

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable J. Derham Cole, Circuit Court Judge

FAASIU TOESE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001738

APPENDIX

SARAH E. SHIPE
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

LINDSEY MCCALLISTER
Assistant Attorney General
Rembert Dennis Bldg, Room 519
1000 Assembly Street
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

RECEIVED

Jul 17 2020

S.C. SUPREME COURT

INDEX

INDEX	i
TRANSCRIPT OF GUILTY PLEA HEARING HELD MARCH 18, 2015.....	1
APPLICATION FOR POST-CONVICTION RELIEF	43
STATE’S RETURN.....	49
TRANSCRIPT OF POST-CONVICTION RELIEF HEARING HELD APRIL 1, 2019	55
ORDER OF DISMISSAL.....	110
INDICTMENT.....	124
SENTENCE SHEET.....	126

STATE OF SOUTH CAROLINA	)	GENERAL SESSIONS
	)	
County of Richland	)	2013-GS-40-2761
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
FAASIU TOESE,	)	
	)	
DEFENDANT,	)	

March 18, 2015
Columbia, South Carolina

BEFORE:

THE HONORABLE ROBERT E. HOOD, JUDGE.

APPEARANCES:

NICOLE SIMPSON, ASSISTANT SOLICITOR
Attorney for the State

JENNIFER DAVIS, DEPUTY PUBLIC DEFENDER
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 FAASIU TOESE, after being duly sworn, testified
2 as follows:

3 THE COURT: All right.

4 MS. SIMPSON: Thank you, Your Honor. May it please
5 the Court. Nicole Simpson for the State. Standing beside
6 me is Investigator John Carwell with the Richland County
7 Sheriff's Department. He is the lead investigator in this
8 case.

9 Before you today is Faasiu Toese. He is represented
10 by Jennifer Davis of the Public Defender's Office. He is
11 pleading guilty as charged and indicted to murder for the
12 death of the victim in this case. This is a negotiated
13 plea for 36 years.

14 Additionally, Your Honor, for the record, there was a
15 competency evaluation in this case as it is and was
16 scheduled for trial next week, and he was found competent
17 to stand trial.

18 THE COURT: All right. How do you say your last
19 name, sir?

20 THE DEFENDANT: Toese.

21 THE COURT: Toese. Good morning, Mr. Toese.

22 THE DEFENDANT: Good morning, Your Honor.

23 THE COURT: Are you under the influence of any
24 alcohol or drugs today?

25 THE DEFENDANT: No, Your Honor.

1 THE COURT: Have you ever been treated for any mental
2 health issues?

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: Okay. Other than your evaluation that
5 you just had, have you ever been treated for mental health
6 issues?

7 MS. DAVIS: Your Honor, he's on Zyprexa. It's a --
8 treats a general -- antipsychotic medication.

9 THE COURT: Okay.

10 MS. DAVIS: He's been on that since he's been at the
11 jail, Zyprexa.

12 THE COURT: Okay. Have you taken that medicine as
13 prescribed by a licensed medical professional?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Okay. Have you understood your
16 conversations with your attorney?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Do you understand what's going on here
19 today?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: And Ms. Davis, have you explained the
22 nature of the charges, the possible penalty, and your
23 client's constitutional rights to him?

24 MS. DAVIS: Yes, Your Honor.

25 THE COURT: Okay. Mr. Toese -- Toese, excuse me.

1 They tell me that you want to plead guilty to one count of
2 murder. That carries a mandatory minimum of 30 years in
3 prison up to life without parole. Do you understand that?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: And do you understand that this is
6 designated as a violent offense in our system?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: And do you understand that this is
9 designated as a most serious offense in our system?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: And what most serious means is were you
12 to receive one more conviction for a most serious offense
13 in your life, you would be facing mandatory life without
14 parole. Do you understand that?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And do you also understand that on a
17 murder charge, it is what we call a day-for-day sentence.
18 There is no parole. The sentence that I give you today,
19 you will do 100 percent of before you will be released.
20 Do you understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Now, once you are released from that
23 sentence, you will be released onto what is known as the
24 Community Supervision Program and monitored for at least
25 two years before you are free from being monitored by

1 anybody. Do you understand that?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Are you on probation or parole now?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: When you plead guilty, Mr. Toese, you
6 give up certain important constitutional rights. The
7 first is your right to remain silent. Do you understand
8 that right?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: And do you want to give up that right?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: The second right that you give up is your
13 constitutional right to a jury trial. Do you understand
14 what a jury trial is?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And do you want a jury trial, or do you
17 want to proceed with your guilty plea?

18 THE DEFENDANT: I want to plead guilty.

19 THE COURT: Third, you give up your right to confront
20 the witnesses that the State would call against you, to
21 call witnesses on your own behalf and to present any
22 defense you may have. If you plead guilty, none of that
23 is going to happen. Do you understand that?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: So your jury -- and during your jury

1 trial, you would have the right to the representation of
2 counsel. You would be presumed innocent. The burden
3 would be upon the State to prove your guilt to a jury of
4 12 people unanimously beyond a reasonable doubt.

5 During the trial, you would have the right to remain
6 silent. You would be presumed innocent. You would also
7 have the right to confront and cross-examine each witness
8 the State would call against you.

9 Further, you would have the subpoena power of the
10 court to compel witnesses to come in and testify. If you
11 plead guilty, none of that is going to happen. Do you
12 understand that?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Now, you've been indicted for murder.
15 Your indictment states that on or about January 1st
16 of 2013, you did willfully, feloniously, and intentionally
17 kill the victim, Temukisa, T-E-M-U-K-I-S-A -- I apologize
18 if I said that incorrectly to anybody -- Enele, E-N-E-L-E,
19 with malice aforethought either expressed or implied by
20 means of stab wounds, and the victim did die as a
21 proximate result thereof on or about January 1st of 2013
22 in Richland County. How do you plead to that charge?

23 THE DEFENDANT: Guilty, Your Honor.

24 THE COURT: Okay. Now, this is what we call a
25 negotiated plea. Have you and Ms. Davis talked about the

1 fact that this plea is negotiated?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Okay. And do you understand that under
4 the terms of it being negotiated -- and negotiated is an
5 official court term. Under the terms of it being
6 negotiated, even if I wanted to give you less than 36
7 years, I could not, and the reverse of that is even if I
8 wanted to give you more than 36 years, I could not.

9 Essentially, as I sit here, if I go along with your
10 plea, my hands are tied, and I must give you the 36-year
11 sentence. Whether I think it should be more or it should
12 be less, I'm bound by the negotiations. Do you understand
13 that?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Besides those negotiations, has anybody
16 promised you anything to get you to plead guilty?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: Has anybody forced you or threatened you
19 to get you to plead guilty?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: Are you pleading guilty freely and
22 voluntarily?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Are you completely satisfied with the
25 services of your attorney?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Have you and your attorney fully
3 discussed the charges against you and the evidence that
4 would be presented at trial?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: And are you pleading guilty because you
7 are, in fact, guilty of this murder?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: You have ten days from today's date to
10 appeal this plea. If you choose to do so, you must do so
11 in writing to this court. Do you understand that?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Okay. Ms. Simpson?

14 MS. SIMPSON: Thank you, Your Honor. This incident
15 occurred between January 1st, 2013 around approximately
16 ten p.m. and January 2nd, 2013 about 2:30 a.m. in the
17 morning at the home of both the victim in this case,
18 Temukisa Enele and the defendant, her boyfriend at the
19 time, located at here in Richland
20 County.

21 That is the location where the defendant brutally
22 stabbed and murdered the victim who was only age 25 at the
23 time of her death. She is fondly referred to by her
24 friends and family as Kesa, and that's how I'll refer to
25 her throughout this -- these facts, Your Honor.

1 During the early morning hours on the 2nd, officers
2 were dispatched to which is actually
3 the parking lot of the McDonald's in response to a
4 possible suicide attempt.

5 The defendant in this case was the one who called
6 9-1-1. At that time when he called, he was in the process
7 of driving -- or believed to be driving. He was very
8 calm. He requested an ambulance. Of course, there is a
9 conversation between him and the dispatcher.

10 He continues to say he really needs help but that
11 he's not at the house. The dispatcher at this point in
12 time thinks that he is actually the one who is injured.

13 Through the course of this conversation -- and I'll
14 just read a portion, Your Honor. He finally indicates to
15 her that he needs an ambulance because she has hurt
16 herself and she tried to commit suicide; that she used a
17 knife to her.

18 The operator then asks, "Okay, so she cut herself
19 with a knife?"

20 At that point, he indicated, "Yes. She stabbed
21 herself with a knife. I tried to stop her. I couldn't
22 help. She was so mad."

23 When asked where he stabbed her, he was asked several
24 times, and he just kind of stated, "Well, like all over, I
25 guess, the face and neck." As I said, he was very calm

1 and kind of causal throughout the course of this
2 conversation.

3 When asked how long ago she injured herself, he was
4 somewhat evasive. He finally did say, "I'm not really
5 sure. I just panicked when the thing happened. I saw
6 her. She didn't move. She didn't move at all. She just
7 laid down. At that point, I grabbed her and tried to wake
8 her up, but she just laid down. I didn't want to do
9 nothing."

10 Your Honor, officers actually did respond pretty
11 quickly to the McDonald's location. At that point when
12 they arrived, they made contact with the defendant who was
13 driving a Montero sport vehicle.

14 They approached him and asked him where the female
15 who was hurt was. At that point, they directed him -- or
16 the defendant directed them to the vehicle that he was
17 driving and stated, "She is in the back of the car."

18 At that point, at the direction of the officers and
19 his own, I guess volition, he opened the vehicle.
20 Officers observed a Tupperware Rubbermaid bin container,
21 two of them. She had been placed crouched, I guess in
22 one, and the other had been flipped over to cover on top
23 of her.

24 The defendant was immediately advised of his rights
25 on scene and then questioned as to where the actual

1 incident took place because it appeared that it did not
2 occur in the vehicle or at the McDonald's.

3 The defendant told them the location of their home on
4 and again stated that, "She is just inside
5 the container."

6 EMS was notified and responded quickly to the scene.
7 Upon their arrival, they found Kesa stuffed into the
8 container, and as a result, they were actually unable to
9 attach any leads due to her size and the position in the
10 container.

11 They did confirm, however, that she was unresponsive,
12 and they noticed blood to her face and neck and that she
13 was cold to the touch and that lividity had begun to set
14 in.

15 She was pronounced dead at the scene, and based on
16 all of the evidence, there was no -- there were no
17 lifesaving efforts that could have been possible at that
18 time.

19 Officers immediately secured the scene at the
20 McDonald's location and crime scene investigators, as well
21 as investigators were notified and responded in addition
22 to the coroner's office who noted in addition to the blood
23 that there was also vomit or what appeared to be vomit
24 about her face and hair.

25 The investigators and crime scene investigators were

1 also notified to respond to the actual incident location
2 which was the home on

3 The vehicle, the Montero sport, at the McDonald's
4 which the defendant had driven the victim in which
5 contained the container, that tag was run and came back to
6 a lady by the name of Jasmine Taylor who is actually
7 present here in the courtroom today. She was subsequently
8 interviewed by investigators.

9 Investigator Carwell was notified and assigned as the
10 lead on this case. He arrived at the McDonald's and also
11 observed the victim who at that time I believe had been
12 taken out of the container still in the position where her
13 body was.

14 She appeared to have been cut and stabbed repeatedly,
15 and one of the other crime scene investigators actually
16 pointed out a number of defensive wounds to her hand,
17 specifically her thumb as well as lacerations to her
18 forearms.

19 By this point in time, Your Honor, Sergeant
20 Eisenhower had already transported the defendant to
21 headquarters in order to be interviewed, and Investigator
22 Carwell proceeded to headquarters, as well.

23 After being briefed about the situation, the
24 defendant was advised of his rights in writing which he
25 did, in fact, waive.

1 His demeanor investigators described as being very
2 calm as he told his story or version of events that
3 transpired causing him to murder his girlfriend. This
4 information would be very different than that that he
5 relayed to the 9-1-1 operator.

6 Specifically, Your Honor, he stated that he got off
7 work from Wal-Mart. They actually -- both he and the
8 victim in this case, Kesa, worked at the Wal-Mart
9 together.

10 When he arrived home after a period of time, he began
11 to ask her if anyone had been at the house while he was
12 working. Specifically he asked about one of their friends
13 and coworkers, Greg, later identified as Greg Miller who
14 was also interviewed, about being at the home.

15 According to him, he had suspicions which were never
16 confirmed or validated in this investigation that Greg and
17 Kesa were having an affair. He stated then that the
18 victim got mad because of the accusation that he was
19 making against her, and at that time, she actually pushed
20 him and then hit him in the face, eye and chest with her
21 hands. No visible injuries were actually noted in these
22 areas by the investigators.

23 The defendant stated that he tried to hug her in an
24 effort to get her to feel what he felt and wanted to be
25 with her -- told her that he wanted to be with her and to

1 work things out and that he was very sorry and apologetic
2 about the accusation.

3 However, after this apology or at the point in time
4 of this apology, the defendant said that he hit Kesa on
5 her cheek with his wrist because he was trying to get her
6 off of him, and that was actually swollen, was the wrist
7 that was swollen, the only visible injury on him.

8 He stated that the victim continued to try to punch
9 him and actually grabbed a knife.

10 At this point, he initially believed that she was
11 going to use the knife on herself, and so he went after
12 that knife. At that point, he says things just went
13 wrong.

14 He got the knife. The victim tried to hit him to get
15 him away, and he just lost control. He recalls stabbing
16 her four times. He couldn't understand what he was doing,
17 and then stated that he just blacked out.

18 When he came to -- and I'll back up just a moment.
19 The victim actually suffered 15 -- approximately 15 or
20 more stab wounds in addition to cuts and lacerations to
21 her body with the fatal injuries being to her neck.

22 The defendant stated that he came to after this at
23 some point and tried to figure out how to get help. He
24 said that he went outside and backed the car up to the
25 front door, and then he went to the back of the house to

1 try to carry Kesa to the car, but he couldn't lift her
2 because she was too heavy. So at that point, he decided
3 he would put her in the plastic container.

4 He decided to turn the container on its side to
5 maneuver her body in there and then dragged the container
6 to the door to get it closer so that he could actually get
7 her up into the vehicle.

8 He said that he put the container on top of her, the
9 second container just so that she would not get wet. At
10 that point, he placed her body in the car and then drove
11 off.

12 He then stated -- and this was actually confirmed
13 that he texted Greg -- and this is the same Greg that he
14 had accused her of having an affair with -- for help to
15 find a hospital. He said Greg would not answer his text
16 message so he tried calling him, and he didn't answer the
17 phone call either.

