Richard Warder
Attorney At Law

April 25, 2019

South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Rufus Raiden vs. . State

Dear Court:

Enclosed please find for filing a Notice of Intent to Appeal and Certificate of Mailing in the above captioned case.

Thank you for your cooperation in this matter.

Sincerely,

Richard H. Warder

RHW/ts

Enclosures

cc: Kelly Oppenheimer, Assistant Attorney General
Pickens County Clerk of Court (courtesy copy)

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
COMMON PLEAS COURT

ALEX KINLAW, JR, THIRTEEN JUDICIAL CIRCUIT

2016-CP-39-512

RUFUS RAIDEN, II #358656.....APPLICANT

v.

STATE OF SOUTH CAROLINA.....RESPONDENT

NOTICE OF INTENT TO APPEAL

RUFUS RAIDEN, II #358656, appeals his Order signed by the Honorable Alex Kinlaw, Jr on March 21, 2019. (enclosed)

Respectfully Submitted

April 25, 2019

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STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Rufus Raiden, III, #358656 Applicant, v. State of South Carolina, Respondent.	)	Case No. 2016-CP-39-512 **ORDER OF DISMISSAL**

2019 MAR 28 A 11:26

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

This matter comes before this Court by way of an application for post-conviction relief filed May 16, 2016, by Rufus Raiden, III (Applicant). The State (Respondent) made its return on January 16, 2018, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 21, 2019, at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr. Applicant was present at the hearing and represented by Richard H. Warder, Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. During its January 2012 term, the Pickens County Grand Jury indicted Applicant for leaving the scene of an accident with death results (2012-GS-39-0107). Steven L. Alexander, Esquire, represented him on this charge. On January 27-28, 2014, and January 30, 2014,

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Applicant proceeded to a jury trial before the Honorable G. Edward Welmaker. Following deliberations, the jury convicted Applicant as indicted. Judge Welamker sentenced Applicant to a term of imprisonment of twenty-five years and also ordered Applicant to pay a fine of $15,000.

Applicant filed a timely notice of appeal, and Appellate Defender Kathrine H. Hudgins, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on appeal. In her *Anders*[1] brief, Appellate Counsel raised the following issue: "In this trial for leaving the scene of an accident resulting in death, did the trial judge err in refusing to exclude irrelevant and highly prejudicial testimony in regard to causation when fault is not an element of the crime?" Applicant filed a *pro se* brief on December 4, 2014, in which he raised the following issues:

> 1. In this trial for leaving the scene of an accident resulting in death, did the trial judge err in refusing to grant [Applicant's] motion for mistrial after Pickens County deputy Jeff Bolde made inappropriate comments in front of two witnesses;
> 2. In this trial for leaving the scene of an accident resulting in death, did the trial judge err in refusing to strike the testimony of Corporal Tommy Brooks of the South Carolina Highway [Patrol] for giving false opinion testimony; [and]
> 3. In this trial for leaving the scene of an accident resulting in death did [Applicant] suffer "due process" violation when the Jury saw him in handcuffs and shackles?

Following a thorough review of the record pursuant to *Anders*, the South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion on May 20, 2015. *State v. Raiden*, Op. Np. 2015-UP-261 (S.C. Ct. App. filed May 20, 2015). The remittitur was issued on June 8, 2015.

STATEMENT OF FACTS

On December 10, 2011, at approximately 1:22 a.m., law enforcement officers were dispatched to Highway 8 near Sheriff Mill Road in reference to a car accident. Tr. 119-20, 151,

[1] *Anders v. California*, 386 U.S. 738 (1967).

158, 240. Upon arrival, officers observed a Chevrolet Silverado truck in the roadway and a Chevrolet Cavalier on the embankment of the right side of the highway. Tr. 120, 122. The driver of the Cavalier was inside his vehicle, being tended to by emergency personnel, but the driver of the truck could not be located. Tr. 122, 125-26, 153, 159-61. After searching the passenger compartment of the truck, officers found paperwork with Applicant's name on it, a checkbook, and clothing bearing the name "Raiden Transport." Tr. 127. There was also a fresh spot of blood on the driver's side door of the truck, which belonged to Applicant. Tr. 254, 326-27. Blood was not found anywhere else in the truck. Tr. 259. There was also no evidence anyone had been in the backseat of the truck at the time of the accident. Tr. 260-61, 267-70, 273. Officers also discovered the truck was registered to Tara Henderson. Tr. 127, 166, 179.

