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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

Appeal from Spartanburg County Court of Common Pleas
The Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case # 2026-001610

DERRICK MILLER,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

Court of Appeals Opinion No. 2026-6136 (S.C. Ct. App. filed February 11, 2026)

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE

Miller pleaded guilty during a WebEx “virtual” hearing. Despite multiple clear opportunities, Miller did not raise any concerns about the terms of his plea and was sentenced within the recommended range. Miller later filed a PCR action claiming he was confused about the terms of his plea. Did the court of appeals err by finding ineffective assistance and presuming prejudice where Miller was not explicitly warned he could speak privately with his attorney during his plea?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Respondent Derrick Miller for attempted murder, kidnapping, and domestic violence of a high and aggravated nature (DVHAN). He pleaded guilty to DVHAN via WebEx before the Honorable J. Mark Hayes, Circuit Court Judge, on January 6, 2021. Miller was represented by Dan MacDonald, Esquire, from the Spartanburg public defender's office. The State recommended a sentence of twenty years' incarceration suspended to a term of active imprisonment between ten and fifteen years with five years of probation. Plea counsel requested a more lenient sentence. App.18. Judge Hayes sentenced Applicant to twenty years' imprisonment, suspended upon service of fifteen years followed by five years of probation.

Miller's direct appeal was dismissed because he failed to provide a sufficient explanation as required by Rule 203(d), SCACR. Miller filed an application for post-conviction relief on June 22, 2021. An evidentiary hearing was held on February 13, 2023, at the Spartanburg County Courthouse before the Honorable Brian M. Gibbons, Circuit Court Judge. Miller and plea counsel were the only witnesses.

Miller claimed he "had no access" to his lawyer during the plea. App.54. He claimed the State originally offered a 10-year sentence, "but it had changed and I didn't know why it changed, but I couldn't ask him nothing because, again, we were doing video conference." App.54. Miller said a jail guard told him he had to wait until he was called upon to speak. App.55. He claimed he "couldn't ask them anything about it." App.56. On cross-examination, Miller admitted he never asked to speak privately with his lawyer and no one told him he could not speak privately with his lawyer. App.69. Miller did not dispute the underlying facts of the

case, admitting he shot the victim because she was attempting to burn some of his clothes. App.70–71.

Plea counsel testified that, based on his experience, Miller could have asked for an independent line to speak with him during the plea if he wanted. App.77. Counsel testified Miller rejected the State’s offer of a negotiated 10-year sentence. App.78. Instead, Miller wanted the opportunity to request a more lenient sentence. Miller was motivated to get out of county jail because “he wasn’t getting any help . . . for rehabilitation . . . and a lot of people were suffering and catching COVID in the jails and not getting any treatment.” App.78. He testified the case against Miller was strong and there were no legitimate defenses. App.80. Miller told police he shot the victim knowing it wouldn’t kill her and that “he would have done it again.” App.80.

The PCR court denied relief in a written order on March 16, 2023. App.102. Miller filed a petition for writ of certiorari on September 6, 2023. This Court transferred the case to the court of appeals, which granted certiorari on October 29, 2024. After briefing, the court of appeals issued a published opinion reversing the PCR court. App.171. The court of appeals did not address the prejudice prong of Strickland v. Washington, instead applying structural error analysis after finding Miller was “constructively” denied assistance of counsel because counsel did not establish an independent line of communication with Miller during the plea. App.176. The court denied the State’s petition for rehearing on June 3, 2026. App.184.

WHY THE PETITION SHOULD BE GRANTED

Rule 242, SCACR, provides that a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring this Court's discretion or power to grant review, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

These factors strongly support certiorari review in this case. The court of appeals, in a published opinion, erroneously applied structural error analysis to Miller's ineffective assistance of counsel claim. The proper ineffective assistance of counsel standard is the well-established two-pronged Strickland standard of deficiency and prejudice. Miller failed to establish either. This Court should grant certiorari to correct this serious constitutional error.

ARGUMENT

The court of appeals erroneously applied structural error analysis to presume prejudice from Miller’s claim that he was constructively denied counsel when he was not explicitly warned that he could speak privately with his attorney during a virtual plea.

This Court has applied Cronic structural error analysis only twice. The court of appeals erred by doing so in this case. Miller was not “constructively” denied counsel merely because he was not explicitly advised that he could speak privately with his lawyer if he desired during his “virtual” plea. This Court should grant certiorari review to correct this serious constitutional error.

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 court of appeals dispensed with the prejudice requirement in this case, finding prejudice need not be shown because Miller was “constructively” denied counsel under the rationale discussed in United States v. Cronic, 466 U.S. 648 (1984), resulting in “structural error.” 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.” Cronic, 466 U.S. at 659–60. 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 during trial, resulting in a presumption of prejudice. McKnight and Nance appear to be the only cases where this 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).

The facts of this case do not warrant a presumption of prejudice. Miller was not denied the assistance of counsel. The court of appeals concluded counsel failed to follow this Court’s order regarding the conduct of “virtual” pleas during the coronavirus emergency. The State disputes that counsel’s failure to explicitly advise Miller that he could access a private line of communication violated the order. See Re: Operation of the Trial Courts During the Coronavirus Emergency (S.C. Sup. Ct. Order dated December 16, 2020) (providing court conducting virtual plea “must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary” (emphasis added)). But even if counsel

did not comply with the order, this does not equate to ineffective assistance, and it certainly did not result in the “denial of counsel.”

The circumstances of this plea were not such that they would “always result[] in fundamental unfairness.” See Weaver v. Massachusetts, 582 U.S. 286, 296 (2017) (discussing prejudice analysis when structural error claim is raised on collateral review). Counsel was not “prevented from assisting” Miller. Cronic, 466 U.S. at 659 n.25. Counsel, an experienced criminal defense attorney, engaged in lengthy pre-plea representation. Cf. Powell v. Alabama, 287 U.S. 45. This is where the bulk of advocacy occurs in a case that ends in guilty plea. Further, Counsel was present and advocating 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 ask the plea court to explicitly explain that Miller could access a private line with his lawyer during this thoroughly negotiated plea did 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. There was no “bona fide defense.” See Cronic, 466 U.S. at 656 n.19. Counsel credibly testified he and Miller

discussed the terms of the plea at length 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). 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. Even so, 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. Instead, the traditional two-pronged Strickland standard of deficiency and prejudice applies. 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. This Court should grant certiorari to correct the serious constitutional error in the court of appeals' published opinion.

CONCLUSION

For all of the foregoing reasons, the Court should grant the State's petition for writ of certiorari.

Respectfully submitted,

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