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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2023-000470

DERRICK MILLER, Petitioner,

v.

THE STATE, Respondent.

Opinion No. 6136 (filed February 11, 2026)

PETITION FOR REHEARING

On February 11, 2026, this Court issued an opinion reversing the circuit court's order dismissing Petitioner Derrick Miller's PCR application. Pursuant to Rule 242 of the South Carolina Appellate Court Rules, the State respectfully petitions for rehearing.

The Cronic presumption of prejudice does not apply.

The Court should not have presumed prejudice in this case. The longstanding test for ineffective assistance of counsel is two-pronged: the applicant must show both deficiency and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). The Cronic presumption of prejudice is an extraordinary and rare exception, appropriate when there is a "complete denial of counsel" or "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."

United States v. Cronic, 466 U.S. 648, 659–60 (1984). Such a scenario constitutes "an actual breakdown of the adversarial process" making the trial "inherently unfair" such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 657–60. "[O]nly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." Id. at 662.

The Cronic presumption is rarely applied. See Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006) ("A finding of per-se prejudice . . . is 'an extremely high showing for a criminal defendant to make.'") (citation omitted); United States v. Roy, 855 F.3d 1133, 1145 (11th Cir. 2017) ("Only once in the 30 years since the Cronic decision was issued has the Supreme Court applied Cronic to presume prejudice. The scope of the Cronic exception is that narrow; the burden of showing it applies is that heavy.") (citation omitted). In McKnight v. State, defense counsel was completely absent from trial without explanation. McKnight v. State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995). In his absence, the trial court allowed the State to examine a witness, and McKnight attempted to cross-examine the witness. Thus McKnight was compelled to act as his own lawyer against his wishes and "altogether" denied the assistance of counsel, resulting in a presumption of prejudice. McKnight and Nance appear to be the only cases where the supreme court has applied a Cronic presumption. See also Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009) (overruled on other grounds) (declining to apply Cronic presumption where counsel failed to communicate plea offer).

Here, the circumstances do not warrant a presumption of prejudice. Miller was not completely or effectively denied the assistance of counsel. His attorney was present for the

entire plea, presenting mitigation, ensuring the charge and facts were correctly represented by the State, and ensuring Miller was lawfully sentenced. Failure to explicitly explain that a defendant has access to a private line with his lawyer does not create such a small "likelihood that any lawyer, even a fully competent one, could provide effective assistance" that it should be treated as the complete denial of counsel. See Wright v. Van Patten, 552 U.S. 120, 125 (2008) ("Our precedents do not clearly hold that counsel's participation by speakerphone should be treated as a 'complete denial of counsel,' on par with total absence."); State v. Anderson, 896 N.W.2d 364, 373 (Wis. 2017) (refusing to apply Cronic presumption of prejudice where defendant claimed right to counsel was violated by participation in plea hearing via videoconference).

Dispensing with the prejudice prong of the inquiry shields Miller's dubious testimony from judicial scrutiny. Miller pleaded guilty after extended plea negotiations. Counsel credibly testified he and Miller discussed the terms of the plea beforehand, and Miller was not confused. App. 79. The trial court clearly laid out the terms of the plea, and Miller agreed:

> THE COURT: Mr. Miller, do you understand that on this charge that I am not bound by a recommendation made by the State?
>
> THE WITNESS: Yes, sir. I -- I do.
>
> THE COURT: And that on this charge I could sentence you up to 20 years at the Department of Corrections? Do you understand that?
>
> THE WITNESS: Yes, sir. I do.

App. 13. Before imposing the sentence, the trial court gave Miller another clear opportunity to raise any concerns:

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

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

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

App. 22. Miller asked for leniency, but did not raise any concern about the terms of the plea.

That Miller said nothing about his supposed confusion seriously undermines his later assertion that he misunderstood the plea agreement. See Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994) (finding no evidence of unintelligent plea—despite defendant's contrary testimony at PCR hearing— where "colloquy from the plea hearing refutes Rayford's claim that he did not understand the plea bargain" because defendant was given opportunity to object to terms of plea but did not).

In State v. Schlenker, 553 P.3d 717 (Wash. App. 2024), the trial court remotely conducted multiple adversarial pretrial hearings without an independent line of communication between Schlenker and his attorney. Unlike Miller, Schlenker verbally complained that he could not privately communicate with his attorney, and the court ignored his objection. The appellate court reversed. The Schlenker court cited State v. Bragg, 536 P.3d 1176 (Wash. App. 2023), for the proposition that a trial court "must not place an unreasonable expectation on a defendant to interrupt a proceeding to assert his right to confer with counsel." Schlenker at 720 (emphasis added). But the Bragg case, like Schlenker, involved multiple contested, adversarial proceedings where Bragg repeatedly expressed his dissatisfaction with his attorney and the court. Notably, the Bragg court acknowledged "Bragg bore the burden of having to interrupt proceedings to confer privately with his counsel," but explained "[t]hat alone would not necessarily have presented an untenable situation." Bragg at 1183. But where Bragg expressed his dissatisfaction

with the proceedings and requested to speak with his lawyer and was told to "stop talking," the court held Bragg was not "realistically . . . able to assert his right to confer with his counsel." Id. at 1184. The Washington courts did not apply a presumption of prejudice under Cronic.

The Cronic presumption of prejudice does not apply in this case, where the facts were not contested and Miller never requested to speak privately with his attorney. The PCR court rightly rejected Miller's claim that he misunderstood the terms of his plea but was too timid to ask to speak privately to his lawyer. Counsel credibly testified he and Miller thoroughly discussed the plea deal ahead of time, and Miller was not confused. The State respectfully asks this Court to grant rehearing.[1]

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[1] The State maintains Miller has not shown deficiency or prejudice, and rests on the arguments in its brief in that respect. The State did not raise issue preservation in its brief, but the issue whether prejudice should be presumed is not preserved for review because it was not raised and ruled on by the PCR court. This Court may affirm on any ground appearing in the record. SCACR 220(c). See also Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (explaining the appellate court is "not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation").

CONCLUSION

This Court should grant the petition for rehearing and affirm Miller's conviction.

Respectfully submitted,

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PROOF OF SERVICE

I, Susan Spencer, certify that I have served the within Petition for Rehearing on Petitioner by sending an electronic copy to Jessica Saxon, Esquire, to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 26th day of February, 2026.

Susan Spencer

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