18 The defendant then said he drove all the way to the
19 Wal-Mart on Harbison which is a substantial distance away
20 and that he pulled in but then just decided to pull out of
21 the parking lot.

22 At that point, he was just trying find a good place
23 to park the car and figure out what to do next, but he
24 said that during this time, he just couldn't find anybody
25 to help him essentially get help for her to find a

1 hospital.

2 It's at this point that he drove to the McDonald's on
3 Parklane and finally realized that he might want to call
4 9-1-1. At that point, he did call 9-1-1 and gave the
5 information that I stated earlier.

6 He also, Your Honor -- beg the Court's indulgence.

7 (Pause.)

8 Your Honor, he also told the police that they had
9 lived together for about three years and prior to --
10 probably about six months prior to this they had been
11 involved in an altercation in which he was charged with
12 criminal domestic violence against her.

13 At this point, the investigators were actually
14 receiving information from the crime scene investigators
15 themselves at the incident location specifically regarding
16 the murder weapon and things of that nature, and he was
17 questioned about those.

18 He was asked what he did with the murder weapon or
19 what the murder weapon was, and he stated that it was a
20 silver cooking knife. He initially said he just threw it
21 on the floor and couldn't remember where. Then when asked
22 why he did not call police, he said, "Well, I was just
23 rushing to get to the hospital and didn't have a working
24 phone."

25 However, at the time of his arrest, he actually had

1 two working cell phones on his person and did, in fact,
2 call both Greg and 9-1-1 from that phone.

3 He was also questioned about his attempts to clean up
4 prior to getting help or calling the police. The
5 defendant said that he essentially got on the floor, gave
6 her a hug and didn't know -- didn't want the house to
7 smell like the blood because there was so much blood
8 everywhere. So at that point he utilized a shirt as well
9 as a tank top and some Clorox in an effort to clean up the
10 area.

11 Again, he was asked about why he did not use the
12 phone at the house. At this point he stated a second or a
13 third version, however many, that he wanted to get her in
14 the car before he called, and at some point he realized
15 she was dead but he wasn't really sure when that was. He
16 just kind of kept sitting there for awhile just thinking
17 something was wrong.

18 After making the efforts to -- or just to address the
19 efforts to clean up, crime scene investigators, as well as
20 the investigators who walked the scene, the strong odor of
21 Clorox was clearly notable when they went in, and this was
22 some time after the actual crime had happened.

23 Crime scene investigators would note that there
24 appeared that there had been a struggle throughout the
25 house. There was blood still on the walls, the bathroom

1 wall, as well as the bedroom wall, I believe the TV that
2 had been moved.

3 There was a container of bleach, as well as a knife
4 that had been wrapped in bubble wrap. The floor was wet
5 in places with clear standing liquid, as well as another
6 gray plastic tub which contained cloth items and a
7 quantity of blood on those.

8 This -- blood stains were swabbed, and the DNA was
9 tested and did come back to be that of the victim in this
10 case.

11 Your Honor, the investigation continued, and several
12 people were interviewed to include Ms. Butler who is also
13 present in the courtroom. She provided information
14 regarding an additional vehicle in this case which was
15 actually broken down and located at the Wal-Mart where
16 they both worked.

17 This vehicle, it was set up in such a way -- the best
18 way to describe it is kind of a tent living area, and that
19 was indicated to investigators as being the place where
20 the defendant made the victim stay while he was at work;
21 that he would make her stay in the vehicle whenever she
22 was not with him.

23 They also spoke with a friend, Ms. Joanne Foster, who
24 is also present in the courtroom, I believe. Ms. Foster
25 indicated to them that she and Kesa were, I guess

1 coworkers and friends, and she was aware that the victim
2 in this case had suffered both mental and physical abuse
3 that was relayed to her by the victim at the hands of the
4 defendant and that she had actually made several attempts
5 to leave him in the past.

6 Jasmine Taylor was also interviewed. She is present,
7 too, in the courtroom. She is the one who actually loaned
8 the vehicle to the defendant as their vehicle was not
9 working, also a friend of actually both of them and
10 coworker. She would mention that there was an occasion
11 where the victim had come to work with a black eye and
12 that Kesa did indicate to her that they often fought at
13 least verbally.

14 Your Honor, the autopsy in this case was quite
15 extensive. Dr. Marcus conducted it. It took
16 approximately four hours based on the nature of her
17 wounds. There were 15 stab wounds, multiple cuts and
18 lacerations.

19 The cause of death was actually multiple fatal stab
20 wounds to the neck. Also noted was blunt force trauma to
21 the back and side of her head, and her carotid artery had
22 been lacerated. Your Honor, with respect to the facts in
23 this case, that would be all of the facts. He does not
24 have a prior record.

25 At the appropriate time, the victims would like to

1 address Your Honor, and if I could tell you who is present
2 in the courtroom on their behalf.

3 THE COURT: All right. Mr. Toese, do you materially
4 agree with the facts as stated by the State?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: I find that there is a substantial
7 factual basis for this plea. I also find that the
8 defendant's decision to plead guilty is freely,
9 voluntarily, knowingly and intelligently made; that he's
10 had the advice of a very competent attorney with whom he
11 tells me he is satisfied.

12 All right. Who would like to speak?

13 MS. SIMPSON: Your Honor, present in the courtroom is
14 Wilbert Butler, Kenneth Gaton, Joanna Foster, Jasmine
15 Taylor, and Tapuhana Butler. Ms. Butler will be
16 addressing Your Honor reading letters from the family, as
17 well as Ms. Foster.

18 Your Honor, just briefly, too, from the State and on
19 behalf of the investigators, we met at length with the
20 family and discussed these negotiations. While nothing
21 that we do in this courtroom will ever bring the victim
22 back, we are going to respectfully ask that you follow the
23 negotiations in this case to give the family closure which
24 they will address, as well.

25 I was truly amazed at the amount of love and support

1 this family has and that Kesa had, the victim in this
2 case, and at that point, I'll let Ms. Butler address your
3 Honor.

4 THE COURT: Okay. Ms. Butler?

5 VICTIM'S REPRESENTATIVE: Good morning, Your Honor.

6 THE COURT: What is your first name, ma'am?

7 VICTIM'S REPRESENTATIVE: Tapuhana.

8 THE COURT: Okay. Would you spell that for me?

9 VICTIM'S REPRESENTATIVE: T-A-P-U-H-A-N-A.

10 THE COURT: Thank you. I'm happy to hear from you,
11 Ms. Butler.

12 VICTIM'S REPRESENTATIVE: Thank you, sir. I'll be
13 reading a letter from Kesa's dad.

14 THE COURT: Okay. Don't read too fast. Usually when
15 people read, they read faster than they normally speak,
16 and we want to take down everything that you say
17 accurately and correctly. So don't read too fast, okay.

18 VICTIM'S REPRESENTATIVE: Yes, sir.

19 THE COURT: Okay. Thank you.

20 VICTIM'S REPRESENTATIVE: Your Honorable Judge,
21 greetings from American Samoa to Your Honorable Judge and
22 respectful members of your staff. My name is Soho Honulay
23 (phonetic). I am Kesa's father. I am unable to be there
24 due to immigration purposes and time that will be
25 necessary to process the travel.

1 I have seven children, four daughters, and three
2 sons. Kesa, as we all called her, is my third to the
3 oldest child and most dependable one.

4 All of my children -- of all of my children, Temukisa
5 has been the one that made us the most proud. I do not
6 say that lightly or proudly as no parent should ever have
7 to admit loving one child more than the next, but Kesa was
8 truly a blessing from God.

9 I can take all day telling you stories and recalling
10 memories of my precious daughter who is gone too soon, but
11 I will try to give a small account of her life.

12 We live in Amunabe (phonetic), and Kesa grew up in a
13 home full of love and very little money. Our home was an
14 open house with no rooms or walls. We did not have
15 running water or electricity for a long time up until
16 1999.

17 In order to get water for cooking and cleaning, we
18 have a well that sits at the base of the mountain from
19 where our home sits. My oldest son, Falainey (phonetic)
20 which is Kesa's older brother, and myself are responsible
21 for hauling water from the well and carrying them to the
22 house.

23 I recall vividly a day I caught Kesa, she was maybe
24 ten years old, hauling water to the house with a milk jug.
25 She made several trips that day just so I don't have to go

1 down to the well after work.

2 Even at very young age, Kesa always took initiative
3 to contribute to the family in her own little ways. While
4 in high school, she decided to work part time at a summer
5 school program at Starkist. It's a fish canning plant in
6 Samoa.

7 She was determined to help us raise money to buy a
8 truck for our family. As he explained where the house
9 sits, it's up on a mountain, and when we need go down to
10 the village to the only convenience store, we either hitch
11 a ride or go it by foot.

12 Going down the mountain was not too bad as we get to
13 enjoy the breeze, and gravity did most of the work. The
14 toughest task is climbing the mountain with groceries in
15 temperatures over 100 degrees every day.

16 Kesa took it upon herself to continue working even
17 after the summer program was over for \$1.75 an hour even
18 though most of her peers would make fun of her working
19 there due to the overwhelming smell. My daughter is an
20 extraordinary person who loves to keep her -- earn her
21 keep.

22 We finally bought our first truck while Kesa was a
23 senior in high school. I'll never forget when I pulled up
24 to the house, she was the first to run out and wrap her
25 arms around my neck and scream, I'm so proud of you, Dad.

1 You did it.

2 She made me so proud of myself that I totally forgot
3 that my daughter's job made it possible for us to get this
4 truck. See, that is the kind of person she is. She is
5 determined to do for others and always seeking to improve
6 herself and those around her.

7 She is a hard worker and does not care to take credit
8 that's rightfully hers. She loved her family and was
9 loved back in return. Most of all, she loved God and had
10 a heart for ministry.

11 My daughter graduated from College of Bible -- the
12 College of the Bible from Overly, Montana (phonetic) with
13 an Associate Degree, the first of my children to earn a
14 college degree.

15 The day I heard the news about her demise, I was
16 consumed with anger and thoughts of revenge. Then her
17 brothers brought her home. Your Honor, I don't have words
18 to express how I felt.

19 It was a pain that I never encountered before. I was
20 presented with what would be the last love offerings from
21 my baby girl: A box full of gifts for every single one in
22 the family. Each was wrapped with care and addressed with
23 love for Christmas.

24 He wants to let her murderer know -- is that okay?

25 THE COURT: (Nods in the affirmative.)

1 VICTIM'S REPRESENTATIVE: You stole from me, my
2 family, a precious daughter, one money can't buy. I want
3 you to know that you no longer matter to me after today.

4 I pray each night that I can find it in my heart to
5 forgive you for my own sanity and salvation. I also hope
6 that the time you will spend in prison will be a time of
7 reflection and self-reevaluation.

8 Your father came to my family to ask for forgiveness,
9 and I saw a man who is ashamed and broken by the acts of
10 his child. I have no hard feelings for your parents.
11 Your evildoings was yours and yours alone. You hurt too
12 many people with this selfish and self-serving act. May
13 God have mercy on you.

14 Thank you, Your Honor.

15 THE COURT: Thank you.

16 VICTIM'S REPRESENTATIVE: That's from her father.

17 THE COURT: Thank you for reading that, Ms. Butler.

18 Would you please relay to him that I understand the
19 difficulty he would have in making it here for this, and I
20 appreciate him sending a letter.

21 All right. Ms. Foster?

22 MS. FOSTER: Yes, sir.

23 THE COURT: Does Ms. Foster wish to speak? Okay.

24 What's your name, ma'am?

25 MS. FOSTER: Joanne Foster.

1 THE COURT: Okay. What would you like to tell me,
2 Ms. Foster?

3 MS. FOSTER: Kesa and I worked together. It was my
4 second job, part-time job. Besides the fact about --

5 THE COURT: Can you speak up just a little bit for
6 me?

7 MS. FOSTER: I -- Kesa and I worked at Wal-Mart as my
8 part-time job besides the fire department, and we quickly
9 became friends due to the fact that it was just mentioned
10 that she was a caring person, always supportive.

11 She -- I initially asked her to babysit my dogs while
12 I go visit my father, and she -- she said she will do it,
13 and they both stayed over at my house.

14 Everything was -- a couple weeks after I returned
15 back -- I don't know the timeframe -- but she gave me --
16 she called me several times and told me that she couldn't
17 take it. She has to leave the household that she was
18 living in with -- with him, the defendant. What's his
19 name?

20 THE COURT: Mr. Toese.

21 MS. FOSTER: Yes, and that she couldn't take it. She
22 had to get away, some kind of how. I told her, "Kesa,
23 you're welcome anytime. The key is under the mat. I'm
24 going to call my boys. They know, just come."

25 That happened about four or five times, and then the

1 final call was, "Joanna, I got -- I got to go."

2 I said, "You're welcome to come on over."

3 She said, "He doesn't know where you live, so I feel
4 safe." So she also had fear that something was going to
5 happen to me, so I said, "Don't worry about it, and just
6 come on."

7 With her also was a friend called Sarah, and that
8 they were the extra nudge to stay over at my house while
9 she was staying at my home like four or five weeks.

10 I was also informed that the defendant that -- tried
11 to harm her, as well with some kind of disagreement that
12 he had coming out of the car that he didn't get her out of
13 the car that he took her head and notched it against the
14 frame of the car window. The police was called, as well
15 on that occasion.

16 As I said, after that, she was concentrating on
17 getting her own home together, getting her life together
18 and just separating from that situation that apparently
19 seemed very, very dangerous, and I'm sorry to say that
20 this situation ended like this. That's pretty much all I
21 have to say.

22 THE COURT: Thank you, Ms. Foster.

23 MS. FOSTER: Thank you.

24 THE COURT: Thank you all for those of you who are
25 here continuing to stay involved in the case and show up

1 today. Thank you very much for being here.

2 All right. Anything else, Ms. Simpson?

3 MS. SIMPSON: Just briefly, I believe Ms. Butler had
4 maybe one more letter from Ms. Manning.

5 VICTIM'S REPRESENTATIVE: I had a letter in -- my
6 own.

7 MS. SIMPSON: Her own Victim Impact Statement.

8 THE COURT: Okay.

9 MS. SIMPSON: Yes, Your Honor.

10 VICTIM'S REPRESENTATIVE: Okay. This is -- this is
11 from Pasitalia, it's P-A-S-I-T-A-L-I-A, Manning.

12 "To whom it may concern, a daughter to her dear
13 parents, a sister to her loving siblings, and an aunt to
14 her nieces and nephews, a cousin, a friend, a church
15 member, a good member of society, a pillar to our lives,
16 and a niece that has left a void in our hearts that no one
17 can fill.

