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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 6136 (S.C. Ct. App. Filed February 11, 2026)
Lower Court Case No. 2021-CP-42-01964
Court of Appeals Appellate Case No. 2023-000470

DERRICK MILLER,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2026-001610

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

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?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES

Whether the Court of Appeals correctly held that Respondent received ineffective assistance of counsel where Respondent was unable to privately converse with his counsel about his confusion with the plea sentencing range during his guilty plea because plea counsel failed to ensure there was private line of communication established between Respondent and himself, despite the existence of an order from this Court *requiring* that a line of communication and other safeguards be established during virtual remote proceedings specifically to protect a criminal defendant's Sixth Amendment right to counsel during an unprecedented global pandemic?

STATEMENT OF THE CASE

On November 12, 2019, officers with the Greer Police Department responded to a call for a weapon being discharged inside a home. They were informed that a woman had been shot and that the shooter was still on scene. Officers arrived and encountered Respondent, who came outside with his hands in his pockets. Officers ordered Respondent to remove his hands from his pockets. While he did not immediately comply with the order, Respondent did remove his hands, along with a firearm, from his pants pockets. After receiving numerous commands, Respondent placed the firearm on the ground, and he was taken into custody. App. 11, l. 3 – 12, l. 23.

Inside the residence, officers found Hannah Foster with a gunshot wound to her hip and leg. Foster stated that Respondent had shot her because he did not want her to leave the residence. Respondent's mother informed police that when she saw Foster had been shot, she attempted to call the police, but Respondent took her phone and pushed her down to prevent her from calling for help. Respondent waived his Miranda[1] rights and agreed to speak with police. He admitted to shooting Foster, but he said he did so because she was trying to burn his personal items, such as his clothing, which he thought was disrespectful. Police found no proof that anything had been burned in the residence. App. 11, l. 3 – 12, l. 23.

Respondent was originally charged with attempted murder, kidnapping,[2] and domestic violence of a high and aggravated nature (DVHAN). App. 5, ll. 10-24. On January 6, 2021,

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1 384 U.S. 436 (1966)

2 Respondent 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 Respondent having ever been charged with kidnapping in this case. The charges on the public index are attempted murder, DVHAN, PWDCVC, and discharging a firearm into a

Respondent 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. Respondent was represented by Daniel James MacDonald, IV. 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 Respondent 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.

Respondent 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, Respondent filed the present PCR action. App. 27 – 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 ineffective assistance of counsel for failing to establish a line of communication between counsel and Respondent during the plea or failing to require the plea court to establish a line of communication between counsel and Respondent during the plea. App. 44 – 45.

On February 13, 2023, The parties convened before the Honorable Brian M. Gibbons for an evidentiary hearing. The state was represented by Chelsey F. Marto. Respondent was represented by counsel Richey. App. 46. Respondent 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 his counsel during the plea. Respondent believed, based on this Court's order regarding court operations

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dwelling. https://publicindex.sccourts.org/Spartanburg/PublicIndex/PISearch.aspx search terms "Miller, Derrick". (last accessed Augst 26, 2026).

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 – 54, l. 22.

Respondent 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 – 57, l. 17. Respondent 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 – 61, l. 15. Respondent 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 – 63, l. 19. Respondent 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, Respondent 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. Respondent 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 he 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 – 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. He confirmed he was not in the same room as Respondent and 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 Respondent, counsel MacDonald stated that Respondent would have had to ask for a jail cellphone to contact him, and he was unsure if Respondent 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 Respondent during the virtual hearing. App. 76, l. 17 – 77, l. 21.

Counsel MacDonald agreed that it would have been beneficial for there to be a direct line of communication between Respondent and himself during the plea, particularly considering the testimony Respondent had provided at the PCR hearing. App. 77, l. 22 – 78, l. 1. He explained that the state had offered a negotiated plea of ten years or a recommended plea offer for ten-to-fifteen years, and that Respondent had accepted the recommended deal in the hopes the judge would go lower than ten years active time. App. 78, l. 2 – 79, l. 17. Counsel MacDonald testified that Respondent "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 Respondent wanted a plea. App. 80, l. 21-App. 81, l. 9.

On cross-examination, counsel MacDonald testified he could not recall if Respondent was confused during the plea hearing. He stated Respondent did not say much during the

hearing. Counsel MacDonald again stated that he did not know if Respondent 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 Respondent in any way about privately speaking with him during the plea. App. 82, ll. 1-22.

On March 17, 2023, an order of dismissal was filed finding that Respondent 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 Respondent 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 Respondent'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.

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.

ARGUMENT

The Court of Appeals correctly held that Respondent received ineffective assistance of counsel where Respondent was unable to privately converse with his counsel about his confusion with the plea sentencing recommendation during his guilty plea because plea counsel failed to ensure there was private line of communication established between Respondent and himself, despite the existence of an order from this Court *requiring* that a private line of communication, and other safeguards, be established during virtual remote proceedings specifically to protect a criminal defendant's Sixth Amendment right to counsel during an unprecedented global pandemic.

