

STANDARD OF REVIEW

The appellate court will defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). However, questions of law are reviewed de novo, with no deference to trial courts. Id. The appellate court can affirm on any ground appearing in the record. Rule 220(c), SCACR.

ARGUMENT

Miller failed to show he did not have the ability to independently communicate with his attorney during his plea and failed to prove he would have otherwise proceeded to trial.

The PCR court correctly denied relief because Miller failed to show he was unable to privately communicate with his attorney during the plea hearing and that counsel provided ineffective assistance in how he conducted the plea. He likewise failed to prove he would have proceeded to trial rather than plead guilty but for counsel's performance. Certiorari should be denied.

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The purpose of the guarantee is to ensure the accused has a fair trial. Id. To prevail on a claim of "actual ineffectiveness," an applicant for post-conviction relief must show counsel's conduct fell below an objective standard of reasonableness based on the range of competence required in criminal cases. Id. at 688. He must further show that, but for counsel's unprofessional errors, there is a reasonable likelihood the result of the proceeding would have been different, i.e. prejudice. Id. at 696. The likelihood of a different result must be substantial, not just conceivable. Harrington v. Richter, 562 U.S. 86, 112 (2011).

In the context of guilty pleas, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Taylor v. State, 404 S.C. 350, 360 (2013). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that

there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Id. (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018). Guilty pleas must be treated as final in the vast majority of cases. Id.

“There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). “[E]ven if there is reason to think that counsel's conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that no competent lawyer would have chosen.” Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021)).

Throughout his guilty plea, Petitioner had numerous opportunities to ask to speak privately with his lawyer. He never did. Petitioner could have easily asked for a private line of communication if he was actually confused about the terms of his plea deal, which he discussed at length ahead of time with his lawyer. App.78. Petitioner failed to show counsel was in any way deficient in how he conducted the plea hearing.

Even if counsel was deficient, Petitioner cannot show prejudice. The case against him was extremely strong. He confessed to shooting the victim, and even at

the PCR hearing did not dispute the underlying facts of the case. Counsel testified Petitioner had no legitimate defenses and was aware of the plea offer. App.78–80. The transcript of the plea hearing shows Petitioner’s plea was knowing and voluntary. He failed to credibly show he would have proceeded to trial but for the supposed lack of an independent line of communication during the plea. Petitioner was hoping for a more lenient sentence, but this is not a sufficient reason to set aside a valid guilty plea. See Garren, 423 S.C. at 9, 813 S.E.2d at 708 (explaining an applicant may “not challenge a lawful sentence merely because he was hoping for a more lenient one.”). The PCR court correctly denied relief. The petition should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 1, 2024

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Feb 01 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

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.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Petitioner for Writ of Certiorari on Jessica M. Saxon, Esquire, counsel of record for the Petitioner, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 1st day of February, 2024.



Anne A. Mueller
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The South Carolina Court of Appeals

Derrick Miller, Petitioner,

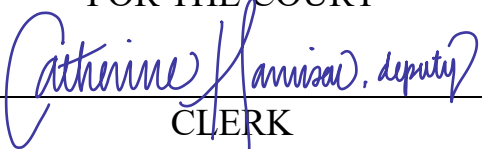
v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000470

ORDER

This matter is before the court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT
BY  Catherine Harniss, deputy
CLERK

Columbia, South Carolina
October 29, 2024

cc:
Jessica M. Saxon, Esquire
Joshua Abraham Edwards, Esquire
Derrick Miller, 00384656
The Honorable Brian M. Gibbons

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Jan 03 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS COURT

Appeal from Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

DERRICK MILLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000470

BRIEF OF PETITIONER

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ISSUE PRESENTED

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

STATEMENT OF THE CASE

Petitioner was originally charged with attempted murder, kidnapping,¹ and domestic violence of a high and aggravated nature (DVHAN). App. 5, ll. 10-24. On January 6, 2021, Petitioner appeared before the Honorable J. Mark Hayes, III, to enter a guilty plea to the DVHAN charge. App. 1; App. 5, ll. 10-15. The State was represented by Jennifer Wells. Petitioner was represented by Dan MacDonald. App. 2. Due to the COVID-19 pandemic, all parties appeared via remote video conferencing. App. 4, ll. 4-9. The State recommended a sentence of twenty years suspended to a term of active imprisonment between ten and fifteen years followed by five years of probation. App. 5, ll. 16-24. Judge Hayes ultimately sentenced Petitioner to twenty years imprisonment providing that upon the service of fifteen years, the remaining five years would be suspended to probation. App. 23, ll. 12-23.

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

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

require the plea court to establish a line of communication between counsel and Petitioner during the plea. App. 44-45.

