide a more definite statement of his claims. Respondent moves to require Applicant to file an additional amended application well in advance of any evidentiary hearing concerning this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the allegation.

VI. Other Allegations Denied

Each and every other allegation in Applicant's PCR application not explicitly admitted, qualified, or explain in this return is hereby denied by Respondent.

VII. Assertion of Rights to Notice of Amendments, Experts

Applicant should raise any claims he intends to raise at the PCR evidentiary hearing well in advance of the hearing. Here, Applicant's court-appointed attorney is the only individual authorized to file amendments to this application, given his representative capacity, Rule 11(a), SCRPC and *pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing is a nullity where person was

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represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”).

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent or, in the alternative, continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (“In most PCR cases . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases.”); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) (“When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record.”); *see also* Rules 15(a)-(b), SCRCP (explaining how to amend a pleading). Pursuant to Section 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless the Court grants leave upon good cause shown. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits withheld until the last minute resulting in undue prejudice to Respondent.

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VIII. Conclusion

WHEREFORE, Respondent requests that the Court require Applicant to provide a more definite statement and then hold an evidentiary hearing regarding Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO
Assistant Attorney General

By: /s Chelsey F. Marto
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-0386

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SPARTANBURG COUNTY
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November 18, 2021

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMONS PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Derrick Miller,)
S.C.D.C. No: 218835)
)
Applicant,)

Case No: 2021-CP-42-1964

**AMENDED
POST-CONVICTION RELIEF APPLICATION**

vs.)
)
)
State of South Carolina,)
)
Respondent.)
_____)

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SPARTANBURG COUNTY
AMY W. COX

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TO: Assistant Attorney General, Chelsey Marto, Esquire:

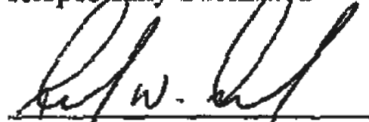
The Applicant, Derrick Miller, through his undersigned attorney, Rodney Richey, Esquire amends his Post-Conviction Relief applications as follows:

1. Trial Counsel was ineffective for communicating with the solicitor that Applicant declined a ten year plea offer which he did not do;
2. Trial Counsel was ineffective for not presenting a defense that Applicant was defending his personal property;
3. Trial Counsel was ineffective for failing to establish communication between him and Counsel during the plea or requiring the Court to establish a line communication;
4. Trial Counsel was ineffective for not advising Applicant of the State's recommendation prior to the guilty plea;
5. Trial Counsel was ineffective for failing to properly communicate with the Applicant

about the case;

WHEREFORE, Applicant request a hearing on all the above issues and issues already
plead in is application.

Respectfully Submitted



Rodney Richey, Esquire
RICHEY AND RICHEY, P.A.
Post Office Box 10916
Greenville, SC 29603
864-467-0503
864-467-0646 (fax)

Dated: July 25, 2022

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1	STATE OF SOUTH CAROLINA)	IN THE COURT OF
)	COMMON PLEAS
2)	OF THE SEVENTH
	COUNTY OF SPARTANBURG)	JUDICIAL CIRCUIT
3)	
)	
4	DERRICK MILLER,)	
)	
5	Applicant,)	TRANSCRIPT OF RECORD
)	2021-CP-42-01964
6	vs.)	
)	
7	THE STATE OF SOUTH CAROLINA,)	
)	
8)	
)	
9	Respondent.)	
)	

10 -----

11
 12 February 13, 2023
 13 Spartanburg, South Carolina

14 B E F O R E:
 15 HONORABLE BRIAN M. GIBBONS, Judge.

16 A P P E A R A N C E S
 17 CHELSEY F. MARTO, ASSISTANT SOLICITOR
 18 For Respondent
 19 RODNEY RICHEY, ESQUIRE
 20 For Applicant

21
 22 Julie A. Cendroski,
 23 Circuit Court Reporter III
 24 Seventh Judicial Circuit
 25

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EXHIBITS

MARKED ENTERED

NO EXHIBITS PROFFERED

1 DERRICK MILLER VS. THE STATE OF SOUTH CAROLINA

2 THE COURT: All right. Madam AG, if you'll
3 introduce -- oh, hold on a second.

4 Mr. Richey, are you ready to proceed? Do you
5 need some more time to talk with your client?

6 MR. RICHEY: We're good.

7 THE COURT: Okay. Madam AG?

8 MS. MARTO: Yes, Your Honor, may it please the
9 Court? We are here today in the case of Derrick Miller
10 versus the State of South Carolina. 2021-CP-42-1964.
11 Presently confined in the South Carolina Department of
12 Corrections and was charged with domestic violence of a
13 high and aggravated nature. He was originally
14 represented by Daniel MacDonald, and Jennifer Wells
15 prosecuted the case.

16 He pled before Judge Hayes on January 6th, 2021,
17 as indicted. And additional charges consisting of
18 attempted murder and kidnapping were dismissed as a part
19 of the plea agreement. The State recommended a sentence
20 consisting of 20 years, suspended to a term of active
21 imprisonment between 10 and 15, with five years
22 probation. He was sentenced to 20 years, suspended upon
23 service of 15, followed by five years probation.

24 He filed a Notice of Appeal, which was dismissed
25 for failure to provide a sufficient explanation. He

1 subsequently filed two petitions, which the Court
2 construed as petitions for rehearing on March 19th,
3 2021, and March 22nd, 2021. These were both denied May
4 13th, 2021.

5 He filed a motion for bail and to substitute
6 counsel. Both of these were denied as well, and a
7 remittitur was issued June 28th, 2021. The application
8 was filed June 22nd, 2021. And the State's return was
9 made November 18th, 2021. And with that I'll turn it
10 over to Mr. Richey.

11 THE COURT: Mr. Richey?

12 MR. RICHEY: Thank you, Your Honor. We call Mr.
13 Miller.

14 THE COURT: All right, sir. Come on up to the
15 witness stand.

16 (Witness comes forward.)

17 Sir, you can just have a seat there. Do you
18 swear or affirm the testimony you give today will be the
19 truth, the whole truth, and nothing but the truth so
20 help you God?

21 THE WITNESS: Yes, sir, I do.

22 THE COURT: All right. Thank you, sir. Do you
23 mind lowering your mask for me, so I can hear you real
24 good? Thank you.

25 All right. Your witness, Mr. Richey.

DIRECT EXAMINATION OF DERRICK MILLER BY MR. RICHEY

1 MR. RICHEY: Thank you, Your Honor. Can I
2 approach the witness?

3 THE COURT: Yeah.

4 DERRICK MILLER

5 having been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. RICHEY:

8 Q. I'm gonna give you a copy of these, because I
9 might ask you about those. Sir, can you state your
10 name, please?

11 A. I'm Derrick Miller.

12 Q. And, Mr. Miller, are you currently in the
13 Department of Corrections?

14 A. Yes, sir, I am.

15 Q. And what are you in there for?

16 A. Domestic violence, aggravated nature.

17 Q. And who represented you on those cases?

18 A. Public defender Dan MacDonald, Spartanburg
19 County.

20 Q. Pardon?

21 A. Spartanburg County public defender attorney Dan
22 MacDonald.

23 Q. Okay. And you -- what type of sentence did you
24 receive?

25 A. It was -- it was a recommendation from the State.

1 Q. No, no. What sentence did you get?

2 A. Twenty years.

3 Q. Okay. And it's your position that Mr. MacDonald
4 did not properly represent you, correct?

5 A. Yes, sir.

6 Q. And you -- and it's your position that the Court
7 should grant you a new trial, correct?

8 A. Yes, sir.

9 Q. And you're asking this Court to vacate your
10 sentences and have you subject to a retrial, correct?

11 A. Yes, sir.

12 Q. Okay. And, and did you have a trial or did you
13 plead guilty?

14 A. I pled guilty because I mean ---

15 Q. No, I'll get to that.

16 A. Okay.

17 Q. Did you -- you pled guilty?

18 A. Yeah, I pled guilty.

19 Q. Okay. And did you discuss that decision with
20 your lawyer?

21 A. Yes.

22 Q. Okay. And at the guilty plea, we're gonna go to
23 line -- we're gonna go to issue three on the paper I
24 gave you. Where trial counsel was un-effective for
25 failing to establish communication between him and

DIRECT EXAMINATION OF DERRICK MILLER BY MR. RICHEY

1 counsel doing a plea or requiring the Court to establish
2 their line of communication. Now, this plea took place,
3 where were you located during the guilty plea?