The COVID-19 pandemic impacted every aspect of life, from how we greeted one another or handled grocery shopping to how we conducted court. To ensure a criminal defendant's Sixth Amendment right to counsel was protected, this Court issued an order regarding court procedure during the pandemic titled "Operation of the Trial Courts During the Coronavirus Emergency." The order was originally issued on April 3, 2020, and was amended throughout the pandemic as this Court deemed necessary. At the time of Respondent'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*

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

> *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).

In resolving this case, the Court of Appeals held that during the "unprecedented circumstances of the coronavirus pandemic," this Court "*added to the rights* of a defendant by requiring the trial court to determine *a defendant knowingly and intelligently waived his rights* to be *physical present for the guilty plea and to have counsel physically present*" which did not occur in Respondent's case. Miller v. State, 448 S.C. 109, 115-116, 930 S.E.2d 709, 712-13 (2026) (emphasis added). The court held "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." Id. (emphasis added). Ultimately, the court held that "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 intended to prevent*. Because Miller was effectively denied counsel, prejudice is presumed in this case." Id. citing to McKnight v. State, 320 S.C. 356, 359, 465 S.E.2d 352, 354 (1995) (emphasis added).

Petitioner primarily asserts the Court of Appeals erred in presuming prejudice in this matter and that Respondent was not denied counsel because Respondent did not ask to speak to counsel during the plea. Petitioner further asserts that under the proper Strickland standard, Respondent cannot show prejudice. As explained below, both arguments are without merit. This Court should deny the petition for writ of certiorari and affirm the well-reasoned, unanimous court of appeals opinion.

Deficiency

The Court of Appeals found plea counsel deficient in three respects: for not alerting the trial court that he could not privately communicate with Respondent, for failing to be aware of the existence of the Order from this Court, and for failing to ensure that trial court followed the Order with respect to determining whether Respondent knowingly and intelligently waived his rights. Miller at 115, 930 S.E.2d at 713. Petitioner did not challenge any of these findings in the petition for rehearing[4] or in its petition to this Court. Instead, Petitioner argued "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," PWC at 5, and that the state "disputes that counsel's failure to explicitly advise Miller that he could access a private line of communication violated the order." PWC at 6.

Petitioner only challenged the deficiency holding in conclusory statements and offered no argument or authority for its conclusion; thus, the claim is considered abandoned. See State v. Addison, 338 S.C. 277, 285, 525 S.E.2d 901, 906 (Ct. App. 1999) (Conclusory arguments constitute an abandonment of the issue on appeal.) Further, the failure to properly challenge the holding of deficiency in the petition for rehearing and in the petition to this court means that the holding of the Court of Appeals is the law of the case. See In re Morrison, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); see also Rule 242(d)(1), SCACR (Only those questions raised in the Court of Appeals *and* in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.)

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4 Petitioner only challenged deficiency in a footnote in the petition for rehearing, writing "the State maintains Miller has not shown deficiency or prejudice, and rests on the arguments in its brief in that respect." PFR at 5.

However, should this Court consider deficiency, the record supports the Court of Appeals holding that plea counsel was deficient. Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 284 (2002) (the Court will not uphold the findings of a PCR court if no probative evidence supports those findings.) The plea transcript plainly shows that at no point did plea counsel alert the plea judge that he could not privately communicate with Respondent, nor did he ensure that the plea judge obtained the required knowing and intelligent waiver of Respondent's physical presence and waiver of his right to have counsel physically present. At the PCR hearing, plea counsel's testimony established that he was unaware of the order from this Court requiring a private line of communication be established during virtual pleas, App. 77, ll. 19-21, despite the fact the order had been in existence for nine (9) months at the time of Respondent's guilty plea. That testimony revealed a lack of knowledge about the scope and content of an order from this Court that directly impacted the representation of criminal defendants during a global pandemic. The failure to be aware of and familiar with such an important, long-standing order was not reasonably effective assistance under the prevailing professional norms and fell well below an objective standard of reasonableness. See 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). Respondent has shown deficiency.

The denial of counsel and the presumption of prejudice

"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) (emphasis added). This right to counsel "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 [proceeding]." 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).

In United State v. Cronic, 466 U.S. 648 (1984), and its companion case Strickland v. Washington, the United States Supreme Court identified circumstances in which prejudice would be presumed. "[O]ne circumstance warranting the presumption is the 'complete denial of counsel,' that is, when "counsel [is] either totally absent, or *prevented from assisting the accused during a critical stage of the proceeding.*" Wright v. Van Patten, 552 U.S. 120, 125 (2008) citing United State v. Cronic, 466 U.S. at 659 (emphasis added); See also Strickland, 466 at 692 (In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.) "The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a "critical stage" at which the right to counsel adheres." Iowa v. Tovar, 541 U.S. 77, 81 (2004).