18 My name is Pasitalia Solopha (phonetic) Manning of
19 Fagogogo (phonetic) American Samoa. I am currently in the
20 military serving in the United States Coastguard abroad.

21 I have lived and worked in Europe since July 2013.
22 Due to obligations in my line of work and the timing of
23 events, I am unable to attend this case, this very
24 emotional time in our lives.

25 I only -- I only pray that the professionals that

1 were appointed by our good Lord for this case will do
2 what's just and fair so that my family can get through the
3 tragedy and know that our beloved daughter, sister, niece,
4 and friend is not forgotten.

5 Kesa Aminae (phonetic) is my niece, one of my
6 brother's daughters, who lived with me in Virginia while
7 attending Central Christian College of Bible in Moberly,
8 Montana from 2005 to 2008. I was her home away from home
9 in American -- oh, her home away from home during the
10 summers and school breaks.

11 Kesa, as we all called her, was an adventurous,
12 outgoing, loving, caring, ambitious, conservative,
13 reserved young woman with a big heart.

14 She was respected and loved by so many that has
15 crossed her path with her and especially her supportive
16 friends and loving family.

17 She was willing to help others and never expected
18 anything in return. She is someone that you can count on
19 when needed and a shoulder to lean on in hard times.

20 I recently visited a home for the home-going
21 celebration for one of my siblings. As we passed by the
22 Post Office, I can see my brother and his wife were sad.

23 My sister-in-law, Kesa's mother, said ever since Kesa
24 passed -- words are lightning with respect to the vicious
25 way her daughter was taken. We never come to the Post

1 Office anymore. Words of a grieving mother for a daughter
2 that never missed a special occasion when it comes to her
3 parents. With little or nothing, Kesa makes a point to
4 let her parents and siblings know that she appreciated
5 them.

6 My brother's treasure chest is now missing of his
7 pearls that was carefully chosen for him for his family by
8 God who grew into a fine young woman that he loved and
9 cared for before her life was ended carelessly and
10 selfishly, a treasure that this murderer never groomed, an
11 educated young woman that's murdered.

12 This man never paid a dime to educate, a life that
13 this murderer never contributed in her livelihood and
14 dreams other than abuse, violence, someone that was dear
15 to my family and is now just a memory in the distance.

16 I have faith that the justice system will have sought
17 out the punishment for a murderer who took something that
18 was not his to take. It will give my family solace
19 knowing this monster will never hurt another daughter,
20 friend, or loved one for good.

21 I will continue to pay my taxes to put him in
22 comradery (phonetic) so he will be locked away, so that
23 society can once again be a safe place for our children,
24 and that's from her auntie.

25 And my name is Takohana (phonetic) Butler. I am

1 Kesa's first cousin, and along with my auntie, Kesa was
2 going back and forth in homes. You know, when the
3 military called -- I was also in the military. So when
4 I'm not available to care for her, my auntie, you know,
5 was splitting the responsibility. So she is a very loving
6 person, a kind girl.

7 I remember one incident as soon as we got the call
8 about what happened to her, my kids -- I have three girls,
9 and the oldest asked, "Who is Kesa? Which one is Kesa"
10 because according to my children, all us Samoan folks look
11 alike.

12 So I told my daughter, tried to explain because Kesa
13 and her other sister that was living with me, they're like
14 identical twins. They look just alike.

15 So I remember we went to the amusement park, and she
16 was going down the water slide and into this tank of
17 water. It's very shallow and she drowned.

18 And my girls are like, "I thought all Samoan
19 people" -- because we are people from the ocean -- "I
20 thought all Samoan people could swim."

21 And Kesa said, "No. We need -- I'm a mountain girl.
22 We don't have an ocean. We have the well, you can't swim
23 in a well."

24 So it's something that, you know, my girls think
25 about all the time when they think of Kesa. When I came

1 to pick up her body, I was so emotional.

2 I have spoken words. Being here to represent my
3 family is very hard because I hold back some details. I
4 give them what I think they can handle, and watching what
5 was done to her, looking at everything that was done to
6 her was very hard, Your Honor.

7 The disregard for human life, I couldn't make sense
8 in my head how you can love someone and do this. I
9 wouldn't even do this to an animal. I was so hurt, and in
10 our funerals, in our funerals in Samoa, we don't cremate
11 the body.

12 In our culture, we are find it cruel to cremate, but
13 I'm looking at my cousin. I'm trying to explain to her
14 parents why she can't come home in the condition she was
15 in.

16 Her brothers came down to pick up her body, and her
17 brothers are big boys. They make some big men in here
18 look like midgets. They're big guys.

19 Not only do I have to deal with her parents back
20 home, I have to be the voice of reason for her brothers
21 being here. I have to calm them down. I have to be the
22 buffer between this horrific crime and -- and those who
23 loved Kesa.

24 The day before we left to take her body home, I had
25 went back to her house one last time. Mind you, this is a

1 couple of days after the holidays. In the corner of their
2 small apartment is a box full of gifts, Christmas,
3 wrapped, labeled, a personal note to whoever. Every
4 single person that lived with her parents at the time
5 received something for Christmas. Big or small, they
6 weren't forgotten. That's -- and this is a young lady who
7 works minimum income, yet everybody got something.

8 I look at her living condition. There was no carpet
9 on the floor. She slept on a blow-up bed and yet, she
10 still made time to bless someone, you know, her family
11 with the little that she had.

12 So as I stand before you representing my family --
13 and I -- what broke my heart more than anything is the
14 defendant is Samoan. I didn't expect this out of my own
15 people.

16 We were brought up in a whole different culture, a
17 whole different set of belief, and our boys are brought up
18 to value. The girls are the pupil of their eyes. That's
19 what -- we're brought up.

20 I stand before you almost feeling guilty for feeling
21 sorry for the defendant. I want you to know that I feel
22 like I have contradict myself because the Christian in me
23 wants to love him nonetheless. The cousin in me wants to
24 avenge my cousin's death and the manner of her death.

25 Yes, you definitely deserve the maximum penalty for

1 what you've done. Yes, no doubt, but that's not going to
2 bring her back. It's not going to matter much if you
3 don't learn what you've done is wrong.

4 I see a man before you getting ready to put away 36
5 years of his life. My prayer is you learn to love while
6 you're in prison the right way. Find the man that is
7 inside of you because the one who committed this crime is
8 an insecure little boy who is afraid of letting go.

9 We forgive you, and I don't say that lightly. I do.
10 I honestly do because I try to block the memories of this
11 crime from my head. I try not to think about it because
12 every time I do, it brings back so much pain, and then I
13 lash out at the very same people who try to bring her
14 justice.

15 It's just -- I couldn't organize my thoughts, so I
16 say I don't blame your family, nor does my family hold
17 anyone else accountable for this crime but you.

18 Whatever it is, wherever this brokenness came from,
19 we all get angry. We all get furious. I just pray that
20 you learn. Make something out of yourself when you're in
21 there.

22 There is no such thing as lost cause until you're
23 down in the ground. Return. If you want to make right
24 what you wronged, make a testimony out of this situation
25 that you're going through.

1 And we thank you and your staff for all that you did
2 for this trial date. Thank you for your time.

3 THE COURT: Thank you, Ms. Butler.

4 MS. SIMPSON: Your Honor, that would be all from the
5 State at this time.

6 THE COURT: All right.

7 Ms. Davis?

8 MS. DAVIS: Thank you, Your Honor. May it please the
9 Court.

10 Just to note a little further in terms of his
11 evaluations, we actually had him evaluated privately, as
12 well, by Dr. Knight. She agreed that he was competent.
13 She also agreed with the DMH findings that he had major
14 depressive disorder with psychotic features that included
15 some auditory hallucinations and delusional thinking.

16 Both DMH and our doctor both agreed that he was
17 competent to stand trial. That didn't undermine what
18 happened that day. I think one of the other things that's
19 important is he was -- had been drinking a lot that day.
20 I think that contributed to his judgment.

21 They were having an argument about him accusing her
22 of cheating while he was very intoxicated. In his right
23 state of mind, I hope and he hopes that he would have
24 never done this.

25 He only remembers three to four injuries. He has

1 maintained that always to the first time he talked with
2 the police to everyone that has ever evaluated him, to me,
3 to his prior attorney.

4 He understands that that's not what occurred, and
5 when I told him and when we talked what about all happened
6 to her, you can just see the shock in his face. He just
7 doesn't -- he doesn't have an actual memory of doing all
8 of those things.

9 He knows that he did, and he is standing here today
10 for that reason, to take responsibility because that's all
11 that he has left that he can do at this point.

12 He understands the loss he has caused to his family,
13 more importantly the loss he has caused to her family. He
14 knew that they were a close family. He knew that this was
15 a tragedy to them.

16 He has family, as well, Your Honor. He has his
17 mother, his father, and his sister that live out in
18 California. Because of that distance, they weren't able
19 to be here for him today. He also has a sister that lives
20 here in Sumter, but she has been deployed. So she is not
21 available.

22 He does have a family that now supports him. When
23 this first occurred -- I wasn't his attorney at the time,
24 but my understanding is there was a good deal of time
25 where they were not willing to communicate with him where

1 they couldn't understand or believe that he had done this
2 or that he is responsible for this.

3 I think they have worked themselves through trying to
4 understand and forgive, as well. He has been fortunate in
5 that regard that they have come back in his life.

6 Dr. Knight also believed that he had PTSD from this
7 incident, and I say that in -- to say that that's
8 consistent in her mind with the true remorse that he
9 feels; that because of what happened, he does -- he is
10 sympathetic. He is remorseful. He does feel horribly for
11 what happened. I can't say that from everything we see in
12 this courthouse. I believe that to be very true for him.

13 I know he wants to address Your Honor and the Court,
14 I believe, briefly. I would just ask Your Honor to accept
15 the negotiated sentence.

16 THE COURT: Yes, sir. Is there anything you'd like
17 to tell me?

18 THE DEFENDANT: Yes, Your Honor. First of all, you
19 would like to apologize, Your Honor, and the State, the
20 Solicitor, for -- for everything, especially the victim's
21 family.

22 I know I am responsible for this, but I still love
23 her even though she is not here. She still lives in my
24 heart.

25 Your Honor, I truly want to say sorry to the family

1 and everybody in this court. Thank you, Your Honor.

2 THE COURT: Thank you, Mr. Toese.

3 MS. SIMPSON: Your Honor, just briefly with respect
4 to the independent evaluation, this is -- we weren't aware
5 of any independent evaluation, but it sounds as though the
6 findings were consistent with the competency eval., so I
7 just wanted to note that for the record.

8 THE COURT: Okay.

9 Ms. Butler, let me say this to you: You are carrying
10 a burden beyond that of just a family member who has lost
11 somebody because you are the representative of the family,
12 essentially, in this situation, and you are the
13 communicator with the family in trying to explain
14 something that's going on thousands and thousands of miles
15 away in a different -- different culture and different
16 rules and different regulations and all of those different
17 things.

18 That must be difficult. It would be difficult enough
19 to make the phone call. It would be difficult enough to
20 come pick her up, but having to communicate and explain --
21 you come up here for a meeting. You meet with law
22 enforcement or the prosecutors. They tell you something
23 most average citizens don't even really completely
24 understand those conversations. Then you're forced to
25 relay it to other people and try to make sense of it. So

1 you're carrying a very heavy burden.

2 I just want to say thank you for doing that and for
3 honoring Kesa here today in your words and your letters
4 and everything else. That is an extreme burden that only
5 a very select few people in each family would be able to
6 carry, so I appreciate you doing that and staying with the
7 case.

8 Mr. Toese, you need to be thankful for their
9 forgiveness. That's very rare that we have families in
10 here that can genuinely say that they forgive you in -- in
11 these situations.

12 This is a horrific, horrific case. This is one of
13 the most violent homicides I have seen, and you need to be
14 thankful to your lawyer, to Kesa's family, to the
15 prosecution for the negotiated sentence.

16 Were it left up to my discretion, I would give you
17 more than this due to the extreme violent nature of the
18 case. So you need to be thankful for the heart of the
19 people who have surrounded you in this case and live your
20 life accordingly.

21 The sentence of this Court is that you be committed
22 to the State Department of Corrections for 36 years.
23 Credit for time served. No contact directly or indirectly
24 with the victim's family. Thank you very much.

25 MS. SIMPSON: Thank you, Your Honor.

1 MS. DAVIS: Thank you, Your Honor.

2 (Whereupon, the proceedings were concluded.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of General Sessions for
Richland County, South Carolina, on the 18th day of March,
2015.

January 26th, 2016

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA

County of Richland

FARSI TOESE #363340
 Full name and prison number (if any) of Applicant,

vs.

State of South Carolina
 Name of Respondent.

2015 CP400 7115

In the Court of Common Pleas

JEANETTE W. MCBRIDE
 C.P. & O.S.

2015 NOV 25 PM 11:20

RICHLAND COUNTY
 FILED

**APPLICATION FOR
 POST-CONVICTION RELIEF**

INSTRUCTIONS — READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention LEE - C.I. 990 Wisacky Hwy Bishopville, SC
29010
2. Name and location of Court which imposed sentence Richland County General Sessions
Court 1701 Main St. Columbia SC. 29201
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2013-G8-4002761 Murder 16-03-0010
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) March 18, 2015 36 years
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made

(a) after a plea of guilty yes

(b) after a plea of not guilty N/A

(c) after a plea of nolo contendere N/A

6. Did you appeal from the judgment of conviction or the imposition of sentence?

yes, Counsel filed appeal in defendant's behalf.

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeal

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. May 29, 2015

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Appellate Case No. 2015-000633

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Failure to investigate

(b) Involuntary guilty plea

(c) Ineffective assistance of counsel

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) See attachment

(b) See attachment

(c) See attachment

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? N/A
- (d) any other petitions, motions or applications in this or any other Court?
N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) PC.R. is the proper forum

(b) _____

(c) _____

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? N/A

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Joanna Delaney. Public defenders office. Richland County. 1701 Main St. Columbia, SC 29201
- ii. Jennifer Davis. public defenders office. Richland County. 1710 Main St. Columbia, SC. 29201

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Arraignment

ii. guilty plead

iii. _____

18. State clearly the relief you seek in filing this application.

Vacate Sentence as bias and prejudice. And to rule on each individual issue for preservation for the higher court

19. Are you now under sentence from any other court that you have not challenged?

N/A

STATE OF SOUTH CAROLINA

VERIFICATION

County of _____

I, FAASIN TOESE, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Faasin Toese

SWORN to and subscribed before me this 19th
day of Nov, 20¹⁹ 15.