The parties convened before the Honorable Brian M. Gibbons on February 13, 2023, for an evidentiary hearing. The State was represented by Chelsey Marto. Petitioner was represented by Counsel Richey. App. 46. The PCR court took the matter under advisement. App. 89, ll. 18-20. An order of dismissal was filed on March 17, 2023, finding that Petitioner had failed to meet his burden of proof and denying his claims. App. 91-102.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

To establish a claim of ineffective assistance of counsel, a PCR applicant must satisfy a two-prong test. Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the applicant must demonstrate that trial counsel’s performance was deficient. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). “Under this prong, ‘the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Id. (quoting Strickland, 466 U.S. at 688) (internal alteration marks omitted); *see also* Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001) (stating that the applicant must demonstrate that trial counsel’s performance fell below an objective standard of reasonableness).

Second, the applicant must demonstrate that trial counsel’s “deficient performance prejudiced the [applicant] to the extent 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, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010).

ARGUMENT

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

Relevant Facts

During the virtual guilty plea hearing, the State alleged that on November 12, 2019, officers with the Greer Police Department responded to a call of a weapon being discharged in a home. They were informed that a woman had been shot and that the shooter was still on scene. Officers arrived and encountered Petitioner, who came outside with his hands in his pockets. Officers ordered Petitioner to remove his hands from his pockets. Initially, he did not comply with the order but eventually removed his hands, along with a firearm, from his pants pockets. After receiving numerous commands, Petitioner placed the firearm on the ground, and he was taken into custody. App. 11, l. 3-App. 12, l. 23.

Inside the residence, officers found Hannah Foster with a gunshot wound to her hip and leg. Foster stated that Petitioner had shot her because he did not want her to leave the residence. Petitioner's mother informed police that when she saw Foster had been shot, she attempted to call the police, but Petitioner took her phone and pushed her down to prevent her from calling for help. Petitioner waived his Miranda² rights and agreed to speak with police. He admitted to shooting Foster but said he did so because she was trying to burn his personal items, such as his clothing,

² 384 U.S. 436 (1966)

which he thought was disrespectful. Police found no proof that anything had been burned in the residence. App. 11, l. 3-App. 12, l. 23.

Petitioner testified at the PCR hearing that during his guilty plea he was not in the same room as his lawyer and had no way to contact him during the plea. Petitioner believed, based on the South Carolina Supreme Court order regarding court operations during the Covid-19 pandemic, that a direct line of communication should have been set up between himself and Counsel MacDonald during the plea. He had questions during the plea that he wanted to ask Counsel MacDonald because he believed the State was going to be recommending a ten-year sentence and he did not understand why it had changed to a recommendation of twenty years. However, he was told by the officers at the jail that he could not speak while the judge or others were talking and that he had to be quiet. App. 53, l. 12-App. 54, l. 22.

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

On cross-examination, Petitioner testified that he had asked Counsel MacDonald about splitting the ten-year plea offer to five years of active time and five years on probation, but he

never heard back on that request. App. 67, ll. 4-9. Petitioner stated he agreed with the plea recommendations during the plea hearing because he could not confer with his lawyer about the plea. He conceded that he did not ask the court if he could speak to his lawyer during the plea and was not explicitly told by the court that he could not speak with his lawyer but stated he was also never advised that he could speak privately with his lawyer during the hearing. He stated he did not tell the court that he was confused about the plea recommendation because he was expecting Counsel MacDonald to say something. App. 68, l. 22-App. 69, l. 20.

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

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

“he was insistent on wanting a jury trial” and other times when Petitioner wanted a plea. App. 80, l. 21-App. 81, l. 9.

On cross-examination, Counsel MacDonald testified he could not recall if Petitioner was confused during the plea hearing. He stated Petitioner did not say much during the hearing. Counsel MacDonald again stated that he did not know if Petitioner was even aware that he could request a phone from the jail to speak with him and he did not think the plea court instructed Petitioner in any way about privately speaking with him during the plea. App. 82, ll. 1-22.

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

Discussion

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

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

The right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages. State v. Register, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996). This right “has long been held to mean the right to effective assistance of counsel.” McKnight v. State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) *citing* McMann v. Richardson, 397 U.S. 759 (1970). “Courts have interpreted this language to mean prejudice will be presumed if counsel is denied at a critical stage of the trial.” Id. Therefore, “[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” Id. *quoting* Strickland v. Washington, 466 U.S. 668, 692 (1998). “Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful.” United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978).