Officers later spoke with Henderson, who told them no one should be driving the truck, but it was parked at Applicant's house. Tr. 166. She also told officers Applicant did not have any other vehicles at his house. Tr. 167. Based on this, Applicant became a person of interest. Tr. 141. Henderson then escorted officers to Applicant's house. Tr. 129, 168. Applicant, however, was not at home when they arrived. Tr. 129, 229.

Later that day, Applicant called his mother in order to get a ride to her house. Tr. 192, 198. Applicant's nephew, Justin, picked Applicant up and took him back to Applicant's mother's house. Tr. 182, 193, 199, 210-11. On the way to the house, Applicant told his nephew someone had stolen his truck and his cellphone, but he did not say anything about being in a car accident. Tr. 212. At the house, Applicant told his family he was in a car accident, during which he blacked out; and when he regained consciousness, no one was in the truck with him, so he ran. Tr. 183. Applicant alleged he was not driving, but a man named "Josh" was driving at the time of the accident. Tr. 200, 213, 214. Applicant also told them he hid in the woods until he

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could get a ride to his mother's house. Tr. 185. Applicant, however, told Justin he had killed a boy. Tr. 215, 224.

At the time, Applicant planned to go to California; and he told his mother he was going because he did not want to go back to jail. Tr. 195, 197, 200. Applicant also told his mother he wanted to go to Columbia in order to take the bus to California, so she took him to the bus station. Tr. 197, 200-01. Applicant's father bought the ticket for Applicant. Tr. 197, 201. Based on the information they received, officers contacted the Columbia Police Department to advise them there was a warrant for Applicant for leaving the scene of an accident with death results. Tr. 134, 315-16. Applicant was then apprehended on December 12, 2011, at the Greyhound bus station in Columbia. Tr. 134, 136, 317. In his possession, Applicant had a bus ticket to Los Angeles, California, as well as two large, black duffle bags with bus tags. Tr. 134-36, 317.

At trial, Applicant testified on his own behalf. He testified on December 9, 2011, at approximately 7:30 p.m. he was at Joe Schmoe's Bar and Grill. Tr. 366, 395. While there, Applicant met a man named "Josh," and the two sat there talking and drinking for about two to two-and-a-half hours. Tr. 367-68, 395-96. Applicant admitted he did not know Josh before and did not know Josh's last name. Tr. 379, 385, 398. He alleged, however, he put Josh's number in his cellphone; but he lost his phone. Tr. 380. Around 10:30 p.m., Applicant was too drunk to drive, so Josh said he could drive; but Josh wanted to go through Easley to check in with his girlfriend on the way to Applicant's house. Tr. 368-69, 397. Applicant and Josh arrived at Steady's in Easley around 11:00 p.m., at which point Applicant called Henderson because he was annoyed that Josh had been texting and driving and because he did not want to stay at the restaurant. Tr. 370-71, 399. However, at approximately 11:30 p.m., Josh drove Applicant home,

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where the two continued to drink. Tr. 372, 400. Later, the two left to go to Wal-Mart in Easley because Josh's girlfriend and her friend could not find Applicant's home. Tr. 372-73. Josh drove, while Applicant laid down in the backseat. Tr. 373. After meeting up with Josh's girlfriend and her friend, they all left to go back to Applicant's house. Tr. 376, 403. Josh was driving, and Applicant was laying down in the backseat. Tr. 376, 402. The truck then hit something, and Applicant ended up on the floorboard in a daze. Tr. 376-77, 382. When Applicant came to, Josh told him to run, opened the door, and started running. Tr. 377, 406-07. Applicant then crawled from the back, turned the engine off, exited the driver's side door, and ran in the same direction as Josh. Tr. 377, 379, 408, 410. Josh then got into his girlfriend's car, and Applicant ran into the woods. Tr. 379, 409. Applicant was in the woods for about thirty to forty-five minutes, waiting for sunlight, before heading back to his house. Tr. 380-81, 409. Applicant then went to his mother's house, and his mother and father took him to Columbia the next morning. Tr. 384, 391-92, 414.