4 A. I was at the Spartanburg County Detention Center.

5 Q. Okay. And where was your lawyer?

6 A. I'm not sure if he was in his office or
7 somewhere. He wasn't with me, though.

8 Q. Okay. Where was -- do you know where the judge
9 was?

10 A. Pretty sure he was in the courtroom. He was
11 sitting behind a desk.

12 Q. Okay. So the three of you all were not, from
13 your position, were not in the same room, correct?

14 A. No. No, sir.

15 Q. Okay. And at the time you were pleading, your
16 lawyer was not beside you or in contact with you,
17 correct?

18 A. No. No, sir.

19 Q. And it's your position, based off the Supreme
20 Court's order, that a line of communication had to be
21 set up between the lawyer and you during the plea,
22 correct?

23 A. Yes, sir.

24 Q. Okay. You're gonna have to speak up now.

25 A. Yes, sir.

1 Q. And so during this plea, you had no access to
2 your lawyer?

3 A. No, sir.

4 Q. Okay. Did you have -- you had questions during
5 this guilty plea, correct?

6 A. Oh, yes, sir.

7 Q. Okay. And one of the questions was about the
8 recommended sentence, correct?

9 A. Yes, sir.

10 Q. And what was that question?

11 A. What happened to the offer that the State was
12 offering? They initially offered me like ten years.
13 And that was depleted. We had discussed, but it had
14 changed and I didn't know why it changed, but I couldn't
15 ask him nothing because, again, we were doing video
16 conference.

17 And from what I was told from the guys at -- I
18 can't remember his name, but one of the deputies at the
19 county jail, he was like, well, you can't speak, you
20 know, you have to be quiet while he's talking, basically
21 if the judge is talking. So it wasn't nothing I could
22 do but wait.

23 Q. Okay. You're tapering off now. You're gonna
24 have to speak up because we can't ---

25 A. Oh, I'm sorry.

1 Q. If you start talking low, we can't hear it.

2 A. Yeah. He was asking me to not speak while the
3 judge was talking because you can't interrupt him, he
4 said. And you just have to wait until you're, you know,
5 called upon to speak.

6 Q. Okay. And at that time your position is you were
7 confused about what was going on?

8 A. Yes, very.

9 Q. Okay. Because that was a ten-year offer. And
10 the plea it was 10 to 15; is that correct?

11 A. Yeah. That's what the recommendation from the
12 State was during the guilty plea hearing, but it wasn't
13 the recommendation that I was told that we were going in
14 there to plead to.

15 Q. Okay. And because this recommendation from the
16 State is 20 years, suspended to a term of imprisonment
17 between 10 and 15 years and five years of probation.
18 That's what they told the judge, correct?

19 A. Yeah. Yeah.

20 Q. But that's not what your understanding of the
21 recommendation was?

22 A. No. No.

23 Q. What was your understanding of it?

24 A. Supposed to have been ten-year recommendation
25 from the solicitor that was relayed to me through Mr.

1 MacDonald. And we had discussed that prior to the
2 guilty plea hearing when he came to see me at the county
3 jail on the fifth of -- which is January 5th, 2021st --
4 I mean 2021, I'm sorry. And I left there under the
5 impression that he was going to let me know what the
6 solicitor had said when he was going to relay my message
7 for accepting the plea to her.

8 And that following day he never said anything,
9 and I just knew that I was in there with a 10 to 15 on
10 a, well, a five year plea, basically. That's the offer
11 they were giving me, so I couldn't ask them anything
12 about it.

13 MR. RICHEY: Okay. And, and number one on here,
14 where it was discussed about communicating with the
15 solicitor, you believe that your lawyer was ineffective
16 for telling the prosecutor that you declined the 10-year
17 offer; is that correct?

18 A. Yes, sir.

19 Q. Okay. So did you ever decline it?

20 A. No, sir.

21 Q. Did you ever communicate to your lawyer you
22 declined it?

23 Q. No, I did not. When he came to see me that day,
24 January 5th, and we discussed about going in there about
25 this plea deal, he offered -- I mean, he specifically, I

DIRECT EXAMINATION OF DERRICK MILLER BY MR. RICHEY

1 remember him saying, well, we want to take this deal
2 because this may be our last chance to take this deal
3 before the offer closes. This was on January the fifth.
4 And I indicated to him, okay. But, like I said, on the
5 following day, the sixth, it wasn't what happened, so I
6 don't, I don't know, you know, what happened from that
7 point on.

8 Q. You've got to keep your voice up.

9 A. I'm sorry. I'm sorry.

10 Q. When you get to the end, you start going down, so
11 let's just keep it up as much as you can, okay?

12 A. Yeah. I don't -- I don't know what happened
13 again from the -- from when we had our discussion on the
14 fifth up until the sixth about the, you know, whether he
15 communicated the offer to her or not, but it wasn't what
16 the guilty plea recommendation from the State was on the
17 sixth.

18 Q. Okay. And you also believe on four that your
19 counsel did not convey this new recommendation to you,
20 correct?

21 A. No, he didn't say anything to me about that.

22 Q. He never told you, hey, it's changed to ---

23 A. No. No, sir.

24 Q. Just a question to ask, this case happened in a
25 home that you were in, correct?

1 A. Yes. My home. Sorry.

2 Q. And briefly tell me what happened. Briefly.

3 A. Well, there, there was a slight disagreement
4 about an issue between me and the female victim, Mrs.
5 Foster. And we were in a disagreement, but it was
6 verbal --

7 Q. Right.

8 A. -- up until the point where she was actually
9 initially trying to leave the home, but she was like I'm
10 taking this and taking that. But that was some of my
11 things so I'm like, no, you can't have that. She was
12 like, well, I'm gonna take this and if you're not gonna
13 let me take it, then she's gonna say, well, I'm gonna
14 burn it, you know? And I said, no, please don't.

15 Q. You've got to keep your voice up.

16 A. So I'm telling her, no, please don't burn my
17 stuff, you know? And she had her lighter lit, you know,
18 with the flame on it. So high, yay high (indicating).
19 And she was initially trying to put it towards, put it
20 towards my clothing.

21 Q. Okay.

22 A. So I didn't let her do that.

23 Q. So she, she attempted to burn your clothes?

24 A. Right, a shirt.

25 Q. And what did you do when she attempted to burn

1 your clothes?

2 A. Okay. I stopped her. I mean, I shot her.

3 Q. Okay. And it's your position you were doing that
4 to protect your personal property?

5 A. Well, not only that but, I mean, you know, my
6 initial thought was, you start this fire here in this
7 room it could initially ---

8 Q. Okay. You've got to -- can you move up some in
9 that chair or something, because what you're doing is
10 you're starting to mumble at the end and we can't hear
11 it. Go ahead.

