

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

JOHN WESTLY HICKS,

PETITIONER.

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000383

APPENDIX

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S.C. SUPREME COURT

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State of South Carolina	)	Court of General Sessions
	)	Twelfth Judicial Circuit
County of Florence	)	Case No. 2017-GS-21-00953
	)	
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Transcript of Record
	)	
John Westly Hicks,	)	
	)	
Defendant.	)	
	)	

March 19, 2018
 Florence, South Carolina

B E F O R E:

The Honorable Roger Henderson, Judge

A P P E A R A N C E S:

John Holt, Esquire
 Attorney for the Plaintiff

Charles E. Johnson, Esquire
 Attorney for the Defendant

Krystal J. Smith
 Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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(No Exhibits Presented)

COURT REPORTER LEGEND

dashes -- intentional or purposeful interruption
or change in thought

ellipses . . . trailing off

[ph] phonetically written

[sic] written as said

1 MARCH 19, 2018

2 (WHEREUPON, the proceedings began at 9:32 a.m.)

3 THE COURT: All right. Solicitor?

4 MR. HOLT: Thank you very much, Judge. If it please the
5 Court. I have handed you the sentencing sheet already, Your
6 Honor.

7 THE COURT: Uh-huh.

8 MR. HOLT: Please get John Westly Hicks Jr. to the -- to
9 the podium, and Mr. Charles Johnson.

10 Judge, this is the State of South Carolina versus John
11 Westly Hicks Jr. He's indicted under 2017-GS-21-953 for the
12 crime of murder. He'll be pleading today to voluntary
13 manslaughter. He's represented by Mr. Charles Johnson from
14 the Columbia area.

15 THE COURT: Okay.

16 MR. HOLT: And, Judge, just so you're aware, there's
17 numerous family here from the victim, Mr. Richard Ennis, and
18 I know that several of them would like to be heard. I
19 believe law enforcement would probably like to speak as well.

20 THE COURT: Okay. All right.

21 All right. John Westly Hicks Jr.?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: You're 25 years of age?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: What county do you live in?

1 THE DEFENDANT: Sumter County, sir. Sumter County.

2 THE COURT: Okay. Speak up now so I can hear you and so
3 the court reporter can hear you.

4 THE DEFENDANT: Sumter County, sir.

5 THE COURT: Sumter County?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Okay. Did this offense that I understand
8 you wish to plead to of voluntary manslaughter -- did it take
9 place in Florence County?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Okay. Do you understand this carries up to
12 30 years in prison?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Okay. Knowing that, how do you wish to
15 plead?

16 THE DEFENDANT: I plead guilty, sir.

17 THE COURT: All right. You clearly understand what a
18 voluntary manslaughter means?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: So you clearly understand what it is you're
21 pleading guilty to?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Okay. Now, there are no recommendations in
24 this case and no negotiated sentence; so this is what we call
25 a straight-up plea. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay. Now, has anyone promised you anything
3 in order to get you to plead guilty?

4 THE DEFENDANT: No, sir.

5 THE COURT: Has anybody threatened you in any way to get
6 you to plead guilty?

7 THE DEFENDANT: No, sir.

8 THE COURT: Are you under the influence of any alcohol
9 or drugs today?

10 THE DEFENDANT: No, sir.

11 THE COURT: Do you suffer from any kind of physical,
12 mental or emotional problems that keep you from being able to
13 understand things clearly?

14 THE DEFENDANT: No, sir.

15 THE COURT: Okay. All right. I want you to understand,
16 sir, that you have the right to a trial by a jury and I'm
17 sure you've gone over this with your attorney many times, but
18 you have the right to a trial by a jury. And if you decide
19 that you want a jury trial, your lawyer, Mr. Johnson, can
20 participate in the selection of that jury. In other words,
21 y'all will have some say-so in who sits in judgment of you.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: If you decide to go to trial, then the
24 burden will fall on the State of South Carolina to convince
25 that jury of your guilt beyond a reasonable doubt, and the

1 State will have to convince all twelve jurors. In other
2 words, the verdict would have to be unanimous before you
3 could be found guilty.

4 If you were to exercise your right to a trial, then your
5 attorney would have the right to confront any witnesses that
6 testify against you. That means he could cross-examine them
7 or ask them questions during the course of the trial.

8 And when the State finished presenting its case, then
9 you would have the right to put forth a defense, if you so
10 desired, and included in that defense would be your right to
11 call witnesses on your behalf or you yourself could testify,
12 if you wanted to, or you could remain silent throughout the
13 trial and exercise your right to remain silent. You wouldn't
14 have to say a single word, if you didn't want to, and that
15 couldn't be held against you in any way whatsoever and the
16 jury would be so advised.

17 And then you also have the right to obtain from the
18 State any and all evidence or materials it has in its
19 possession that could benefit you in the preparation of your
20 defense.

21 Do you understand these rights, Mr. Hicks?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you understand that by pleading guilty
24 you give up all these rights?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Are you telling me now then that you are
2 freely and voluntarily giving up all of your rights in order
3 to plead guilty to this charge?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Okay. Now, you're represented by Mr.
6 Johnson?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Have you had enough time to talk to him
9 about all of this?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Has he answered all of your questions to
12 your satisfaction?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Are you fully satisfied with his services on
15 your behalf?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Do you agree that he's done everything he
18 possibly can for you under the circumstances as your
19 attorney?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. All right. At this time, I'm going
22 to ask Mr. Holt with the Solicitor's Office or someone from
23 law enforcement to give me the facts which support this
24 charge. Once that statement of facts has been laid, I'll
25 have a couple more questions for you.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Mr. Holt?

3 MR. HOLT: Thank you very much, Judge.

4 A little before midnight on November 18th, 2016, the
5 defendant did walk into 804 North Brockington Street, and
6 that's a business called BJ's Lounge and that's in
7 Timmons ville in the Florence area of South Carolina, Judge,
8 and he did fire one shot into an individual that was playing
9 pool, a Mr. Richard Ennis, Judge, 41 years of age, and Mr.
10 Richard Ennis did die of that shot.

11 THE COURT: Okay. Mr. Hicks?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you agree that that statement of the
14 facts made by Mr. Holt -- Holt is substantially correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Okay. After hearing that statement of the
17 facts and considering all the other questions that I've asked
18 you, is it still your desire to plead guilty to this charge?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Okay. Mr. Johnson, do you believe that your
21 client fully understands all of his rights?

22 MR. JOHNSON: Yes, sir, Your Honor.

23 THE COURT: And do you concur in his decision to plead
24 guilty based on the facts and circumstances presented?

25 MR. JOHNSON: Yes, sir.

1 THE COURT: Okay. All right. I find that the facts
2 support the plea. I find that the plea has been entered
3 freely, voluntarily, and intelligently, and done so upon the
4 advice of very competent counsel with whom he indicates he is
5 satisfied.

6 Therefore, I am going to accept his guilty plea. He'll
7 have ten days to appeal any decision that I render.

8 Mr. Johnson, I'll be glad to hear from you first on his
9 behalf, and then I'll hear from the other family members.

10 MR. JOHNSON: Yes, sir, Your Honor. Thank you, Your
11 Honor.

12 Again, Your Honor, he's 25 years old. He's got three
13 kids. A lifelong resident of -- he was born in Lynchburg.

14 Your Honor, basically, he was out partying with friends
15 of his. Too much alcohol and drugs. Very bad decision on
16 his part. He is very, very -- at this time, after having
17 quite a bit of time to think about the incident, he's very
18 remorseful.

19 He's well aware of his actions. He did something that
20 no one can change at this point in time, and we just ask the
21 Court -- he wants to speak to the Court, Your Honor. He
22 wrote a letter, and he just wanted to ask the Court to allow
23 him to kind of speak to the Court and to the family members.

24 THE COURT: All right, sir. Mr. Hicks, first of all, do
25 you agree with the things that your lawyer just said?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay. I'll be glad to hear from you.

3 Anything you want to say, sir?

4 THE DEFENDANT: Yes, sir. I'd like to speak to the
5 family.

6 THE COURT: Certainly.

7 THE DEFENDANT: I've got a letter. I know y'all might
8 not want to listen to me right now.

9 THE COURT: Hang on. Hang on just a minute now. We're
10 going to have to be able to hear you.

11 THE DEFENDANT: All right.

12 THE COURT: You're going to have to be able to speak
13 loud enough for my court reporter to take down everything
14 you're saying.

15 THE DEFENDANT: All right.

16 THE COURT: So if you can position yourself so she can
17 hear you and I can hear you too. Speak loudly.

18 THE DEFENDANT: This is to the family. I'm truly sorry
19 and I really don't know the hurt that I caused y'all --
20 caused y'all. I made a very bad decision that night. I was
21 drunk out of my mind and I did something that I wouldn't
22 normally do, and I regret it. I'll regret it all my life.
23 You know what I'm saying. We can't bring him back, but if we
24 could, I promise you I would.

25 And if there's anything I can do to show that I'm truly

1 sorry for what I did, and I ask God that y'all will forgive
2 me and I'm sorry. I'm truly sorry for what I did, and I hope
3 y'all accept my apology.

4 To you, Your Honor, I'm sorry for what I did. I want to
5 ask you to please have mercy on me, sir.

6 THE COURT: Okay. Anybody else that wants to speak on
7 behalf of Mr. Hicks?

8 MR. JOHNSON: No, sir. That's all we have.

9 THE COURT: Okay. I'll be glad to hear from the family
10 members, Mr. Holt.

11 MR. HOLT: Anybody from the family that would like to be
12 heard at this time, just state your name loud enough so the
13 court reporter can hear you.

14 MS. BROGDON: Hey. My name is Shanquetta.

15 THE COURT: What's your last name?

16 MS. BROGDON: Brogdon.

17 THE COURT: Let's -- let's have her come forward a
18 little bit closer, Mr. Holt, and we can sort of keep
19 everything safe, but the court reporter is having difficulty
20 hearing and I am too.

21 MS. BROGDON: My name is Shanquetta [ph] Brogdon.

22 THE COURT: Take the chewing gum out of your mouth so
23 you can speak clear.

24 MS. BROGDON: My name is Shanquetta Brogdon. I'm
25 speaking on behalf of my family. I feel that whatever

1 happened, it was done on purpose, and I ask that he can get
2 the max for whatever he's done, and that's it.

3 And Richard is my uncle. That's my mom's brother. He
4 was like my dad.

5 MS. ENNIS: My name is Beulah Ennis. Richard was my
6 son. And I don't feel sorry for him because he got three
7 kids. My son had 18, and they got to grow up without their
8 father. And I wish he'd get the max, you know, and I hope he
9 gets sober. Thank you.

10 MS. TOLSON: My name is Tomeka Tolson [ph], and I'm
11 speaking on behalf of my daughter, Shanaya Tolson [ph].
12 That's Richard's daughter.

13 I pray that one day we can be able to forgive you for
14 what you did. You broke my girl's heart and not only hers,
15 but the rest of the family. He has so many kids that
16 couldn't come in here today and face you because of what you
17 did to them. And my daughter -- she's sitting back there and
18 she's just crying. I pray that you find God in all of this.

19 MR. HOLT: Anybody else from the family want to be heard
20 at this time?

21 (WHEREUPON, there was no response.)

22 MR. HOLT: I think, Judge, the last person we had that
23 would like to speak would be law enforcement. This is Inv.
24 Thomas McFadden.

25 THE COURT: Sure.

1 THE INVESTIGATOR: Thank you, Your Honor. I'm Inv.
2 McFadden of the Sheriff's Office. I've been doing this for
3 going on 21 years.

4 And he did state the facts and, if it were a trial, then
5 you would have heard this actually started in Lynchburg. The
6 individuals went to a club. Like he said, they were
7 drinking. They were high. They were on drugs. They were
8 kicked out of that club. Not with all the details, but law
9 enforcement did told me they kicked them out there; so they
10 came to Florence County.

11 Once they got to Florence County, they went to one club
12 and the individual -- he and Mr. Hicks -- they were drinking
13 and high, saying somebody was going to die tonight.. Yeah.
14 Was going to die tonight.

15 You'd have heard the testimony from the -- it was
16 actually two other individuals in the car. You would have
17 heard them testify to the same facts. They were kicked out
18 of that club once people saw a weapon.