Donnie Pringle (L.S.)
Notary Public

My Commission Expires: 9/27/2023

RICHLAND COUNTY
 FILED
 2015 NOV 25 PM 11:20
 JEANETTE M. MCBRIDE
 C.C.P. & G.S.

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, FAASIN TOESE, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Faasin Toese
Applicant

SWORN or affirmed to and subscribed before me this

19th day of Nov, 20¹⁹ 15

Donnie Pringle
Notary Public

My Commission Expires 9/27/2023

(A). Applicant was denied the right to effective assistance of counsel guaranteed by the sixth and fourteenth amendments to the United States Constitution and the corresponding provision of the South Carolina Constitution.

1). Ineffective assistance of counsel for failure to seek continuous to better prepare the case.

2). Ineffective assistance of counsel for failure to offer a defense strategy other than a guilty plea.

3). Ineffective assistance of counsel for failure to provide interpreter notwithstanding the defendants' request.

4). Ineffective assistance of counsel for failure to explained or discussed with the defendant any of the elements of the crime charge.

5). Ineffective assistance of counsel for failure to challenge the voluntariness of the defendants' statement to the police.

6). Ineffective assistance of counsel for failure to explained or discussed with the defendant her professional opinion why I should or should not testify.

7). Ineffective assistance of counsel for failure to investigate the possibilities of self-defense and a lesser included offense of voluntary manslaughter.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Faasiu Toese, #363340

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2015-CP-40-07115

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed November 25, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the April 2013 term of the Court of General Sessions for Richland County for Murder (2013-GS-40-02761). Applicant was represented by Jennifer C. Davis, Esq. and Joanna K. Delany, Esq. Applicant pleaded guilty as indicted on March 18, 2015. The Honorable Robert E. Hood sentenced Applicant to thirty-six (36) years imprisonment, pursuant to negotiations.

A Notice of Appeal was filed on Applicant's behalf on March 20, 2015. The South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation on May 29, 2015. A rehearing was denied on February 5, 2016.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's plea hearing, Applicant's records for the Department of Corrections, and Applicant's appellate

records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel, in that;
 - a. "Failure to seek continuous to better prepare the case."
 - b. "Failure to offer a defense strategy other than a guilty plea."
 - c. "Failure to provide interpreter notwithstanding the defendants' request."
 - d. "Failure to explained or discussed with the defendant any of the elements of the crime charge."
 - e. "Failure to challenge the voluntariness of the defendants' statement to the police."
 - f. "Failure to explained or discussed with the defendant her professional opinion why I should or should not testify."
 - g. "Failure to investigate the possibilities of self-defense and a lesser included offense of voluntary manslaughter."

III.

Respondent interprets Applicant's claims as allegations of ineffective assistance of counsel. Respondent contends that Applicant's plea counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such 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. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent therefore requests that this Court convene an evidentiary hearing on the issue of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of

material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VI.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

VII.

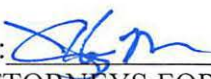
WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

April 27, 2016

STATE OF SOUTH CAROLINA
COUNT OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

FAASIU TOESE, #363340

2015-CP-40-07115

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

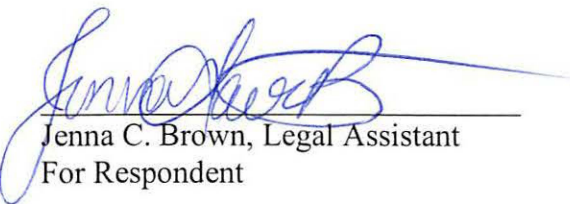
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jonathan D. Waller
Giese Law Firm
1315 Blanding Street
Columbia, SC 29201

DATED this 27th day of April, 2016.


Jenna C. Brown, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2015-CP-40-07115
	)	
FAASIU TOESE,	)	
	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT,	)	

April 1, 2019
Columbia, South Carolina

BEFORE:

THE HONORABLE J. DERHAM COLE, JUDGE.

APPEARANCES:

JONATHAN WALLER, ESQ.
Attorney for the Applicant

LINDSAY MCALLISTER, ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S
INDEX OF WITNESSES:

FAASIU TOESE (through an interpreter)

Direct By Mr. Waller	15
Cross By Ms. Mcallister	32
Redirect By Mr. Waller	36

JENNIFER DAVIS

Direct By Ms. Mcallister	37
Cross By Mr. Waller	48
Redirect By Ms. Mcallister	53

> > > < < <

(No exhibits were introduced)

CERTIFICATE OF REPORTER	55
-----------------------------------	----

1 MS. MCALLISTER: May it please the Court, Your Honor.
2 This is Faasiu Toese vs. the State of South Carolina,
3 2015-CP-40-7115.

4 Your Honor, Mr. Faasiu was indicted in April 2013 by
5 the Richland County grand jury for murder. He was
6 represented on those charges by Jennifer Davis and Joanna
7 Delaney. He pleaded guilty as indicted on March 18th,
8 2015. The Honorable Robert E. Hood sentenced him to 36
9 years imprisonment pursuant to negotiations.

10 A Notice of Appeal was filed on his behalf on
11 March 20th, 2015. The South Carolina Court of Appeals
12 dismissed the appeal for failure to provide a sufficient
13 explanation on May 29th, 2015. Rehearing was denied on
14 February 5th, 2016.

15 He filed this application for post-conviction relief
16 on November 25th, 2015, and Mr. Jonathan Waller has been
17 appointed to represent him in this matter.

18 Your Honor, Mr. Toese and Mr. Waller are present in
19 the courtroom here today, and I will turn it over to
20 Mr. Waller at this time.

21 THE COURT: All right. Mr. Waller.

22 MR. WALLER: Judge, Mr. -- may it please the Court,
23 Your Honor. Judge, Mr. Toese is originally a speaker of
24 the Samoan language. Judge, he requires the assistance of
25 an interpreter. So I guess I would ask if the court would

1 swear the interpreter at this time.

2 THE COURT: Ma'am, do you have a card? Are you a
3 certified interpreter?

4 THE INTERPRETER: In the State of Utah.

5 THE COURT: Do you have that information available
6 for us?

7 THE INTERPRETER: Do I have any information?

8 THE COURT: Yes. Do you have a card or something
9 with your name on it?

10 THE INTERPRETER: I do have a card. I didn't bring
11 my business cards with me, but I am an independent
12 contractor with the court of Utah. I'm a certified Samoan
13 interpreter.

14 THE COURT: Well, if you'll start by telling me what
15 your name is, please.

16 THE INTERPRETER: My name is Seira Moors.

17 THE COURT: Can you spell each of those for us?

18 THE INTERPRETER: S as in Sam, E, Edward, I-R-A and
19 last name is M, Mary, O-O-R-S, Sam.

20 THE COURT: O-O-R?

21 THE INTERPRETER: S.

22 THE COURT: O-O-R-S. All right. And you are from
23 the State of Utah?

24 THE INTERPRETER: Yes, I am.

25 THE COURT: And do you have your certification

1 number?

2 THE INTERPRETER: No, I don't have a certification.
3 I can give you my contact in the State of Utah.

4 THE COURT: All right. What is your contact?

5 THE INTERPRETER: I will have to actually look it up
6 and give you --

7 THE COURT: Well, let me ask you this. You do have
8 some business cards. Where are they?

9 THE INTERPRETER: Well, I have to update my business
10 card because now I'm also licensed to do interpreting for
11 the hospitals. But I take my cards, and that's the reason
12 why I didn't bring any of my cards with me.

13 THE COURT: Well, do you have some anywhere close by,
14 or are they in Utah?

15 THE INTERPRETER: I can give you a contact number for
16 the State of Utah.

17 THE COURT: Well, I'm not going to be doing that. I
18 just wanted your information. You said you had a business
19 card that you needed to update. Where are those?

20 THE INTERPRETER: My business card is actually on my
21 Facebook page, too.

22 THE COURT: Okay. Can you give us a screen shot of
23 it? I don't know anything about that stuff, but can you
24 screen shot it and give it to us or send it to the court
25 reporter or something?

1 COURT REPORTER: She wrote down her name prior.

2 THE INTERPRETER: If you look on the Utah court, you
3 will see there are only three certified interpreters, and
4 I myself am one of them.

5 THE COURT: All right. What does it say on your
6 Facebook page about your credentials?

7 THE INTERPRETER: Registered Samoan court interpreter
8 in Samoan language.

9 THE COURT: All right. Registered court interpreter?

10 THE INTERPRETER: Correct.

11 THE COURT: And who does the registration? Who
12 approves of you?

13 THE INTERPRETER: The State of Utah, the courts.

14 THE COURT: Well, how do you apply? Who do you apply
15 to?

16 THE INTERPRETER: I've been doing this a couple of
17 years.

18 THE COURT: Who did you apply to become --

19 THE INTERPRETER: You go on the Utah court's website
20 and you put in an application. And you go through --
21 there's a coordinator there, the Utah courts, that deals
22 with interpreters. Then you go through a certification,
23 you take an exam and then also a court observation with a
24 Spanish interpreter.

25 We're a rare language. We don't go as far as being

1 certified. We go as far as being registered, which is
2 certified for us, because there's no actual test in our
3 language, just the English test that we have to take, the
4 two-day workshop that we have to and then, also, there's
5 two tests, the basic English tests, including the ethics
6 test for court interpreters.

7 THE COURT: All right. And when were you last
8 certified or registered?

9 THE INTERPRETER: A couple of years ago.

10 THE COURT: And how long does that certification
11 last?

12 THE INTERPRETER: As far as I know, for a while.

13 THE COURT: Do you have to do updated continuing
14 education requirements for certifications?

15 THE INTERPRETER: Yeah. It's -- I can give you the
16 number of a contact, the coordinator for the Utah courts.
17 Her name is Evangelina Burroughs, B-U-R-R-O-U-G-H-S, and
18 her phone number, [REDACTED]-7338.

19 THE COURT: And she is with Utah court system?

20 THE INTERPRETER: Yes, she is.

21 THE COURT: What's your background? How is it that
22 you are competent to interpret the Samoan language?

23 THE INTERPRETER: I was born and raised in Samoa. I
24 served a full-time mission for the LDS Church in Samoa. I
25 was raised in American Samoa, which is U.S. territory and

1 served my mission in the independent Samoa, which is
2 independent. And I graduated from high school, got my
3 Bachelor's in English at Brigham Young, Hawaii, and I also
4 have a Master's Degree from San Diego State in education.

5 THE COURT: All right.

6 SEIRA MOORS, after being duly sworn to
7 interpret as follows:

8 THE COURT: Okay. Thank you, ma'am.

9 All right. Mr. Waller?

10 MR. WALLER: Thank you, Your Honor. Your Honor,
11 Mr. Toese filed an application. I think it's very
12 clear -- if Your Honor has that in front of you, very
13 clear the allegations he is raising. So at this time,
14 Your Honor, we call Faasiu Toese.

15 THE INTERPRETER: Judge, the Defendant would like to
16 ask you a question.

17 THE COURT: Okay. Tell him to tell Mr. Waller first.
18 Tell Mr. Waller first what he wants to ask me.

19 (Pause.)

20 MR. WALLER: Judge, he has asked -- he has a sister
21 that he believes lives in South Carolina, in Sumter. I
22 tried to contact her. I've called her. I've sent
23 letters. I've got no response. He's asking how we can
24 get his sister here essentially.

25 THE COURT: Well, I mean, I have no way. I don't

1 know his sister. But you've made the effort to locate her
2 with the information he has provided you?

3 MR. WALLER: I have, Your Honor.

4 THE COURT: And you've been unable to?

5 MR. WALLER: I have, Your Honor.

6 THE COURT: Okay. Does he have additional
7 information that would help you?

8 MR. WALLER: Judge, he's asking if he can ask you
9 directly. He does speak some English, Judge. He's asking
10 if he can ask you a question.

11 THE COURT: Oh, he certainly can, but I'm not
12 understanding why I flew in an interpreter from Utah out
13 here if he can speak English.

14 MR. WALLER: Judge, he speaks some English. He does
15 not speak fluent English.

16 THE COURT: Well, we'll see.

17 What do you want to ask me?

18 THE APPLICANT: Your Honor, my name is Faasiu Toese.
19 I was born and raised in Samoa, and I moved to this state
20 maybe the end of 2010. I took English in school and
21 stuff.

22 I came here with a little English on me. So I'm not
23 sure what I'm doing, but I want to ask you -- my
24 situation, you know, as far as speaking a little English,
25 my understanding and comprehend [sic] is why I need an

1 interpreter.

2 THE COURT: I understand. That's why she's here.

3 THE APPLICANT: So I was wondering if I can ask you,
4 I went to court back home in Samoa a couple of times.
5 Every time I go to court, I always have an interpreter,
6 you know, translate between me and my lawyer.

7 It's because my lawyer back home is a white person,
8 respectfully. She's from America. She can't -- she don't
9 speak my language. Also, the judge, he's a white person,
10 don't speak my language.

11 So every time I go to court, I always have an
12 interpreter. I had a CDV 2012 over here, Columbia, and I
13 didn't understand what my lawyer was telling me, so I told
14 him I don't understand. And he asked if I have anybody,
15 family that can help me, so I told him my sister. So I
16 want to get my sister. My sister would help me interpret
17 between me and my lawyer.

18 THE COURT: Well, we have an interpreter here now.
19 That's why Ms. Moors is here.

20 THE APPLICANT: That's why I want to ask you because
21 I don't know if I'm entitled to have my sister, to put her
22 testimony on the record, you know, as far as helping me
23 with the language stuff.

24 THE COURT: Well, you mean you're asking if your
25 sister can be here to help interpret?

1 THE APPLICANT: No. I'm saying can she talk about --
2 like, she was interpreter between me and my lawyer. What
3 I'm trying to say, Your Honor, is this is the first time I
4 had a conversation with a lawyer without an interpreter.

5 As far as Ms. Jennifer Davis, when I had her, I
6 remember asking her for an interpreter, and I remember her
7 response saying why I needed an interpreter. It seems
8 like I understand everything she said.

9 So most of the time, I don't have the English word on
10 me to explain what I want to say to the lawyer, so that's
11 why sometimes lawyers think I understand.

12 THE COURT: Well, let me ask you this, do you need
13 some additional time to talk with Mr. Waller with the
14 interpreter about your case?

15 THE APPLICANT: Well, I don't know. I think I wanted
16 to ask you like if, if it's possible for -- if I can get
17 my witness or not to...