12 A. Initially, like I said, my thoughts were if you
13 initially start this fire in this room, it could
14 possibly start to burn down my home. And not only am I
15 here with her, I'm here with my mother. My mother was
16 in the other room, as far as that, but she didn't
17 actually hear the confrontation, exactly what was said,
18 what was going on at the time. But she came in
19 afterwards. But I was thinking about her, so I didn't
20 want any of that to basically happen. So that's why I
21 did what I did.

22 Q. And so, did you discuss with your lawyer what
23 type of defenses you might have?

24 A. No. He -- I asked him, I want to say, over the
25 kiosk messages that we had when I was in the county

1 about, I think, the Castle doctrine, if I'm not
2 mistaken. But he, he didn't answer, like directly
3 answer me directly about that. And I remember him
4 responding, like, what's your defense? And I kept
5 telling him I had self-defense but, you know, me not
6 knowing at the time much about, you know, South Carolina
7 law, he was like, well, I'll get something. I'll come
8 up with something or what not to that extent, and that
9 was the end of that.

10 Q. Well, tell me about the decision to plead guilty.
11 Did you want to plead guilty or did you want to go to
12 trial?

13 A. I wanted to go to trial, but during the time of
14 COVID there was no trials. So, there wasn't anything
15 going on. No preliminaries, no trials, no nothing. And
16 the only thing that was available at that point in time
17 was the video conference thing. And so, they did some,
18 pleas, where they were doing those.

19 Q. Well, how long were you in the county prior to
20 pleading?

21 A. Fourteen months.

22 Q. Okay. And so, you did not see yourself getting a
23 trial quickly?

24 A. No, not any time soon. I asked about the speedy
25 trial rights, but they were conveying, I think one of

1 the court, workers, was saying they weren't doing
2 anything. It's gonna be a while. The courts were down.

3 I actually remember back, I went to a bond
4 hearing. I had Monier Abusaft initially as my first
5 public defender when I first got incarcerated in
6 Spartanburg. And we went to a bond hearing, I think
7 February or March or something like that.

8 And after that, that's when all the courts went
9 down. So I kept writing Mr. Abusaft to find out what
10 was going on. But he, he never wrote me back at all.
11 He never responded to nothing. So, I was trying to
12 reach out to him. I think I wrote Clay Allen. He was
13 his boss at the time. And Clay Allen responded back to
14 me and said, well, the courts are closed, we're not --
15 it's gonna be a while.

16 They wouldn't let him come to the courthouse, you
17 know, to see anybody obviously during the COVID. And it
18 was just months. Months went by before -- I actually
19 found out that Mr. Abusaft was running for city counsel
20 at the time, so he was not going to be a lawyer anymore.
21 He quit.

22 And that's when Mr. MacDonald came to the
23 courthouse. Well, actually wrote me a letter first and
24 said that, I'm going to be replacing Mr. Abusaft, and he
25 was going to be my new lawyer. And then I think shortly

1 after that he came with a plea offer for another charge
2 which, I think, Mr. Abusoft was aware of this charge --
3 I mean, this offer, plea offer, but he never conveyed it
4 to me. So it was just like a ---

5 Q. Okay. Let's, this lady that was in the house,
6 was she armed?

7 A. Well, from my understanding I believe that,
8 because -- how did they put that? If, if ---

9 Q. No. No. I don't want to complicate this.

10 A. Okay.

11 Q. Was she armed? Was she armed --

12 A. That could do any harm?

13 Q. -- that put -- that you believe put you in
14 danger?

15 A. A cigarette lighter.

16 Q. What?

17 A. A cigarette lighter.

18 Q. Okay. And she was using that to burn stuff in
19 the house, burn up stuff in the house, your clothes and
20 all that?

21 A. Trying to, yes.

22 Q. And your whole intent was to prevent her from
23 destroying your property?

24 A. Yes.

25 Q. And you believe that -- I think you mentioned

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1 something about you were constructively denied a lawyer;
2 is that correct?

3 A. Yeah. I'm kind of not really familiar with that,
4 but I was just reading something about it, but it kind
5 of fell in line with this number three, with this number
6 three issue here for failing to establish communication
7 with counsel during the plea, required the court to
8 establish ---

9 COURT REPORTER: Sorry, I didn't hear that.

10 BY MR. RICHEY:

11 Q. Sir, you've got to speak up.

12 A. I'm sorry. That the issue trial counsel was
13 ineffective for failing to establish communication
14 between him and counsel during the plea, or requiring
15 the court to establish a line of communication. Mr.
16 Richey, my attorney, was asking me about constructive
17 denial of counsel, and I told him that I was just
18 reading something that kind of fell in line with that
19 issue.

20 Q. Okay. So it goes back to the issue of the
21 failure to establish the line of communication with you?

22 A. Yes, sir.

23 Q. Okay. Do you believe that Mr. MacDonald
24 effectively represented you?

25 A. No, sir.

1 Q. You've got to speak up now.

2 A. No, sir.

3 Q. Okay. And you believe that had he effectively
4 represented you, you would not have pled guilty,
5 correct?

6 A. No, sir.

7 Q. And you would have proceeded to trial?

8 A. Yes, sir.

9 Q. And it's your position you would have won that
10 trial, correct?

11 A. Vaguely, yes, sir.

12 Q. What did you say?

13 A. Yes, sir, vaguely.

14 Q. Okay. So are you asking this Court to grant you
15 a new trial?

16 A. Yes, sir.

17 Q. Thank you. Answer the questions the Attorney
18 General has.

19 A. Okay.

20 CROSS-EXAMINATION

21 BY MS. MARTO:

22 Q. Good morning, sir.

23 A. Good morning.

24 Q. So, when you pled, the State dropped your
25 attempted murder and kidnapping charges, correct?

1 A. Yes and no. No, I wasn't ever charged with any
2 kidnapping. I don't, I don't know where the State came
3 in with that, but I understand it was something
4 clerical, but I wasn't -- if you, if you have any of my
5 criminal charges there in front of you,, you can
6 obviously look and see that I was never charged with
7 kidnapping. There was another incident.

8 Q. Do you recall the State stating at the plea
9 hearing that they were dismissing the attempted murder
10 and kidnapping charge?

11 A. Yeah. Because I think I kind of found when they
12 mentioned kidnapping, because I wasn't sure how that
13 was, you know, brought into the line of charges that I
14 was actually incarcerated for during the time, because I
15 wasn't never bringing a kidnapping charge.

16 Q. Now, you stated you wanted a trial initially,
17 correct?

18 A. Yes, ma'am.

19 Q. And was that when the first offer was accepted
20 you wanted to go to trial?

21 A. At the time, yeah. But, I mean, again, COVID was
22 kind of, you know, growing at that point, so there
23 weren't any trials. I remember Mr. MacDonald was
24 telling me that I think -- I'm not quite definite about
25 the month. It may have been October, November of 2020,

1 that he was gonna try to line up a jury or something
2 like that. We were going to try to select a jury, but
3 then he was like, no, they're not doing the trial so we
4 can't do that right now.

5 I think, if I remember correctly, I was asking
6 him to take me up for a bond, a second bond hearing.
7 And I think he filed one, but we never went up for a
8 bond.

9 So then I think the guilty plea was rolling
10 around. And I think he said he finally scheduled that
11 and set that up. And he will be about to talk to me
12 about what we want to do as far as going to the offer.

