STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
Michael Pearson, #238921, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-14-240 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 27, 2016. Respondent submitted its Return and Motion for More Definite Statement on June 9, 2017. An evidentiary hearing was convened on July 24, 2018, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Timothy L. Griffith, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from Harry Devoe, Esquire ("Trial Counsel"). This Court had before it the records of the Clarendon County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, Applicant's appellate records, Applicant's records for the Department of Corrections, and the pleadings. The Court finds as follows:

I. 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 Clerk of Court for Clarendon County. Applicant was indicted by the January 2011 term of the Clarendon County Grand Jury for first-degree burglary, attempted murder, armed robbery, grand larceny - $2,000 to $10,000,

kidnapping, and possession of a weapon during a violent crime (2011-GS-14-0068). Applicant was represented by Harry Devoe, Esquire, at trial. On May 18, 2012, Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. and was convicted of first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during a violent crime. Judge Cothran sentenced Applicant to imprisonment for thirty years for first-degree burglary, thirty years for armed robbery, five years for grand larceny, twenty years for kidnapping, and five years for possession of a weapon during a violent crime. The sentences for first-degree burglary and armed robbery were consecutive while the other sentences were to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals reversed Applicant's conviction in an opinion refiled on October 8, 2014. State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014). The State petitioned for a writ of certiorari to review the decision of the Court of Appeals, which was granted by the Supreme Court of South Carolina. On March 23, 2016, the Supreme Court of South Carolina reversed the decision of the Court of Appeals and affirmed Applicant's convictions and sentences. State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016).

II. ALLEGATIONS

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

1. Ineffective Assistance of Counsel

At the evidentiary hearing, Applicant made an oral amendment, adding the following allegations:

1. Trial Counsel had been very ill before and during the trial, recovering from heart issues in addition to his wife being very ill. This contributed to ineffective representation in that Trial Counsel:
   i. Did not interview witnesses provided to him by the defendant prior to trial and did not call witnesses

ii. Did not enter a Notice of Alibi for the Defendant to the Court, after an alibi was provided to him by the defendant

iii. Did not enter evidence provided to him by the defendant

iv. Did not speak with the defendant prior to trial other than a brief encounter the weekend before starting the trial

v. Did not investigate the facts of the case

vi. Did not move to bifurcate the trial for defendant

2. Newly Discovered Evidence

i. New evidence that the co-defendant admitted to law enforcement that he did not know the defendant and other evidence exculpating the defendant.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the evidentiary hearing, Applicant testified that initially no attorney would take his case because the victim was very well known in the county, but he was eventually represented by Harry Devoe. He stated he met Trial Counsel at his bond hearing, meeting once or twice thereafter, after which Trial Counsel stopped coming to see him. He testified Trial Counsel finally came to meet with him the weekend before trial. Applicant testified he did not know why Trial Counsel was absent for much of the time leading up to trial. However, Trial Counsel, in his opening statements, told the jury he had been sick while preparing for trial, leading Applicant to believe that was the reason Trial Counsel failed to meet with him.

Applicant testified he gave Trial Counsel the names of several alibi witnesses, and testified he was at his cousin's house when the crime occurred. Applicant stated Trial Counsel told him he investigated the alibi witnesses, two of which he could not locate, but did not recommend calling them as witnesses during trial. Further, Trial Counsel did not file notice of an alibi defense and Applicant never got in touch with his witnesses because trial came so quickly.

Applicant testified he did not know his co-defendant and had never met him before trial, and mentioned to Trial Counsel that he wanted their trials to be severed. He testified that his trial came so quickly that he could not get in touch with his witnesses.

Trial Counsel's testimony[1]

At the evidentiary hearing, Trial Counsel testified he had been practicing law since 1962. He stated he was appointed to represent Applicant a week before trial, and began meeting with him every day. He stated he filed both Brady and Rule 5 motions, as he did for every case. Trial Counsel testified he reviewed the discovery material with Applicant and explained the elements of the charges and what the State was required to prove. Applicant appeared to understand. He testified he spoke with Applicant about the case, received and reviewed discovery, and spoke with co-defendant's lawyer in preparation for the trial. He testified he would have requested a continuance if he did not feel as though he had enough time to prepare, but he felt as though he did.