19 Instead of going back to Lynchburg, they decided to go
20 to another club, which the victim was present in this
21 location. That's when -- and the other witness in the car
22 would tell you they were still saying that, but he was saying
23 nothing wasn't going to happen. They were just drinking.
24 They were high.

25 Then they went inside this club. Once he went inside

1 this club, maybe a brief moment, probably not even long, Mr.
2 Hicks shot -- fired a shot and ran out the back door. Now,
3 they said only one shot was fired, but when I located the
4 weapon -- because I walked the trail where he ran because he
5 didn't go back with the -- the other co-defendants. They
6 said he ran. He left them.

7 But when I walked the trail, the weapon was located.
8 After he jumped the ditch -- people said he jumped the ditch
9 here and went back up to town. They didn't know where he
10 went. So when I walked the trail, I stepped on the weapon.

11 The only reason he fired one shot because it jammed. A
12 stovepipe we call it. He pulled the trigger. When the next
13 round -- when that round been ejected, it lodged into the
14 gun; so he couldn't fire it again. So I'm not saying he was
15 going to make one shot and just one shot.

16 And yes, when they called and said who the victim was in
17 this case, I knew that family was going to be devastated
18 because we knew what he was to that family. When they say 18
19 kids, he'd had a lot of kids, and they played sports and
20 stuff in the town. Some of the kids I didn't even know were
21 his kids. I thought he was just at the game watching the
22 game. So he was supporting his child at all the games.

23 So I knew they were going to be devastated. I knew that
24 he was the backbone to that family. If something went wrong,
25 he would call me. If he would have something go wrong, you

1 need to come turn yourself in and come talk to me. So when
2 that happened, I felt bad.

3 Not devaluing the life of anybody else in that club, but
4 I asked the other co-defendant out of all the people, why
5 him? Y'all don't know what y'all just did. You almost
6 destroyed this family.

7 So that's why it's probably difficult for them to talk
8 or speak on today. So would like to ask me they would accept
9 the manslaughter, but they was hoping for the max. Once he
10 get it, it won't bring Richard back no matter what, what he
11 do, but still for his kids and the family and friends that
12 would ask.

13 THE COURT: I mean how well did he know Mr. Hicks?

14 THE INVESTIGATOR: He didn't.

15 THE COURT: At all?

16 THE INVESTIGATOR: At all. That's why it was so
17 reckless. It could have been anybody.

18 THE COURT: It could have been me.

19 THE INVESTIGATOR: It could have been you. It could
20 have been any of us. It was just that reckless that night,
21 and I told them, y'all -- y'all should have just turned
22 around. Go back home. I know you want to have a good time,
23 but not -- if he's in that state, take him home. Go back.
24 Drop him off. Then y'all come back out. That was reckless.

25 MR. HOLT: I think it was the defendant at all those

1 other clubs was drunk and high, Judge, and was screaming that
2 somebody was going to die tonight. And it appears what --
3 where we were going to struggle at trial was establishing any
4 type of motive. Of course, we don't have to. Okay? But any
5 experienced litigator is going to let you know it's
6 important. We could not do that. We believe he picked the
7 victim at random.

8 Judge, I think it's also important for you to know his
9 record is minimal. He's got some property offenses, some
10 shopliftings and things like that. He was on probation at
11 one time for a forgery.

12 What took this case a little bit longer was there was a
13 four-page confession from the co-defendant and so we had to
14 check various things out. Well, then come to find out that
15 the co-defendant did not write that letter, and the letter,
16 in fact, originated with the defendant in this case.

17 So after all that was done and the polygraph was done on
18 the co-defendant, then we felt like we had enough facts to go
19 ahead and proceed to trial. Still missing the motive, but it
20 appears here at the end that there was no motive. That there
21 was just some type of aggression built up from a night of
22 drinking and pills and resulted in a -- in this situation.

23 THE INVESTIGATOR: Yes. So, Your Honor, even after that
24 fact, like he said, the letter, the co-defendant gave me a
25 statement and then I saw a letter from him and I was like,

1 what is this? Why are you changing your story? He was like,
2 what story? I said you're confessing saying you did it and
3 handed him the gun and ran out. He was like, I didn't do
4 that. He told me that whoever talked back to you again, he
5 was going to take care of the whole situation. He was going
6 to do what he had to do.

7 So he was setting his co-defendant up to write a letter
8 saying he confessed to the killing. So it was kind of crazy.
9 Never had that happen before, but it was crazy.

10 THE COURT: So how old were you at the time this took
11 place?

12 THE DEFENDANT: Twenty-four. Twenty-four.

13 THE COURT: And you have three children?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Why weren't you home with them instead of
16 out at some club drinking and using drugs?

17 THE DEFENDANT: Sir, I don't know.

18 THE COURT: If you'd been doing what you're supposed to,
19 you wouldn't be standing here now.

20 THE DEFENDANT: No, sir.

21 THE COURT: And you didn't even know this man. Is that
22 right?

23 THE DEFENDANT: No, sir.

24 THE COURT: Well, how did you pick him out to shoot?

25 THE DEFENDANT: I ain't -- I ain't picked him out.

1 THE COURT: You were just shooting?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Just to be shooting?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Is that right?

6 THE DEFENDANT: Yeah. My co-defendant know that man.

7 THE COURT: Sir?

8 THE DEFENDANT: My co-defendant know that man -- had
9 know him.

10 THE COURT: Well, but your co -- you're the one that
11 shot.

12 THE DEFENDANT: Yes, sir. And I --

13 THE COURT: Sir?

14 THE DEFENDANT: I said, yes, sir, and I apologize, sir.
15 I apologize.

16 THE COURT: Apologizing doesn't do any good now.

17 THE DEFENDANT: I know, sir. I really wish I could
18 change time. Please have mercy on me, sir.

19 THE COURT: Speak up.

20 THE DEFENDANT: I just ask for you to have mercy on me,
21 sir, because I'm truly sorry for what happened.

22 THE COURT: Well, I'll try to have about as much mercy
23 as you had on the victim in this case, which was very little,
24 wasn't it?

25 THE DEFENDANT: No, sir. No, sir.

1 THE COURT: What were you drinking that night?

2 THE DEFENDANT: Some of everything, sir.

3 THE COURT: What kind of drugs were you using?

4 THE DEFENDANT: Cocaine, pills, and marijuana.

5 (WHEREUPON, there was a pause in the proceedings, after
6 which the proceedings resumed as follows.)

7 THE COURT: How long has this gentleman been in jail?

8 MR. HOLT: Judge, he was arrested on December 1st, 2016.

9 THE COURT: How many days is that? December the 1st you
10 said?

11 MR. HOLT: Yes, sir.

12 THE COURT: '16.

13 THE LAW CLERK: 2016?

14 THE COURT: 2016, yeah.

15 THE LAW CLERK: 473.

16 THE COURT: Mr. Hicks, this is about as sense -- as
17 senseless an act as I have heard of in a -- in a good while.

18 THE DEFENDANT: I truly apologize, sir.

19 THE COURT: Sir?

20 THE DEFENDANT: I truly apologize, sir.

21 THE COURT: That's fine. I'm glad you've apologized to
22 the family and, hopefully, one day they can forgive you, as
23 one of the family members said. That's -- that's totally up
24 to them, but this could have been anybody. It might have
25 been some more people had that gun not jammed.

1 THE INVESTIGATOR: Exactly.

2 THE COURT: He might be here for two or three other
3 murders. I guess you're lucky that the gun jammed.

4 Well, the State has given you some consideration by
5 allowing you to plead to the manslaughter charge as opposed
6 to making you stand trial for murder.

7 SENTENCE

8 THE COURT: Because of the senseless act that you have
9 committed, it's the sentence of this Court that you be
10 committed to the State Department of Corrections for a term
11 of 30 years. I'll give you credit for time served of 473
12 days.

13 MR. HOLT: Thank you very much, Judge.

14 MR. JOHNSON: Thank you, Your Honor.

15 THE COURT: Thank you, Mr. Johnson.

16 THE INVESTIGATOR: Thank you, Your Honor.

17 THE COURT: Sir, thank you, Mr. McFadden.

18 (WHEREUPON, the proceedings ended at 9:59 p.m.)

19

20 --- END REQUESTED TRANSCRIPT ---

21

22

23

24

25

1	State of South Carolina	)	
2		)	Certificate
3	County of Florence	)	

I, the undersigned, Krystal J. Smith, Notary Public and Official Court Reporter for the Twelfth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing pages, numbered 1 through 21, constitute a true, accurate, and complete Transcript of Record of all the proceedings had and evidence introduced in the hearing of the above captioned case, relative to appeal, in the Court of General Sessions for Florence County, South Carolina, on the 19th day of March, 2018.

14 I do further certify that I am neither of kin, counsel,
15 nor interest to any party hereto.

Krystal J. Smith
Court Reporter

20 Florence, South Carolina
21 September 18, 2018

FORM 5

20 18 CP 21 1904

STATE OF SOUTH CAROLINA

County of FLORENCE

IN THE COURT OF COMMON PLEAS

John Hicks 355602

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR
POST-CONVICTIONDORIS EULOS O'HARA
COP & GS
FLORENCE COUNTY, SC

2018 JUL 16 PM 3:42

FILED

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 clear to which question any such continued answer refers.

Since every application must be sworn 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 the applicant was convicted.

1. Place of detention LEE COUNTY CORRECTIONAL INSTITUTION
990 WISACKY HWY BISHOPVILLE S.C 29010
2. Name and location of Court which imposed sentence 181 N. IRBY STREET
FLORENCE S.C 29501 GENERAL SESSIONS COURT
3. Name(s) of co-defendant(s) (if any) RODERICK COMMANDER
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2017-GS-21-00953
 - (b) MANSLAUGHTER / VOLUNTARY MANSLAUGHTER

SCANNED

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) MARCH 19, 2018
- (b) MAUSLAUGHTER
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NA
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. NA
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. NA
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. NA
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. NA
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) BECAUSE I TAKE A GUILTY PLEA
- (b) _____

(c) _____

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

(a) 8th AMENDMENT BEEN VIOLATED
 (b) 6th AMENDMENT BEEN VIOLATED
 (c) 14th AMENDMENT BEEN VIOLATED

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

(a) SEE ATTACHMENT
 (b) SEE ATTACHMENT
 (c) SEE ATTACHMENT

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NA
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NA
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NA
 (d) any other petitions, motions or applications in this or any other Court? NA

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

(a) the specific nature thereof:
 i. NA
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. NA
 ii. _____
 iii. _____
 iv. _____

11. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (10):

(A) PLEA COUNSEL WAS INEFFECTIVE FOR INADEQUATE ~~ADVISE~~ ADVICE

(B) PLEA COUNSEL WAS INEFFECTIVE FOR ADVISING APPLICANT THAT HE WOULD GET A LIFE SENTENCE IF APPLICANT GO TO TRIAL WHEN KNOWING APPLICANT CO-DEFENDED RODERICK COMMANDER WROTE A CONFESSION STATING HE COMMITTED THE ALLEGE CRIME AT HAND WHEN KNOWING THE FACTS IF TRIAL COUNSEL WOULD HAVE TOOK THE TIME TO GO TO TRIAL AND READ THE EVIDENCE THAT OUT COME AT TRIAL COULD HAVE LEAD TO A NOT GUILTY VERDICT:
SEE: ATTACHMENT CONFESSION OF CO-DEFENDANT