13 Q. So, is it fair to say you decided to plead
14 because you wanted to get out of county?

15 A. No. I was just ready to go to trial, basically.
16 I mean, it wasn't just all about leaving the county. I
17 wanted to get out of, you know, the county, to go to
18 trial to make sure that we was getting ready to proceed
19 forward.

20 Because, again, you know, because a speedy trial
21 rights were common. You know, there was nothing going
22 on. Everybody -- no one knew exactly how long this was
23 going to be. So if the, I guess to answer your
24 question, if I was gonna assume I had to sit in the
25 county another two years, no, I didn't want to do that.

CROSS-EXAMINATION OF DERRICK MILLER BY MS. MARTO

1 Because I actually wanted to go to trial or we could
2 either try the plea, but since he had already put off
3 about that, it sounded pretty good.

4 But I asked him, if I'm not mistaken, if he could
5 see if the solicitor would split the ten-year offer from
6 like five years and five probation, because probation is
7 actually still considered part of the sentence, correct?
8 So, that's what I did, asked him about it, but he never
9 got back with me on that.

10 Q. So, again, you wanted to get out of county and no
11 trials were going on, and that was the reason why you
12 decided to plead, correct?

13 A. Yeah, if you want to say that.

14 Q. And you understood by pleading you were waiving
15 your right to a trial, correct?

16 A. Yeah.

17 Q. And your right to call and confront witnesses?

18 A. Yeah. I think that was in the plea colloquy, is
19 that what they call it?

20 Q. Yes, sir.

21 A. Yeah.

22 Q. So you understood everything you were giving up
23 by pleading, correct?

24 A. Yeah. As far as on the rights that you guys give
25 about the rights I was giving up, yeah.

1 Q. And the State at the plea hearing stated you were
2 pleading to a recommendation of 20 years, suspended to
3 10 or 15, correct?

4 A. Yeah. That part, that was -- that's, I mean,
5 again, I didn't get the chance to speak with him about
6 that because we're talking about a ten-year deal. It
7 wasn't a 10, 15, and 5, given probation. So, you know,
8 doing the math on that, 10 plus 5 is 15. And 15 plus 5
9 is 20, so it sounds to me, again, like the plea that was
10 offered was a 15 to 20-year plea with 20 being the max.

11 So, if I was pleading to the max, I could have
12 that if I took a chance at trial, you know? So, it's
13 rare that -- well, I can't say that. I'm sorry. I, I
14 don't want to say that. But to me, it seems like if the
15 State is offering you the max on a plea deal offer,
16 there's no benefit to that.

17 So, with that being said, why wouldn't my lawyer
18 say, hey, look, let me see if I can get this done for
19 you or try to get this lowered, but they were
20 recommending the max. And this is, did we want to take
21 this? We didn't discuss any of that.

22 Q. But after the State stated that they were
23 recommending that sentence, and the Court asked you if
24 you were intending to enter the plea as of now, you
25 stated yes, correct?

CROSS-EXAMINATION OF DERRICK MILLER BY MS. MARTO

1 A. Well, again, I couldn't confer with my lawyer
2 about anything, so that would have been something I
3 would have liked to ask him but, you know, I mean, this
4 is good to let me even do this. But me not being able
5 to do that, of course I'm going to ask that question
6 because there's only one philosophy, you go through it
7 or you don't. But you know, again, haven't having had a
8 discussion with my lawyer, I think it would have helped
9 me make a decision because, you know, but I think I
10 should have did at the time.

11 Q. Did you ever ask the Court if you could speak to
12 your lawyer at your plea hearing?

13 A. No.

14 Q. Did the Court ever explicitly tell you, you could
15 not speak to your lawyer during the plea hearing?

16 A. No, but they never told me I could either.

17 Q. Okay. Why didn't you tell the Court, no, I don't
18 intend to ever plea, I thought I was entering a plea to
19 something else?

20 A. I was waiting for my lawyer to say something.

21 Q. And you told the Court you were satisfied with
22 counsel, correct?

23 A. Yeah. But I think Mr. MacDonald knows that we've
24 had differences. Even before we took this to the guilty
25 plea stage, we were having problems. When he came to

1 me, we had some discussions. And he even put in a
2 Motion for Relief of Counsel, which should be in the
3 record somewhere that he filed that motion. And we
4 actually went in front of the judge; and the judge
5 didn't give me a new lawyer, obviously. He said I had
6 to keep Mr. MacDonald because he wasn't gonna appoint me
7 another lawyer. And from there, we went on. You know,
8 like I said, got to the guilty plea and all of that,
9 so... But, yeah, we did have issues before.

10 Q. And so, why did you tell the Court that you were
11 satisfied with counsel if you had your differences and
12 you were unsatisfied with his work?

13 A. I'm not really sure. I guess just trying to get
14 this thing over and done with. You know? I'm just
15 asking questions, again, you know? Questions that
16 you're not really familiar with or unsure about, those
17 are questions, you know, you would like to see some kind
18 of legal advice about, you know?

19 Q. And you're not denying the facts of the case,
20 correct?

21 A. No. The facts were stated, if you're asking what
22 was written in the transcript, yes, those statements
23 were stated fine up until the point where I think where
24 she mentions something about -- I'm trying to remember.
25 I've got it wrote down. She -- I've got it right here

1 actually. Where she mentions -- I think you're
2 referring to page 12, am I correct, of the transcript?

3 Q. Yes.

4 A. Okay.

5 Q. The facts of the case are on page 12.

6 A. Right. Right. And she said that -- well, I'm
7 not gonna go over it word-for-word because I'm pretty
8 sure -- I don't want to waste anyone's time here. But
9 where she said that I said never stated I was trying to
10 burn his personal items. He thought that was
11 disrespectful. And then she goes on to talk about her,
12 her presumption of intent. And she said that she had.
13 You know, her quote was: There was no proof, from her
14 talking with law enforcement, that the victim had
15 actually burned anything. And then she goes on to give
16 another presumption.

17 But I don't -- I disagree with that, just due to
18 the fact that there was a -- how did they put that?
19 Items of protection of personal property. I don't know
20 if I'm saying that right. But the Immunity Act. There
21 was a case that was decided in September of 2022,
22 State vs. McCarty from the Supreme Court. And there --
23 they, I think, they ruled fact finder was not the -- it
24 had to be decided by the jury and not the fact finder.

25 But the old precedent was during the time -- I

1 mean, that was standing when I went to court. I mean,
2 basically, I don't know if I'm saying this right, but
3 the old precedent was State versus Martin.

4 THE COURT: Let me interrupt. Has he answered
5 the question that you asked?

6 MS. MARTO: No, Your Honor.

7 THE COURT: What question are you asking? Repeat
8 the question.

9 MS. MARTO: I asked if he was ---

10 THE WITNESS: I did with the fact ---

11 THE COURT: Hold on. Be quiet until she asks you
12 a question.

13 THE WITNESS: I'm sorry.

14 BY MS. MARTO:

15 Q. Sir, I was asking you if you disagree with the
16 facts underlying the charges in this case.

17 A. Underlying charges?

18 Q. And you stated, to an extent, correct?

19 A. Yeah. Up until her -- where she -- where the
20 solicitor started speaking about presumption. So I
21 disagree with that, but the other facts are correct.

22 Q. You don't deny that you shot her, correct?

23 A. No. No, ma'am.

24 Q. And you don't deny that you spoke to the police
25 about this case, correct?

1 A. No, ma'am. No.

2 Q. And you don't deny that you told the police that
3 you shot her, correct?

4 A. No.

5 Q. And do you deny that you told the police when
6 being told you're gonna be charged with attempted
7 murder? You stated, quote, getting shot in the leg
8 might hurt like hell, but it's not gonna kill anybody,
9 end quote?