CURRENT APPLICATION

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

> 1. Trial counsel did not properly prepare or represent [Applicant].
>   a. Was offered plea agreement that was never explained or recommendations made;
>   b. Counsel waited 2 yrs before investigated [sic] case or contacted [sic] witness;
>   c. Never got expert witness;
>   d. Never subpoena's [sic] defense witness; [and]
>   e. Never did investigation until it was too late.

At the evidentiary hearing, Applicant proceeded forward on the allegations raised in his *pro se* application.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of Woodrow M. Poplin, M.S.E., P.E. Respondent presented the testimony of Steven L. Alexander, Esquire (Counsel). This Court also had before it a copy of Applicant's trial transcript, the records of the Pickens County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records.

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he was arrested on December 11, 2011, and he met with Counsel one month after his arrest in the Pickens County jail. He testified during that meeting, he and Counsel reviewed the charges, the warrants, and briefly discussed what happened but did not discuss the facts. He elaborated they did not discuss all of the evidence at that time. He further elaborated Counsel had a list of people to see at the jail on the day of their first meeting. He testified every time Counsel met with him, Counsel had a list of people to see in the jail. Applicant further testified he met with Counsel several times during the first three months after Applicant's arrest. He testified, however, after those initial meetings, thirteen months passed without Counsel meeting with Applicant. Applicant testified it was not completely Counsel's fault as to why they did not meet for thirteen months. He testified as trial neared, he and Counsel had more visits. He explained they met every couple of weeks in order to prepare for trial. Applicant elaborated Counsel did not push Applicant on issues Applicant knew about in connection with the case. He further elaborated he and Counsel did not discuss details of the case, nor did they discuss the evidence. Applicant testified Counsel was not interested in his case, and Applicant was just another number to push

through the system. He further testified had Counsel done his job, Applicant would not be incarcerated.

Applicant also testified Counsel gave him no details about the plea offer, but rather told him if he pled guilty, then he would get to pick the judge. He elaborated Counsel never explained what that meant. He further elaborated he could not recall when the offer was given, but it was closer to trial. He testified he would not have accepted the plea. He further testified he did not tell Counsel he was not interested in the plea, but he did not understand the agreement.

Applicant testified his defense was that he was not the driver of the truck, but he did run away from the scene and admitted to not helping the victim. He elaborated Josh was driving at the time of the accident. He admitted, however, he does not know Josh's last name. He further elaborated he met Josh that evening at a bar, and the two were drinking. He testified he had never seen Josh before that evening. Applicant also testified he testified to the same story at trial. He stated at trial, he told the jury Josh was driving, and Applicant put Josh's number in his phone, but he had lost his phone. He testified he told Counsel to find Josh. Applicant admitted Josh is a common name, and he had no information about Josh to give to Counsel.

He further testified Mark Chastain, who gave a statement, saw Applicant with Josh that evening. He testified Counsel did not call Chastain as a witness and gave no explanation for failing to do so. Applicant admitted this was the first time he ever mentioned Chastain. He further admitted he was not with Chastain that evening. He testified he did not tell the jury about Chastain, but he could have.

Applicant also testified he told Counsel to interview the people at Joe Schmoe's that evening and to get the camera footage from the bar. He testified he also told Counsel to obtain footage from the South Carolina Department of Transportation cameras, as well as any footage

from gas stations on Highway 8. He elaborated by the time Counsel investigated, too much time, about fifteen to nineteen months, had lapsed and there was nothing on file. Applicant testified he told Counsel to investigate these things within the first three months after Applicant's arrest and asked Counsel for them several times.

He also testified he asked Counsel to interview the Grays, who lived in a neighboring house to the accident. He elaborated Counsel told him they had moved to Alabama. He further elaborated they found the Grays two days before trial, and they were living in the same house they were living in at the time of the accident. He testified Counsel never questioned the Grays. He further testified the Grays saw people leaving the scene of the accident, and no one else saw anyone leaving the scene. Applicant testified Counsel was able to track the Grays down and called them as witnesses at trial. He further testified the Grays testified they saw two people running from the scene. He admitted, however, there were no eyewitnesses to the accident, as it occurred in the early morning. Applicant similarly testified he asked Counsel to call the firemen who were on the scene as witnesses at trial. He elaborated Counsel told him there was no way of knowing who those firemen were, but Applicant disagreed. He further elaborated there were documents stating who was at the scene, but Applicant did not push the issue. He testified, however, emergency personnel on scene did testify at trial as to what they saw when they arrived on scene.