In the matter at bar, Respondent was physically separated from his lawyer due to the global pandemic. This 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 remain 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). Respondent 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 this Court's order. Prejudice in this matter was properly presumed, as the failure of counsel to know about and enforce the order of this Court resulted in the constructive denial of counsel in violation of the Sixth Amendment.

Petitioner relied upon State v. Schlenker, 31 Wash.App.2d 921, 553 P.3d 712 (2024), as persuasive authority for this Court to find that a presumption of prejudice does not apply. Critically, Schlenker was a direct appeal case, not a collateral challenge that would fall under the ambit of Strickland and Cronic, *supra*. The Washington courts could not have properly applied either case, as it was not Schlenker's counsel's performance that was at issue, but whether the trial court "violated his constitutional right to privately confer with counsel at critical stages of the criminal prosecution." Id. at 931; 553 P.3d at 718.

Because this was a direct appeal case, the Washington courts instead considered "the concepts of manifest constitutional error, critical stages in a prosecution, and harmless error" in determining whether to reverse the convictions of Schlenker after determining that his right to counsel was violated. Id. at 939, 553 P.3d 722. The court there observed that "the right to

counsel, including the right to confer with counsel, extends to all hearings, not just critical stage hearings, but *the error analysis heightens with a critical stage proceeding.*" Id. at 941, 553 P.3d 723 (emphasis added). Important to resolving the case was that "[u]nder a constitutional harmless error standard, [the appellate] court *presumes prejudice*" and will "reverse unless the State persuades us beyond a reasonable doubt that the error did not contribute to the verdict." Id. (emphasis added).

The Washington court concluded that Schlenker had no burden to show prejudice, and the state, who possessed the burden to show the error was harmless beyond a reasonable doubt, did not attempt to make that argument or attempt to establish harmless error. Id. at 946, 553 P.3d 725. Schlenker's convictions were reversed and remanded for a new trial. Id. at 948-49, 553 P.3d 726. While Petitioner is correct that the Washington courts did not apply Cronic, as it was inapplicable, Petitioner ignores that the courts did apply a presumption of prejudice that the state had to overcome because the error involved was one of manifest constitutional significance.

Here, Respondent 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 Respondent and counsel. Further no one, neither the court nor counsel, instructed Petitioner that he had the ability to request a private line of communication with his counsel. When he inquired at the jail, he was told he had to be quiet and not interrupt. Not only was this a violation of this Court's administrative order directing the operation of courts in this state during the coronavirus pandemic, but it was also a violation of Respondent's Sixth Amendment right to counsel, as he was denied access during a critical stage of the proceedings against him. As such, prejudice was properly presumed.

Actual prejudice

However, even if prejudice was not presumed, Respondent has still met the burden under Strickland, *supra*, and Hill v Lockhart, 474 U.S. 52 (1985). Plea counsel testified twice that there were times throughout the representation where Respondent 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 Respondent, evidence that Respondent had an actual defense to the charges against him. App. 82, l. 20-App. 83, l. 20. Respondent 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 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, Respondent had only been to court on a bond motion, which was ultimately denied.[5] 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, Respondent testified that had plea counsel effectively represented him, he would have gone to trial instead of pleading guilty because he believed he would prevail. App. 67, ll. 3-13. This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial

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5 https://publicindex.sccourts.org/Spartanburg/PublicIndex/PISearch.aspx (Search case no: 2019A2320501353)(last access August 26, 2026) *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).

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)).

The PCR court found and Petitioner contends that because Respondent had not attempted to speak privately with counsel during the plea hearing that he could not have suffered prejudice. Petitioner also contends that Respondent was not confused. This contention is directly refuted by the record. Respondent testified that he was very confused during the plea hearing because he had discussed the plea offer with plea counsel the day before the hearing, and he accepted the recommendation for a ten-year offer. App. 54, l. 4 – 56, l. 12. As plea counsel testified, the offers available to Respondent were for a *negotiated* ten-year sentence or a *recommended ten-to-fifteen-year* sentence. App. 78, ll. 5-11. Neither 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 Respondent was confused about the sentencing range. Further, the uncontradicted testimony in the record was that the guards informed Respondent that 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.

Respondent has met his burden under Strickland, Hill, and McKnight, *supra.* Counsel was deficient in failing to know about and enforce the "Operation of the Trial Courts During the Coronavirus Emergency" order, and Respondent was denied access to his counsel during a critical stage of the proceedings against him. Prejudice was properly presumed but even were it not, Respondent has shown actual prejudice.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests that this Court deny the petition for writ of certiorari to the Court of Appeals. Should this Court grant certiorari, Respondent respectfully requests that certiorari only be granted on the question of prejudice.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR RESPONDENT

This 26th day of August, 2026.