10 A. Yeah, I did say that.

11 Q. Okay. So you knew you were on the hook at least
12 for attempted murder, correct?

13 A. Yeah. Those were the first charges that they
14 were charging me with, attempted murder and, I think,
15 possession of a weapon. And I wasn't charged with
16 domestic violence until like maybe a week or so later,
17 after I was incarcerated.

18 Q. And you know the maximum sentence you can receive
19 for attempted murder is 30 years, correct?

20 A. No, didn't know that.

21 Q. So you would be on the hook for more time if you
22 went to trial. Do you understand that now?

23 A. Yeah, now that you say it, I guess.

24 Q. And then if you were charged with kidnapping,
25 that would be an additional 30 years that could run

1 concurrent or consecutive. Do you understand that?

2 A. Well, I've never been charged with kidnapping, so
3 that part, that would be a brand new charge for me,
4 right?

5 Q. And now understanding you could be facing at
6 least ten more years if you went to trial, do you still
7 want to go forward with your PCR?

8 A. Yes, ma'am.

9 Q. Now, why didn't you try to take the lighter out
10 of the victim's hand?

11 A. Well, I mean, again, she was actually in the
12 process of trying to find something, so I don't -- you
13 know, it was just a reaction. I don't believe that
14 probably would have been a smart move on my part.

15 Q. I see. Did you think of anything else you could
16 have done in that moment besides shoot her?

17 A. No. Because I actually, again, if you got facts
18 in front of you, I don't know if you have to have a
19 motion or discovery or anything, because I don't have
20 that. But there was an actual discussion with the
21 interviewer where I laid that story out for them. So
22 whatever he has, it should be in a written version and
23 an audio version, if I'm not mistaken. So the audio
24 version is the version that I would like to present when
25 I go to court.

REDIRECT EXAMINATION OF ALLEN WILLIAMS BY MR. RICHEY

1 MS. MARTO: Nothing further, Your Honor.

2 THE COURT: Any redirect?

3 MR. RICHEY: Just one question.

4 REDIRECT EXAMINATION

5 BY MR. RICHEY:

6 Q. So this 30 years, your intent is to get a new
7 trial whether you get 30 years or not, correct?

8 A. Yes, sir.

9 Q. Okay, thank you.

10 THE COURT: All right. Thank you, sir. You can
11 step down.

12 MR. RICHEY: I call Mr. MacDonald.

13 THE COURT: All right.

14 THE WITNESS: Oh, you're waiting for me to move,
15 I'm sorry.

16 THE COURT: Yeah, you can step down. Thank you,
17 sir.

18 (Witness leaves witness stand.)

19 (Witness comes forward.)

20 THE COURT: Sir, do you swear the testimony you
21 give today will be the truth, the whole truth, and
22 nothing but the truth so help you God?

23 THE WITNESS: Yes.

24 THE COURT: Thank you, sir.

25 DAN MACDONALD,

1 or his courtroom.

2 Q. Okay. And, and during these types of
3 videoconference, guilty pleas, was there a line of
4 communication established between you and Mr. Miller at
5 this time?

6 A. The only line of communication was all three
7 parties were on the call, the Webex call, but we were
8 all in separate rooms. We were not ever in the same
9 room during the plea.

10 Q. Was it -- I'm sorry, I interrupted, go ahead.

11 A. No, go -- that's ---

12 Q. Was there a line where he could call directly to
13 you or you directly to him with any questions?

14 A. So, he would have to ask for it, from my
15 experience, and there was a jail, I guess kind of like a
16 jail cellphone that they would provide if he wanted to,
17 but that would only be if he requested it and I don't
18 know if he was aware that he could request it.

19 Q. Okay. Was the Court supposed to establish a line
20 of communication during these Webex hearings?

21 A. I'm not sure.

22 Q. Okay. And, and do you believe that at this point
23 that a line of communication would have been beneficial
24 to him?

25 A. Well, based off his testimony, it seems like it

1 would have been.

2 Q. Because his offer was ten years, correct?

3 A. No, that wasn't his offer.

4 Q. At any point was it ten years?

5 A. He had two options. His offer was ten years or
6 he could do a -- and it would have been a negotiated
7 ten, or he could do a range of 10 to 15 active time.
8 Where with it being a negotiated ten, we wouldn't be
9 able to ask for a lower sentence. But with the
10 recommendation, we'd be able to ask the judge to go
11 below the recommendation of the prosecutor.

12 When I met with Mr. Miller days prior to this
13 plea, I went over the two options and he did not want to
14 take the ten. He wanted to try to get less. He even
15 tried -- he even kiosk me, asking if he could do five
16 years active and five years of probation, citing that he
17 wasn't getting any help here for rehabilitation or
18 anything like that, and that it would be more beneficial
19 if he would get less time because during COVID he wasn't
20 getting a lot of help and a lot of people were suffering
21 and catching COVID in the jails and not getting any
22 treatment. That was what he was telling me.

23 Q. So this offer of a negotiated ten, that would
24 have almost assured him of getting no more than ten,
25 correct?

1 A. Correct.

2 Q. And the 10 to 15, basically he could argue for
3 less, but the likelihood of him getting less would have
4 been not as high, correct?

5 A. Well, we were gonna put up mitigation for why he
6 should get less. That's why he decided to go that
7 route.

8 Q. But he understood that he was exposing himself,
9 essentially to five additional years?

10 A. That's correct, but he didn't want to take the
11 ten.

12 Q. And so, in essence, when he didn't take the ten,
13 that was a denial of the ten, a refusal of the ten if he
14 didn't take it, right?

15 A. Well, he chose the recommendation with us having
16 the option to ask the judge to undercut what the
17 recommendation from the solicitor was.

18 Q. And did you discuss the case with him?

19 A. Oh, yeah.

20 Q. In terms of his culpability? Did you discuss
21 with him -- well, can you tell me what defenses did you
22 discuss with him that he could potentially have?

23 A. We discussed stand your ground with the fact that
24 his version of events was that she was trying to burn
25 his clothes.

1 The only problem that I let him know about that
2 going to trial, was that there was no evidence of
3 clothes being burned, and so it was gonna be tough to
4 establish by a preponderance of evidence, that that is
5 what took place without there being any burn marks on
6 the clothing.

7 Q. Okay. Was there any other defenses that you
8 discussed with him?

9 A. I don't recall. I think the stand your ground
10 was, was the big one that we were focused on. The issue
11 with this case was that he waived his Miranda Rights and
12 told officers that he shot her. And so, it really kind
13 of -- and that he shot her in the leg and that he knew
14 it wouldn't kill her.

15 I believe later on in the interview he said he
16 would have, under the same scenario, he would have done
17 it again. And I just -- the statements he made in the
18 interview were not -- I don't think would have played
19 well with a jury or with a judge at a stand your ground
20 hearing.

21 Q. Well, did he tell you that he wanted a jury
22 trial?

23 A. So, he had times -- he had -- he flip-flopped
24 several times. There were a lot of times where he was
25 insistent on wanting a jury trial, but then there were

CROSS-EXAMINATION OF DAN MACDONALD BY MS. MARTO

1 also times where he wanted a plea. I believe in June of
2 2020 he asked if we could just plead to domestic
3 violence high and aggravated. He actually sent me a
4 kiosk message asking that, and the benefit of getting
5 the attempted murder dismissed. And, you know, I felt
6 that that would be a benefit to him, if he could get the
7 attempted murder dismissed would be huge for him,
8 because I don't think from a factual standpoint, I
9 didn't think he had a strong case.