(C) APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE SOUTH CAROLINA CONSTITUTION ISSUES RELATED TO THE A WHEN PLEA TRIAL COUNSEL FAILED TO PRESERVE THE STATE AND FEDERAL CONSTITUTIONAL ISSUES RELATED TO THE ADMISSION OF A LIST OF DISCIPLINARY INFRACTIONS BY FAILING TO GIVE ADEQUATED ADVICE ABOUT PROCESSING TRIAL

idm. Commander

its killing me inside to know what I did is wrong
an I want to step up an be the man that I'm are
for what I did to be honest I was the one that
I shot an pass the gun to Buck an he did what
I ask him he run with the gun for me I
know it was not the right thing to do but I
didnt want to go to jail by myself so I put
Buck id it with me if you would of check me
for gun, would you had me but here is the truth
the guy that got kill had a brother
4,000 so my brother paid me \$2,000 to shot him
I really didnt not mean to kill him an my brother
had want me to kill Buck to but I didnt becuse
I know that would of been wrong so I set him up
to run with the gun after I shot - had one time
see I know every body was going say he was the one
shot becuse they see him run with the gun out
the club with me being the man I was with Buck should
not be lock up forreal an this coming from my heart
mefadden please just help me out an I dont want
jail for life but if that wasnt it I would

then that what it is I'm writing this statement
because the truth will set you free. Buck really
didn't know what was going on I put cocaine in
his drink besides Buck Don't Know any baby
from + ville so why would he shot any baby
to be honest I did it for my mother Kevin it was
only past to be buck lock up but since I got
lock up I'ma tell the truth I already told you
I'm sorry an I write him an tell him what had
really happen that night I was past to kill buck he
but I didn't after we got to the club I ask buck
when I shot buck will you run an hand the gun he
say no so I ask buck again an he said no ag
so I gave him another drink an ask Buck again
an he say what you want me to do with the gun
after you shot I told buck just hold it in your hand
an run out the door an hand the gun to after
I shot that what buck did he run with the gun
for me that why everybody say Buck was the
one shot but here is my statement I was the
one shot an I pass the gun off to Buck to run
with it But here is my statement

P.S I'm high on these pills right now so I may not remember
this but here is the truth
Rodrick Commander AKA X man

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NA

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

(a) which grounds have been presented:

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

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

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

16. If any ground set forth in (10) 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) NA
(b) _____
(c) _____

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

(a) your arraignment and plea? YES
(b) your trial, if any? NA
(c) your sentencing? NA
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NA
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
NA

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

(a) the name and address of each attorney who represented you:
i. CHARLES E. JOHNSON P.O. DRAWER 12426
1332 MAIN ST. SUITE 65 COLUMBIA, SC 29211
ii. _____
iii. _____
(b) the proceedings at which each such attorney represented you:
i. PLEA HEARING
ii. _____
iii. _____

CERTIFIED A TRUE COPY
Donna L. Poulos
 CLERK OF COURT C.P. & S.
 FLORENCE COUNTY, SC

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

I, John Hicks, 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 thereof.

John Hicks
 Applicant

SWORN or affirmed to and subscribed before me this
14 day of June, 2018.

Miriqua Greene
 Notary Public

My Commission Expires: 9-29-2027

FILED
 2018 JUN 16 PM 3:42
 BORIS POULOS Q'HARA
 C.C.P. & S.
 FLORENCE COUNTY, SC

19. State clearly the relief you seek in filing this application:

VACATED AN REVERSE
CORRECTING THE CONVICTION
TIME REDUCTION

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

STATE OF SOUTH CAROLINA)

County of FLORENCE)

VERIFICATION

I, JOHN HICKS, 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.

John Hicks

SWORN to and subscribed before me this 14th
 day of June, 2018.

Uniqua Greene (L.S.)
 Notary Public

My Commission Expires: 9-29-2027

FILED
 2018 JUL 16 PM 3:42
 DORIS POULOS O'HARA
 CCP & GS
 FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT
)

John Hicks, # 355602

) 2018-CP-21-1904
)

) Applicant,
)

) v.
)

) RETURN
)

) State of South Carolina,
)

) Respondent.
)

In response to the application for post-conviction relief (PCR) filed by John Hicks (Applicant) on July 16, 2018, the State files this return:

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the August 2017 term of the Florence County Grand Jury for murder. (2017-GS-21-00953). Applicant was represented by Charles E. Johnson, Esquire. Applicant pled guilty on March 19, 2018, to the lesser included offense of voluntary manslaughter before the Honorable Roger Henderson. Applicant's plea was entered without a sentence negotiation or recommendation. Judge Henderson accepted Applicant's guilty plea and sentenced him to the maximum—thirty years imprisonment. Applicant did not appeal his plea or sentence.

II. Facts

John Hicks pled guilty to voluntary manslaughter. Hick's guilty plea stemmed from an incident that occurred over the late night / early morning hours of November 18–19, 2016. That night: Hicks walked into a bar, raised his gun, randomly selected a target, and fired one shot. The target was Richard Ennis. He died. (Tr. 8–9).

Hick's plea hearing was held on March 19, 2018. At the hearing, Investigator Thomas McFadden—the lead investigator—explained the State's theory of the case and the evidence it intended to introduce at trial. (Tr. 13–18). On November 18, 2016, Hicks was partying with two friends. Roderick Commander—Hick's co-defendant—was with Hicks that night. Hicks, Commander, and another friend went to several social establishments that night. They began the night at a bar in Lynchburg.

The group was eventually kicked out of the Lynchburg bar, but they did not want their night to end. The group then went to a bar in Florence. The group was kicked out of the second bar because someone in the group had a weapon. Although they had just been kicked out of a second bar, Hicks and his friends did not want to stop partying. The group decided to try their luck at a third bar. At some point, Hicks and Commander both stated, "Someone is going to die tonight." (Tr. 14).

The group arrived at the third bar, BJ's Lounge, shortly before midnight. (Tr. 9). When Hicks arrived at BJ's Lounge, Ennis was playing pool inside. (Tr. 9). Hicks entered BJ's Lounge, fired one round from a pistol, and then ran out the back door. Hicks fled, but his friends stayed at the bar. (Tr. 15).

Once McFadden arrived at the scene, Hicks's friends directed him to a trail behind BJ's Lounge. McFadden walked the trail and stepped on a handgun. When he found the gun, it was jammed. (Tr. 15). Apparently, Commander provided the State with a written statement confessing to the crime; however, after further investigation, the State believed the confession originated with Hicks. (Tr. 17). Commander and the third member of the group cooperated with law enforcement. (Tr. 14, 17–18).

Hicks stated at the hearing he was drunk and high at the time of the incident. He told the plea court he was high on “[c]ocaine, pills, and marijuana.” (Tr. 20). He stated he did not know Ennis and that he was just shooting randomly. (Tr. 16, 18–19).

The State admitted it would struggle at trial establishing motive because Hicks shot Ennis at random. (Tr. 17). However, the State then explained, “Of course, we don’t have to [establish motive]. . . . But any experienced litigator is going to let you know [establishing motive is] important. We could not do that.” (Tr. 17). As for the written confession, the State’s theory at trial would have been that Hicks wrote the confession in an attempt to set up his co-defendant. (Tr. 17).

There was no sentence recommendation or negotiation. Judge Henderson accepted Hicks’s guilty plea and sentenced him to the maximum—thirty years imprisonment. Hicks did not appeal. He commenced this PCR action on July 16, 2018.

III. Current Application

Applicant alleges he is being held in custody unlawfully due to ineffective assistance of plea counsel. Applicant alleges plea counsel was ineffective for:

1. Providing inadequate advice;
2. Advising Applicant that he would get a life sentence if he went to trial when Applicant’s co-defendant wrote a confession;
3. Failing to preserve issues related to the admission of a list of disciplinary infractions;
4. Failing to give adequate advice about the trial process.

Applicant requests the following relief:

1. His conviction be vacated and reversed;
2. His conviction be corrected; or
3. His sentence be reduced.

Attached to this return and incorporated herein are the Florence County Clerk of Court records, Applicant’s records from the South Carolina Department of Corrections, the plea transcript, and the records of this current PCR action.

IV. Response to Allegation of Ineffective Assistance of Counsel

The State submits Applicant's allegation of ineffective assistance of counsel is without merit. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). However, counsel is presumed to have adequately assisted and exercised reasonable professional judgment in making decisions in the case. *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64. "[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

"[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). Plea counsel is not deficient for advising a defendant to plead guilty based on what counsel believes the sentence would be if the defendant were convicted at trial. *See Bennett v. State*, 371 S.C. 198, 204–05, 638 S.E.2d 673, 676 (2006).

To prove prejudice, the applicant must show a reasonable probability he would not have pled guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

As to Applicant's claim that plea counsel was ineffective for failing to give adequate advice about the trial process, the State submits this allegation is without merit. The record does not refute Applicant's allegation that plea counsel failed to explain the trial process. Even so, even if plea counsel did not adequately advise Applicant of the trial process, plea counsel's alleged deficiency was cured by the plea court. See *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (stating that plea counsel's deficient performance can be cured by the plea court's colloquy). The plea court thoroughly explained the trial process to Applicant during the plea hearing, and Applicant stated that he understood what the plea court explained to him. (Tr. 6-8). Accordingly, this Court should deny relief as to this allegation.

However, the record does not dispute Applicant's other allegations; therefore, the State requests an evidentiary hearing to fully resolve the issues. See *Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983).

V. Any Future Amendments

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to the Uniform Post-Conviction Relief Act¹ and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments

¹ S.C. Code Ann. §§ 17-27-10 to -160.

to this application. *See* Rule 11, SCRPC. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRPC.

VI. Response to Any and All Other Allegations

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

VII. Request for an Evidentiary Hearing

WHEREFORE, The State requests that an evidentiary hearing be held on the claims of ineffective assistance of plea counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

SAMUEL L. KEY
Assistant Attorney General

By: 
 ATTORNEYS FOR RESPONDENT
 Office of the Attorney General
 Post Office Box 11549
 Columbia, SC 29211

Oct. 1, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	
	)	
	)	2018-CP-21-1904
JOHN HICKS, #355602	)	
	)	
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:

Mr. Overture E. Walker
 Stoney & Walker, LLC
 1527 Blanding Street
 Columbia, SC 29201

DATED this the 1st day of October, 2018.


 Carmen A. Nord, Legal Assistant
 For Respondent

I N D E X

WITNESSESPAGE

John Hicks:

Direct Examination by Mr. Walker

7

Cross-Examination by Mr. Key

16

Charles E. Jackson, Sr.

Direct Examination by Mr. Walker

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Cross-Examination by Mr. Key

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EXHIBITSNO.DESCRIPTIONEV.

(NO EXHIBITS WAS INTRODUCED DURING HEARING)

1 MR. KEY: May it please the court? This is John Hicks
2 versus the State of South Carolina. Case number 2018-CP-
3 21-1904. The applicant is confined in the South Carolina
4 Department of Corrections pursuant to orders of commitment
5 of the Florence County Clerk of Court. Applicant was
6 indicted at the August, 2017 term of the Florence County
7 Grand Jury for murder. Applicant was represented by
8 Charles Johnson. Applicant pled guilty on March 19, 2018
9 to the lesser included offense of voluntary manslaughter
10 before the Honorable Roger Henderson. Applicant's plea was
11 entered without a sentence negotiation or recommendation.
12 Judge Henderson accepted the applicant's plea and sentence
13 him to 30 years imprisonment. Applicant did not appeal his
14 plea or sentence. In his application for post-conviction
15 relief he alleges ineffective assistance of counsel and,
16 specifically, he alleges ineffective assistance of counsel
17 for providing inadequate advice, advising him that he would
18 get a life sentence if he went to trial when applicant's
19 co-defendant wrote a confession. Failing to preserve
20 issues related to the admission of a list of disciplinary
21 infractions. And failing to give adequate advice about the
22 trial process. He is represented by Overture Walker.

23 THE COURT: All right. Mr. Walker, how you doing
24 this morning, sir?

25 MR. WALKER: Good morning, Your Honor, how are you?

1 THE COURT: Doing well. Are you ready to proceed?

2 MR. WALKER: I am, Your Honor. Before we proceed
3 allow me apologize to the court. I drove from Columbia
4 this morning. I got my times mixed up. And then once I
5 arrived I went to wrong courthouse. I went across the
6 street and the deputies over there were kind enough to
7 direct me over here so - but that was after I got through
8 security. But, in any event, we're here and my apologies
9 for being tardy and we're ready to proceed, judge.

10 THE COURT: Well, you really weren't tardy. You
11 got here before we called your case.

12 MR. WALKER: Well, it says 9:30 so....

13 THE COURT: You good. You good.

14 MR. WALKER: All right. Thank you, judge. At this
15 time we would call Mr. John Hicks to the stand.

16 THE COURT: Sir, if you'd come around to be sworn
17 please.

18 MR. WALKER: And, Your Honor, before we swear in Mr.
19 Hicks if I may just give a very brief opening, I mean, very
20 brief remarks.