He also testified he wanted a reconstruction of the accident. He testified he asked Counsel for a reconstruction team, but Counsel said there were no funds available. He testified Counsel could have filed motions for funding, however. He elaborated every time Counsel met with him, Applicant would ask about a reconstruction. Applicant elaborated he was concerned about where people were sitting in the truck. He further elaborated he was concerned there were

no fingerprints taken from the steering wheel. He testified had fingerprints been taken from the steering wheel, it would have shown multiple people drove the car. Applicant further testified Counsel asked Corporal Brooks whether or not any fingerprints were taken from the truck only after Counsel came to defense table, although Applicant admitted Counsel asked this question early in his cross-examination. He also testified there were no books in the backseat during the accident, because they would have hit him. He explained he was in the backseat laying down at the time of the accident.

Applicant testified Josh was driving at the time of the accident, and Applicant was not driving. He elaborated he woke up, and Josh told him to run. He further elaborated he crawled between the front seats and through the driver's side door, because it was open. He also testified he was relying on Counsel to question the witnesses at trial, and Applicant expected Counsel to push the issue with Corporal Brooks as to whether or not Applicant was in the backseat. He further testified the blood spot to which Corporal Brooks testified was not reliable, because the blood spot would have been dry by the time Corporal Brooks found it. Applicant testified he is not an expert in serology. He also testified he had no scars or bruises after the accident, which was revealed at trial. He admitted, however, he had a "briar" scratch on his face at the time. He also testified if he was bleeding during the accident and he was in the backseat, there would have been blood in the backseat. He testified Counsel did not make Corporal Brooks testify he was one hundred percent certain no one was in the backseat of the truck at the time of the accident. He admitted, however, Counsel did, in fact, ask Corporal Brooks if he was one hundred percent certain, and Corporal Brooks testified he was. He further testified the most important question to ask was whether or not there were two people in the truck at the time of the accident. He elaborated Corporal Brooks was the "smoking gun," and Counsel should have pressed Corporal

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Brooks to answer whether or not there were two people in the truck. He further elaborated because Counsel did not press this issue, Counsel was ineffective. Applicant admitted, however, Counsel attempted to exclude Corporal Brooks' testimony, but Counsel was unsuccessful.

Following Applicant's testimony, Woodrow Poplin, who was qualified as an expert in accident reconstruction, testified. Poplin testified he was hired to look at the evidence gathered as part of this accident, including the South Carolina Highway Patrol Multi-disciplinary Accident Investigation Team (MAIT) report. He further testified he had most of the MAIT file, including photographs, but he did not have the airbag control module or the field measurements, which would have contained information about what the Chevrolet Cavalier was doing before the accident.

He further testified he cannot determine whether one or two people were in the truck at the time of the accident. He testified he cannot conclude whether or not there was only one person in the truck. He explained there was a lack of information provided to him. He further explained there were no photographs detailing the backseat, seatbelts, or the passenger side. He testified, however, he did have one photograph of the passenger side in the backseat. Poplin testified had he had this information, he could assess whether or not a position in the truck was occupied at the time of the accident. He further testified he cannot say two people were in the truck at the time of the accident, and he cannot say that just one person was in the truck at the time of the accident. He testified he cannot state to a reasonable degree of certainty that two people were in the truck. He further testified it is entirely possible only one person was in the truck at the time of the accident.

He also testified the drawings and diagram of the accident were inconsistent. He explained MAIT indicated the collision occurred in one lane, but both vehicles were actually straddling the center line.

Applicant rested his case after Poplin's testimony, and Respondent presented the testimony of Counsel. Counsel testified he has been practicing law since 2003, and about ten to fifteen percent of his practice involves criminal law. He further testified at the time of Applicant's trial, he was a part-time contract public defender for Pickens County and practiced a lot more criminal law at the time. He further testified at the time, he would be appointed fifty to one hundred cases.