18 THE COURT: Who's your witness?

19 THE APPLICANT: Like I had a couple more can testify
20 to different part of my case.

21 THE COURT: And did you give those names to
22 Mr. Waller?

23 THE APPLICANT: Yes, I did. I have a copy of a
24 letter on me. I asked him about it, so...

25 THE COURT: Did you give him contact information for

1 those witnesses?

2 THE APPLICANT: Yeah, I gave him the name. I think
3 a -- a lot of my witnesses, they worked at the place I
4 worked at, so, you know...

5 THE COURT: All right.

6 THE APPLICANT: I did give him the name. And some of
7 them, the phone numbers don't work no more.

8 THE COURT: All right. Well, that can be an issue.

9 Mr. Waller, what about the witnesses?

10 MR. WALLER: Judge, every witness he gave me, I
11 attempted to contact if I had contact information.

12 Judge, some people, he wasn't able to give me a full
13 name, it was a first name, some just a description of a
14 coworker or neighbor that he didn't know his name.

15 Judge, he did give me a couple people's name and
16 telephone number. I tried to contact them. One, in
17 particular, the phone number had been disconnected. I had
18 no additional information.

19 They're not unusual names, so doing a search yields
20 30 in Columbia. So it doesn't -- I was unable to find any
21 of the names or contact any of the people. Judge, we have
22 spoken extensively about these people he asked me to
23 contact and what their usefulness in this case would be.
24 I did my best to contact them.

25 Judge, I think his sister -- his concern with his

1 sister is more background of previous cases and how he
2 needed assistance in reviewing materials and understanding
3 what his case was about and he did not have it in this
4 case.

5 He did not have his sister or he didn't have the
6 services of an interpreter in the case we're here for
7 today, or to discuss today, not the PCR case. I met with
8 him at Lee Correctional Institution. We did have an
9 interpreter on the telephone with us.

10 I was there present with him. We had an interpreter,
11 so we've been able to communicate well, but I think the
12 sister is more background information about his previous
13 language barriers, Judge, is my understanding.

14 THE COURT: And, of course, he can provide that
15 information.

16 MR. WALLER: Correct, Your Honor.

17 THE COURT: Okay. Mr. Toese, anything else you need
18 tell me before we commence the hearing?

19 MR. WALLER: Your Honor, my client has requested that
20 I move for a continuance.

21 THE COURT: And the grounds will be what?

22 MR. WALLER: Your Honor, I'm guessing he needs
23 additional time to prepare for his case.

24 THE COURT: Do you perceive any additional time to be
25 of any value to continue the case, Mr. Waller?

1 MR. WALLER: No, Your Honor, I don't.

2 THE COURT: All right. The motion for a continuance
3 is denied.

4 MR. WALLER: Thank you. May it please the Court,
5 Your Honor. I will call Mr. Faasiu Toese.

6 THE COURT: Mr. Waller, as he comes up, tell me,
7 please, what the grounds are that you intend to proceed
8 on.

9 MR. WALLER: Yes, sir, Your Honor. Your Honor, the
10 Applicant has raised several grounds of ineffective
11 assistance of counsel. Your Honor, the first is failure
12 to seek a continuance to better prepare the case, lack of
13 investigation allegation, an allegation that counsel was
14 ineffective for failure to offer a defense strategy other
15 than a guilty plea, an allegation that -- an allegation
16 regarding the interpreter, that counsel did not secure the
17 services of an interpreter despite the Applicant or the
18 defendant at times' request.

19 THE COURT: Is that prior to the disposition of the
20 case?

21 MR. WALLER: Yes, Your Honor, in the criminal case.
22 An allegation that counsel was ineffective for failure to
23 explain the elements of the charge, an allegation of
24 ineffective assistance of counsel for counsel's failure to
25 challenge the voluntariness of the Defendant's statement

1 to police, an allegation of ineffective assistance of
2 counsel for failure to explain the Defendant's -- to where
3 he comprehended his right to testify or not, ineffective
4 assistance of counsel for failure to investigate and
5 develop a self-defense and/or the lesser included offense
6 of voluntary manslaughter.

7 THE COURT: All right. Is that it?

8 MR. WALLER: That's it, Your Honor.

9 THE COURT: Okay.

10 FAASIU TOESE, after being duly sworn,
11 testified through an interpreter as follows:

12 MR. WALLER: May it please the Court, Your Honor.

13 DIRECT EXAMINATION (through interpreter):

14 BY MR. WALLER:

15 Q Good morning, Mr. Toese. How are you?

16 A Good.

17 Q Mr. Toese, where are you from?

18 A Samoa.

19 Q And where were you born?

20 A Samoa.

21 Q When?

22 A [REDACTED] 1986.

23 Q Okay. And how long did you live in Samoa?

24 A My whole life, born and raised.

25 Q When did you move to America?

- 1 A The end of 2010.
- 2 Q Okay.
- 3 A The end of 2010.
- 4 Q From 1986 until 2010, what language did you speak?
- 5 A Samoan.
- 6 Q Were you taught English or anything?
- 7 A In school.
- 8 Q In school, you were taught English?
- 9 A Yes.
- 10 Q How did you do in those English classes?
- 11 A Not good.
- 12 Q Okay. How many English classes did you take?
- 13 A Once a year.
- 14 Q Okay. At home, did your family speak Samoan or did
- 15 they speak English?
- 16 A Samoan.
- 17 Q Okay. Your friends or other relatives, when you
- 18 would go to their homes, did they speak English or Samoan?
- 19 A Samoan.
- 20 Q Okay. When you would go to the mall or to church or
- 21 to wherever, what language was spoken?
- 22 A Samoan.
- 23 Q Okay. Outside of the once-a-year class you took in
- 24 school, did you speak English at all?
- 25 A No.

1 Q In your day-to-day life, did your friends or family
2 speak English?

3 A No.

4 Q You watched television, what language was the
5 television?

6 A English.

7 Q Okay. Did you watch a lot of television?

8 A At times, sometimes.

9 Q Okay. When you came to the United States in 2010,
10 where did you go?

11 A I stayed in California with a family.

12 Q Okay. Did you ever go to Hawaii?

13 A When it was in 2004, I went to Hawaii.

14 Q Okay. When you were in Hawaii, what language was
15 spoken where you were?

16 A A lot of times, Samoan.

17 Q When you said you came to California, was it with
18 your family or you lived with a different family?

19 A Relative, my family.

20 Q Okay. In that house, what language did y'all speak?

21 A Samoan.

22 Q Okay. How did you end up in South Carolina?

23 A My sister was in the Army, and so she wanted us to
24 come here to South Carolina and work and live with her.

25 Q Okay. When you first came here, how much English did

1 you speak? Were you able to go to the store and be okay?
2 Or in your words, how much English did you speak and
3 understand when you first came to South Carolina?

4 A When I would come across people that -- who spoke
5 Samoan, it was mostly all done in Samoan, but I tried with
6 other people that didn't.

7 Q You mentioned before to the judge that you had
8 previously needed the services of an interpreter for a
9 court case; is that right?

10 A Yes.

11 Q Okay. And your -- did you have a certified
12 interpreter or was it your sister helped you? Or how many
13 times have you needed interpreters?

14 A Every time I went to court, even when I was in Samoa.

15 Q All right. Every time you've been to court, you've
16 needed an interpreter?

17 A Every time I go to court, I should get an
18 interpreter.

19 Q Okay. When the incident we're talking about here
20 that took place in 2013, did you have an interpreter at
21 all throughout that case, the criminal case that we're
22 here about today?

23 A No.

24 Q At that time, did you speak some English?

25 A Very little English.

1 Q Okay. And just so we're clear, you -- in the nine
2 years that you've been in the United States, you have
3 learned some English; is that right?

4 A Yes.

5 Q You and I have spoken in English; is that right?

6 A Yes.

7 Q But back in 2013, your English is not what it is
8 today; is that right?

9 A Yes.

10 Q All right. And when you and I have spoken, did we
11 use an interpreter before for you to understand our
12 conversation?

13 A Ask the question again.

14 Q When you and I met at Lee Correctional Institution,
15 did we have the services of an interpreter by the
16 telephone so that you and I could better communicate?

17 (There was no response).

18 (There was a discussion between the Applicant and the
19 interpreter.)

20 THE INTERPRETER: Counsel -- this is the interpreter
21 speaking. I'm just going to ask the question again.

22 (Pause.)

23 (Interpreting)

24 When you would come to visit me, there was time there
25 was an interpreter, and other times, there wasn't an

1 interpreter and they tried to get ahold of one.

2 BY MR. WALLER:

3 Q All right. Okay. But we didn't need an
4 interpreter -- one time we met, we did have an
5 interpreter; is that right?

6 A Yes.

7 Q And were there things that you needed help from the
8 interpreter to understand what I was saying during that
9 meeting?

10 A Yes.

11 Q That meeting took place towards the end of last year;
12 is that right, in August of last year?

13 A I don't remember.

14 Q Okay. But it was a long time after the incident took
15 place, January 1st of 2013; is that right?

16 A Yes.

17 Q Your English had gotten better since then; is that
18 right?

19 A Yes, because in prison nobody speaks my language, so
20 I have to learn English. That's how I'm able to get by.

21 Q But even several years later, you still had
22 difficulties understanding?

23 MS. MCALLISTER: Your Honor, I think this question
24 has been asked multiple times and answered.

25 MR. WALLER: I'll move on, Your Honor.

1 BY MR. WALLER:

2 Q Mr. Toese, when you were -- when you were appointed
3 an attorney in your criminal case, did you ever discuss
4 with them getting the services of an interpreter?

5 A One of the very first lawyers that I met with, a
6 Joanna Delaney, I did request that I needed an interpreter
7 and she said that she was going to --

8 MS. MCALLISTER: I'm going to object to whatever was
9 said.

10 THE COURT: Who is --

11 MR. WALLER: It's his counsel at the public
12 defender's office prior to Ms. Davis taking over the case
13 for whatever reason.

14 THE COURT: Okay. Overruled.

15 BY MR. WALLER:

16 Q All right. You can continue.

17 A When I first came in contact with Jennifer Davis, I
18 did request that I needed an interpreter. So she asked
19 why I needed an interpreter because she thought that I was
20 fine because I was able to speak, you know, English like I
21 understood everything that was said in our conversation.

22 Q Okay. Did you talk to Ms. Delaney or Ms. Davis about
23 the statement that you gave to law enforcement?

24 A Yes.

25 Q What did you tell them about how your statement was

1 taken from you?

2 A I tried to tell them what happened, what had happened
3 from the beginning because I didn't have enough English
4 words at the time to express what I wanted to say. There
5 were some factors involved in me trying to express myself
6 because of the barrier, the language barrier. I was
7 unable to really express what I wanted on the report to
8 the police and to my lawyers.

9 Q Okay. Did -- when you gave your statement to law
10 enforcement, were you read your rights?

11 A I remember the first time I spoke to the officer.
12 First time I came in contact with the officer, they kept
13 asking me questions. I was telling them what happened and
14 before I signed an affidavit of my rights. It was after
15 the questioning that then they read me my rights.

16 Q Okay. So you started speaking to law enforcement
17 prior to them reading you your rights?

18 A Yes.

19 Q Okay. Did you start speaking to them before your
20 written statement begin?

21 A This is what I wanted to express to my lawyer that
22 the statement that was written was not written by me. It
23 was written by police officer.

24 Q Okay. Were you able to express that to your lawyer?

25 A I tried, but I wasn't sure if my lawyer understood my

1 English.

2 Q Okay. You did try to express that, but you don't
3 know if you were able to?

4 A I did try, but I wasn't sure that they understood my
5 English.

6 Q Okay. Did you and your lawyer discuss any videos
7 that might have existed?

8 A I don't remember talking to the lawyer about any
9 videos.

10 Q Okay. Did you talk to your lawyer about your cell
11 phone?

12 A Before I spoke to my lawyer, I did not know my rights
13 before I spoke to my lawyer and then, also, talking about
14 the videos, you know, that's used for evidence that I
15 could have given.

16 Q Okay. Let me ask you this --

17 MS. MCALLISTER: I'm sorry, I missed that last part.
18 Can you repeat that last part? Your interpretation, I
19 missed that.

20 THE INTERPRETER: The first time before I spoke to
21 the lawyer, I was not aware of my rights and that I was
22 able to produce the videos that I had.

23 BY MR. WALLER:

24 Q When you were read your rights, what language were
25 the rights read to you, if you recall?

1 A They were speaking English to me.

2 Q Okay. When you spoke to law enforcement, were you
3 intoxicated?

4 A I was intoxicated.

5 Q Did you and your lawyer discuss that you were
6 intoxicated when you spoke with law enforcement?

7 A I'm not really sure if my lawyer knew that I was
8 intoxicated.

9 Q How does that affect your ability to understand and
10 comprehend English if you're intoxicated?

11 A Yes, a lot of times when I'm drunk, people can take
12 advantage of me and I would, you know -- they would take
13 advantage of me.

14 Q Okay. How many times do you think you met with
15 Ms. Davis, Jennifer Davis?

16 A I'm not really sure, but I'm thinking three, four
17 times.

18 Q Do you recall how long each of the meetings lasted,
19 approximately?

20 A Not really accurate to be sure, but about sometimes
21 30 minutes.

22 Q Okay. In those 30 minutes, or what you believed
23 approximately 30 minutes, were y'all able to communicate
24 effectively?

25 A No, not really. There are a lot of times that I had

1 difficulty with my lawyer, especially expressing what I
2 wanted my lawyer to do or things that needed to be done
3 with my case.

4 Q Okay. When you came to the United States and were
5 learning, still learning English, is it easier for you to
6 understand or to speak English?

7 A Whether it was speaking or trying to understand, it
8 was both a challenge. Originally, it wasn't easy.

9 Q Did you provide Ms. Davis with any information or any
10 witnesses you wanted her to talk to?

11 A The challenge was that I didn't think that the lawyer
12 and I communicated effectively. First of all, because of
13 the language barrier and there were things I wanted to ask
14 the lawyer, which I didn't have enough words to express
15 regarding the case and how the case should go about that.

16 Q Did y'all discuss self-defense at all?

17 A I think the biggest challenge with that case is that
18 I really don't have an understanding of my constitutional
19 rights here and also my rights as a resident here in South
20 Carolina. That's the biggest challenge that I have.

21 Q What did you tell Ms. Davis took place during the
22 incident?

23 A When I came into -- when I went into jail, when I
24 went into jail, the only thing I can recollect was the
25 statement, my statement that was written by the police

1 officer.

2 Q Okay. Did you and Ms. Davis ever discuss going to
3 trial?

4 A I never -- I never heard her say anything about
5 whether we were going to trial or what to prepare for
6 going to trial.

7 Q Okay. Did y'all discuss -- did she explain the
8 charge of murder, the elements of murder?

9 (There was no response).