Trial Counsel testified that he argued at trial that Applicant did not know and had never met the co-defendant before the trial. The State, however, presented evidence that Applicant and the co-defendant had worked together briefly at a work center before the crime. Trial Counsel testified he believed at the time that the State had a very weak case against Applicant. He felt he did not need to present evidence to secure a favorable verdict, but only needed to show the weakness of the State's case. The only evidence tying Applicant to the crime was a single

[1] This Court notes that Trial Counsel's ability to present accurate and reliable testimony has likely been impacted by advancing age and health issues in recent years. At times during his testimony, Trial Counsel appeared to be confused and non-responsive to certain questions. His ability to recall details of the case wavered throughout his testimony, leading to some inconsistent and contradictory statements. Although Trial Counsel's PCR testimony appears to lack reliability in certain regards, the record before the Court indicates that Trial Counsel's present condition did not affect his ability to provide competent and proficient representation and assistance to Applicant during the trial six years previous. The majority of testimony Trial Counsel did provide was consistent with court records, and we find there is no overwhelming prejudice to Applicant due to the current declining health of Trial Counsel.

fingerprint found on the stolen vehicle. Trial Counsel argued to the jury that it was impossible to date a fingerprint on an object, therefore it was impossible to know when Applicant's fingerprint was left on the vehicle. He argued that the fingerprint could have existed on the vehicle months before the crime occurred. He stated he also tried to minimize the severity of the crime.

Trial Counsel testified that, in retrospect, he probably should have moved to bifurcate Applicant's trial from his co-defendant, but was not one hundred percent sure if he would have. He stated he discussed this with Applicant, but because there were no statements given by either Applicant or his co-defendant implicating the other, he likely had no basis to make that motion. He stated Applicant consistently told him he did not know the co-defendant, but Trial Counsel had no evidence to show that they did not know each other.

Trial Counsel could not recall if Applicant informed him of any alibi witnesses, but testified if Applicant had told him about such witnesses he would have tried to find them. He did not recall filing a notice of alibi. Trial Counsel testified he hoped his illness did not affect his representation of Applicant or performance at trial, and he did not believe it did.

IV. APPLICABLE LAW

In a post-conviction relief action, the 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). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

V. 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).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Trial Counsel was ineffective in his representation before and during his trial. This Court finds Applicant has failed to meet his burden of proving any of his allegations and that Trial Counsel was not ineffective in any of his actions or inactions. Each individual allegation is addressed as follows:

Trial Counsel's illness

This Court finds Applicant has failed to prove Trial Counsel's illness before his trial

affected his preparation for trial or his representation in any way. The record before the Court shows Trial Counsel was prepared for trial, had investigated the case, and had prepared a strategic defense and argument for the case. The trial transcript reflects that Trial Counsel represented Applicant for many months before the trial. Although Trial Counsel told the jury in his opening statement that he had been sick for four or five months during his representation of Applicant,[2] his explanation still shows he had months after recovering from his illness to prepare for trial.[3] Most importantly, Applicant has failed to prove any specific example of what Trial Counsel would have done, had he not been ill, that would have changed the outcome of the trial. Accordingly, Applicant has not shown any specific instance of deficiency or any resulting prejudice, and has failed to meet both prongs of the Strickland test. This allegation is denied and dismissed with prejudice.

Failure to interview and call witnesses

Applicant alleges Trial Counsel was ineffective for failing to interview and call witnesses provided to him by Applicant before the trial. However, this Court finds Trial Counsel was not ineffective on this ground.

Applicant testified at the evidentiary hearing that he gave Trial Counsel the names of several alibi witnesses before his trial that would testify he was at his cousin's house at the time of the crime. Applicant testified that Trial Counsel later told him that he had been unable to find one or two of these witnesses, but he had investigated the other witnesses and he would not recommend putting them on the stand. Trial Counsel could not specifically recall whether

[2] "I also at the same time feel sorry for my client who has been sitting in jail for two years awaiting trial; much longer than he should have waited. But not all his fault. Part of it is my fault. I was sick last September and couldn't do much for the next three or four months; four or five months actually. But before that is one of the reasons the delay was not due to my client." Tr. Vol. 3, p. 25, line 8-16.

[3] The trial took place May 14-18, 2012. Based on his statement in the transcript, if Trial Counsel were sick from September 2011 until February 2011, he would still have at least three months to prepare for trial.