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

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

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

Our Supreme Court took great care to protect a defendant's Sixth Amendment right to counsel during the pandemic by mandating that a defendant entering a guilty plea via remote technology 1) make a knowing and intelligent waiver of the right to be physically present in court and physically present with their counsel, and 2) have the ability to consult privately with their counsel during the plea hearing. While the order states that the plea court must ensure that the defendant has the ability to privately consult with counsel, it is ultimately the responsibility of counsel to ensure that he can privately communicate with his client during all critical stages of representation. Counsel MacDonald was deficient in failing to bring to the court's attention the inability for he and Petitioner to privately communicate during the plea hearing. He was further deficient because he was not aware of the administrative order requiring a private line of communication that had been issued by our Supreme Court.

The transcript of the plea hearing is devoid of any determination by the court that Petitioner was freely and knowingly waiving his right to be present and his right to be present with counsel.

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

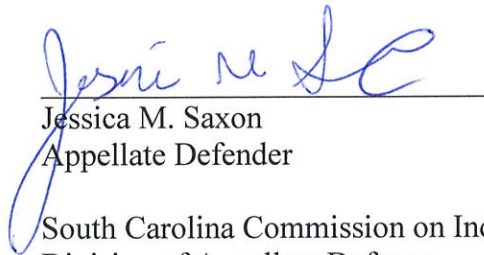
Further, at no point prior to or during the plea hearing was Petitioner advised that should he need to consult with his counsel, a private line of communication would be established. The PCR court found the inability of Petitioner to communicate with counsel was non-prejudicial because the plea transcript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

Further, the PCR court found that because Petitioner had not attempted to speak privately with counsel during the plea hearing that he could not have suffered prejudice. The court went on to state that "even if there was a denial of communication, there has been no showing of prejudice." App. 101. The analysis of the PCR court failed to consider that by denying Petitioner private communication with his counsel during a critical, if not the most critical stage of Petitioner's case, Petitioner's right to counsel was violated and therefore prejudice would, and should, be presumed. See McKnight v. State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) ("Courts have interpreted this language to mean prejudice will be presumed if counsel is denied at a critical stage ... "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

The record does not support the ruling of the PCR court. Counsel MacDonald was deficient in failing to ensure that Petitioner had the ability to communicate with him privately during the plea hearing. Since Petitioner could not freely and privately communicate with Counsel MacDonald, he was denied his Sixth Amendment right to counsel. Further, both the plea court and Counsel MacDonald violated our Supreme Court's administrative order that was active during the pandemic. Counsel's failure to ensure that Petitioner could communicate with him freely and privately during the guilty plea was deficient performance as it fell below an objective standard of reasonableness. Petitioner was denied access to counsel during the most critical stage in the proceedings against him. Under the law, when a defendant is actually or constructively denied their right to counsel, prejudice is presumed. Petitioner has met his burden under the standard set forth in Strickland. The PCR court's denial of relief should be reversed.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that this Court reverse the order of the PCR court and remand this matter back to the Court of General Sessions of Spartanburg County.



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This 3rd day of January, 2025

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Jan 03 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS COURT

Appeal from Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

DERRICK MILLER,

PETITIONER

V.

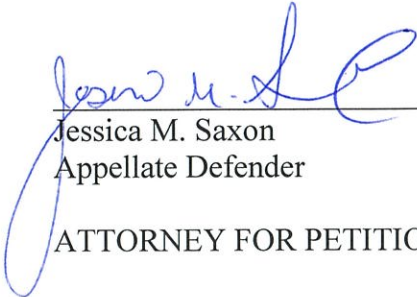
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000470

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Derrick Martino Miller, #384656, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, This 3rd day of January, 2025.


Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

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Apr 24 2025

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.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

Whether the PCR court abused its discretion by denying relief where Miller failed to show he was not able to independently communicate with his attorney during his plea because Miller never made any attempt to speak privately with his lawyer and failed to prove he would have otherwise proceeded to trial rather than plead guilty.

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Petitioner 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. Petitioner 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.

Petitioner's direct appeal was dismissed because he failed to provide a sufficient explanation as required by Rule 203(d), SCACR. The remittitur was issued on June 28, 2021. Petitioner 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. Rodney W. Richey, Esquire, represented Petitioner. Petitioner and plea counsel were the only witnesses.

Petitioner claimed he "had no access" to his lawyer during the plea. App.54. Petitioner 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. Petitioner 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, Petitioner 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. Petitioner 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, Petitioner could have asked for an independent line to speak with him during the plea if he wanted. App.77. Counsel testified Petitioner rejected the State's offer of a negotiated 10-year sentence. App.78. Instead, Petitioner wanted the opportunity to request a more lenient sentence. Petitioner 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 Petitioner was strong and there were no legitimate defenses. App.80. Petitioner 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. Petitioner filed a petition for writ of certiorari on September 6, 2023. The supreme court transferred the case to this Court on February 27, 2024. This Court granted certiorari on October 29, 2024. Petitioner filed his brief on January 3, 2025. This Brief of Respondent follows.