10 (The interpreter and Applicant had a discussion.)

11 THE INTERPRETER: Counsel, I'm going to ask the
12 question one more time.

13 (Pause).

14 THE WITNESS: No.

15 BY MR. WALLER:

16 Q Did you understand what the State would have -- what
17 the State of South Carolina would have to prove in order
18 for you to be found guilty of murder?

19 A No.

20 Q What did you and Ms. Davis talk about during your
21 meetings then?

22 A Nothing really pertaining to the trial or the case.

23 Q Okay. You have raised an allegation that your lawyer
24 did not discuss with you whether or not you should testify
25 or not at a trial?

1 A Can you ask the question one more time?

2 Q In your application, you have alleged that your
3 lawyer was ineffective for not discussing with you whether
4 or not you should testify at a trial?

5 A Yes.

6 Q Can you repeat that, I'm sorry?

7 THE INTERPRETER: He said, yes, she was.

8 BY MR. WALLER:

9 Q Okay. If you and Ms. Davis did not discuss going to
10 trial, where were you going to testify?

11 THE INTERPRETER: Did you say where?

12 MR. WALLER: Yes.

13 (Interpreting)

14 THE WITNESS: One thing I know is that the statement
15 that was supposed to be mine written by the police officer
16 is not true.

17 BY MR. WALLER:

18 Q Okay. Was your case scheduled for trial?

19 A Yes. I remember that I was supposed to have a trial.

20 Q Okay. Did you and Ms. Davis discuss whether you
21 should testify if your case got to that trial?

22 THE INTERPRETER: Counsel, could you ask that
23 question one more time?

24 BY MR. WALLER:

25 Q Did you and Ms. Davis discuss whether or not you

1 should testify if your case went to trial?

2 A No.

3 Q Did you and Ms. Davis discuss any possible defenses
4 that you might have?

5 A No.

6 Q What did she tell you about your case?

7 A All I know is that I never heard her mention anything
8 about any defenses or how to prep for, you know, the trial
9 before it were to happen.

10 Q Okay. What did she tell you?

11 A She didn't say much, but the only thing she said was
12 that I was convicted of manslaughter and that I was
13 looking at staying in prison for life.

14 Q Okay. How did you end up pleading guilty?

15 (There was a discussion between the interpreter and
16 the Applicant.)

17 THE INTERPRETER: Counsel, can you just ask the
18 question and have the defendant answer according to the
19 question?

20 MS. MCALLISTER: Wait, I'm sorry. I think she needs
21 to say what he said first, and then she can re-ask the
22 question.

23 THE INTERPRETER: Just going off intentions. He's
24 not really answering the question. The defendant is just
25 saying that he wasn't really represented, didn't really

1 understand what was going on, but the question that
2 counsel had asked -- so I'm just trying to get to the
3 answer to that.

4 THE COURT: Ask it again.

5 BY MR. WALLER:

6 Q Okay. How did you end up pleading guilty?

7 A I signed an offer based on a suggestion by the
8 lawyer.

9 Q Okay. Did you and Ms. Davis ever discuss trying to
10 seek a continuance to continue to prepare the case?

11 A No.

12 Q Mr. Toese, that's all the questions that I have for
13 you. Is there anything you think I have left out that
14 Judge Cole needs to be aware of in Ms. Davis'
15 representation of you?

16 A Yes.

17 Q (Indicating.)

18 A I want to put this on record. A lot of things have
19 happened from the beginning when I had my first lawyer,
20 Joanna Delaney. She filed the motion for a Rule 5 motion.

21 MS. MCALLISTER: I'm sorry, I can't hear you.

22 THE INTERPRETER: Rule 5 motion.

23 MS. MCALLISTER: Oh.

24 (Interpreting)

25 THE WITNESS: This is the reply from the court. I

1 want to put this on record that my lawyer filed that
2 motion, motion to compel discovery and disclosure of
3 evidence.

4 BY MR. WALLER:

5 Q Okay. Let me ask the question. To your
6 understanding, your lawyer filed a motion to compel
7 discovery, correct?

8 A I didn't understand it at the time, but when I went
9 to jail and I studied it, now I understand what it is.

10 Q Okay. But that's what was filed; is that right?

11 A Yes.

12 Q And that was filed by Joanna Delaney?

13 A Yes.

14 Q Okay. Did you and Ms. Delaney or you and Ms. Davis
15 ever talk about the outcome of that?

16 A No.

17 Q Do you know if there was ever a hearing developed
18 from the motion?

19 A No.

20 Q Do you know if the State ever provided the
21 information that was demanded in that motion?

22 A Not everything.

23 Q Not everything. Do you not know if everything was
24 provided or do you know that not everything was provided?

25 A I know not everything.

1 Q So your understanding that motion is not complied
2 with?

3 MS. MCALLISTER: Your Honor, I just have an
4 objection. There's no allegation in -- there is nothing
5 in his allegations about a Rule 5 violation or a Brady
6 violation. So I'm going to object to continuing this line
7 of questioning.

8 MR. WALLER: Judge, he made an allegation of lack of
9 investigation being produced. I think that is certainly
10 part of it.

11 THE COURT: Is there an allegation material was not
12 provided?

13 MR. WALLER: There was not one in his affidavit, Your
14 Honor.

15 THE COURT: Well, are you aware? Do you have
16 knowledge of the State's failure to comply with Rule 5?

17 MR. WALLER: I don't have any knowledge that Rule 5
18 was not complied with.

19 THE COURT: All right. Okay. Well, then let's go on
20 to something else.

21 BY MR. WALLER:

22 Q Mr. Toese, outside of the motion to compel, is there
23 anything else that you need the judge to be aware of Ms.
24 Davis' representation?

25 A Can I add this to my record, the application?

1 Q Mr. Toese, you can't ask questions. Anything that
2 was filed with the Clerk is part of the record.

3 MR. WALLER: I don't have any further questions.
4 Please answer any questions Mr. McAllister has.

5 CROSS-EXAMINATION (through interpreter):

6 BY MS. MCALLISTER:

7 Q Mr. Toese, who filed this application?

8 A Me.

9 Q Did you write the application?

10 A With some of my friends in jail, with their help.

11 Q Okay. Is it actually your handwriting?

12 A Yes.

13 Q Those friends in jail that helped you file this
14 application, did you speak English with them to tell them
15 or Samoan?

16 A Broken English.

17 Q Do you recall going in front of the judge and
18 entering this guilty plea?

19 A Yes.

20 Q Do you recall answering questions that the judge
21 asked you?

22 A Yes.

23 Q You were able to understand the questions that the
24 judge was asking, correct?

25 A I didn't understand everything.

1 Q At any point, did you tell the judge during your plea
2 that you didn't understand something he was asking you?

3 THE INTERPRETER: Counsel, let me just ask the
4 question again. That way, he answers the question as
5 asked.

6 MS. MCALLISTER: Okay. Can you put on the record
7 what he just said and then re-ask the question?

8 THE INTERPRETER: He was just saying when he goes to
9 jail -- goes to court, he was thinking back to when he was
10 in Samoa.

11 BY MS. MCALLISTER:

12 Q Okay. So my question was, did you ever tell the
13 judge in this plea hearing that you didn't understand
14 something he was asking you?

15 A I couldn't.

16 (Pause.)

17 I didn't know. I didn't know that I had a right to
18 question the judge.

19 THE COURT: Re-ask the question. He didn't
20 understand the question.

21 BY MS. MCALLISTER:

22 Q Okay. My question is, you testified just a minute
23 ago that you didn't understand everything that the judge
24 was asking. Did you ever let the judge know that you
25 didn't understand?

1 A I couldn't say anything to the judge if I did not
2 know my rights, that one part of my right is that I was
3 able to ask a question to the judge.

4 Q Did you ever let Ms. Davis know during the plea that
5 there was something you didn't understand?

6 A All I said to her was that I needed an interpreter.

7 Q Did you say that at the plea during the plea?

8 A I didn't know what else to say to the lawyer.

9 Q So when you asked Ms. Davis for an interpreter or
10 told her take a look at that you needed help, was that on
11 the day of the plea?

12 A No, it was not on the day of the plea.

13 Q When was it?

14 A When she came to release me from the county jail --
15 oh, when she came to visit with me at the county.

16 Q The judge during the plea asked you questions in
17 English, correct?

18 A Yes.

19 Q And you answered him in English, correct?

20 A Yes.

21 Q At the time in 2013, did you know how to tell someone
22 that you needed an interpreter?

23 A I was not in the right frame of mind. I didn't know
24 how to begin or how to express myself at the time.

25 Q I think you testified you came to California in 2010,

1 when did you come to South Carolina?

2 A I really don't remember what year, but I think
3 sometime towards the end of 2011.

4 Q And when you came to South Carolina, were you working
5 here?

6 A Three or four months later.

7 Q Okay. It took three or four months to find a job?

8 A Yes.

9 Q Okay. And then once you found a job, you worked up
10 until the time of this incident in 2013; is that correct?

11 A Yes.

12 Q Did you speak English at your job?

13 A Broken English.

14 Q Where was the job?

15 A I first started -- when I first came, I worked at
16 Harbison, a store on Harbison Boulevard six months. Then
17 after six months, I worked at another store on Two Notch
18 Road.

19 Q Two Notch Road. What kind of store was that?

20 A Wal-Mart.

21 Q Wal-Mart?

22 A Retail.

23 Q You testified that you and Ms. Davis did not really
24 discuss taking this case to trial; is that correct?

25 A Yeah, we did not have a discussion.

1 Q Okay. You also testified that you remembered that
2 this case was scheduled for trial, though. How did you
3 know if you and Ms. Davis had never spoke about that?

4 A The lawyer did tell me that I was scheduled for
5 trial, but there are a lot of things about the trial that
6 I didn't have an understanding about until I went to the
7 jail.

8 (Pause).

9 THE INTERPRETER: Your Honor, may I please get my
10 water?

11 THE COURT: Sure.

12 MS. MCALLISTER: Your Honor, I think that's all the
13 questions I have.

14 MR. WALLER: I just have one follow-up question,
15 Judge.

16 REDIRECT EXAMINATION (through interpreter):

17 BY MR. WALLER:

18 Q What did you do at Wal-Mart? What was your job at
19 Wal-Mart?

20 A Stocker.

21 Q You weren't a cashier or interacting with customers?

22 THE INTERPRETER: What was the question?

23 BY MR. WALLER:

24 Q He wasn't a cashier or interacting with customers.

25 A Not really.

1 MR. WALLER: Nothing further, thank you.

2 THE COURT: You may step down. We'll take ten
3 minutes.

4 MR. WALLER: Thank you.

5 (WHEREUPON, a short break was taken.)

6 THE COURT: Okay.

7 MR. WALLER: Nothing further from the Applicant.

8 THE COURT: All right. Counsel.

9 MS. MCALLISTER: Thank you, Your Honor. The State
10 calls Jennifer Davis.

11 THE COURT: Okay.

12 JENNIFER DAVIS, after being duly
13 sworn, testified as follows:

14 THE COURT: All right. Thank you. Be seated.

15 DIRECT EXAMINATION:

16 BY MS. MCALLISTER:

17 Q Ms. Davis, where do you currently work?

18 A The Richland County Public Defender's office.

19 Q And how long have you been there?

20 A Going on 13 years.

21 Q Were you appointed to Mr. Toese's case as part of
22 your employment with the PD's office?

23 A I was eventually. Joanna Delaney represented him
24 upon his arrest until January of 2015, and then I got it
25 when she left our office for a new job.

1 Q Okay. So you took over in January 2015 and he
2 pleaded guilty in March of 2015, correct?

3 A Correct, but I was second seat on the case much
4 earlier.

5 Q Okay. So how long total had you -- were you on the
6 case with Mr. Toese?

7 A I think from my notes, she put me on it around March
8 of 2014.

9 Q Okay. So approximately one year?

10 A Yes.

11 Q Do you recall how many times you met with Mr. Toese?

12 A I know I met with him once with Ms. Delaney, I think
13 it was in August of 2014, and then on my own, I met with
14 him six to seven times between January and March after she
15 left.

16 Q During those meetings, were you speaking English with
17 Mr. Toese?

18 A Yes.

19 Q Did Mr. Toese ever indicated to you that he needed an
20 interpreter?

21 A He did not.

22 Q Did he ever indicate to you that he didn't understand
23 something you were explaining?

24 A He did in terms of questions on legal concepts or
25 about what may happen, but never in terms of not being

1 able to understand the language.

2 Q Did you feel like he was able to help you prepare the
3 case?

4 A Yes.

5 Q Could you just briefly kind of summarize what the
6 State's case was?

7 A The allegation was that he killed his girlfriend.
8 That there had been some sort of argument. She ended up
9 with multiple stab wounds. He eventually calls 9-1-1 and
10 then they find her in his vehicle. And then they
11 interview him after that.

12 Q Okay. So he was actually the one who called 9-1-1 to
13 report this, correct?

14 A Yes.

15 Q And he initially told them that this was a suicide,
16 correct?

17 A I think there was some initial, yes.

18 Q Okay. And you mentioned that he gave a statement to
19 police eventually admitting that he had stabbed her,
20 correct?

21 A The police typed up a statement, yes, saying that he
22 admitted to his involvement. But he did give some details
23 as to how the fight happened and everything.

24 Q Were you able to discuss that statement with him?

25 A We did.

1 Q You were here in the courtroom earlier, correct?

2 A Yes.

3 Q And you heard him testify that the statement was --
4 that law enforcement -- it was written by law enforcement
5 and it wasn't what he said?

6 A Yes.

7 Q Was he able to convey that to you?

8 A Yeah, it was actually typed up, but yes, he conveyed
9 anything -- we discussed the statement in general multiple
10 times.

11 Q So you were aware that law enforcement typed it up
12 for him?

13 A Well, yes, because, I mean, it's a typed statement.

14 Q Okay.

15 A So he would not have been able to do that.

16 Q Okay. Did he ever tell you that he wanted you to
17 challenge that statement as not being a voluntary
18 statement?

19 A There were aspects of the statement that what he says
20 happened were different than what he says was in the
21 statement itself, just in terms of what started when,
22 things of that nature. Had we proceeded to trial and
23 there were any grounds, we certainly could have challenged
24 that.

25 Q And did you explain all of that to him? That he

1 would -- did you explain to him that if you proceeded to
2 trial you would be able to challenge some of those things
3 that he brought up to you?

4 A I didn't see in my notes specifically a Denno
5 hearing, but, certainly, I have in my notes that we
6 discussed pretrial matters, what it would look like, what
7 the State could do, what we could do.