21 THE COURT: Well, let's -- since he's up here let's
22 swear him in ---

23 MR. WALKER: Okay.

24 THE COURT: --- and he can sit and then I'll hear
25 from you a quick.

1 MR. WALKER: Sure.

2 THE CLERK: Place your left hand on the Bible and
3 raise your right hand as best as you can. Do you swear to
4 tell the truth, the whole truth, nothing but the truth help
5 you God?

6 MR. HICKS: Yes, ma'am.

7 THE COURT: All right. You can come around and be
8 seated, sir. All right. Go ahead, Mr. Walker.

9 MR. WALKER: Yes, Your Honor. So on December 1,
10 2016, Mr. Hicks was arrested for a murder that occurred
11 here in Florence County. I believe the date of the murder
12 was November 19, 2016. He retained Mr. Charlie Johnson for
13 representation shortly thereafter. After about 473 days in
14 jail he plead guilty to the charge of voluntary
15 manslaughter. That guilty plea came on March 19, 2018. As
16 counsel has stated he was sentenced to 30 years on that
17 guilty plea which is the maximum sentence that is allowed
18 under the law for voluntary manslaughter. And then on July
19 16, 2018 he filed this PCR application with the Clerk of
20 Court's Office here in Florence County and, Your Honor, we
21 take the position that his plea was not knowingly and
22 voluntarily made and we base it off the fact that we did
23 not receive effective assistance counsel, judge, but also
24 but for that deficiency he would not have pled guilty. So
25 that is the petitioner's or the applicant's, rather, is our

J. Hicks- Direct Examination by Mr. Walker

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1 position this morning and we believe that the evidence,
2 I'll be able to bear that out.

3 THE COURT: All right. Go ahead, sir.

4 JOHN HICKS, first being
5 duly sworn, testified as follows:

6 **Direct Examination by Mr. Walker:**

7 Q. Mr. Hicks, state your full name for the record, sir?

8 A. John Hicks.

9 Q. And where are you from, Mr. Hicks?

10 A. Lynchburg, South Carolina.

11 Q. And where are you currently incarcerated?

12 A. Well, um, at McCormick. That is in McCormick, South
13 Carolina.

14 Q. And elevate your voice because the clerk has to
15 transcribe this and the State needs to be able to hear your
16 testimony as well.

17 A. Yes, sir. Yes, sir.

18 Q. And you are housed there on what charge?

19 A. Manslaughter.

20 Q. And was that by a guilty plea or by a conviction at
21 trial?

22 A. A guilty plea.

23 Q. And who was your attorney in that case?

24 A. Charles E. Johnson.

25 Q. And how did he become involved in your case, was he

J. Hicks- Direct Examination by Mr. Walker

8

1 appointed to your case or did you retain him?

2 A. Retained him.

3 Q. And how did he become involved as your attorney as far
4 as you retaining him? Would you explain to the court how
5 that came about?

6 A. Well, my mother said he was a good lawyer so we hired
7 him. That's how that came about, sir.

8 Q. Okay. And was that your choice for an attorney Mr.
9 Johnson?

10 A. No. That wasn't my choice that was my mother's
11 choice.

12 Q. And how many times -- well, let me backtrack. When
13 was the first time you met with him?

14 A. I'd say, I think it was a Saturday. I turn myself in
15 and I think it was a Monday if I ain't mistaken. I think
16 it was a Monday.

17 Q. And so after he became your attorney, how many times
18 did you meet with him?

19 A. Maybe three or four times. Probably five at the most.

20 Q. Five times at the most?

21 A. Yes.

22 Q. And do you recall during those meetings what you all
23 discussed?

24 A. Yes. Yes, sir. The first time we met he said it
25 would be accessory after the fact or something like that,

1 accessory after the fact of murder, something like that.
2 Then he said I would get a bond for \$100,000 or something
3 like that. But none of those never happened. And then I'd
4 say maybe a month after the first time he came to see me,
5 he came back and see me like a month later and he told me
6 it would be, he would get manslaughter, 15 years. He said
7 I'd get 15 years on manslaughter or whatnot. He said he
8 couldn't get the accessory after the fact or something like
9 that. And then he came back again maybe a month after that
10 and he told me, um, he keep saying the same thing,
11 manslaughter 15 years! Manslaughter 15 years! That's all
12 he was saying. And then come to the last inning he was
13 like he got the plea for manslaughter but it's an open
14 plea. So I told him, I was like, I ain't trying to take no
15 plea like that. So he, basically, told me he was like
16 well, if you don't take this plea and you go to trial, you
17 gonna lose. He said it was like forty-nine people who were
18 willing to testify against me or something like that. He
19 said I would lose if I went to trial. He said I would
20 receive a life sentence. And then he told me - he also
21 told me he was like well, if you take this guilty plea you
22 wouldn't receive 30 years. And he said write a letter to
23 the family and the judge would have leniency on you. So I
24 did what he said.

25 Q. Do you recall at any time during Mr. Johnson's

J. Hicks- Direct Examination by Mr. Walker

10

1 representation of you, reviewing the discovery or
2 discussing the discovery evidence in your case?

3 A. One time. One time. That was the second time he came
4 to see me.

5 Q. The second time he came to see you?

6 A. Yes, sir.

7 Q. What were those discussions like or what did those
8 discussions entail about the discovery?

9 A. He showed me - he showed me something or investigator
10 write. That was, basically, it. And he showed me a couple
11 pictures and that was, basically, it.

12 Q. Did you have a chance to review the incident report?

13 A. No. I ain't get my Rule 5 until after the plea.

14 Well, it wasn't even a whole Rule 5. It was like a
15 partial. It wasn't even - it wasn't even half of a Rule 5.

16 Q. And so again what was the extent of the discovery you
17 reviewed with him or what he reviewed with you, evidence?

18 A. Basically, he reviewed with me was, ah, something, I
19 think it was, McFadden write. I think McFadden had write a
20 little incident report, a statement or whatnot.

21 Q. Investigator McFadden?

22 A. Yeah. I think so.

23 Q. So you review the investigative report ---

24 A. Yeah ---

25 Q. --- that was transcribed by Investigator McFadden.

1 A. Yeah, that was it.

2 Q. Did you ever request a copy of your discovery?

3 A. Yes, on multiple times.

4 Q. And what was Mr. Johnson's response?

5 A. He can't give it to me - he can't give it to me
6 because it would cause more problems in my case. Something
7 like that. He said it would cause more problems in my case
8 if you give it to me with me being incarcerated - well,
9 with me being locked up at the detention center.

10 Q. Did he ever talk to you about the strength of the
11 State's case?

12 A. About what?

13 Q. The strength, did he discuss the strengths and
14 weaknesses in the State's case with you, their evidence?

15 A. No. No, sir. Not that I can ---

16 Q. Did he discuss with you as far as the strengths and
17 weaknesses of the evidence against you?

18 A. No, sir, not as I recall. No, sir.

19 Q. So tell me, then, what ultimately influence your
20 decision to plead guilty?

21 A. He left me no choice. I mean, ---

22 Q. Explain to the court which you mean he left you know
23 choice?

24 A. Well, I'mma say it like this, he was like if I go to
25 trial I would receive life. He say, guarantee I'm gonna

J. Hicks- Direct Examination by Mr. Walker

12

1 lose. He said forty-nine people was willing to testify and
2 he guarantee that I will lose and I will receive a life
3 sentence. So he was like, you rather life - you rather 30
4 years or life? And then I was like, man, I ain't wanna -
5 - I ain't taking this plea. I ain't want to take this
6 plea. And then he came back a day or so later and was like
7 - and was like if you don't take this plea you gonna
8 receive life. So I was sitting down thinking about it and
9 I was like I ain't wanna go to jail for life. So, I mean,
10 he, basically, left me no choice but to plea guilty. He
11 let me know choice.

12 Q. So you don't feel like your plea was voluntarily made?

13 A. No, it wasn't. And then we was inside the court,
14 inside of the courtroom, he tell me everything he tell the
15 judge. Like, yes, he was highly representative. Yes -
16 basically, everything.

17 Q. Do you feel like he spent enough time working on your
18 case and preparing your case?

19 A. No. He didn't even know my case. No.

20 Q. And but for the advice of counsel, would you have pled
21 guilty?

22 A. Say that again, sir?

23 Q. But for the advice -- but for the advice of Mr.
24 Johnson, would you have pled guilty to voluntary
25 manslaughter?

1 A. You talk about, would have I ---

2 Q. Oh his advice ---

3 A. If it wasn't for his advice?

4 Q. Correct.

5 A. If it wasn't for his advice, no, I wouldn't plead
6 guilty, if it wasn't for his advice.

7 Q. So if you would've proceeded to trial?

8 A. Yes. I had ask him a couple of times about trial. I
9 send motions through the clerk of court to him to file on
10 my behalf. Like, fast and speedy trial. Preliminary
11 hearing. Bond. Prosecution of misconduct. All kind of
12 motions I had ask him to file on my behalf and he's filed
13 none on my behalf.

14 Q. Would you tell this court why you were leaning toward
15 going to trial?

16 A. Because I wasn't the one - I wasn't the shooter. I
17 wasn't the one.

18 Q. And you told your attorney you wasn't the one?

19 A. Multiple times.

20 Q. And we're not here to try the case today but, did you
21 ever inform him that there was someone else perhaps?

22 A. You talking about that was the shooter?

23 Q. Correct.

24 A. Well, not really but - yes.

25 Q. Okay.

J. Hicks- Direct Examination by Mr. Walker

14

1 A. He knows who the shooter was.

2 Q. Tell me why you say that? Tell the court why you feel
3 like he knows who the shooter is?

4 A. Because in the incident report -- after I get the
5 partial of my Rule 5 ---

6 Q. Mmm, hmm.

7 A. --- a guy named Julius Small stated who the shooter
8 was. And with him having all of my information he already
9 know that. So with that being said he knows this.

10 Q. Who is this Commander fellow, is it Roger Commander?

11 A. Yes, sir.

12 Q. Can you tell the court about Roger Commander?

13 A. Well, he's from Lynchburg. I've known him all my
14 life. I mean, and he was just - like he was - he was just
15 on probation for attempted murder.

16 Q. Well, don't get into his entire history but, wasn't
17 there something about a letter or what-have-you?

18 A. You said a letter he gave me?

19 Q. Yeah, is there something about a letter or a
20 confession?

21 A. Oh, yeah, a confession letter.

22 THE COURT: Hold up!

23 Q. Yeah. Will you explain that ---

24 THE COURT: Hold up! Hold up! Yes, sir?

25 MR. KEY: The State would object to any hearsay

1 as to the letter. Mr. Walker? Sustained.

2 MR. WALKER: Well, Your Honor, I mean, what he's --
3 the letter is not being offered, you know, for the purpose
4 of, I guess, to establish truth of the matter asserted or
5 what-have-you. But instead the letter is being offered
6 because in the application for PCR one of the things that
7 my client alleges is that he didn't receive effective
8 assistance of counsel because there was a letter in which
9 someone else confessed to you - confess to this crime. And
10 he's alleging that his attorney did not follow up on this
11 so....

12 THE COURT: Well, I'll allow you to ask him, you
13 know, if he knows whether or not his lawyer ever followed
14 up on it or talked about it. But the substance of it, I'll
15 sustain the objection.

16 MR. WALKER: Okay. Fair enough, Your Honor.

17 Q. Let me just -- I'll rephrase the question. And you
18 all -- was your attorney aware of a letter that was
19 provided to law enforcement ---

20 A. I don't think so ---

21 Q. --- regarding this incident?

22 A. Yes, sir.

23 Q. And did your attorney ever follow-up on that letter?

24 A. No, sir. He said he couldn't use it or something like
25 that.

J. Hicks- Cross-Examination by Mr. Key

16

1 Q. He told you he could not do it?

2 A. Yes. He said he couldn't use it or something like
3 that.

4 Q. And why did he tell you he couldn't -- what was his
5 basis for that to say that he couldn't use it?

6 A. Got to get a writing specialist. It cost all this
7 much money and this that and the third.

8 MR. WALKER: I beg the Court's indulgence Your
9 Honor.

10 THE COURT: Yes, sir.

11 Q. And the person who represented you in this case, is he
12 present in the courtroom today?

13 A. Yes, sir.

14 Q. Where is he in the courtroom?

15 A. Sitting right there.

16 Q. All right.

17 MR. WALKER: Your Honor, no further questions at
18 this time.

19 THE COURT: Very well. Cross examination?

20 **Cross-Examination by Mr. Key:**

21 Q. Mr. Hicks, how many times did Mr. Johnson meet with
22 you to prepare for the case?

23 A. Maybe five times at the most.

24 Q. Five times, okay. And I know you went over this when
25 Mr. Walker was questioning you but, do you recall going

1 over any of the discovery with Mr. Johnson?