Counsel also testified he was appointed to represent Applicant on January 6, 2012, and he met with Applicant eleven times in the detention center. He testified his first meeting with Applicant was on February 13, 2012, about one month after his appointment, and this meeting lasted approximately ten minutes, which is common. He explained the first meeting is an introductory meeting. He further testified in 2012, he met with Applicant in February, April, May, June, and November; and in 2013, he met with Applicant in May, August, September, and December. He testified Applicant's case went to trial in January 2014. He also testified in between meetings, he would send Applicant letters, and they would have meetings via telephone. Counsel testified during these meetings they discussed the case. He explained in the early meetings, they would not discuss specific details, but rather would discuss general information about the charges. He further explained these discussions would have been generalized until Counsel received the incident report. He also testified he and Applicant started discussing the facts later, when discovery was received. He testified during their meeting on May 4, 2012, he and Applicant discussed what occurred, basics of the State's case, and Applicant's timeline,

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including Joe Schmoe's and Josh. He further testified they also discussed whether or not Applicant would testify. He explained they could not keep out the fact Applicant was intoxicated at the time, but there was no practical choice other than Applicant testifying. Counsel further testified he discussed multiple aspects of trial strategy with Applicant.

He also testified he hired a private investigator in order to assist in his investigation. Counsel testified he attempted to find Josh, who Applicant told him about early on his representation, and put extensive effort into that attempt. He explained he sent subpoenas to every grocery store and gas station Applicant and Josh could have gone to that night in order to get more alcohol, in an attempt to get video surveillance, to get receipts, or to find an employee who remembered seeing Applicant and Josh. He testified he received responses from all of the stores and gas stations, except for one. He further testified the credit card receipts received did not develop anything. Counsel also testified he sent a subpoena to Joe Schmoe's but the bar was not responsive to the subpoena. He testified he followed up with the bar multiple times and attempted to obtain employee records, but the bar did not respond. He also testified he spoke with the owner of Joe Schmoe's on the phone, and the owner was not helpful and refused to talk to Counsel and his private investigator. He explained the owner alleged the employee records had been lost or damaged. Counsel also testified he spoke with employees working at Joe Schmoe's at the time, but none of them could remember anything from the night of the accident. He testified he received a Health Insurance Portability and Accountability Act (HIPAA) order and subpoenaed the local hospitals in an effort to find Josh. He explained Josh could have been injured during the accident. He testified, however, the medical records received did not produce any viable leads. He explained his investigator followed up with these potential leads, but those efforts did not go anywhere.

Counsel testified Applicant gave him all of the information he had about Josh. He testified, however, Applicant did not provide a last name for Josh. He further testified Applicant gave him a description of Josh, describing him as slender, weighing 160-170 pounds, and having arm tattoos. He testified there was no description of Josh in writing, and the only description given came from Applicant. He testified a lot of people match this description, and he could not find Josh. He further testified they attempted to show Applicant was with someone else at trial through the voicemail Applicant left Henderson and Applicant's testimony. He explained Applicant called Henderson after the accident, and he was talking about someone else being there at the time of the accident. Counsel further testified Applicant saved Josh's number in his phone at the bar, but Applicant lost his phone, so they did not have it.

Counsel testified he could not find the Grays at first, as they were not responsive to his attempts to talk to them. He explained his investigator went to their house and was told the Grays did not live there and had moved to Alabama. He further explained he subpoenaed the Grays for trial and attempted to get a continuance because he had not yet found them. He further testified once he found the Grays, he called them as witnesses at trial. He testified at trial, the Grays testified they saw two different people leaving the scene of the accident, going in different directions. He further testified the Grays were the only people around the scene at the time of the accident, other than first responders, who testified at trial. Counsel testified the first responders did not testify that they saw people fleeing the scene of the accident. He also testified he could not recall whether or not he and Applicant discussed calling the firemen on scene as witnesses.

He testified Chastain gave a statement on November 19, 2013, stating he saw Applicant at Steady's on the evening of this accident. He testified this statement was provided in

supplemental discovery, and he learned about Chastain late in the case. He further testified he asked Applicant about Chastain, and Applicant stated he did not know Chastain. He also testified Chastain was on the State's witness list but was not called to testify at trial.

Counsel testified he received a plea offer from the State on May 18, 2012, which he mailed to Applicant on May 23, 2012. He explained the offer stated the State would not make a recommendation, but Counsel and Applicant could pick the judge if Applicant were to plead. He further testified the offer expired in September 2012, and it was the only offer they received. He testified he discussed the offer with Applicant a couple of times and also talked to local attorneys about the possibilities if Applicant were to enter an open plea to the crime charged. He explained based on his conversations with local attorneys and the fact Applicant did not have an extensive record, he believed Applicant could have been sentenced to a term of imprisonment of eight to ten years with a lenient judge. He further testified he explained to Applicant it is impossible to know exactly what a judge would do. Counsel also testified he asked the solicitor about a specific sentencing range and an *Alford*[2] plea, as Applicant was adamant he was not driving at the time of the accident, but the solicitor was not willing to offer either of these options. He testified ultimately, Applicant was not going to plead guilty, as he did not want to plead guilty.