8 Q Okay. Did you feel that he understand the
9 conversation with you?

10 A I did. We did end up having him evaluated twice
11 because of his mental health history, so there were
12 questions in that regard, at least, that led us to two
13 evaluations.

14 Q In terms of his ability to communicate with you, did
15 you ever feel like there was a time that he was trying to
16 communicate something to you that you needed to know to
17 prepare his case that he was not able to get across?

18 A I think we had a good picture of what his concerns
19 were, what he said happened. Like I said, the concerns we
20 had in terms of any understanding or concerns in that
21 regard were what led to us getting him evaluated for
22 competency.

23 Q So your only concerns with him had to do with his
24 mental health, not with his ability to understand the
25 legal conversations that you had?

1 A From my perspective at the time, yes.

2 Q Did you explain to him his various options in terms
3 of having a trial and what he would be able to do in a
4 trial?

5 A Yes.

6 Q Did you -- I'm sorry, let me start over, did he ever
7 give you any witnesses or defenses or leads to
8 investigate?

9 A I know -- well, in terms of defenses, we talked at
10 length about self-defense, voluntary manslaughter. He had
11 mentioned accident at one point. So we were always having
12 conversations about those and how they would work and what
13 we would try to do at trial.

14 Q You said you discussed self-defense with him?

15 A Yes.

16 Q And you discussed what he said happened that night
17 and whether or not that would legally amount to a
18 self-defense defense?

19 A Right.

20 Q Did you feel he understood that conversation?

21 A As far as I knew, yes. He would ask relevant
22 questions.

23 Q Okay. And you also discussed with him the fact that
24 potentially there could be a lesser included offense of
25 voluntary manslaughter?

1 A Yes.

2 Q And you said he mentioned accident at one point?

3 A Yes.

4 Q Okay. So he was able to understand enough to convey
5 to you that he thought there might be a defense of
6 accident?

7 A I mean, I guess, I don't know what he meant when he
8 was saying it if he knew it was an actual defense, but he
9 asked about could this be an accident, yes.

10 Q Okay. You felt he was able to understand all of
11 those conversations with you?

12 A I did.

13 Q There's been an allegation that you should have
14 sought a continuance to better prepare this case. Can you
15 talk just a little bit about kind of how the plea came to
16 be in the first place and what your discussions with Mr.
17 Toese were about that?

18 A Sure. The trial initially -- there may have been a
19 much earlier trial date. I don't remember when
20 Ms. Delaney had the case only. I know initially it had
21 also been set for trial February 2nd of 2015 and that she
22 knew she was leaving the office a few weeks in advance.
23 And I don't remember now if it was a status conference or
24 what, but that date did get moved because she was leaving
25 and the case was going to come to me. And then, I don't

1 remember if it was formally noticed for March 23rd of that
2 year, but I know that there was going to be a new pending
3 trial date.

4 In terms of the plea offer, I began discussing that
5 with him of what he would rather do in terms of plea
6 versus trial. I think, generally, all along, if there had
7 not been an offer, the plan was to proceed with trial.
8 The solicitor made an offer of, I think at one point a cap
9 of 40 eventually. He had asked about an offer of ten to
10 15. And then went back and forth to the solicitor and
11 they eventually offered a negotiated 36.

12 Q So the eventual offer that was accepted was that
13 negotiated 36 years?

14 A Yes.

15 Q Did you explain to him what that meant, the fact that
16 the offer was negotiated?

17 A Yes.

18 Q And were you able to have an intelligent conversation
19 with him about that?

20 A As far as I knew, he understood what his options
21 were, yes.

22 Q And whose discussion was it for him to enter into the
23 guilty plea?

24 A It was his decision. We discussed that. He asked
25 about an appeal, what that would mean. So we discussed

1 that before and after the plea.

2 Q So you were actually the attorney who entered the
3 guilty plea with him, correct?

4 A Yes.

5 Q On the day of the guilty plea, did he ever tell you
6 he didn't understand something that was happening?

7 A No.

8 Q You were there to hear the colloquy between your
9 client and the judge, correct?

10 A Yes.

11 Q Did it seem like he was able to respond appropriately
12 to the judge's questions.

13 A Yes.

14 Q Was there ever any part during the plea colloquy that
15 he let you know there was something he didn't understand?

16 A He did not.

17 Q If you had felt Mr. Toese didn't understand
18 something, what would you have done?

19 A I mean, if it had crossed my mind, obviously, we
20 would have attempted to get an interpreter.

21 Q And to be clear, it didn't cross your mind because he
22 was able to help you prepare the case and based on your
23 interactions with him, he seemed to understand what was
24 going on without needing an interpreter?

25 A Yeah. I mean, when I met with him -- nothing from

1 Ms. Delaney's interactions, she didn't lead me to believe
2 there were any issues. When I met with him, I did not
3 believe at the time we were having any problems
4 communicating.

5 Q So he was able to ask you relevant questions about
6 his case and his potential defenses?

7 A He was. I mean, there were the general questions
8 where I think there was legitimate confusion about the
9 trial system here and we had discussed, me and
10 Ms. Delaney, just generally any culture concerns, our
11 differences. But again, in terms of questions or
12 explaining things to him, those were -- the concerns I had
13 were because of competency, which is why we had him
14 evaluated.

15 Q Did you explain to him the elements of the crime of
16 murder?

17 A I don't have that specifically in my notes. Like I
18 said, Ms. Delaney represented him for the first year, but
19 I know we went through what they would have to prove at
20 trial for murder, what they would have to prove at trial
21 -- or what we would have to show to get a voluntary and
22 self-defense claim, so we went through the meanings of
23 those things. I don't know that I read the actual
24 definition of murder.

25 Q Do you feel that he understood what he was being

1 charged with?

2 A Yes.

3 Q And what the State would have to prove to convict
4 him?

5 A Yes.

6 Q Did you ever discuss with him his option to testify
7 if he went to trial?

8 A We did. Ms. Delaney did prior to my involvement, I
9 saw from her notes, as well. I also spoke with him. He
10 had indicated to me that -- her opinion to him was that he
11 maybe should not testify and that we had conversations
12 that we would talk more about what we thought would happen
13 at trial.

14 Q Did he ever tell you he did not want to enter into
15 this plea agreement and he wanted to go to trial instead?

16 A After he made the decision to accept the plea, no.

17 Q I'm sorry, I may have asked this. Did he give you
18 any witnesses that he wanted you to investigate or track
19 down?

20 A I know we -- we had an investigator, Joe Best.
21 Initially, I think we had Bobby Watkins. He passed away,
22 so it was substituted for Joe Best. I know he interviewed
23 people. In particular, Greg Miller and Jasmine Taylor
24 were two people that I just in reviewing this morning
25 quickly saw statements from. And I know that Ms. Delaney

1 had also asked him to follow up with any coworkers at the
2 Wal-Mart that they both worked at to see if there was
3 anyone there that knew the two of them.

4 Q And to your knowledge, that was done by either one of
5 those investigators?

6 A It would have been Investigator Best.

7 Q Okay. And did you discuss that with Mr. Toese, the
8 fact that you had an investigator who could go out and
9 look for witnesses for him?

10 A Yes. And it would have probably been more extensive
11 at the beginning with Ms. Delaney about Investigator Best,
12 but, yes.

13 MS. MCALLISTER: I believe that's all the questions I
14 have for Ms. Davis, Your Honor.

15 MR. WALLER: May it please the Court, Your Honor?

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION:

18 BY MR. WALLER:

19 Q Ms. Davis, you testified that you had Mr. Toese
20 evaluated twice due -- for competency due to some
21 difficulty communicating?

22 A Well, not communicating. He had a history of mental
23 health issues, that he was on antipsychotics at the
24 detention center. And so we had him evaluated, I think
25 initially a private eval and then eventually had DMH

1 evaluate him, as well.

2 Q What specifically led you to question his competency?

3 A Well, the best I can remember is the antipsychotics
4 that he was on at the jail. And then the general -- he
5 had explained -- or I think had made comments to
6 Ms. Delaney about hearing voices or having some
7 hallucinations while he was initially at the jail.

8 Q Okay. Did that affect your communications with him
9 or just something you were concerned about?

10 A Something I was concerned about.

11 Q Okay. When you met with him, how -- you testified he
12 asked relevant questions. How were his questions
13 prepared? I mean, did he have a list of questions he was
14 going to ask you or was it just a back and forth
15 conversation? Do you recall?

16 A I do not recall. I mean, I don't recall him having a
17 list of questions, I should say. I certainly remember him
18 asking questions, but I can't say if he had a list of
19 questions written down or anything.

20 Q Do you know -- did he ever express to you that anyone
21 might have helped him formulate questions or helped him
22 prepare while at the detention center.

23 A Not that I can remember, no.

24 Q You mentioned that there were some discrepancies
25 between the typed statement and what he related to you

1 afterwards. What do you recall specifically?

2 A I think there was some differing of -- that there had
3 been an argument. The statement certainly said that there
4 was -- that she had picked up a knife and that he was then
5 trying to get it from her. I think at some point, he had
6 explained to us that he -- I'm trying to remember because
7 he also had an evaluation where they went into that, too,
8 so I'm trying to remember exactly. I know at one point,
9 he did ask early on when Joanna represented him about if
10 he could make a supplemental statement to the police and
11 talk more about self-defense.

12 Q Did you have a chance to review the advice of rights
13 and the circumstances surrounding his statement?

14 A Oh, the police when they arrested him?

15 Q Yes.

16 A Yes. I mean, we looked at the advice of rights, the
17 signature, time, dates to see what they were alleging in
18 terms of what the timeframe was.

19 Q Did he ever let you know that he thought there were
20 violations of the rules, for lack of a better word, of how
21 law enforcement took his statement from him?

22 A Not that I recall.

23 Q Okay. Did you -- there was some testing, forensic
24 testing and other discovery gathered that would have taken
25 some time. Do you recall having complete discovery in

1 this case?

2 A I know we got DNA after the initial trial had been
3 set. I remember from the notes the trial was set February
4 2nd, that got continued a couple weeks out. But I
5 remember once we got the DNA report finding it a little
6 odd that the trial date had been for February 2nd, but I
7 don't think they did the DNA testing until February 12th
8 of that year. So I know we got that kind of later in the
9 game.

10 I know Joanna, that was before I was involved, filed
11 a motion to compel with a list of things. And then I see,
12 you know, there's a check-off of the items that we
13 received. So I'm not aware of anything big that was
14 outstanding at the time.

15 Q Okay. You're not aware of anything that you were
16 missing that would have affected this case?

17 A Not off the top of my head. I mean, we certainly --
18 had it proceeded to trial, I'm sure if there was anything
19 that was missing, we would have followed up with
20 additional motion to compel.

21 Q You may have testified to this earlier, but did you
22 personally go over the elements of murder with him?

23 A That's what I was saying. I don't remember if I read
24 the actual definition of murder. We certainly talked
25 about what murder was, what the State would have to prove,

1 what it would take for us to try and prove or show
2 voluntary or self-defense in terms of just getting those
3 instructions at a trial.

4 Q You mentioned self-defense. What preparations did
5 you take in order to try to develop that defense?

6 A Well, I mean, a lot of that would have come from him
7 testifying at trial as to the events that happened. He
8 had stated that when they were arguing, he, I believe he
9 said hit her in the face, but it wasn't super clear in the
10 statement how that came about. And then stated, she's
11 actually the one who grabbed the knife first. So going
12 from that angle.

13 Q Did you and Mr. Toese discuss his level of
14 intoxication during the incident, also, during the
15 statement law enforcement?

16 A I remember that being an allegation, that he had been
17 drinking.

18 Q Okay. Did you ever obtain any phone records or any
19 information regarding his cell phone?

20 A I know the police took his cell phone and downloaded
21 it. I can't remember the exact contents of it now, but I
22 know we have a CD in the file.

23 Q So you were provided information of that?

24 A Yes.

25 MR. WALLER: Beg the Court's indulgence, please.

1 BY MR. WALLER:

2 Q Do you know if his statement was ever recorded,
3 either audio or video?

4 A Not that I recall.

5 MR. WALLER: I don't have anything further. Thank
6 you, Ms. Davis.

7 MS. MCALLISTER: Your Honor, just briefly.

8 REDIRECT EXAMINATION:

9 BY MS. MCALLISTER:

10 Q You testified about the two mental health
11 evaluations. What were the results of those evaluations?

12 A We had Dr. Knight evaluate him. They both found him
13 competent --

14 Q Found him competent.

15 A -- but they did diagnose him with major depressive
16 disorder with psychotic hallucinations, I think.

17 Q Okay.

18 A Or psychotic features.

19 Q Okay. So he was competent to stand trial?

20 A They found him to be, yes.

21 MS. MCALLISTER: Thank you. That's all.

22 THE COURT: You may step down.

23 MS. MCALLISTER: Nothing further from the State, Your
24 Honor.

25 MR. WALLER: Nothing further, Your Honor. I'll just

1 ask that you consider the entire record and the
2 allegations Mr. Toese has made in reaching your decision.

3 Judge, I think that he, like a lot of people do that
4 don't natively speak the language, he is able to have
5 conversations where he may not be able to understand
6 everything, but as a defense mechanism, people act like
7 they do understand. I think it was clear that he is not a
8 native English speaker and, certainly, gotten better, but
9 has still had difficulties even to this day. So I'd ask
10 just that you consider that in reaching your decision.

11 Thank you.

12 MS. MCALLISTER: Your Honor, the State would just
13 point to the transcript. The plea colloquy was thorough.
14 He never indicated that he didn't understand and he
15 clearly has the ability to do so. He clearly has the
16 ability to let people know if he doesn't understand
17 something and he needs an interpreter. And he did not do
18 that at the plea and he did not do that with his attorney
19 in preparing the case.

20 THE COURT: All right. I'll review it and issue an
21 order shortly.

22 MR. WALLER: Thank you, Your Honor.

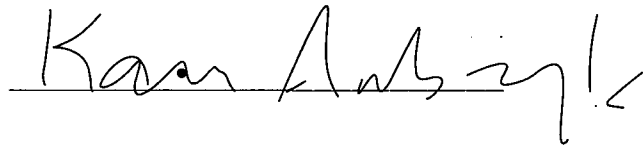
23 (Whereupon, the proceedings were concluded.)
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 1st day of April,
2019.

January 16, 2020

A handwritten signature in black ink, reading "Karen Ambroziak", written over a horizontal line.

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Faasiu Toese, #363340,	)	C.A. No. 2015-CP-40-7115
	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Faasiu Toese (Applicant) on November 25, 2015. Respondent made its return on April 27, 2016. An evidentiary hearing into the matter was convened on April 1, 2019, at the Richland County Courthouse before the undersigned. Jonathan D. Waller, Esquire, represented Applicant. Assistant Attorney General Lindsey A. McCallister represented Respondent.