2 A. Yes. Just, ah, it was a few pages of, I think, of
3 McFadden had write or - it had been a little incident
4 report McFadden had write, the Detective McFadden. Yeah,
5 just that.

6 Q. But you claim he didn't give it to you?

7 A. No, sir.

8 Q. Did he explain why?

9 A. He said that he couldn't give me my Rule 5 because it
10 would cause more problems in my case or something like
11 that.

12 Q. Okay. Do you recall discussing any defenses with your
13 attorney?

14 A. No, sir.

15 Q. Did y'all prepare to go to trial or did y'all have any
16 discussions leading up to the plea?

17 A. No, sir. I was wanting to go to trial but he was,
18 like, I'd lose.

19 Q. Okay. So you did want to go to trial?

20 A. Yes, sir.

21 Q. Did you give him any leads or potential witnesses for
22 him to investigate?

23 A. Yes. As a matter of fact, Shaneka Wright (sic).

24 Q. Do you recall if she spoke at your sentencing?

25 A. No. She wasn't.

C. Johnson- Direct Examination by Mr. Walker

18

1 Q. Did Mr. Johnson tell you all the plea offers that were
2 presented?

3 A. No. He ain't tell me no plea offers. He come to me
4 one time with a plea and that was for manslaughter 2 to 30
5 with no recommendations. That been the only time.

6 Q. But he did tell you that you could plea to the reduced
7 manslaughter charge?

8 A. He said I could plea to that?

9 Q. Yes.

10 A. Yes. He said - he said that was my plea. That what
11 the plea was.

12 Q. Okay. And was it your decision to plead guilty?

13 A. No. He left me no choice. That was his decision for
14 me to plead guilty.

15 Q. Do you recall the plea judge asking you if it was your
16 decision to plead guilty?

17 A. I can't recall that but - I can't recall that.

18 MR. KEY: Okay. No further questions, Your
19 Honor.

20 MR. WALKER: Nothing on redirect, Your Honor.

21 THE COURT: All right. Hold on just a minute, sir.
22 You may step down. Mr. Walker, call your next witness
23 please.

24 MR. WALKER: Thank you, Your Honor. This time, Your
25 Honor, the applicant would call Mr. Charlie Johnson to the

1 stand. Your Honor, Charles Johnson. He has a brother
2 named Charlie. I always get Charlie and Charles mixed up.
3 Charles is the oldest.

4 THE CLERK: Raise your right hand. Do you swear or
5 affirm that the testimony you give will be the truth, the
6 whole truth, nothing but the truth so help you God?

7 MR. JOHNSON: Yes, I do.

8 THE COURT: How are you, Mr. Johnson? How you
9 doing, sir?

10 MR. JOHNSON: I'm doing fine, sir. How are you
11 doing?

12 THE COURT: Good.

13 CHARLES E. JOHNSON, first being
14 duly sworn, testified as follows:

15 **Direct Examination by Mr. Walker:**

16 Q. Mr. Johnson, how long have you been practicing
17 criminal law?

18 A. This year thirty-two years.

19 Q. Thirty-two years. And how did you become involved in
20 this case?

21 A. I got a call from his mother. She actually was
22 calling for my brother Charlie. But then after talking I
23 advised her at the time that I was Charles Johnson not
24 Charlie Johnson and we talked on the phone and then she
25 called back and said she wanted me to come talk with her

C. Johnson- Direct Examination by Mr. Walker

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1 about her son. Actually, the first contact was prior to
2 him turning himself in. So initially advised her -- the
3 first thing she needed to do was advise him to turn himself
4 in, first. And then after that I told her I would come
5 down and talk to him after he turn himself in and then get
6 back with her.

7 Q. How soon did you meet with him after he got himself
8 turned in?

9 A. In thinking back, I think within about a week from the
10 time that he actually was incarcerated.

11 Q. And over the course of your representation of Mr.
12 Hicks, did you recall a number of times that you met with
13 him?

14 A. As he said roughly five - I think it was more than
15 five times. Initially, there was a problem in getting the
16 discovery because in talking to Investigator McFadden,
17 initially, he indicated that there was a full
18 investigation, talking to witnesses and whatever. So it
19 took quite a while from, I think, the latter part of the
20 summer or something like that. I actually didn't get the
21 file until I think it was like June or July.

22 Q. And did you discuss with Mr. Hicks, I guess, the
23 nature of the charges as well as the elements of the
24 events?

25 A. Yes, I did.

1 Q. And do you recall also discussing with him, I guess,
2 the punishment for the events or what he was facing?

3 A. Well, before I got the file I told him I really
4 couldn't discuss his case with him because the only
5 information I had was what he provided and what information
6 I got from Investigator McFadden verbally. I told him,
7 initially, until I get the file I had to take a look at it
8 and we really couldn't discuss defenses or anything like
9 that because I wanted to see what the State had. His
10 initial concern was about a bond hearing. And so it took
11 me about three months to get that set. I think it was in
12 March of the following year we had a bond hearing. So we
13 did that first.

14 Q. What was a result of that, Mr. Johnson?

15 A. He was denied bond.

16 Q. Okay.

17 A. If my memory is right. Because at the bond hearing
18 the only person showed up at the bond hearing for him was
19 his mother. His mother did show up but no one else from
20 the family did.

21 Q. Now, once you got the discovery, were you able to go
22 to the jail and meet with him and review the discovery with
23 him?

24 A. Yes. When - it actually came in a CD so I printed up
25 a stack, roughly, about two and a half inches thick which

C. Johnson- Direct Examination by Mr. Walker

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1 also included investigator reports, the witness statements,
2 the autopsy pictures, pictures of the club where the
3 shooting took place at. All of that I brought to the jail
4 and I'm just looking through my notes and I put down about
5 four hours, four or five hours of time that we sat and went
6 through the whole file. He indicated he just read through
7 some kind of report. Actually he looked at, I remember
8 sitting and watching him go through some of the statements,
9 the investigator reports. He actually went through the
10 autopsy looking at pictures. Because the gentleman, they
11 had pictures of the gentleman when he was in the hospital,
12 all of that. He went through all of that. We sat and
13 talked about it. Also the statement he mentioned earlier
14 from the jail that was something that was given to me early
15 on, I think, about February of 2017, actually. Because
16 that letter that you're talking about, that confession, was
17 actually something written in jail that was passed between
18 the dorns in the jail that Investigator McFadden had and he
19 notified me of it because it was given to him. And then
20 allegedly within that statement was allegedly by the co-
21 defendant but there was some question about who actually
22 wrote it, the signature was questioned, and the co-
23 defendant denied even doing, writing the statement in the
24 first place. So that came before we even got the whole
25 file. So that's what we discussed early on even before the

1 bond hearing, actually, to be honest with you.

2 Q. Did you ever discuss the strengths and weaknesses of
3 the State's case with Mr. Hicks?

4 A. Yes. Prior to getting the file at the time I didn't
5 have my hands on, we discussed - I asked him what happened?
6 What he was doing before? And then I had got the file and
7 then looking at the statements that were provided by
8 different witnesses - but, actually, prior to the shooting
9 they went to two other clubs in the area before there. So
10 we had statements from folks not only at the incident
11 itself, but also statements from other people who saw them
12 together prior to and statements which were made prior to
13 the shooting itself which was problematic in themselves.
14 Because it attributed certain attitudes and statements that
15 both Mr. Hicks and Mr. Commander stated to people prior to
16 the shooting. So I provided him with all that information
17 as well.

18 Q. And did Mr. Hicks ever give you the names of any
19 potential witnesses that would've been beneficial to his
20 case?

21 A. The only time that he mentioned a witness as far as
22 the alibi witness, actually, was a week before the plea.
23 There was no mention of any witnesses to place him anywhere
24 else or anybody that had anything to say that would be in
25 mitigation to this alleged act at the time.

C. Johnson- Direct Examination by Mr. Walker

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1 Q. Did you two discuss any possible defenses to the
2 charge?

3 A. Well, the problem with that was that - what I told him
4 was if I had something to work with, again, that goes back
5 to the defense part, that I would not have mind trying the
6 case if I had a plausible defense to his actions. And
7 there was none. I mean, the sad part about it is, is that
8 the victim was someone that he did not know, never met,
9 never spoken to, had no interaction with that all. So I
10 could not make an argument that he wasn't at the club that
11 night because the driver of the car was in the parking lot
12 by his own statement drinking and smoking a blunt.
13 Commander was the other co-defendant who was in the club
14 and people will put him there. We had multiple people
15 putting Mr. Hicks there at the time. And so there was
16 nothing from the defense standpoint that I could actually
17 make a plausible argument in mitigation for his late
18 actions at all and that's what I was up against. So in
19 speaking with him, other than his condition at the time,
20 which was he said he was drinking and he smoking, getting
21 high or something, some narcotics or whatever, drugs, prior
22 to so his mental condition would have been the only defense
23 in mitigation. But because of the statement from a prior
24 club owner who indicated that he told Mr. Hicks and Mr.
25 Commander to leave his club because they were allegedly -

1 his statement was they were running around saying somebody
2 is gonna die tonight. So that was - that was a statement
3 from a club owner in another club they went prior to
4 arriving at this ---

5 Q. So how did you feel about the State's ability to
6 prove, I guess, prove the case beyond a reasonable doubt?
7 It sounds like you felt pretty strongly about that?

8 A. Yes, because again I could not put him on the stand
9 because of what he told me which was that he actually shot
10 him. He had shot the guy. So I could not put him on the
11 stand to purge himself. So if he had went to trial I would
12 have asked to be removed if he insisted on testifying. So
13 that was put at a disadvantage. And I could've put him on
14 this stand to testify other than to say, well, I was high I
15 really didn't know what I was doing that probably would've
16 been the only defense.

17 Q. So he hadn't -- so you're saying that -- just so I
18 understand you, that he admitted to you, I guess, in a
19 private discussions that he shot the victim?

20 A. Yes.

21 Q. Now, explain to me or, at least, share with us
22 complete negotiations between you and the State, how did
23 that come about?

24 A. My concern was like I told the solicitor I could not
25 have him plea to murder. The minimum of murder was 30 to

C. Johnson- Direct Examination by Mr. Walker

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1 life. To me that didn't make any sense at all. If you
2 were going to do that then we need to go ahead and try it.
3 Even though I knew going in that I had a ten percent chance
4 maybe because I doubt it of a possibility of getting not
5 guilty. But the reality of it was in my experience under
6 uniquely circumstances we have at least ten to twelve
7 people - well at the club itself it had at least three,
8 four, five folks that would put him there with the gun in
9 his hand plus the prior statements from some of the folks
10 at the other club, talking about what their intent was,
11 somebody's gonna die tonight, that would just embellish the
12 story per se. And most likely looking at it at a
13 standpoint of him having no interaction with the victim
14 here at all and no reasons that I could even put forth to
15 justify the shooting. There was very the likelihood of
16 possibility of life without parole here at which I advised
17 him of. And so in discussing with the solicitor to
18 minimize his chance of getting the possibility of life
19 without parole, that with manslaughter we have an option
20 here. And so in talking with the solicitor and we agreed
21 to that and they got the family to agree to that, I thought
22 it was the best option.