Counsel also testified their strategy from the very beginning was Applicant was not driving the truck at the time of the accident, and Applicant was adamant he was not driving. He testified he made a motion to exclude any testimony relating to fault, as it is not an element of the offense. He explained any testimony about fault was irrelevant.

He testified he did not hire an expert based on trial strategy. He explained he discussed hiring an expert with Applicant early on in his representation, and he explained to Applicant it

[2] *North Carolina v. Alford*, 400 U.S. 25 (1970).

would be better to focus on the notion Applicant was not the driver. He further explained fault did not matter. He testified he explained to Applicant they did not need an accident reconstruction expert, and they did not want one. He also testified had they decided to hire an expert, the expert would have needed to testify to a reasonable degree of certainty, and the testimony would not be admissible unless the expert could testify to such a degree of certainty. Counsel testified he was surprised when Corporal Brooks testified he was one hundred percent certain there was not more than one person in the truck at the time of the accident. He testified he attacked Corporal Brooks' certainty on cross-examination and in arguments to the jury. He explained he argued it is an absurdity any expert could be one hundred percent certain about anything.

He also testified he and Applicant discussed the fact Applicant's blood was found in the truck but did not discuss whether or not to get the car re-fingerprinted. He testified he questioned Corporal Brooks about whether or not any fingerprints were taken, and Corporal Brooks responded because they found blood, they did not take any fingerprints. Counsel further testified the truck belonged to Applicant, and Applicant was the primary driver of the truck. He testified the blood was found on the driver's side door, and he had no evidence to contradict Corporal Brooks' statement the blood was still wet when it was found. He also testified blood was not found anywhere else in the truck. He testified Applicant did not have any marks or injuries on him, which Applicant's mother testified to, and they introduced photographs of Applicant from the day after the accident at trial. He testified Applicant's mother testified he had a "briar" scratch on his head.

He testified he made a motion for a mistrial based on Officer Bolde's statement in front of sequestered witnesses. He further testified the jury did not hear Officer Bolde's statement.

He also testified Officer Bolde responded to the scene of the accident, and his testimony was not specific. He explained Officer Bolde merely testified to what he saw on the scene and did not testify about the cause of the accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant's allegations of ineffective assistance of counsel are as follows: (1) failure to convey and explain the plea offer; (2) failure to investigate; (3) failure to call witnesses; (4) failure to hire an expert witness; and (5) failure to prepare for trial. On these allegations, this Court finds Applicant has failed to meet his burden.

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to convey and explain the plea offer

Applicant alleges Counsel was ineffective for failing to convey and explain the plea offer, which would allow Applicant to enter into an open plea and choose the judge in front of whom he wanted to plead. In order to prevail on a claim counsel was ineffective for failing to convey a plea offer, the applicant must show: (1) plea counsel's failure to communicate the State's initial plea offer constituted deficient performance and (2) the applicant was prejudiced by the deficient performance, in other words there was a reasonable probability that but for this deficient performance, the applicant would have accepted the original plea offer. *Davie v. State*, 381 S.C. 601, 675 S.E. 416 (2009). Here, Applicant contends although Counsel told him about the plea offer, Counsel never explained it to him. On the other hand, Counsel testified he presented Applicant with the plea offer by mailing him a letter on May 23, 2012, and they also discussed

the offer a couple of times. He further testified based on his discussions with local attorneys and the fact Applicant did not have an extensive record, he explained to Applicant with a lenient judge he could be sentenced to a term of imprisonment of eight to ten years. He explained he told Applicant he could not make any guarantees. This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Because Counsel did, in fact, convey the plea offer to Applicant and explained it as best he could to Applicant, this Court further finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. In order to establish prejudice from an alleged failure to convey a plea offer:

> [A] defendant must demonstrate a reasonably probability that: (1) he "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;" (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it," and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or sentence of less prison time."

Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting *Missouri v. Frye*, 566 U.S. 134, 147 (2012)). Here, Counsel testified Applicant did not want to plead guilty. Indeed, Applicant admitted he would not have accepted the plea offer. Accordingly, there is no indication Applicant would have accepted the offer but for Counsel's alleged failure to explain the offer to him. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to investigate

Applicant further contends Counsel was ineffective for failing to investigate. In particular, Applicant alleges Counsel should have interviewed the people who were at Joe

Schmoe's on the night of the accident and also should have obtained video footage from the South Carolina Department of Transportation and gas stations along Highway 8, as well as surveillance video from Joe Schmoe's. Applicant asserts had Counsel done this, he would have been able to find Josh. "Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973). "'Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.'" *Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Moreover, "failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Here, Applicant asserts Counsel waited too long before investigating his case, such that video footage was no longer available by the time Counsel began investigating. Counsel, however, testified he hired a private investigator in order to assist in the investigation of this case. He further testified he went through extensive efforts to find Josh, including subpoenaing gas stations and grocery stores they could have gone to, subpoenaing medical records from the

local hospitals, and subpoenaing Joe Schmoe's. None of Counsel's efforts produced any viable leads or beneficial information. This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not. Based on the foregoing testimony from Counsel, this Court further finds Counsel's conduct was reasonable under the circumstances.

This Court further finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. Applicant wholly fails to establish what benefit would have been realized from additional investigation by Counsel. Furthermore, any assertion as to what these videos would have shown is mere speculation on the part of Applicant, as he failed to present this Court with any concrete evidence of these videos. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to call witnesses

Applicant further alleges Counsel was ineffective for failing to call witnesses at trial. In particular, Applicant asserts Counsel should have interviewed people at the bar who could have placed him with Josh that evening. He further asserts Counsel should have called Mark Chastain, who saw Applicant with Josh that evening, and the firemen who responded to the scene as witnesses.

Here, Counsel testified he interviewed the employees at Joe Schmoe's, and no one remembered anything from the night of the accident. He further testified when he asked Applicant about Chastain, Applicant asserted he did not know Chastain. Furthermore, Counsel testified he was able to track down and call the Grays as witnesses at trial. He explained they were the only people around the scene of the accident at the time and were able to testify they saw two people fleeing the scene. Based on the foregoing, this Court finds Counsel's conduct

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was reasonable under the circumstances, and Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Prejduice from counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witness' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the post-conviction relief hearing in order to establish prejudice from the witness' failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). Applicant wholly failed to present the testimony of any of the witnesses Counsel allegedly should have called at trial at the evidentiary hearing. Rather, Applicant merely speculated as to how these witnesses would have benefited his case. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to hire an expert witness

Applicant alleges Counsel was ineffective for failing to hire an expert witness. Specifically, Applicant alleges Counsel should have hired an expert in accident reconstruction to refute Corporal Brooks' testimony. Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. There is a strong presumption counsel's decisions are

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based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). *See also Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel); *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)).

Here, Counsel testified after discussing hiring an expert in accident reconstruction with Applicant, he chose not to hire an expert. Rather, he testified based on his trial strategy, he attempted to exclude Corporal Brooks' testimony. He further testified he attacked Corporal Brooks' opinions through cross-examination and arguments to the jury. Counsel explained their strategy was to focus on the idea Applicant was not driving the truck at the time of the accident. He further explained because fault is not an element of the offense, any testimony as to fault would have been irrelevant and did not add anything to their case. Based on the foregoing, this Court finds Counsel made a valid strategic decision in choosing not to hire an expert in accident reconstruction. This Court, therefore, finds Applicant has failed to establish any deficiency on the part of Counsel.

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This Court further finds Applicant has failed to establish any prejudice from the alleged deficiency. Applicant contends had Counsel hired an expert in accident reconstruction, he would have been able to prove Applicant was not driving the truck at the time of the accident, but rather was in the backseat. In support of this contention, Applicant presented the testimony of Woodrow Poplin. However, Applicant's own expert testified he cannot conclude whether or not one or two people were in the truck at the time of the accident. Indeed, Poplin testified it is entirely possible only one person was in the truck at the time of the accident. Accordingly, Applicant has failed to meet his burden, and this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to prepare for trial

Applicant alleges Counsel was ineffective for failing to prepare for trial. In particular, Applicant alleges Counsel was ineffective for failing to adequately meet with Applicant, for failing to communicate with Applicant, and for failing to review the discovery with Applicant. "There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence counsel met with Applicant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective. *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by Smalls*, 422 S.C. at 181, 810 S.E.2d at 839.