At the call of the case, Applicant addressed the Court, in English, and requested a continuance in order to have his sister and other witnesses present at the hearing. Mr. Waller explained he had attempted to contact the witnesses and Applicant's sister but had been unsuccessful in doing so, and he was prepared to go forward without them. Thereafter, Applicant testified on his own behalf. Jennifer C. Davis, Esquire, Applicant's plea counsel, was also called to testify. Evangelina Burrows was sworn as a certified court interpreter and translated the proceeding from English to Samoan and vice versa for Applicant.

This Court had before it a copy of the records of the Richland County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's

Return, and the plea transcript. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application for relief.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the April 2013 term of the Richland County Grand Jury for one count of murder (2013-GS-40-02761). Applicant was represented by Jennifer C. Davis, Esquire (Counsel). Applicant pleaded guilty as indicted on March 18, 2015. Pursuant to a negotiated agreement between Applicant and the State, the Honorable Robert E. Hood sentenced Applicant to thirty-six years imprisonment.

A notice of appeal was filed on Applicant's behalf on March 20, 2015. The South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation on May 29, 2015. A rehearing was denied on February 5, 2016. The case was remitted to the circuit court on April 26, 2016.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. "Failure to seek continuous (sic) to better prepare the case."
 - b. "Failure to offer a defense strategy other than a guilty plea."
 - c. "Failure to provide interpreter notwithstanding the defendant's request."
 - d. "Failure to explained or discussed (sic) with the defendant any of the elements of the crime charge[d]."
 - e. "Failure to challenge the voluntariness of the defendant's statement to the police."

- f. "Failure to explained or discussed (sic) with the defendant her professional opinion why I should or should not testify."
- g. "Failure to investigate the possibilities of self-defense and a lesser included offense of voluntary manslaughter."

SUMMARY OF TESTIMONY

Applicant testified he is from American Samoa, where he lived until 2010 when he moved to California to live with relatives. Applicant testified his family spoke Samoan in their home growing up, all of his friend spoke Samoan, and he was exposed to English only on television and a few times per year at school. Applicant explained he moved to South Carolina to live with his sister, who was in the Army and stationed here. Applicant testified he spoke Samoan with other Samoans here but spoke English with everyone else. Applicant further testified he had been involved in a previous court case and required an interpreter every time he appeared in court, but he did not have one in this case. Applicant stated he first met with a different attorney, Joanna Delany (Delany), and asked her for an interpreter, but she did not arrange one as she thought it was unnecessary because he spoke English and understood what was said. However, Applicant testified he needed an interpreter to understand his meeting with his PCR counsel in August 2018, and he speaks more English now than he did at the time of his criminal case because he has learned since being in prison.

Applicant testified he spoke to Counsel and Delany about the statement he gave to law enforcement. Applicant stated he tried to explain to his attorneys what happened but he did not speak enough English to adequately express himself. According to Applicant, law enforcement asked him some questions, he told them what happened, and he signed an affidavit waiving his rights after questioning. Applicant also testified law enforcement wrote out the statement, not

him, and his right were conveyed to him in English. Applicant stated he tried to explain these details to his attorneys, but he was not sure they understood. Applicant also testified he was “over intoxicated” at the time he gave his statement, and when he is drunk sometimes people can take advantage of him due to his level of English-speaking ability. Applicant stated he did not recall whether he discussed his intoxication with his attorney.

Applicant testified he met with Counsel three or four times for approximately thirty minutes each time. Applicant stated he had difficulty expressing what he wanted her to do, and he had questions he did not know how to ask. Applicant testified the only thing he could recall about what happened was that law enforcement wrote his statement for him. Applicant further stated he did not recall Counsel telling him anything about going to trial or how to prepare for a trial. Applicant also testified he and Counsel did not discuss the elements of the charges, possible defenses, or whether he should testify at a trial, and he did not understand what the State would have to prove against him. Applicant stated he did not talk to Counsel about anything related to the charges or his case, although he did recall being told he was supposed to have a trial. On cross-examination, Applicant explained Counsel told him the case was scheduled for a trial, but he did not understand what that meant until he was already in prison.

Applicant further testified Counsel never discussed any possible defenses with him and did not explain much about his case except that he was looking at life in prison. Applicant stated he signed the plea agreement based on Counsel’s advice. Applicant testified he and Counsel never discussed seeking a continuance to give them more time to prepare.

On cross-examination, Applicant stated he prepared his PCR application, in English, with the help of friends, but agreed he wrote it. Applicant testified he came to South Carolina at the end of 2011 and spoke only broken English. Applicant further testified at the time of the incident he was working at a Wal-Mart store on Farrow Road, stocking shelves, but he did not have much contact with customers. Applicant recalled the plea hearing and agreed he answered the judge's questions, but he testified he did not understand all of them. Applicant testified he told Counsel he needed an interpreter when she came to visit him in the detention center prior to the plea, but he did not ask for one on the day of the plea. Applicant stated he did not inform the plea judge he did not understand what was going on because he did know he had the right to ask questions of the judge.

Counsel testified she was appointed to Applicant's case and took over as the lead attorney in January 2015, but she had been involved as second chair since March 2014. Counsel stated she met with Applicant six or seven times between January and March 2015, when he entered the guilty plea. Counsel denied Applicant ever asked her for an interpreter, and she testified that although he had some trouble understanding legal concepts when they spoke, it was not because of a language barrier. Counsel testified she would have obtained an interpreter if he told her he need one.

Counsel testified Applicant gave a statement to law enforcement admitting his involvement, and the version of the facts he told her differed from the content of the statement. Counsel stated she discussed this discrepancy with Applicant, and Applicant inquired about giving a supplemental statement to talk about self-defense. Counsel testified she reviewed the statement

and advice of rights form and verified the signatures, date, and time. Counsel testified Applicant never mentioned any details to make her think there was a violation of Applicant's rights in taking the statement. Counsel also testified she was aware of the allegation Applicant had been drinking the night of the incident, when the statement was given. Counsel did not recall whether Applicant's statement was recorded. Counsel also testified law enforcement confiscated Applicant's cell phone and downloaded its contents, and she had that data on a CD in her file.

Counsel testified she had some concerns about Applicant's mental health, and he was evaluated privately and by the Department of Mental Health. Counsel testified her concerns about Applicant's competency were not because of communication issues, but because Applicant had a history of mental illness and was complaining of hallucinations while in pre-trial detention. Counsel stated Applicant was put on anti-psychotic medication.

Counsel testified she and Applicant discussed what murder is, the State's burden of proof, the defense's responsibility to show self-defense, and how to mitigate the offense to voluntary manslaughter. Counsel also testified she explained Applicant's right to have a trial and what could happen if he chose to do so. Counsel testified she and Applicant discussed self-defense, voluntary manslaughter, and the defense of accident. Counsel stated she felt Applicant understood their conversations, and she did not have any trouble explaining issues to him. Counsel also stated Applicant asked relevant questions during their discussions.

Counsel explained much of their defense would have come from Applicant testifying at trial. Counsel stated Applicant claimed he and the victim had an argument, he struck her in the face, and then she grabbed the knife first. Counsel testified she used an investigator from her office

and followed up with Applicant's co-workers at Wal-Mart as potential witnesses. Counsel stated the case was set for trial twice but was continued prior to the first trial date because Delany knew she was leaving the office. Counsel explained she received DNA testing results after the continuance was granted because Delany had filed a motion to compel. Counsel testified she did not recall missing any discovery, and she would have followed up again if the case had proceeded to trial.

Counsel testified she discussed the State's plea offer with Applicant and explained his right to plead guilty or go to trial. Counsel further explained the State eventually offered Applicant a plea with a cap of forty years, but Applicant wanted a sentencing range of ten-to-fifteen years. Counsel testified the parties ultimately agreed to a negotiated sentence of thirty-six years, and Counsel explained the ramifications of the agreement to Applicant, including its effect on his right to an appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the evidence and witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 466 U.S. at 688 (1984)). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered

by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant failed to prove Counsel's performance was deficient in any way, nor was Applicant prejudiced by Counsel's performance. Counsel met with Applicant on several occasions and reviewed with him the elements of the crime charged, the evidence and discovery in the case, Applicant's version of the facts and potential defenses, and the State's plea offer. This Court finds Applicant ultimately chose to plead guilty in order to avail himself of a guaranteed thirty-six year sentence, and this decision was made freely and voluntarily. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

Involuntary Guilty Plea

Applicant alleges Counsel's ineffective assistance in (1) failing to seek a continuance; (2) failing to investigate self-defense or voluntary manslaughter; (3) failing to prepare a defense; (4) failing to challenge the voluntariness of Applicant's statement; (5) failing to explain the elements of the crime charged; (6) failing to explain Applicant's right to testify at trial; and (7) failing to secure an interpreter led to Applicant entering an involuntary and unknowing guilty plea. This Court disagrees and finds the plea colloquy is dispositive as to these issues. The Court finds the combined record from the plea hearing and the evidentiary hearing clearly establishes Applicant pleaded guilty freely and voluntarily.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). An applicant who pleads guilty with the advice of counsel

may collaterally attack the plea only by showing (1) counsel was deficient and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994); Lockhart, 474 U.S. at 52). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he 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). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harres, 282 S.C. at 133, 318 S.E.2d at 361. However, statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from

the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975), overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir. 1985).

The plea transcript reflects Applicant entered his plea knowingly and voluntarily, engaged in an intelligent and coherent colloquy with the plea court, and gave appropriate responses to the court's questions. At the beginning of the plea hearing, Applicant informed the court he was not under influence of any substance which would affect his ability to understand what he was doing, and he informed the court he had taken Zyprexa as prescribed. Tr. pp. 3-4. The plea court explained Applicant's right to remain silent, jury trial, confront witnesses and present a defense, and the State's burden of proof beyond a reasonable doubt, and Applicant indicated he understood those rights and wished to give them up in order to plead guilty. Tr. pp. 6-7. The plea court then explained the negotiation and clearly informed Applicant if it accepted his plea, the only possible sentence would be the agreed upon thirty-six years, and Applicant again indicated he understood. Tr. pp. 7-8.

Importantly, Applicant informed the plea court he had understood all of his conversations with Counsel, and he understood why he was in court and what he was doing. Tr. p. 4. Applicant averred he satisfied with Counsel and felt they had fully discussed the charges and evidence. Tr. p. 8. Applicant stated no one had threatened him or promised him anything to induce his guilty plea, and he was entering the plea freely and voluntarily. Tr. pp. 8-9. Applicant was given the opportunity to speak to the plea court and never indicated he did not understand the proceedings or needed an interpreter. Instead, Applicant took responsibility for the crime, telling the plea court, "I know I'm responsible for this." Tr. p. 38.

The Court finds Counsel's representation of Applicant was not deficient. The Court finds credible Counsel's testimony she was able to communicate effectively with Applicant, and she had no indications he did not understand their conversations. This finding is confirmed by the plea transcript, which reflects Applicant understood the plea court's colloquy and answered the plea court's questions intelligently. Additionally, this Court finds credible Counsel's testimony she reviewed both the content of Applicant's statement and the circumstances surrounding the taking of the statement and discussed Applicant's version of the facts with him. Counsel testified Applicant never divulged any information indicating or imply the statement was not given voluntarily. Counsel further testified she used an investigator and followed up with potential witnesses from Applicant's employment. However, the record reflects Applicant never disputed that he killed the victim; any defense would have involved an argument for self-defense, accident, or voluntary manslaughter. Counsel credibly testified she discussed these concepts and issues with Applicant prior to his guilty plea.

In any event, Applicant did not present any witnesses or evidence to support his claims Counsel failed to investigate, failed to prepare a defense, and failed to ask for a continuance, so this claim must fail as to the prejudice prong as well. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (holding a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific

testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Accordingly, based on the combined record of the plea transcript and the testimony presented at the evidentiary hearing, this Court finds Counsel's representation of Applicant was not deficient, nor was Applicant prejudiced by Counsel's representation. Counsel met with Applicant on multiple occasions to review discovery, discuss the facts of the case, and explain Applicant's constitutional rights and options for resolving the case. Further, the plea transcript reflects Applicant understood the proceedings, interacted intelligently with the plea court, and entered his guilty plea knowingly and voluntarily. Therefore, this Court denies relief and dismisses this allegation with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides

that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

9/20, 2019



J. DERHAM COLE, JR.
Presiding Circuit Court Judge
Fifth Judicial Circuit

WITNESSES

(S) John Carwell – Richland County
Sheriff

ARREST WARRANT NUMBER

2013A4010200019

ACTION OF GRAND JURY
TRUE BILL

[Signature]
Foreperson of Grand Jury
Date:

APR 10 2013

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013GS4002761

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2013

79

THE STATE
vs.

Faasiu Toese

Indictment for
MURDER

SC Code: 16-03-0010
CDR Code: 0116

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeannette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on APRIL 10, 2013, the
Grand Jurors of Richland County present upon their oath:

MURDER

That Faasiu Toese did in Richland County, on or about January 1, 2013,
willfully, feloniously, and intentionally kill the victim, TEMUKISA ENELE,
with malice aforethought, either express or implied, by means of STAB
WOUND(S), and the victim did die as a proximate result thereof on or
about JANUARY 1, 2013 in Richland County, in violation of Section 16-03-
0010, S. C. Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the
statute in such case made and provided.


DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Richland

VS.

Faasiu Toese

AKA:

Race: UNKNOWN Sex: M Age: 28

DOB: 1986 SS#

Address: Ferrell Drive

City, State, Zip: Columbia, SC 29204

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Murder

in violation of § 16-03-0010 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: SIMPSON, NICOLE 7500 x Justin Toese 75392
SC Bar# Defendant Attorney for Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 36 months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114(BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS4002761 ✓

A/W#: 2013A4010200019

Date of Offense: 1/1/2013

S.C. Code § : 16-03-0010

CDR Code #: 0116

RECOMMENDED
SENTENCE SHEET
NEGOTIATED ☒☐ CONVICTED OF or ☒ PLEADSCERTIFIED TRUE COPY
OF ORIGINAL FILED,

_____ days/hours Public Service Employment
 Obtain GED ☐
 Attend Voc. Rehab. or Job Corp. ☐
 May serve W/E beginning _____
 Substance Abuse Counseling ☐
 Random Drug/Alcohol testing ☐
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

NO CONTACT DIRECTLY OR
INDIRECTLY w/ the VICTIM'S FAMILY☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date:

Re Hord
3.18.15