

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jul 17 2020**

**S.C. SUPREME COURT**

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Certiorari to Richland County

Honorable J. Derham Cole, Circuit Court Judge  
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FAASIU TOESE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001738  
—————

PETITION FOR WRIT OF CERTIORARI  
—————

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**ISSUE PRESENTED**

Did the PCR court err in finding counsel was not ineffective for failing to secure an interpreter for Samoan, non-native English-speaking petitioner at their meetings or at petitioner's guilty plea, where counsel admitted petitioner had trouble understanding legal concepts?

## STATEMENT

On January 2, 2013 petitioner called 911 requesting help from the parking lot of a fast food restaurant. App. 10, 1-12. Petitioner told the emergency operator his girlfriend, decedent, hurt herself with a knife. App. 10, ll. 20-22. When law enforcement arrived, they asked petitioner where his girlfriend was, and he pointed to his vehicle. Law enforcement found decedent in the back of petitioner's car. She appeared to have been stabbed multiple times. App. 11, ll. 10-23; 13, ll. 14-18.

Petitioner was arrested and transported to police headquarters to be questioned. Petitioner told officers he and decedent argued, and she tried to punch him. App. 13, ll. 19-23; 14, ll. 10-22. Decedent grabbed a knife and then "things went wrong." Petitioner told police he "lost control" trying to protect himself, blacked out, and when he came to the decedent had been stabbed multiple times. App. 15, ll. 8-25.

On April 10, 2013, a Richland County grand jury indicted petitioner for murder. App. 124. On March 18, 2015, petitioner pled guilty before the Honorable Robert Hood, to murder with a negotiated sentence of thirty-six years' imprisonment. App. 1-3. Jennifer Davis represented petitioner and Nicole Simpson, assistant solicitor, represented the state. App. 1.

On March 20, 2015, a notice of appeal was filed on petitioner's behalf. On May 29, 2015, the Court of Appeals dismissed the appeal for failure to provide a sufficient explanation.

Thereafter, petitioner filed an application for PCR on November 25, 2015. App. 43-48. On April 1, 2019, an evidentiary hearing was held before the Honorable J. Derham Cole. App. 55. Jonathan Waller represented petitioner and Lindsay McAllister, assistant attorney general, represented the state.

At the evidentiary hearing PCR counsel told the court petitioner required the assistance of

an interpreter because his first language was Samoan. App. 57, ll. 22-25. Petitioner was born in Samoa in 1986 and spoke exclusively Samoan with friends and family. App. 69, ll. 17-24; 70, ll. While petitioner was in school, he took English but struggled. App. 70, ll. 8-11. In 2010 petitioner moved to America but still spoke very little English, only enough to get by. App. 71, ll. 25-72, 6.

When petitioner was arrested in 2013, he had great difficulty articulating himself to law enforcement or to plea counsel Davis. App. 76, 2-8. Petitioner testified that he requested plea counsel find an interpreter to help him but she never did because he was able to speak English. App. 75, ll. 17-21. Petitioner felt he and counsel were not able to communicate effectively. It was hard for petitioner to understand all that counsel said to him and even more difficult for him to express to counsel things, he wanted her to do on his case. App. 78, l. 22-79, l. 15. At petitioner's guilty plea he did not understand all of what the judge asked him. However, petitioner did not know that he could tell the judge he was confused or ask questions during his guilty plea. App. 87, l. 12-88, l. 4.

Plea counsel Davis testified petitioner did not indicate to her that he needed an interpreter and they spoke English during their meetings. However, plea counsel said she knew petitioner did not understand certain legal concepts regarding his case. App. 92, 16-25. Plea counsel had petitioner evaluated twice because he was taking antipsychotic medication and had a history of mental illness. App. 102, ll. 22-25. Both times petitioner was found competent to stand trial but was diagnosed as having major depressive disorder with "psychotic features." App. 107, ll. 12-18. Plea counsel acknowledged "there was legitimate confusion about the legal system" but she believed petitioner's confusion was solely due to his mental capacity and not to a language barrier. App. 95, l. 23-96, l. 1.

On September 20, 2019, Judge Cole signed an order denying PCR. App. 110-123. The judge found plea counsel's was not ineffective for failing to obtain an interpreter because he found plea counsel's credibly testified that she was able to communicate effectively with petitioner. App. 121.

This petition for a writ of certiorari follows.

## ARGUMENT

The PCR court erred in finding counsel was not ineffective for failing to secure an interpreter for Samoan, non-native English-speaking petitioner at their meetings or at petitioner's guilty plea, where counsel admitted petitioner had trouble understanding legal concepts.

A defendant who enters a guilty plea on the advice of counsel may only attack the voluntary and intelligent character of a 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. *Hill v. Lockhart*, 474 U.S. 52, 106 (1985).

To determine whether a waiver is effective, the court examines the particular facts and circumstances surrounding the case, *including the background, experience, and conduct of the accused*. *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as the evidence at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 415 (1998) (emphasis added).

Notwithstanding any other provision of law, whenever a party, witness, or victim in a criminal legal proceeding does not sufficiently understand or speak the English language to comprehend the proceeding or to testify, the court *must appoint a certified or otherwise qualified interpreter* to interpret the proceedings to the party or victim or to interpret the testimony of the witness.

S.C. Code Ann. § 17-1-50(B)(1) (emphasis added).

Plea counsel was deficient for failing to secure an interpreter for petitioner for their meetings and for his guilty plea. In its order, the PCR court relied on plea counsel's testimony that she did not think petitioner required an interpreter because he spoke English and the guilty plea transcript where petitioner answered the plea court's questions in English. The relevant statute provides that a party who "*does not sufficiently understand or speak the English*

language,” be appointed an interpreter. *See* S.C. Code Ann. § 17-1-50(B)(1). Petitioner’s passable ability to answer questions in English should not have ruled out his need for an interpreter.

Being in a strange country with only nominal command of its language and accused of a serious crime is a frightening prospect.<sup>1</sup> From his arrest to his conviction petitioner struggled without the help of an interpreter. Petitioner spent all his life in Samoa and had only been in the country for three years at the time of the incident and five years at the time of his guilty plea. Petitioner was able to speak novice English, but it was clear, even to counsel, that he had difficulty understanding what they were talking about, specifically in regard to the American legal process. At the time of PCR, nine years after he moved from Samoa to America, petitioner required the assistance of an interpreter in order to understand legal proceedings.

The constitutional rights defendants waive when entering a guilty plea are often hard for English speaking persons to fully appreciate. Petitioner was from a different country, unfamiliar with the American legal system, and contending with serious mental illness. Petitioner’s plea was not voluntarily, knowingly or intelligently made because, without the assistance of an interpreter, he did not understand enough English to comprehend the crime he was charged with, his legal options, or the rights he waived by pleading guilty. *See Hill v. Lockhart*, 474 U.S. 52, 106 (1985); *see also Spooone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008).

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<sup>1</sup> Though the facts of the underlying crime bear no relation to this case this type of situation is exemplified in the infamous Amanda Knox case. In that case, Knox, an American student traveling abroad, was convicted by Italian authorities for the brutal murder of her roommate, Meredith Kercher. Luckily Knox, who spoke little Italian, was afforded the services of an interpreter. Her conviction was later reversed.

**CONCLUSION**

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.

s/Sarah E. Shipe \_\_\_\_\_  
Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 2020.