STANDARD OF REVIEW

The appellate court will defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018). However, questions of law are reviewed de novo, with no deference to trial courts. Id.

ARGUMENT

Miller failed to show he did not have the ability to independently communicate with his attorney during his plea and failed to prove he would have otherwise proceeded to trial.

The PCR court correctly denied relief because Petitioner failed to show he was unable to privately communicate with his attorney during his plea or that counsel provided ineffective assistance rendering his plea involuntary or unintelligent. He likewise failed to show he would have proceeded to trial rather than plead guilty but for counsel's performance. This Court should affirm.

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The purpose of the guarantee is to ensure the accused has a fair trial. Id. To prevail on a claim of “actual ineffectiveness,” an applicant for post-conviction relief must show counsel's conduct fell below an objective standard of reasonableness based on the range of competence required in criminal cases. Id. at 688. He must further show that, but for counsel’s unprofessional errors, there is a reasonable likelihood the result of the proceeding would have been different, i.e. prejudice. Id. at 696. The likelihood of a different result must be substantial, not just conceivable. Harrington v. Richter, 562 U.S. 86, 112 (2011).

In the context of guilty pleas, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Taylor v. State, 404 S.C. 350, 360 (2013). A defendant's plea of guilty based on reasonably competent advice is an intelligent plea. McMann v. Richardson, 397 U.S. 759, 770 (1970). As to voluntariness, a “plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or

his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).” Brady v. United States, 397 U.S. 742, 755 (1970) (cleaned up).

“A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” McMann at 770 (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018). Guilty pleas must be treated as final in the vast majority of cases. Id. The plea colloquy “affords the State substantial protection against later claims that the plea was the result of inadequate advice.” Missouri v. Frye, 566 U.S. 134, 142 (2012).

“There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). “[E]ven if there is reason to think that counsel's conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that no competent lawyer would have chosen.” Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021)).

Throughout his guilty plea, Petitioner had numerous opportunities to ask to speak

privately with his lawyer. He never did. Petitioner, a competent adult, could easily have asked to speak privately with his lawyer if he was actually confused about the terms of his plea deal, which he discussed at length ahead of time with his lawyer. App.78. The supreme court order for remote proceedings cited by Petitioner required the “ability to consult privately with counsel during the plea proceeding as may be necessary.” Petitioner was not denied the ability to consult privately with his lawyer, and he certainly was not denied the right to counsel as he argues in his brief. The record shows (and the PCR court found) Petitioner was not confused about the terms of the plea, and this explains why he never requested to speak privately with his attorney. Petitioner failed to show counsel was in any way deficient in how he conducted the plea hearing. He should not be heard to complain on appeal about his supposed inability to speak with his attorney when he failed to take any action whatsoever to do so at the time of his plea.

The PCR court found Petitioner was aware of the plea offers and chose to accept a recommendation of 10–15 years rather than a negotiated sentence of 10 years. App.99–100. This factual finding is binding the appellate court because it is supported by the record, specifically by plea counsel’s testimony, which the PCR court found credible. See Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839. The PCR court did not find credible Petitioner’s claim that he did not know about the 10–15 year offer, which contradicted his statements at the plea hearing. App.100. At the plea hearing itself the court engaged Petitioner in a thorough colloquy confirming he understood the terms of the plea and the trial rights he was waiving, and that he wanted to accept the plea as announced by the solicitor. Petitioner stated he was pleading guilty freely and voluntarily. App. 9. The plea court specifically confirmed with Petitioner that the State was recommending an active sentence of 10–15 years, but that the court could impose a sentence of up to 20

years. App. 13. At the PCR hearing, Petitioner testified that he pled guilty largely because he did not think he could quickly proceed to trial during COVID due to the courts being shuttered. App.60–61. The record firmly establishes the knowing and voluntary nature of Petitioner’s plea.