23 Q. The victim's family you're referring to, right?

24 A. The victim's family, right. I thought that would be
25 the best option here. So he wouldn't have to spend the

1 rest of his life in prison as a possibility. And I told
2 him that. I did not tell him that there will be 15 years.
3 I said I would talk -- initially, when I first met him and
4 I also told his mother this, I said I will talk and based
5 on what he told me - what he told me the facts was
6 initially, which wasn't what they actually was, but based
7 upon his representation of what happened, I told him I
8 would try and talk to the solicitor and see if he could get
9 a plea to 15 years ---

10 Q. Negotiated ---

11 A. --- a negotiated plea. But there were no guarantee on
12 that. And that is where that 15 years came about. And I
13 said also based upon receiving the full file and see
14 exactly what's in it and not what you told me. Because,
15 again, my experience over the years is what your client
16 tells you initially and what is, sometimes is not the same
17 thing. So that's where that 15 years come in at. There
18 were no guarantee that I advised him of that. That what --
19 even with the plea, I said, now, the max is 30. It's up to
20 you to convince the judge to give you less. The State
21 agreed not to recommend - did not have a recommended plea
22 just a straight a plea. I said that's the best we could do
23 on that. Get it reduced to murder to manslaughter. No
24 recommendation from the State. And I told him you gonna
25 have to convince the court that you deserve less than the

C. Johnson- Direct Examination by Mr. Walker

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1 max. And I told him that's in your lap. I cannot -- I
2 don't have anything I could say.

3 Q. What you mean by that, Mr. Johnson, that he has to
4 convince the judge?

5 A. Because my explanation here and in looking at the
6 totality of the facts, is that there was nothing I could
7 argue for mitigation. Again, if this was a guy he had a
8 fight with before and has some disagreement with or a heat
9 of the moment or some beef he had with the family or
10 something that could justify anger or some kind of
11 emotional response, some feelings of anger or mistrust or
12 whatever, then that's something I could work with. But to
13 shoot someone that you don't know, you never spoke to, had
14 no interaction with, I don't know how to deal - I could not
15 come up with plausible reasonable explanation for that.
16 And so, I told him that. See what I'm saying. He seemed
17 to imply that our conversation was brief in a very narrow
18 scope. Far from it. Even before I received the discovery
19 I sat down with him for an hour or more at the jail and
20 just talked about how the system worked. What he was
21 looking at. What are some of the problems we had in
22 defending this case. And so for him to get up here and act
23 like it was such a brief conversation that he wasn't fully
24 aware of anything is just to say disingenuous of being nice
25 with the word. He was fully aware. And I told him that if

1 he wanted to try it I would try it, but I told him based on
2 my experience and I have tried many cases, several I got
3 not guilty on - well, most of the time in a trial I got not
4 guilty ---

5 Q. But ---

6 A. --- so going to try wasn't an issue with me. I enjoy
7 trying cases. So I'm not an attorney who don't want to try
8 cases. That's not even the case here. But I'm not -- my
9 interest was not for him to spend the rest of his life in
10 prison. And I told him about a young man who I knew since
11 he was 10 years old who's doing life without parole right
12 now because he wanted to go to trial. And there was no
13 basis for him to go to trial. And if he had did a plea he
14 had, at least, be one day be able to get out and see his
15 mom or have the possibility of but right now he doesn't.
16 So at 40 years old he's going to spend the rest of his life
17 in jail and die there. And he started at 32. So, yeah, I
18 advised him about that. And so to me my job is to protect
19 him sometimes against hisself, my client, in that this is
20 not TV, this is not play-play, the ain't Judge Judy or all
21 those things. And so my job is to be realistic about what
22 his options really are and often tell my clients, I tell
23 them I say I'm not going to lie for you and I'm not gonna
24 lie to you. So, therefore, this is what we're looking at.
25 And I left it up him to decide.

C. Johnson- Direct Examination by Mr. Walker

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1 Q. After the two of you had that conversation, did he
2 make this decision immediately or did you give him time to
3 discuss it family?

4 A. The first time we met, I'm just looking at my notes,
5 we met in July when I first got the file. I printed all of
6 this out. We sat down, again, and talked. Like I said I
7 got four or five hours in my notes so we can take it to
8 trial. So we sat for, at least, two hours going through
9 all of that.

10 Q. Right.

11 A. And came back in September. I told him, you know,
12 think about it and come back and another four hours in
13 September. His plea wasn't until the following year. So
14 with the whole file again and we went back through
15 everything. So, at least, two and a half hours or more in
16 July and, at least, two hours or more at the jail sitting
17 down with him, we taken our time going through it. So we
18 had September all the way through November, December, into
19 the following year. Went back and talked to him again
20 before the plea because even in September that wasn't a
21 given that the plea offer I discussed with the solicitor
22 about manslaughter. That wasn't a guarantee then. That
23 was - he said he had to get back with the family. So we
24 didn't get a response back on that until the following
25 year.

1 Q. And once you got the response back that the
2 manslaughter plea had been greened lighted by the victim's
3 family ---

4 A. Right.

5 Q. --- was Mr. Hicks given a chance to think it over?

6 A. Yes. Then I went back to him and sat down with him
7 again and told him, okay, they said, yeah - yes, you know,
8 we can do this. So what that does is limit your exposure
9 to 30 years, not to life. And I went back over it again.
10 I said, understand, murder with a minimum of 30 to
11 possibility of life without parole. By doing this plea you
12 will limit your exposure to a max of 30 years. Now, it's
13 up to the judge to decide between the minimum and the max
14 what you get.

15 Q. Right.

16 A. And the State agreed not to - to leave it up to the
17 judge to decide without any recommendation from the State.
18 That was the deal. I said now it's up to you to decide what
19 you want to do.

20 Q. Now do you feel like you pressure him at all into this
21 plea or to accepting the plea?

22 A. No.

23 Q. And you believe that it was his decision, ultimately,
24 to accept the State's offer?

25 A. Yes. But what I did was I spoke with him and then

C. Johnson- Direct Examination by Mr. Walker

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1 also went and spoke with his mother as well because I know
2 he was going back talking to his mother's. So I also
3 explained to his mother and then his sisters and everybody
4 what was going on as far as what my recommendation was, why
5 I suggest we do it this way, and explain to them what we're
6 looking at if he went to trial. So it wasn't just him in
7 isolation but also with his family, in this case, his
8 mother. That's the only person I ever really talked to on
9 a regular basis was his mother.

10 MR. WALKER: I beg the court's indulgence, Your
11 Honor.

12 THE COURT: Yes, sir.

13 Q. Mr. Johnson, do you recall Mr. Hicks telling you on
14 the day of the plea right before you two went to the
15 courtroom that he did not want to accept the State's offer?

16 A. No. He never said that.

17 Q. And do you recall telling him that he would get 15
18 years with the letter that he wrote expressing remorse?

19 A. No. I made a point repeatedly throughout the entire
20 time I represented him to let him know that I asked for
21 that. That was not even on the table for the minimum.
22 Initially, I told him I would try to work for, again,
23 before got the package, to see if it's possible to get a 15
24 year plea, you know, a cap of 15 or whatever. That was the
25 early part of 2017. That went away after I got the.

1 discovery. And I told him that was not, after looking at
2 what was presented, the statements, the witnesses
3 everything, that 15 years was not gonna - I told him just
4 to forget about that, okay. What we're looking at possibly
5 was a 20 to 30 year range depending on how the court
6 perceived him. I made a point of telling him that. You
7 understand. My emphasis with him was, and whether or not
8 he wants to accept this or not I'm not really sure, but
9 that the court would look at you and your actions that
10 night and somebody's got to judge you as a person. And
11 that's where my emphasis with him was to, understand you've
12 got to explain your actions in such a way that - so that it
13 may give you some leniency under the circumstances. But
14 that day we went to the plea he never said he didn't want
15 to plea. Never said that. If you said it, again, for me
16 like I told the client one time I'm going home one way or
17 the other, okay. So it's not, you wouldn't try it? I
18 would try it. But that's not my recommendation. So if he
19 really wanted to I would have tried the case. And I have
20 clients who rejected my recommendation after it didn't work
21 out the way they thought. They regretted it. But I did
22 what they wanted. So he was not under any pressure. So --
23 and in that letter he actually did a fairly - to be honest
24 with you - he actually did a real good speech. He wrote
25 something that actually kind of surprised me. But - and he

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1 did a good job on it - but it wasn't enough to convince the
2 judge at that time not to give him the max and he had over
3 two weeks to write the speech. So within that timeframe
4 we're talking about here, if he has some other - if he had
5 changed his mind that day I would say fine, but he never
6 said - but he never told me that.

7 Q. All right.

8 MR. WALKER: I beg the court's indulgence, Your
9 Honor.

10 THE COURT: Yes.

11 Q. One final question, Mr. Johnson. Any reason why you
12 didn't follow up on this statement that's been referenced
13 as a confession from Mr. Commander?

14 A. Oh, I did. I got a copy of it. I read it. It wasn't
15 anything about handwriting experts as he spoke of before.
16 If you actually read the statement, you had inconsistencies
17 throughout the statement, for one. There were no way to
18 actually identify who actually written statement, for one.
19 The co-defendant deny even making the statement, for
20 another. And even with the statement, itself, the other -
21 every other witness statement put the gun in his hands.
22 And the statement, itself, wasn't, what's the word,
23 coherent. So the statement checking with Investigator
24 McFadden and what he found out and what he told me through
25 his investigation of it was how he came about it, the co-

1 defendant saying that wasn't me. So given all that it
2 would have really impact at trial in my opinion.

3 Q. Okay.

4 MR. WALKER: No further questions, Your Honor.

5 THE COURT: Mr. Key?

6 MR. KEY: May it please, the court?

7 **Cross-Examination by Mr. Key:**

8 Q. Mr. Johnson, you stated you knew of the written
9 confession note?

10 A. Yes.

11 Q. If the case had gone to trial, is that something that
12 you would've tried to use in your defense or in your
13 defense strategy?

14 A. No. To be honest with you I would not have use it at
15 all. Because it was a self-serving statement in a way and
16 there would've been a question about who actually wrote it
17 and it was implicated that my client actually wrote it to
18 frame co-defendant. So it would've been something that
19 probably may have came up but it anything of any real
20 significance here in my opinion.

21 Q. Did you fully explain the trial process with Mr.
22 Hicks, like, what would've happened if the case had gone to
23 trial?

24 A. Yes. What I told him was that, one, I would not put
25 him on the stand. And the reason was, again, because what

C. Johnson- Cross-Examination by Mr. Key

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1 he told me. Even if he didn't tell me that, that he
2 actually shot him, shot the guy, it would've been
3 problematic anyway simply because he had a prior record.
4 And the first version of the events of what he told me
5 before I got discovery wasn't real plausible and could not
6 have been substantiated by witness statements either. So,
7 again, I was caught between a rock and hard place at the
8 time.

9 Q. Now, did he ever give any indication to you that he
10 did not want to take the plea?

11 A. No.

12 Q. No.

13 A. Well, I take that back. Initially, his main concern
14 was how many years. It wasn't the plea. It was the 30
15 year. He was willing to take less time for the plea but
16 his biggest issue was he didn't want to do 30 years.

17 Q. Did you ever promise him 15 years?

18 A. I told him I would try and talk to the solicitor and
19 see if he would be amenable to a 15 year sentence. That's
20 what I told him. And after I talked to the solicitor about
21 it and I told him that was a no go.

22 MR. KEY: I beg the court's indulgence.

23 Q. Mr. Johnson, during the plea, did you feel like Mr.
24 Hicks knew what he was doing?

25 A. Yes.

C. Johnson- Cross-Examination by Mr. Key

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1 Q. And do you believe he pled voluntarily?

2 A. Yes, I do.

3 MR. KEY: No further questions. Thank you.

4 MR. WALKER: Nothing on redirect, Your Honor.

5 THE COURT: You may step down. Thank you.

6 MR. JOHNSON: Thank you.

7 THE COURT: All right. Anything else?

8 MR. WALKER: Nothing further from the applicant,

9 Your Honor.

10 THE COURT: The State?

11 MR. KEY: Nothing from the State.

12 THE COURT: All right. Anything by way of
13 argument?

14 MR. WALKER: Your Honor, I guess I'm going to say is
15 that we take the position that the greater weight of the
16 evidence I'll suggest that counsel's performance was
17 deficient and, but for that deficiency, my client would not
18 have filed, pleaded guilty to the charge and that it was
19 not knowingly and voluntarily made, so we would ask that
20 you grant the relief in the petition, Your Honor.

21 THE COURT: Mr. Key, anything?

22 MR. KEY: Briefly, Your Honor. Just like to
23 point out in the record on Page 6, Judge Henderson ask Mr.
24 Hicks if anyone promised him or threaten him in any way to
25 plead guilty and he stated, that no one had. And the court

1 also explained the trial process, what he was facing if he
2 had proceeded to trial and that's all from the State.