Applicant testified there were long periods of time between his meetings with Counsel. He further testified when he did meet with Counsel, they did not discuss anything about his case in detail, and Counsel appeared to not be interested in Applicant's case. Applicant testified

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Counsel did not push important issues at trial and never discussed his strategy with Applicant. Counsel, however, testified he met with Applicant eleven times and also discussed the case with him via telephone and letters. He testified their initial meetings were more focused on general information, such as the charges, whereas the later meetings became more detailed as he obtained discovery materials. He explained he and Applicant discussed the basics of the State's case, Applicant's version of events and timeline, and whether or not Applicant would testify. Counsel further explained he and Applicant discussed multiple aspects of the trial strategy, including whether or not to hire an expert witness or to focus on the idea Applicant was not driving the truck at the time of the accident. This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Based on the foregoing, Counsel thoroughly reviewed everything with respect to this case with Applicant and thoroughly prepared for trial. This Court, therefore, finds Applicant has failed to establish any deficiency on the part of Counsel. *See Harris*, 377 S.C. at 75, 659 S.E.2d at 145 (finding trial counsel was not deficient when he had been practicing law for a number of years and had met with the applicant, however brief, particularly in light of the fact counsel is presumed to have rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case).

This Court similarly finds Applicant has presented no evidence which would establish any prejudice on the part of Applicant. In particular, Applicant has wholly failed to provide this Court with any evidence as to what benefit could have been realized from additional preparation by Counsel. *See Harris*, 377 S.C. at 75, 659 S.E.2d at 145 ("Furthermore, Harris did not offer any evidence or argument as to how counsel's alleged lack of preparation prejudiced him.

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Therefore, it is merely speculative that counsel's alleged deficient performance was prejudicial to Harris."). Accordingly, this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 27 day of March, 2019.

ALEX KINLAW, JR.
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

CLERK OF COURT
PICKENS COUNTY, SOUTH CAROLINA
2019 MAR 28 A 11:33

State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

2019 MAR 28 A 11:26

Alex Kinlaw, Jr.
Judge

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Greenville County Courthouse
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Greenville , SC 29601
Phone: (864) 467-8043
Fax: (864) 467-8035
akinlawj@sccourts.org

March 26, 2019

Pickens County Clerk of Court
Court of Common Pleas
214 E Main St,
Pickens, SC 29671

Re: Rufus Raiden, III vs. State of South Carolina
2016-CP-39-512

Dear Clerk:

Enclosed herewith is The original of the order in the above styled matter. Please file the same and facilitate copies to counsel on both sides.

Thanking you, I am,

Shannon Thurman
Administrative Assistant to Judge Alex Kinlaw, Jr.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
COURT OF COMMON PLEAS

HONORABLE ALEX KINLAW, JR.

RECEIVED
APR 29 2019
S.C. SUPREME COURT

CASE NUMBER: 2016-CP-39-512

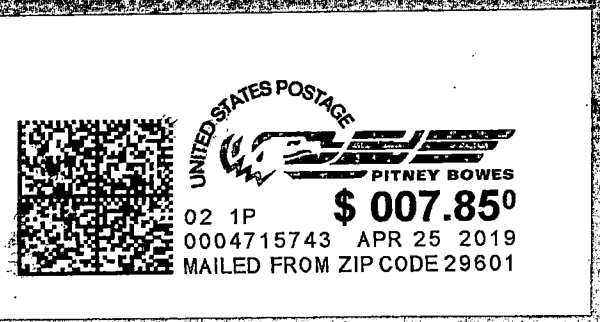
RUGUS RAIDEN 358656.....Appellant
V
State of South Carolina .....Respondent

I certify that I have served the Notice of Intent to Appeal on Kelly Oppenhelmer, Assistant Attorney General, by depositing a copy of it in the United States Mail, postage prepaid on April 25, 2019, addressed to her at South Carolina Attorney General Office, P.O. Box 11549, Columbia, South Carolina 29211-1549

RICHARD H. WARDER
P.O. BOX 26133
GREENVILLE, S.C. 29616
ATTORNEY FOR APPELLANT

SWORN to before me this
25th day of April, 2019.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 9-25-23



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