Even if counsel was deficient, Petitioner cannot show prejudice. The case against him was extremely strong. He confessed to shooting the victim, and even at the PCR hearing did not dispute the underlying facts of the case, explaining he shot the victim because she was trying to burn some of his clothes. App.58–62. No rational defendant would have proceeded to trial under these facts. See Hill, 474 U.S. at 60. Counsel testified Petitioner had no legitimate defenses and wanted to plead guilty. App.78-80. He echoed Petitioner’s testimony that Petitioner was motivated to get out of county jail, and testified Petitioner understood the benefit of pleading guilty to the lesser charge of DVHAN rather than attempted murder. App.78, 81. Plea counsel testified Petitioner rejected the solicitor’s original offer of a 10-year negotiated sentence so that counsel could ask the court for a more lenient sentence, testimony which the PCR court found credible. App.78. Thus Petitioner was not confused about the matter which he claims he wanted to discuss with counsel during the plea. The plea proceeded exactly as counsel explained it would, with the State recommending a sentence of 20 years suspended upon the service of 10 to 15 years in the discretion of the court and plea counsel asking for less time. Petitioner has failed to credibly show he would have proceeded to trial but for the supposed lack of an independent line of communication during the plea. Petitioner was clearly hoping for a more lenient sentence, but this is not a sufficient reason to set aside a valid guilty plea. See Garren, 423 S.C. at 9, 813 S.E.2d at 708 (explaining an applicant may “not challenge a lawful sentence merely because he was hoping for a more lenient one”). The PCR court correctly denied relief. This Court should affirm.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BY: _____


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ATTORNEYS FOR RESPONDENT

April 24, 2025

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Apr 24 2025

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.

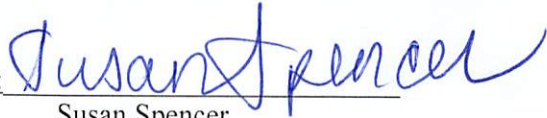
THE STATE,

Respondent.

PROOF OF SERVICE

I, Susan Spencer, certify that I have served the within Brief of Respondent by emailing a copy to Petitioner's counsel of record, Jessica Saxon, Esquire, at the email addresses provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 24th day of April, 2025.

By: 

Susan Spencer

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May 01 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

DERRICK MILLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000470

REPLY BRIEF OF PETITIONER

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ARGUMENT IN REPLY

Respondent argues that Petitioner had numerous opportunities to ask to speak with his lawyer but never did, thus there is no deficiency. This argument wholly misses the mark. First, at the time of Petitioner's plea there was an order in place from our Supreme Court *requiring* that a plea court *ensure* that a defendant *who is not physically present with his counsel* has a private, direct line of communication with his counsel. The Operation of the Trial Courts During the Coronavirus Emergency order was issued on April 3, 2020, and had been in effect for nine months at the time of Petitioner's plea. Yet Counsel MacDonald testified at the PCR hearing that he was not even sure that the plea court had a duty to ensure a line of communication, App. 77, ll. 2-21, showing an utter lack of knowledge about the scope and content of an order from our highest Court that directly impacted the representation of criminal defendants in South Carolina.

Second, the duty to ensure communication between a client and lawyer rests on the lawyer, as made clear by the South Carolina Rules of Professional Conduct. Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.4. The editor's comment to the rule regarding communication notably states that "[r]easonable communication between the lawyer and the client is *necessary for the client effectively to participate in the representation.*" Further, the uncontradicted testimony in the record was that the guards informed Petitioner he could not speak while others were speaking and he had to be quiet. App. 54, ll. 11-22. The onus is not on the incarcerated individual to ensure that the plea court and his lawyer comply with the Supreme Court orders in place to protect his constitutionally protected rights during an unprecedented global pandemic.

Finally, Respondent asserts that the record shows Petitioner was not confused. This point is directly refuted by the record. Petitioner testified that he was very confused during the plea hearing because he had discussed the plea offer with Counsel MacDonald the day before the

hearing and he had accepted the recommendation for a ten-year offer. As Counsel MacDonald testified, the offers available to Petitioner were for a *negotiated* ten-year sentence or a *recommended ten-to-fifteen-year* sentence. App. 78, ll. 5-11. Neither party testified that the recommendation was for a twenty-year split sentence, which is what the State presented to the plea court. The record supports the finding that Petitioner was confused about the sentencing range.

Defense counsel was deficient in his lack knowledge and understanding of our Supreme Court's order. He was deficient in failing to ensure the order was followed by establishing a private line of communication with Petitioner for the duration of the plea. Petitioner's testimony that he was confused about the plea recommendation range is supported by the record. Petitioner has met the first prong of the Strickland¹ test.

Respondent avers that Petitioner failed to credibly show he would have proceeded to trial but for counsel's error, and therefore has not shown prejudice. Prejudice is presumed in this matter because Petitioner did not have meaningful access to his lawyer during a critical stage of the proceedings against him. See McKnight v. State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) ("Courts have interpreted this language to mean prejudice will be presumed if counsel is denied at a critical stage ... "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

In U.S. v. Cronin, 466 U.S. 648, 659 (1984), the United States Supreme Court set forth the three situations in which "the circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." First is "the denial of counsel at a critical stage of the case," second is "counsel's complete failure to subject the government's

¹ Strickland v. Washington, 466 U.S. 668 (1984)

case to meaningful adversarial testing,” and third is “although counsel is available, the circumstances of the [proceeding] would render even a competent lawyer so unlikely to provide effective assistance to the client that no inquiry into prejudice is warranted.” Id.