10 Q. So, he sent you messages about pleading guilty?

11 A. He did.

12 Q. Did he send you a message about taking a ten-year
13 offer?

14 A. No. He sent me offers about taking open pleas or
15 to negotiate a lesser sentence, such as five years
16 active and five years of probation or things along those
17 lines. But I had told him that the solicitor was not
18 willing to drop below ten in this case, so he would have
19 to take the recommendation and under -- and try to see
20 if the judge would undercut that recommendation if he
21 wanted any lower sentence.

22 Q. Thank you. Answer any questions the Attorney
23 General has for you.

24 CROSS-EXAMINATION

25 BY MS. MARTO:

1 Q. So, you were virtually present for the plea
2 hearing, correct?

3 A. Yes. I was on Webex.

4 Q. Were you given any indication during the plea
5 hearing Mr. Miller was confused?

6 A. I don't recall. He may have been confused. I
7 really don't remember.

8 Q. If you noticed he was confused, would you have
9 interrupted the proceedings?

10 A. If I did, but he didn't -- Mr. Miller didn't
11 really say much. And I believe his testimony was he was
12 instructed not to say anything.

13 Q. Did you instruct him not to say anything?

14 A. No.

15 Q. And, again, he never asked for the phone during
16 the hearing, correct?

17 A. I don't even know if he was aware he could, but
18 no.

19 Q. Did the Court ever tell him he couldn't contact
20 you?

21 A. I, I don't think they said one way or the other.
22 I don't recall.

23 Q. And, again, it was Mr. Miller's decision to enter
24 the plea to the recommended 20, suspended to the 10 to
25 15, correct?

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A. Yes.

Q. And, again, it was because he wanted less than ten years, correct?

A. That's correct.

Q. And you stated that his police statements showed a complete lack of remorse, correct?

A. Well, that's not what I said. I just thought that those statements would not play out well to a jury.

Q. Because he stated that he would do it again, correct?

A. I believe so.

Q. And you stated that Mr. Miller was off and on when it came to pleading versus trial, correct?

A. Yeah. I mean, there were times at the beginning of the representation where he was insisting on wanting a trial. And then there were times where he wanted me to start working on plea offers and negotiate something out. Again, we did have a bond hearing that was going to be scheduled. We moved the bond hearing and he ended up taking the plea offer before we could get the next bond hearing scheduled.

Q. And it was Mr. Miller's decision to plead guilty, correct?

A. It was.

Q. And did you inform him about the rights he was

1 waving by pleading?

2 A. I did.

3 Q. Based upon your conversations, did he seem to
4 understand the plea process?

5 A. Oh, he understood, yeah.

6 Q. He understood your conversations, correct?

7 A. Oh, yeah. Yes.

8 Q. And you were never given any indication that that
9 had changed at the plea colloquy?

10 A. No.

11 Q. Okay. Was Mr. Miller ever charged with
12 kidnapping?

13 A. I, I don't recall. He may have been. The facts
14 would support that, based on what was in the report,
15 which was that in the report he took his mother's
16 cellphone away from her when she tried to call police
17 and he also prevented the victim from leaving. So that
18 may have been where the kidnapping may have been coming
19 from. I, I just, I don't recall if that was -- I know
20 he wasn't gonna plead to that, and that wasn't a part of
21 our negotiations.

22 Q. So, regardless of whether or not he was formally
23 indicted, he was on the hook for it if he went to trial.
24 Is that fair to say?

25 A. I, I believe so.

1 Q. And, again, you were hoping for a lesser sentence
2 because of your mitigation strategy, correct?

3 A. That's correct. We had some family of his that
4 were going to appear on Webex to speak on his behalf,
5 and we were hoping that that would help his situation.

6 Q. And you, I guess, spoke on behalf of Mr. Miller
7 at the plea hearing as well, correct?

8 A. That's right.

9 Q. You stated that he worked full-time; is that
10 correct?

11 A. I'm sorry?

12 Q. And you stated that he held a job and was working
13 full-time; is that correct?

14 A. That's right.

15 Q. And you stated that the relationship you had with
16 the victim was toxic; is that correct?

17 A. That's right.

18 Q. And you stated that he was taking anger
19 management classes, correct?

20 A. That's right.

21 Q. And that he has a child, correct?

22 A. That's right.

23 Q. And it was based upon those reasons you requested
24 a lesser sentence, correct?

25 A. That's correct.

1 Q. Now, were you given an option as to what judge
2 you were to plead in front of?

3 A. We could just schedule it on a certain date,
4 depending on what judge would be handling the plea
5 dockets for that week.

6 Q. Do you think Mr. Miller stood a chance at getting
7 a lesser sentence in front of Judge Hayes?

8 A. I think he did. I would have recommended that he
9 not risk and take the ten. But, again, it wasn't my
10 choice to make which offer he wanted to take.

11 Q. So, it was your recommendation that he take the
12 negotiated ten, correct?

13 A. That is what I would have recommended.

14 Q. And Mr. Miller disagreed with that, correct?

15 A. Well, he didn't want to take ten. He wanted
16 less. That was, that was his big thing that he tried to
17 see if we could negotiate something less and the
18 solicitor, given the facts in this case, wasn't willing
19 to go less than ten.

20 Q. Were you ever given any indication that the only
21 reason why Mr. Miller wanted to plead was because of
22 COVID?

23 A. I think he wanted to just get this over with and
24 was just hoping for good results. And when the judge
25 sentenced him, obviously that was not the result that he

CROSS-EXAMINATION OF MR. WILLIAMS BY MS. MARTO

1 was wanting.

2 MS. MARTO: Nothing further, Your Honor.

3 THE COURT: All right. Any redirect?

4 MR. RICHEY: Hold on, Your Honor. No questions.

5 THE COURT: All right. Thank you, sir. You can
6 step down.

7 MR. RICHEY: No other witnesses.

8 THE COURT: All right. Applicant rests. Any
9 other testimony or evidence to be presented by the
10 State?

11 MS. MARTO: No, Your Honor.

12 THE COURT: All right. Let's hear argument, Mr.
13 Richey.

14 MR. RICHEY: Thank you, Your Honor. May it
15 please the Court? Your Honor, just we're requesting the
16 Court grant this postconviction relief application.
17 Your Honor, we're gonna focus on the communication
18 issue. At the time of this plea, it's our position that
19 counsel did not establish a line for his client to be
20 able to communicate with him. He testified down at the
21 jail, the people at the jail told him, be quiet, don't
22 interrupt the judge and all this. And there was some
23 question in his mind from his testimony, the terms of
24 the recommendation offer. And he said that he would
25 have liked to have talked to his lawyer during the plea,

1 but there was nothing established by the Court to allow
2 him to do it, because all these folks were in three
3 different places, and he was at the jail and the lawyer
4 was in his office. The Court was in chambers or the
5 courtroom. And it's his position that -- he used the
6 term to me -- he was purposely denied -- certainly
7 denied counsel because he had no way of communicating
8 with that counsel about this offer. He might have, you
9 know -- especially with his recommendation 10 to 15 and
10 10, that it's our position that counsel should have
11 established the fact that, hey, if he had any questions
12 to his counsel during the guilty plea, that he could
13 raise them.

14 He discussed other issues about the Castle
15 doctrine, those things of that nature. The record
16 speaks of that. They also basically said that the
17 lawyer was ineffective for not communicating with him.
18 Thank you, Your Honor.