3 THE COURT: Mr. Walker, let me ask you this
4 question.

5 MR. WALKER: Yes, sir.

6 THE COURT: You asserted on your client's behalf
7 that Mr. Johnson's representation was deficient, but for
8 the deficient performance, he would not have pled guilty,
9 any specific as to deficiency, you want to address?

10 MR. WALKER: That's correct, Your Honor. Has my
11 client says, at least, what's been testified to is that he
12 was guaranteed to get 15 years. Now, certainly there's
13 testimony contradicting my clients testimony but,
14 nevertheless, his testimony is evidence. He says, 'but
15 for' that representation, would not have pled guilty. We
16 all know Your Honor as a defense attorney you can't make
17 guarantees. No one knows what a judge is going to do. No
18 one knows what a jury is going to do if it had been a case
19 where they were to go to trial. So we just take the
20 position that, you know, that making a guarantee with
21 respect to a specific outcome does not fall within the
22 range of competence as demanded by attorneys in criminal
23 cases. And so for us Your Honor that would be deficiency
24 and my client has been pretty adamant about that. He
25 referenced that multiple times from the witness stand and

1 'but for' that representation he certainly would not have
2 pled guilty to manslaughter. So that would be our argument
3 judge with respect to the deficiency.

4 THE COURT: All right. I'm going to stand down
5 just a minute. I'll be right back.

6 (Whereupon, the judge took a brief moment off the record to
7 go over file before ruling)

8 THE COURT: All right. Based on what I've heard
9 here today and based upon my review of the file, based upon
10 the testimony that's been presented I do find - I do not
11 find, excuse me, I do not find that counsel was
12 ineffective. I do not find that he was ineffective nor do I
13 find 'but for' any errors on behalf of counsel the
14 defendant would not have pled guilty. That's what he's
15 required to prove in a post conviction relief action for
16 the purposes of granting a relief pursuant to a guilty
17 plea.

18 In reviewing the plea transcript and Judge Henderson,
19 I think who took the plea, was very thoroughal in his
20 questioning of this defendant. As to threats, promises,
21 force, pressured, intimidation, there's no mention of any
22 promises of a 15 year sentence then. I do not believe
23 based upon my observation of the witness, based upon the
24 explanation of Mr. Johnson, it's the court's responsibility
25 to judge credibility. I do not believe - I do believe

1 there was sufficient and adequate explanation of the
2 entire, entire negotiation process when negotiating a
3 charge from a murder to a manslaughter which would, in
4 turn, reduce the exposure of this defendant from 30 to life
5 to a maximum of 30 under manslaughter.

6 Therefore, I am respectfully denying the defendant's
7 request for post-conviction relief. Mr. Key, if you would
8 prepare me an order to that effect, sir. Mr. Walker, thank
9 you.

10 MR. WALKER: Thank you, Your Honor.

11 (CONCLUSION OF THE HEARING ON NOVEMBER 5, 2018)

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CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Twelfth Circuit Court for Florence County, South Carolina, on the 5th day of November, 2018.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

s/ Lisa S. Carter

Lisa S. Carter

Circuit Court Reporter

May 23, 2019

STATE OF SOUTH CAROLINA)
 COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
 IN THE TWELFTH JUDICIAL CIRCUIT

John Hicks, # 355602,)

Case No: 2018-CP-21-1904

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

DORIS POULOS O'HARA
 C.C.P. & G.S.
 FLORENCE COUNTY, SC

2019 FEB 12 AM 8:50

FILED

The matter before the Court is an action for post-conviction relief (PCR). John Hicks commenced this PCR action July 16, 2018. Hicks alleged ineffective assistance of counsel and attacked the knowing and voluntary nature of his guilty plea.

The Court held an evidentiary hearing November 5, 2018, at the Florence County Courthouse before the undersigned. For the reasons discussed below, the Court finds Hicks's allegations to be without merit and concludes plea counsel was not ineffective. Therefore, the Court denies relief and dismisses the action with prejudice.

I. FACTS & PROCEDURAL HISTORY

John Hicks is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Hicks was indicted at the August 2017 term of the Florence County Grand Jury for murder. (2017-GS-21-00953). Hicks was charged in connection to an incident that transpired over the late night / early morning hours November 18–19, 2016. (Tr. 8). Hicks walked into a bar, raised his gun, randomly selected a target, and fired one shot. The target was Richard Ennis. Ennis died. (Tr. 8–9).

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Doris Poulos O'Hara
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

On November 18, 2016, Hicks was partying with two friends. Roderick Commander (co-defendant) was with Hicks that night. That night, Hicks, Commander, and another friend frequented several social establishments. They began the night at a bar in Lynchburg. (Tr. 13).

The group was eventually kicked out of the Lynchburg bar, but they did not want their night to end. The group then went to a bar in Florence. The group was kicked out of the second bar because someone in the group had a weapon. Although they had just been kicked out of a second bar, Hicks and his friends did not want to stop partying. The group decided to try their luck at a third bar. At some point, Hicks and Commander both stated, "Someone is going to die tonight." (Tr. 14).

The group arrived at the third bar, BJ's Lounge, shortly before midnight. (Tr. 9). When Hicks arrived at BJ's Lounge, Ennis was playing pool inside. (Tr. 9). Hicks entered BJ's Lounge, fired one round from a pistol, and then ran out the back door. Hicks fled. His friends did not. (Tr. 15). Shortly thereafter, Investigator Thomas McFadden arrived on scene.

Once McFadden arrived at the scene, Hicks's friends directed him to a trail behind BJ's Lounge. McFadden walked the trail and stepped on a handgun. When he found the gun, it was jammed. (Tr. 15). Apparently, Commander provided the State with a written statement confessing to the crime; however, after further investigation, the State believed the confession originated with Hicks. (Tr. 17). Commander and the third member of the group cooperated with law enforcement. (Tr. 14, 17-18). Hicks turned himself in to law enforcement and was arrested December 1, 2016.

Hicks pled guilty March 19, 2018, to the lesser included offense of voluntary manslaughter before Judge Roger Henderson. Hicks retained Charles E. Johnson to represent him. Hicks's plea was entered without a sentence negotiation or recommendation.

At the plea hearing, the State recited the underlying facts for the record, and Hicks agreed the facts were accurate. Hicks stated at the plea hearing he was drunk and high at the time of the

incident. He told the plea court he was high on “[c]ocaine, pills, and marijuana” when the shooting occurred. (Tr. 20). He stated he did not know Ennis, and he was just shooting randomly. (Tr. 16, 18–19).

The State admitted it would struggle at trial establishing motive because Hicks shot Ennis at random. (Tr. 17). However, the State then explained, “Of course, we don’t have to [establish motive]. . . . But any experienced litigator is going to let you know [establishing motive is] important. We could not do that.” (Tr. 17). As for the written confession, the State’s theory at trial would have been that Hicks wrote the confession in an attempt to set up his co-defendant. (Tr. 17).

The plea court accepted Hicks’s guilty plea and sentenced him to the maximum—thirty years imprisonment. Hicks did not appeal his plea or sentence. Hicks commenced this PCR action July 16, 2018. Overture Walker represented Hicks at the PCR hearing. Assistant Attorney General Samuel Key represented the State.

II. ISSUES RAISED

Hicks alleges ineffective assistance of counsel and attacks the knowing and voluntary nature of his guilty plea. Specifically, Hicks alleges plea counsel was ineffective for:

1. Providing inadequate advice;
2. Advising Hicks he would get a life sentence if he went to trial when Hicks’s co-defendant wrote a confession;
3. Failure to preserve issues related to the admission of a list of disciplinary infractions; and
4. Failure to give adequate advice about the trial process.

III. PCR TESTIMONY

Hicks’s Testimony

Hicks testified at PCR as to his version of the events leading up to his guilty plea. According to Hicks, his mother retained plea counsel to represent him on the charges. He and plea counsel met

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to discuss the case a maximum of five times. Hicks alleged the first time he and plea counsel met, plea counsel stated he thought he could negotiate for a plea to accessory after the fact, and negotiate for bond to be set at \$100,000. Hicks and plea counsel met a month later, and plea counsel told him that plea counsel would negotiate for a plea to voluntary manslaughter with a fifteen year sentence. At some point, Hicks told plea counsel to contact Shaniqua Wright as a potential witness. Hicks conceded plea counsel reviewed some of the discovery with Hicks during their second meeting. However, Hicks testified he never saw any pictures of the investigative report, and he did not receive his own copy of discovery until after he pled guilty. According to Hicks, plea counsel told Hicks that physically giving Hicks a copy of the discovery would cause numerous problems in his case. Hicks stated plea counsel never reviewed the State's case and evidence with him.

Hicks testified he could no longer reach plea counsel to discuss the case after the second meeting. Hicks further testified the last time plea counsel met with Hicks before his plea, plea counsel told him the only offer was an open plea to voluntary manslaughter. Plea counsel told Hicks that if the case went to trial, they would lose, and Hicks would get a life sentence. Plea counsel told Hicks that if he took the plea, he would not receive a thirty year sentence. Plea counsel told Hicks to take the plea deal.

Hicks testified he felt plea counsel did not spend enough time on the case and did not know the case well enough to go to trial. Hicks stated he wanted to go to trial because he was not the shooter, he told plea counsel multiple times that he was not the shooter, and plea counsel knows the shooter was someone else. Once he received the discovery, after he pled guilty, Hicks discovered a confession note in the materials that was written by his co-defendant. Hicks testified plea counsel knew about the confession letter, but told Hicks it could not be used without hiring a handwriting expert witness.

Hicks alleged he told plea counsel he did not want to plead guilty, but plea counsel reiterated that if he went to trial he would receive a life sentence. Hicks felt plea counsel gave him a choice between a life sentence and pleading guilty. Hicks felt this was no choice at all. Hicks testified he pled guilty because he did not want to receive a life sentence. Plea counsel made the decision, not Hicks, to plead guilty. Plea counsel told Hicks what to say to the judge during sentencing. Hicks could not recall the colloquy with the plea court and could not recall what he said during sentencing.

Plea Counsel's Testimony

Plea counsel testified at the PCR hearing and stated that he had been an attorney for thirty-two years. Hicks's mother called plea counsel prior to Hicks turning himself into law enforcement. Hicks's mother called back after Hicks turned himself in and retained plea counsel to represent Hicks. Plea counsel met with Hicks within a week of Hicks turning himself in. At first, plea counsel had difficulty getting the discovery file because the investigation was not finished. During their first meeting, in March 2017, plea counsel advised Hicks of the charge against him and the elements of murder; however, plea counsel did not want to discuss too much about the facts of the case until he received the discovery file and saw what evidence the State had against Hicks. The focus of the initial meeting was on Hicks's bond hearing.

Plea counsel received the full discovery file in either June or July 2017. The discovery file was contained on a disk. Plea counsel printed all the material from the disk and then went to the jail to review the material with Hicks. Plea counsel recalled taking the investigative reports, witness statements, autopsy documents, and pictures of the crime scene to review with Hicks. Plea counsel spent around four to five hours at the jail going over the discovery with Hicks.

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Plea counsel knew of the written confession letter because Investigator McFadden gave it to him. Plea counsel stated the letter had been passed through the jail, and there were multiple questions regarding who wrote the letter because the co-defendant denied writing it. Plea counsel spoke with Hicks about the letter shortly after receiving it.

Hicks told plea counsel of a potential alibi witness about a week before Hicks pled guilty. Plea counsel recalled the witness being a woman, but plea counsel was not able to locate her. Other than the one witness, Hicks did not offer any other witnesses or any evidence in mitigation.

As for possible defenses, there was not much plea counsel could have argued at trial. Hicks did not know the victim, there was no argument, and several witnesses, including the co-defendant and the driver of the car put him at the club. Plea counsel stated the only plausible argument he could have made was that Hicks was so intoxicated from drinking and using drugs, Hicks did not know what he was doing. However, the State had one of the bar owners who would have testified that Hicks was kicked out of that bar earlier in the night because he was drunk and saying, "Somebody is going to die tonight."