In the matter *sub judice*, Petitioner was physically separated from his lawyer due to the global pandemic. Our Supreme Court, recognizing the potential problems that could arise in a virtual courtroom setting where counsel and client are not physically together, set forth specific directives to ensure that a criminal defendant’s Sixth Amendment right to counsel was protected. That order required a private line of communication between a defendant and his lawyer to ensure “the protection of free and open communication between client and counsel” that is essential to the Sixth Amendment right to counsel. State v. Quattlebaum, 338 S.C. 441, 446, 527 S.E.2d 105, 107–08 (2000). Petitioner was denied access to his lawyer during the plea proceeding, an inherently critical stage of any case, due not only to the pandemic, but to the failure of counsel and the plea court to follow our Supreme Court order. Prejudice in this matter should be presumed.

However, even if prejudice was not presumed, Petitioner has still met the burden under Strickland, *supra*, and Hill.² Counsel MacDonald testified twice that there were times throughout the representation where Petitioner was insistent on wanting to go to trial but that he would “flip-flop.” App. 83, l. 21–Ap. 84, l.3; App. 86, ll. 14–21. He also testified that he discussed the potential self-defense/stand your ground defense with Petitioner. App. 82, l. 20–App. 83, l. 20. Petitioner testified,

I wanted to go to trial, but during the time of COVID there was no trials. So, there wasn't anything going on. No preliminaries, no trials, no nothing. And the only thing that was available at that point in time was the video conference

² Hill v. Lockhart, 474 U.S. 52, 56 (1985)

thing. And so, they did some, pleas, where they were doing those. App. 60, ll. 13-18.

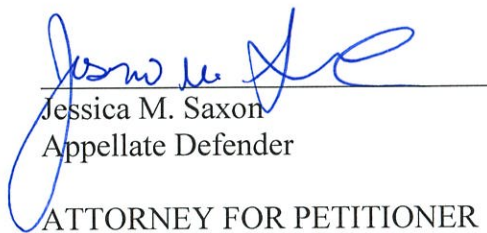
He continued that he had been incarcerated for fourteen months at the time of his plea and he did not see himself receiving a trial in a timely manner. Prior to his plea, Petitioner had only been to court on a bond motion which was ultimately denied.³ While trying to learn what happened with his bond motion, he was informed that the “courts were closed, we’re not – it’s gonna be a while.” App. 60, l. 19-App. 61, l. 15. Further, Petitioner testified that had Counsel MacDonald effectively represented him, Petitioner would have gone to trial instead of pleading guilty because he believed he would prevail. App. 67, ll. 3-13. Our South Carolina Supreme Court has held that a “defendant’s undisputed testimony that he would not have pled guilty but for trial counsel’s advice is sufficient to prove that defendant would not have pled guilty.” Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)). Petitioner has shown actual prejudice.

Petitioner was not able to effectively and privately communicate with his lawyer, in direct contravention of our Supreme Court’s order regarding the operation of court during the COVID pandemic. This was due to Counsel Macdonald’s lack of knowledge of the order and his failure to ensure that the order was enforced during Petitioner’s plea. This amounted to a denial of the right to counsel. Petitioner has met his burden under Strickland and Hill, *supra*. This Court should reverse the order of the PCR court.

³ <https://publicindex.sccourts.org/Spartanburg/PublicIndex/PISearch.aspx> (Search case no: 2019A2320501353) *See Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d. 117, 122 (Ct. App. 2011) (noting an appellate court can take judicial notice of a fact that was not before the lower court if the fact is indisputable); Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) (stating a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records).

CONCLUSION

Based on the foregoing argument, as well as the argument in the Brief of Petitioner, Petitioner respectfully requests this Court reverse the order of the PCR court and grant him a new trial.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of May, 2025.

RECEIVED

May 01 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

DERRICK MILLER,

PETITIONER

V.

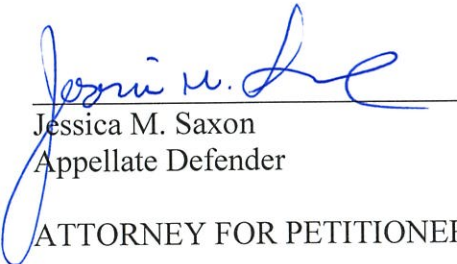
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000470

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply Brief of Petitioner in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), and on Derrick Martino Miller, #384656, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 1st day of May, 2025.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Derrick Miller, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000470

Appeal From Spartanburg County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 6136
Submitted November 3, 2025 – Filed February 11, 2026

REVERSED

Appellate Defender Jessica M. Saxon, of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Joshua Abraham Edwards, both of
Columbia, for Respondent.