19 THE COURT: All right, thank you.

20 Any -- what's the reply argument?

21 MS. MARTO: Yes, Your Honor, just briefly. It's
22 our position that Mr. MacDonald probably testified that
23 the decision to plead to the recommended 20 was Mr.
24 Miller's. And, in fact, if he would have recommended
25 something, he would have recommended the opposite.

1 Mr. Miller seemed well aware of the rights he was
2 waiving, stated he was satisfied with counsel, and was
3 seeming like it was his decision to enter the plea that
4 he chose. Mr. Miller never indicated during the plea
5 process he had any questions or was confused. And Mr.
6 MacDonald stated he seemingly fully understood their
7 conversations and that they were consistent with both
8 the plea hearing and also with what he observed during
9 the plea process.

10 The judge never explicitly told him he couldn't
11 speak to counsel, and Mr. Miller never asked for that
12 opportunity. And, in fact, when asked if he intended to
13 enter the plea as cited by the State, he stated he did,
14 and that he understood what he was doing in doing so.
15 And so, it's our position that relief should be denied
16 based upon that reason, and we would request you just
17 deny relief. Thank you.

18 THE COURT: All right, thank you. I'll take the
19 matter under advisement and issue a decision later on.
20 Thank you all very much.

21 MR. RICHEY: Thank you, Your Honor.

22 MS. MARTO: Thank you, Your Honor.

23 THE COURT: You all have a good day.

24 (Hearing concluded at 11:34 a.m.)

25 --- THIS ENDS REQUESTED TRANSCRIPT ---

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COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Cendroski, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 13th day of February, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A. Cendroski
Julie A. Cendroski
Circuit Court Reporter III
Seventh Judicial Circuit

charge. Additional charges consisting of attempted murder and kidnapping were dismissed as a part of the plea agreement. The State recommended a sentence consisting of twenty years', suspended to a term of active imprisonment between ten and fifteen years' with five years' probation. Judge Hayes sentenced Applicant to twenty years' imprisonment, suspended upon service of fifteen years' followed by five years' probation.

Applicant filed a timely notice of appeal on January 11, 2021, which was dismissed by the South Carolina Court of Appeals for failure to provide a sufficient explanation, as required by Rule 203(d)(1)(B)(iv), SCACR. Applicant subsequently filed two petitions, which the Court construed as petitions for rehearing on March 19, 2021 and March 22, 2021, respectively. These were denied on May 13, 2021. Applicant subsequently filed a motion for bail and motion to substitute counsel, which were both denied on June 16, 2021. The remittitur was issued on June 28, 2021.

Summary of Relevant Facts

On November 12, 2019, officers were dispatched in reference to a weapon being discharged. (Tr. 11). Dispatch advised a female was shot and the shooter was on scene. (Tr. 11). When officers arrived, Applicant came outside with his hands in his pockets and refused to comply when officers ordered him to remove his hands from his pockets. (Tr. 11). Applicant produced a firearm from his pants and began walking towards the officer. (Tr. 11). After multiple commands, Applicant put the weapon on the ground. (Tr. 11).

Officers found the victim in the home with a gunshot wound to her hip and leg. (Tr. 11). The victim stated that the Applicant shot her because he did not want her to leave the residence. (Tr. 11). She was transported to the hospital for treatment. (Tr. 11).

Applicant's mother stated that when she saw the victim was shot, she tried to call the

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police, but Applicant took her phone and pushed her down. (Tr. 11-12). Applicant waived *Miranda* and agreed to speak to law enforcement. (Tr. 12). Applicant objected to being charged with attempted murder, stating that being shot in the leg might hurt, but will not kill anyone. (Tr. 12). Applicant stated that the victim was trying to burn his personal items, which he found to be disrespectful. (Tr. 12). Applicant stated his attempt was to shoot the victim if she attempted to burn his items, which he thought she had, though there was no proof she actually burned anything. (Tr. 12). Applicant admitted to shooting the victim, and said the victim was shocked he shot her. (Tr. 12). In response, he said "I told you not to do anything to my to my things." (Tr. 12).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "Wrong Evidence."
 - a. *Brady* material.
2. Involuntary guilty plea.
3. Ineffective assistance of counsel.

By amendment dated July 25, 2022, Applicant, through PCR Counsel, alleged:

1. Ineffective assistance of counsel
 - a. For communicating with the prosecutor that Applicant declined a ten-year plea offer which he did not do.
 - b. For not presenting a defense that Applicant was defending his personal property.
 - c. For failing to establish communication between him and Counsel during the plea or requiring the Court to establish a line of communication.
 - d. For not advising Applicant of the State's recommendation prior to the guilty plea.
 - e. For failing to properly communicate with the Applicant about the case.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel.
 - a. For communicating with the prosecutor that Applicant declined a ten-year offer when he did not.

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- b. Failure to present a defense that he was defending his personal property.
 - c. Failure to inform Applicant of the recommended sentencing before the plea.
 - d. Failure to properly communicate with Applicant about the case.
2. Invalid plea.
- a. Applicant thought he was entering a plea to a recommended ten years' imprisonment.
 - b. There was no direct line of communication between Applicant and Counsel established on record.
 - c. Applicant was deprived of his right to a trial because of COVID.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated he was represented by Counsel. He stated that he thought Counsel was ineffective. He stated he was sentenced to twenty years' imprisonment. He stated that he pled guilty but wanted a trial. He stated he discussed the plea with Counsel. He stated that he was incarcerated at the Spartanburg County Jail. He stated that Counsel was not with him at the time of the plea. He stated that he was confused by the plea hearing because he thought he was pleading to a ten-year recommended sentence. He stated that the sentence length was increased at the plea hearing. He stated that this was new to him, and he did not have access to Counsel to discuss this with him. He stated he never declined the ten-year offer.

He stated the incident was rooted in a verbal disagreement with his partner. He stated he shot her in the leg when she threatened to burn his belongings. He stated he did not consider taking the lighter from her. He stated he agreed with most of the facts, including the fact that he shot her.

He stated he wanted a trial, but they were not happening during COVID. He stated he wanted to plead to get it over with. He stated that a plea was his only option at the time. He

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stated he was in county for fourteen months prior to the plea. He stated he was never told he could not talk to Counsel at the time. He stated he waived his rights at the hearing.

Counsel Testimony

Counsel testified that the plea hearing occurred via WebEx and all three parties were in separate rooms. He stated that Applicant needed to ask for a phone if he wanted to contact Counsel. He stated he did not know if Applicant knew this was an option. He stated that based on the PCR testimony, a phone call in the middle of the plea hearing would have been beneficial. He stated that Applicant was offered two plea options: a negotiated ten years and an open plea to a recommended range for ten to fifteen active time. He stated Applicant wanted the second deal because he hoped he could convince the judge to give him a lighter sentence. He stated Applicant did not want to serve ten years in prison. He stated they discussed the case and facts. He stated that Applicant's police statements were very detrimental because Applicant stated he would do it again. He stated Applicant kept switching between pleading or proceeding to trial. He stated that Applicant wanted to plead to DVHAN instead of attempted murder. He stated that Applicant sent him messages about the plea. He stated he did not think Applicant knew he could ask to contact Counsel during the plea. He stated that he recommended Applicant take the negotiated plea, but Applicant elected to take the recommended plea instead. He stated that Applicant was ultimately confident in his decision to plead.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the appeal records, the plea transcript, and the current PCR

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application. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. Counsel is strongly presumed to have rendered adequate assistance

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and made all significant decisions in the exercise of reasonable professional judgment.”

Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*. 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies: if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Invalid Plea

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right

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to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. See *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he 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." *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Warrick v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional

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defects and defenses, including claims of a violation of a constitutional right prior to the plea.”
Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

This Court finds that the plea was entered freely, knowingly, intelligently, and voluntarily. Applicant stated he intended to enter a plea to the charge as announced by the prosecutor. (Tr. 6). Applicant stated he did not take any substance affecting his ability to understand the plea process, was never treated for substance abuse issues. (Tr. 8-9). Applicant stated he was satisfied with Counsel and that he was entering the plea freely and voluntarily. (Tr. 9). Applicant stated that he understood by entering the plea he was waiving his right to a trial where he is presumed innocent, and all twelve members would have to find him guilty beyond a reasonable doubt. (Tr. 9-10). Applicant waived his right to call and confront witnesses, to present evidence establishing a defense, the right to subpoena, and the right to remain silent. (Tr. 10). Applicant agreed to the facts, stated he understood Judge Hayes was not bound to the State's recommendation as to sentencing, and that he could face up to twenty years' imprisonment. (Tr. 13). Applicant stated that he understood the charge pled to was classified as both violent and serious and that he talked to Counsel about the consequences and ramifications of the classifications. (Tr. 13). Applicant stated he still wanted to plead, that he was in fact guilty of the charge pled to, and all his answers to the questions were truthful and honest. (Tr. 14). Accordingly, this Court finds that the plea was freely, knowingly, intelligently, and voluntarily entered and cannot be withdrawn now.

Ten-Year Offer

Applicant claims Counsel was ineffective for telling the State Applicant was rejecting the ten-year plea offer. However, Counsel credibly testified that Applicant was presented with two plea offers: one to a negotiated ten years and the other to a recommended sentencing range of

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between ten and fifteen years, active time. Counsel credibly testified that Applicant was aware of both offers and opted for the second offer because he was hoping the mitigation evidence presented would leave him with an active sentence of less than ten years. Thus, this Court finds that Applicant did reject the ten-year offer and allegations to the contrary are not credible. Accordingly, relief is denied on this ground.

Failure to Assert a Defense

Applicant claims Counsel was ineffective for failure to assert a defense that Applicant shot the victim because he was protecting his personal property. The right to assert this defense was waived through entry of an otherwise valid plea. Accordingly, relief is denied on this ground.

Failure to Inform Applicant of Sentencing Recommendation

Applicant claims Counsel was ineffective for failure to inform Applicant of the sentencing recommendation. Counsel credibly testified that he told Applicant about the two offers and the sentencing negotiations or recommendations associated with each. Additionally, the plea transcript shows that the recommendation was conveyed to Applicant at the plea hearing and he was informed that the Court is not bound to the recommendations. (Tr. 5-6, 13). Accordingly, relief is denied on this ground.

Failure to Properly Communicate

Applicant alleges that Counsel was ineffective for failure to effectively communicate with Applicant. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id.* See *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d

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768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant has failed to state with any specificity what Counsel did not communicate with him about or why it would have caused him to proceed to trial instead. Accordingly, Applicant has failed to meet his burden of proof concerning this allegation and relief is denied as a result.

No Direct Line

Applicant claims Counsel was ineffective for failure to establish a direct line of communication between Applicant and Counsel during the plea. Any failure to establish a direct line of communication between Applicant and Counsel during the plea was non-prejudicial. The plea hearing transcript itself reflects that the plea was entered freely, knowingly, intelligently, and voluntarily. There was no denial of the right to speak to Counsel. If Applicant was explicitly forbidden from speaking with Counsel during the proceedings, the analysis may be different. Instead, the record remains silent on this issue and there has been no showing of a denial of a direct line to Counsel because no attempt on Applicant's part to speak to Counsel was ever made. Regardless, even if there was a denial of communication, there has been no showing of prejudice. Accordingly, relief is denied on this ground.

COVID

Applicant claims his plea is invalid because he was forced into pleading during COVID times because trials were not being held at the time. This, by itself, is not enough to undercut an

otherwise valid plea. Accordingly, relief is denied.

Conclusion

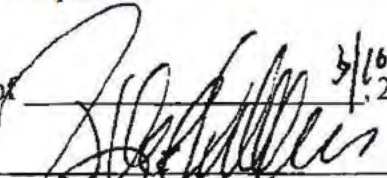
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this _____ day of _____, 2023.



 BRIAN M. GIBBONS
 Presiding Judge
 Seventh Judicial Circuit

_____, South Carolina.

CLERK OF COURT
 SPARTANBURG COUNTY
 2023 MAR 17 AM 11:56

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WITNESSES

Greer Police Department

RA 6/12/20

ARREST WARRANT NUMBER

2019A2320501353

ACTION OF GRAND JURY

True Bill

JUN 12 2020

[Signature]
Foreperson of Grand Jury
Date:

VERDICT

CLERK OF COURT
SPARTANBURG COUNTY
SOUTH CAROLINA

JUN 22 AM 9:48

[Signature]
Foreperson of Petit Jury
Date:

DOCKET NO.

20-GS-42-3407

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

JUN 15 2020

TERM

THE STATE
vs.

Derrick Martino Miller

Indictment for

**DOMESTIC VIOLENCE OF A HIGH
AND AGGRAVATED NATURE**

SC Code: 16-25-55
CDR Code: 3814
Class FEL C



STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG
STATE VS.

INDICTMENT/CASE#: 2020GS4203407
A/W#: 2019A2320501353
Date of Offense: 11/12/2019
S.C. Code §: 16-25-0065(A)
CDR Code #: 3814

Derrick Martino Miller

AKA:

Race: BLACK Sex: M Age: 46

DOB: 1974 SS#: [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

TO: Domestic / Domestic violence of a high and aggravated nature (0 - 20 years)

SENTENCE SHEET

Rec: 20 years // 10 - 15 years and 5 years probation

CONVICTED OF or PLEADS

in violation of § 16-25-0065(A) of the S.C. Code of Laws, bearing CDR Code # 3814

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Jennifer E. Wells SCD69498 / Derrick Miller / Daniel J. MacDonald IV SCB102614
WELLS, JENNIFER E. SC Bar# Defendant MacDonald IV, Daniel J. SC Bar# Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 20 days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of 15 days/months/years and/or payment of \$ _____, plus costs and assessments as applicable*; the balance is suspended with probation for 5 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SCDOP.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms:

Set by SCDPPPS

Recipient:

*Fine:	\$
§14-1-206 (Assessments 107.5 %)	\$
§14-1-211(A)(1) (Conv. Surcharge)	\$100
§14-1-211(A)(2) (DUI Surcharge)	\$100
§56-5-2995 (DUI Assessment)	\$12
§56-1-286 (DUI Breath Test)	\$25
Proviso (Public Def Probation)	\$500
§14-1-212 (Law Enforce. Funding)	\$25
§14-1-213 (Drug Court Surcharge)	\$150
§50-21-114(BUI Breath Test Fee)	\$50
§56-5-2942(J) (Vehicle Assessment)	\$40/ea
3% to County (if paid in installments)	\$ 18.75

TOTAL \$ 643.75

Clerk of Court/ Deputy Clerk: Cindy D. Cox
Court Reporter: Amber Payne

SCCA/217 (04/2018)

Obtain GED
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund
Other: County will be held liable to Daniel Violent
100 Contact with Victim, Nels.

Angie Murray
Mental Health/Case Mgmt if needed

Appointed PD or appointed other counsel
Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge: _____
Judge Code: _____
Sentence Date: 11/6/21

422 days