Importantly, plea counsel felt he could not put Hicks on the stand in his own defense because Hicks admitted to plea counsel that he was the shooter. Plea counsel fully explained the trial process and explained he could not ethically put Hicks on the stand in defense because Hicks told plea counsel he shot the victim. Because there were not any plausible defenses, plea counsel advised Hicks to plead guilty. Plea counsel negotiated hard to get the charge reduced from murder. If murder was the charge, because Hicks would have been exposed to thirty to life, plea counsel would have taken the case to trial. Plea counsel felt very strongly that if Hicks had been convicted of murder at trial, he would have received a life sentence. Plea counsel explained this to Hicks and advised him that thirty years in prison is much better than life. Plea counsel told Hicks he would try

the case if Hicks wanted, and the decision was up to Hicks, but there was a very slim possibility of being successful at trial. Plea counsel did not force Hicks to plead guilty, but he made clear his recommendation to plead guilty.

Plea counsel asked for voluntary manslaughter to eliminate the possibility of a life sentence. The solicitor and the victim's family agreed to the plea deal. Plea counsel fully explained the circumstances and consequences of the guilty plea. Plea counsel never said the offer was fifteen years. Hicks may have asked plea counsel to see if he could get a fifteen year deal, and plea counsel may have taken that offer to the State; however, the State never made a fifteen year offer. If the State had made a fifteen year offer, plea counsel would have strongly urged Hicks to take the deal. Plea counsel may have mentioned the possibility of accessory after the fact to Hicks before he received the discovery file, but that possibility went away after plea counsel received the discovery file. Plea counsel explained to Hicks there was no guaranteed sentence if he pled guilty.

Plea counsel told Hicks what sentence he would receive was up to Hicks. Plea counsel explained the minimum and maximum Hicks could receive, and told him it was up to Hicks to convince the plea court to give him somewhere in between. Plea counsel told Hicks he would likely receive a sentence in the twenty to thirty year range. Hicks gave a convincing speech at sentencing and wrote a thoughtful letter, but it was not enough to convince the plea court. Hicks had two weeks to prepare his speech and letter and never informed plea counsel he did not want to go through with the plea. Hicks never indicated he did not want to accept the State's offer the day of the plea. Hicks's main concern was how many years he would receive, not whether he should plead guilty.

IV. DISCUSSION

The issue before the Court is whether Hicks's guilty plea was the result of ineffective assistance of counsel. To establish ineffective assistance of counsel, the PCR applicant must prove

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(1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

In the context of a guilty plea, a defendant who entered a plea on the advice of counsel may only attack the voluntary and intelligent nature of the plea. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). To prove prejudice, the applicant must show a reasonable probability he would not have pled guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Hicks and plea counsel agreed at the PCR hearing that Hicks pled guilty based on plea counsel's advice. The Court finds Hicks pled guilty pursuant to the advice of plea counsel; therefore the issue before the Court is whether Hicks's plea was knowing and voluntary. *See Roscoe, supra*.

1. Providing Inadequate Advice

Hicks alleges plea counsel was ineffective for providing inadequate advice. At the outset of the hearing, Hicks, through counsel, clarified the allegation was an attack on the knowing and voluntary nature of Hicks's guilty plea. Specifically, Hicks alleged he pled guilty because he believed he would receive a fifteen year sentence. For the reasons stated below, the Court finds plea counsel was not ineffective for providing inadequate advice.

"[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). To prove

prejudice, the applicant must show a reasonable probability he would not have pled guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill*, 474 U.S. at 59.

The Court finds plea counsel was not deficient for providing inadequate advice about the plea offer. The Court finds Hicks's testimony on this issue not credible. Specifically, the Court finds Hicks's assertion plea counsel promised Hicks a fifteen year sentence in exchange for his plea, and promised Hicks he would not receive a thirty year sentence, is not credible. The Court finds plea counsel's testimony on the issue to be credible.

From plea counsel's credible testimony at the PCR hearing, it is clear a fifteen year offer was never made by the State and never promised to Hicks. As mentioned above, plea counsel testified he explained the murder charge and the elements of murder to Hicks. Plea counsel explained he negotiated for a plea to voluntary manslaughter to eliminate the possibility of a life sentence. Plea counsel stated he may have suggested a plea deal to fifteen years to the State on behalf of Hicks, but the State immediately refused the suggestion. Further, plea counsel testified that had the State made a fifteen year offer, he would have strongly encouraged Hicks to take the deal. Based on plea counsel's testimony, the Court finds plea counsel was not deficient because plea counsel never promised Hicks he would receive a fifteen year sentence, and Hicks knew and understood the terms of the plea were an open sentencing range for voluntary manslaughter.

The Court further finds Hicks failed to meet his burden of establishing prejudice. As mentioned above, Hicks stated at the PCR hearing he pled guilty because he did not want to receive a life sentence. While the Court finds other portions of Hicks's testimony not credible, this statement is credible. By his own admission, Hicks pled guilty to voluntary manslaughter because he did not want to receive a life sentence. This is a valid consideration in entering a plea deal, and this Court

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finds Hicks made that determination freely and voluntarily. Hicks has not shown prejudice because he did not want to proceed to trial with a potential life sentence on the table.

The Court finds plea counsel was not ineffective for providing inadequate advice. Hicks failed to show plea counsel was deficient for providing inadequate advice, or show any prejudice resulting from the alleged inadequate advice. Therefore, the Court dismisses Hicks's first allegation with prejudice.

2. Advising Hicks that He Would Get a Life Sentence if He Went to Trial When Hicks's Co-defendant Wrote a Confession

Hicks alleges plea counsel was ineffective for advising Hicks he would receive a life-sentence if he went to trial when plea counsel knew Hicks's co-defendant wrote a confession. Specifically, Hicks claims plea counsel pressured him into pleading guilty by stating Hicks could either plead guilty to voluntary manslaughter or go to prison for the rest of his life. Hicks claims plea counsel should not have made this assertion because Hicks's co-defendant wrote a letter confessing to being the shooter. For the reasons stated below, the Court finds plea counsel was not ineffective for informing Hicks of the sentence he believed Hicks would receive if convicted at trial based upon his review of the evidence, including the purported written confession.

Plea counsel is not deficient for advising a defendant to plead guilty based on what counsel reasonably believes the sentence would be if the defendant were convicted at trial. *Bennett v. State*, 371 S.C. 198, 204-05, 638 S.E.2d 673, 676 (2006). Further, where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found deficient. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996). To prove prejudice, the applicant must show a reasonable probability he would not have pled guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill*, 474 U.S. at 59.

As discussed above, plea counsel stated he knew of the written confession before trial and discussed with Hicks, there were many issues with the written confession of the co-defendant, and Hicks told plea counsel he shot the victim. Plea counsel made a reasonable strategic decision not to base his defense strategy based on a questionably authentic jailhouse confession particularly when Hicks had confessed to being the shooter and could not take the stand in his own defense. As such, it was reasonable for plea counsel to advise Hicks he would get a life sentence if convicted at trial, based on his view of the evidence. Plea counsel may have strongly recommended Hicks to plead to voluntarily manslaughter; however, plea counsel testified that he left the ultimate decision whether or not to plead guilty to Hicks. Hicks receiving a sentence of life in prison was a real possibility because of the exposure he faced proceeding to trial on the murder charge.

As for prejudice, as set forth in the previous section, Hicks failed to establish prejudice because he stated he pled guilty to voluntary-manslaughter because he did not want to face life-imprisonment. Therefore, the Court finds there was no reasonable probability Hicks would have proceeded to trial.

Based on the foregoing, the Court finds plea counsel was not deficient in his representation of Hicks, and Hicks has not met his burden establishing prejudice. Accordingly, the Court finds plea counsel was not ineffective.

3. Failure to Preserve Issues Related to the Admission of a List of Disciplinary Infractions

Hicks presented no evidence in support of his allegation plea counsel was ineffective for failure to object during sentencing when the State presented a list of Hick's disciplinary infractions to the plea court. The Court finds Hicks waived this allegation; therefore, this allegation is denied and dismissed with prejudice.

4. Failure to give adequate advice about the trial process

Hicks alleges plea counsel was ineffective for failure to explain the trial process. The Court finds plea counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Both plea counsel and Hicks conferred on numerous occasions. The Court finds credible plea counsel's testimony he discussed with Hicks the pending charges, the elements of the charges and what the State was required to prove, Hicks's constitutional rights, Hicks's version of the facts, and possible defenses or lack thereof. Further, the Court has reviewed the transcript and finds the record reflects Hicks's plea was entered freely, voluntarily, knowingly, and intelligently. The record also reflects Hicks told the plea court he was satisfied with plea counsel, and no one had threatened him or promised him anything to plead guilty. Therefore, this Court finds that plea counsel adequately advised Hicks of the trial process.

Even if plea counsel had not adequately advised Hicks of the trial process, the Court finds plea counsel's alleged deficiency was cured by the plea court. *See Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (stating that plea counsel's deficient performance can be cured by the plea court's colloquy). The plea court thoroughly explained the trial process to Hicks during the plea hearing, and Hicks stated he understood what the plea court explained to him. (Tr. 6-8). Therefore, Hicks was not prejudiced by plea counsel's alleged deficiency of failing to explain the trial process.

Plea counsel explained the trial process to Hicks, and any alleged deficiency for failure to explain the trial process was cured by the plea court. Therefore, the Court finds plea counsel was not ineffective for failure to explain the trial process.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes Hicks has not established any constitutional violations or deprivations that would require this court to grant his application. The

Court finds plea counsel's representation was neither deficient nor prejudicial. Hicks pled guilty pursuant to the competent advice of plea counsel. The Court finds Hicks knew the meaning and consequences of pleading guilty to voluntary manslaughter and was fully aware of the mandatory maximum and minimum sentencing range. The Court further finds Hicks voluntarily pled guilty and was not threatened by plea counsel. His voluntariness is evinced by the plea transcript and testimony given at the PCR hearing.

The Court notes Hicks 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. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Hicks has a right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Hicks's behalf. Hicks is directed to Rule 243, SCACR, for appropriate procedures for appeal.

THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Hicks shall be remanded to the custody of the State.

AND IT IS SO ORDERED.

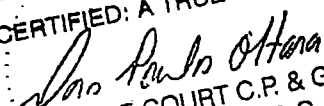
February 11, 2019.


D. CRAIG BROWN
Presiding Judge
Twelfth Judicial Circuit

FLORENCE COUNTY, SC

2019 FEB 12 AM 8:50
DORIS POWERS O'HARA
CCCP & GS
FLORENCE COUNTY, SC
South Carolina

FILED

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CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

2018-CP-21-1904

WITNESSES

Thomas Mcfadden

Florence County Sheriff

DOCKET NO. 2017-GS-21-00953

The State of South Carolina

County of

FLORENCE

COURT OF GENERAL SESSIONS

August

TERM

2017

THE STATE

vs.

RODERICK COMMANDER

JOHN WESTLY HICKS JR

John W. Holt, IV

ARREST WARRANT NUMBER

2016A2110201035

2016A2110201036

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 8-24-17

VERDICT

Foreperson of Petit Jury

Date:

CERTIFIED A TRUE COPY
 [Signature]
 CLERK OF COURT C.F. & G.S.
 FLORENCE COUNTY, S.C.

2017 AUG 24 PM 3:18
 DORIS POULOS ORRICK
 C.C.P. & G.S.
 FLORENCE COUNTY, SC

FILED

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE)

INDICTMENT FOR

MURDER
 MURDER

At a Court of General Sessions, convened on August 24 2017 the Grand Jurors of FLORENCE County present upon their oath:

COUNT ONE- MURDER

CDR: 0116 16-03-0010,0020

That Roderick Commander did in Florence County, on or about November 19, 2016, willfully, feloniously, and intentionally kill the victim, Richard Ennis, with malice aforethought, either express or implied, by means of Shotting him with a handgun, and the victim did die as a proximate result thereof on or about November 19th 2016 in Florence County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

COUNT TWO- MURDER

CDR: 0116 16-03-0010,0020

That John Westly Hicks Jr. did in Florence County, on or about November 19, 2016, willfully, feloniously, and intentionally kill the victim, Richard Ennis, with malice aforethought, either express or implied, by means of Shotting him with a handgun, and the victim did die as a proximate result thereof on or about November 19th 2016 in Florence 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.



E.L. Clements, III
 TWELFTH CIRCUIT SOLICITOR