WILLIAMS, C.J.: In this action for post-conviction relief (PCR), Derrick Miller pled guilty via Webex to domestic violence of a high and aggravated nature for shooting his girlfriend. The PCR court denied Miller's PCR application, and this court granted his petition for writ of certiorari to review the PCR court's finding that plea counsel was not ineffective for failing to establish a direct line of communication during the plea. We reverse.

FACTS/PROCEDURAL HISTORY

At the beginning of the guilty plea, on January 6, 2021, the trial court noted the proceeding was being held via Webex because of the coronavirus pandemic. The trial court told Miller to alert him immediately if he could not hear the trial court or other participants. The trial court asked Miller about his family, education, and employment. The trial court asked if Miller was under the influence of drugs or had a drug abuse problem. Miller affirmed he was satisfied with the work his attorney performed for the case. He affirmed he understood his right to a jury trial, that he did not wish to have a jury trial, and that his plea was free and voluntary. The trial court told Miller that in pleading guilty, Miller would

give up your right to confront and cross-examine the State's witnesses. You also give up your right to present evidence which you or your lawyer might feel establishes a defense, meaning you have to give up your right of subpoena as well as your right to remain silent. And you wish to give up all those rights?

Miller stated "yes." Miller agreed with the State's recitation of the facts and affirmed the trial court was not bound by any sentencing recommendation from the State. The trial court stated "I could sentence you up to [twenty] years at the Department of Corrections? Do you understand that?" Miller agreed and stated he understood the charge he was pleading to was classified as a violent and serious offense. Miller affirmed his guilt to the trial court.¹

Plea counsel spoke to the trial court on Miller's behalf, and the trial court asked Miller if he agreed with the statements made by his lawyer. Miller agreed, and when asked by the trial court if there was "anything else that you would like to say or want me to know or consider," Miller stated "[n]o your honor. Not at this time." The trial court replied "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?" Miller then spoke of his remorse for his actions.

The State advised the trial court that it was unable to reach a negotiated plea but recommended a sentence of twenty years' imprisonment suspended on the service

¹ Miller shot his girlfriend as she was holding a lighter and threatening to burn his belongings. He stated at the time of the incident that "getting shot in the leg might hurt like hell, but it's not gonna kill anyone."

of between ten- and fifteen-years' imprisonment and five years' probation. The trial court accepted the State's recommendation suspended upon the service of fifteen years' imprisonment.

In his amended PCR application, Miller argued plea counsel was ineffective for failing to establish communication between Miller and counsel during the plea or requiring the court to establish a line of communication. At the in-person PCR hearing, Miller stated that he was at the Spartanburg County Detention Center during the guilty plea, he did not know where his counsel was, and he did not have access to his counsel during the plea. He stated the deputies at the detention center told him he could not speak while the trial court was talking. Miller said he told the trial court that he was satisfied with counsel even though he was not because he was "just trying to get this thing over and done with." Miller admitted he was originally charged with attempted murder and could face at least ten more years' incarceration if his PCR was successful and he went to trial.

Plea counsel testified that he was at his office during the guilty plea and there was only one line of communication on the Webex guilty plea call. Plea counsel was not aware whether Miller knew he had to request a line of communication with him during the plea. Plea counsel was not sure whether the trial court was supposed to establish a line of communication between attorney and client during the Webex call. Plea counsel noted that in the weeks leading up to the guilty plea, he discussed with Miller the weaknesses in his case and Miller's nonchalant attitude about the shooting. Plea counsel believed it would be difficult to establish an effective defense when there were no burn marks on Miller's belongings and with Miller having stated to others he would do it again. Plea counsel stated it was Miller's decision to plead guilty and that Miller understood the plea process.

The PCR court found plea counsel was not deficient for failing to ensure there was a direct line of communication between counsel and Miller during the plea. The PCR court found there was no denial of the right to speak to counsel. The court stated, "even if there was a denial of communication, there has been no showing of prejudice." This appeal followed.

ISSUE ON APPEAL

Did the PCR court err in finding plea counsel was not ineffective for failing to establish a required line of communication with Miller during the coronavirus-era Webex guilty plea?

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). "We will not uphold a PCR judge's findings if there is no evidence of probative value in the record to support those findings." *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). "[Appellate courts] do not defer to a PCR court's rulings on questions of law." *Mangal*, 421 S.C. at 91, 805 S.E.2d at 571. "Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.* (quoting *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)).

LAW/ANALYSIS

"The applicant in a PCR hearing bears the burden of establishing he is entitled to relief." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). "In addressing the adequacy of a PCR applicant's guilty plea, it is proper to consider both the guilty plea transcript and the evidence presented at the PCR hearing." *Sellner*, 416 S.C. at 611, 787 S.E.2d at 527.

Specifically, the voluntariness of a guilty plea is not determined by an examination of a 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 also from the record of the PCR hearing.

Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (quoting *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)), *abrogated on other grounds by*, *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." *Holden*, 393 S.C. at 572, 713 S.E.2d at 615 (quoting *Roddy*, 339 S.C. at 33, 528 S.E.2d at 421). Before a court can accept a guilty plea, "a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers." *Roddy*, 339 S.C. at 33, 528 S.E.2d at 421.

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Kolle v. State*, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), *abrogated on other grounds by*, *Smalls*, 422 S.C. 174, 810 S.E.2d 836. "[T]here is

a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)).

Of import in this case is our supreme court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (S.C. Sup. Ct. Order dated December 16, 2020). The Order states:

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

(emphases added). Miller argues plea counsel was deficient for not being aware of the Order and failing to alert the trial court that he could not privately confer with Miller during the guilty plea. Miller claims he was denied counsel during the critical stage of his case, and therefore, prejudice should be presumed. *See McKnight v. State*, 320 S.C. 356, 359, 465 S.E.2d 352, 354 (1995) ("[W]hen counsel is denied at a critical stage of a defendant's trial, prejudice will be presumed and harmless error analysis is precluded. Inquiry under the two-part test established in *Strickland* is therefore inappropriate."). We agree.

In most aspects this was a "textbook" guilty plea. However, during the unprecedented circumstances of the coronavirus pandemic, the Order added to the rights of a defendant by requiring the trial court to determine a defendant knowingly and intelligently waived his rights to be physically present for the guilty plea and to have counsel physically present. The additional requirements of the Order were not met here.

We find plea counsel's failure to alert the trial court that he could not privately communicate with Miller, failure to be aware of the Order, and failure to ensure the trial court followed the Order with respect to determining whether Miller knowingly and intelligently waived his rights constituted ineffective assistance of counsel. Miller told the PCR court he did not have access to plea counsel during the plea and could not ask plea counsel questions. Plea counsel did not know if Miller knew he had to request a line of communication with him and he did not know whether the court was under an obligation to provide a line of communication between attorney and client. It was plea counsel's responsibility to ensure Miller's rights were safeguarded. Under the particular facts of this case, plea counsel failed to render reasonably effective assistance under prevailing professional norms. *See Thompson v. State*, 340 S.C. 112, 116, 531 S.E.2d 294, 296 (2000) ("[A]ttorney's failure to object fell below prevailing professional norms.").

Miller's isolation from counsel with no recourse amounted to denial of counsel during the guilty plea and was exactly the type of situation the Order was intended to prevent. Because Miller was effectively denied counsel, prejudice is presumed in this case. *See McKnight*, 320 S.C. at 359, 465 S.E.2d at 354 ("[W]hen counsel is denied at a critical stage of a defendant's trial, prejudice will be presumed and harmless error analysis is precluded. Inquiry under the two-part test established in *Strickland* is therefore inappropriate."). Therefore, the PCR court erred in denying Miller's PCR application.

CONCLUSION

Accordingly, the order of the PCR court is **REVERSED**.²

THOMAS and CURTIS, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

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Feb 26 2026

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 Cronin 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 Cronin 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. Cronin, 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 Cronin 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 Cronin decision was issued has the Supreme Court applied Cronin to presume prejudice. The scope of the Cronin 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 Cronin 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 Cronin 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

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

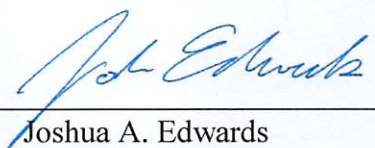
This Court should grant the petition for rehearing and affirm Miller's conviction.

Respectfully submitted,

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February 26, 2026

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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.

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.



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The South Carolina Court of Appeals

Derrick Miller, Petitioner,

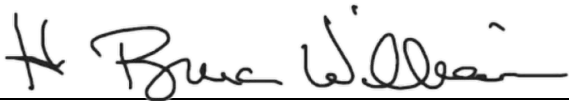
v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000470

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

Jessica M Saxon, Esquire
Joshua Abraham Edwards, Esquire
Alan McCrory Wilson, Esquire
Derrick M. Miller, 00384656
The Honorable Brian M. Gibbons

FILED
Jun 23 2026