Applicant gave him the names of any witnesses and could not recall investigating them,[4] but he credibly testified that if he had been given names, he would have investigated them.

This Court finds Applicant's credible recollection of his discussion with Trial Counsel before the trial showed that counsel did investigate or attempt to investigate the witnesses he was told about. Applicant's testimony further suggests that Trial Counsel strategically chose not to call these witnesses at trial, presumably based on the substance of their testimony or perhaps on their credibility as a witness. Based on this testimony, this Court finds Trial Counsel was not deficient in failing to interview or call these witnesses at trial.

Furthermore, Applicant has failed to prove the prejudice prong of the Strickland test by failing to present the testimony of these witnesses at the evidentiary hearing. In order to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to enter a notice of alibi

Similarly, Applicant's allegation that Trial Counsel was ineffective for failing to enter a notice of alibi before trial is meritless, as Applicant has failed to prove that he had a viable alibi defense to present. To qualify as an alibi, a witness's testimony must account for the defendant's

[4] *See* note 1.

whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

The testimony discussed above shows Trial Counsel likely did investigate a potential alibi defense before the trial. His failure to present the defense suggests there was no viable defense to present. This Court finds Trial Counsel was not deficient on this ground. Although Applicant stated at the PCR hearing that he was at his cousin's house at the time of the crime, he did not testify about the specifics of this alleged alibi. Furthermore, Applicant failed to present the testimony of any alibi witnesses to support his claim which he asserts should have been used at trial, therefore he cannot prove any resulting prejudice.

Additionally, this Court finds Trial Counsel's trial strategy in defending the case was reasonable under the circumstances, and he cannot be ineffective for failing to pursue an alternative defense. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's

performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). 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, 417 S.E.2d 529 (1992).

Trial Counsel credibly testified that he believed the case was "pretty good," and he did not need to present evidence. As reflected in the record, Trial Counsel's strategy was instead to cross-examine each of the State's witnesses to show the weaknesses in the evidence and suggest Applicant had no involvement in the crime. The only physical evidence tying him to the crime was a single fingerprint on the stolen vehicle, which could have been placed there at any time before the crime. Trial Counsel's choice to focus on attacking the State's evidence rather than attempting to present a viable alibi was reasonable under the facts and circumstances of this case.

Based on these reasons, this Court finds Trial Counsel was not ineffective on this ground and this allegation is denied and dismissed with prejudice.

Failure to enter evidence provided by Applicant

Applicant alleges Trial Counsel was ineffective for failing to enter evidence Applicant allegedly provided to him before trial. However, Applicant did not present any such evidence at the evidentiary hearing. Therefore, he cannot meet his burden of proving deficiency or prejudice.

Trial Counsel credibly testified there was no evidence to show Applicant did not know his co-defendant prior to trial. Trial Counsel also investigated a potential alibi defense and was unable to locate some witnesses and declined to call others to testify at trial.

Additionally, as discussed above, this Court finds Trial Counsel's strategy to attack the State's evidence was reasonable under the circumstances. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Trial Counsel credibly testified that he believed the case was "pretty good," and he did not need to present evidence. As reflected in the record, Trial Counsel's strategy was instead to cross-examine each of the State's witnesses to show the weakness in the evidence and suggest Applicant had no involvement in the crime. Given the sparse amount of physical evidence presented by the State at trial, Trial Counsel's strategic choice to focus on attacking the State's evidence was reasonable.

Because Applicant failed to present any evidence that would have changed the outcome of the trial, this allegation is denied and dismissed with prejudice.

Failure to speak with Applicant prior to trial

Applicant alleges Trial Counsel was ineffective for failing to speak with him often enough before the trial and claims Trial Counsel only spoke with him at his bond hearing and at a brief encounter the weekend before the trial began. At the evidentiary hearing, Applicant testified he met with Trial Counsel four or five times before going to trial. Trial Counsel testified he met with Applicant daily in the five to seven days before the trial to prepare.

Regardless of the amount of times they met, Trial Counsel was clearly prepared and fully defended Applicant at the trial. The testimony at the evidentiary hearing shows that Trial Counsel met with Applicant multiple times, fully reviewed the discovery and the evidence with Applicant, fully explained the elements of the charges and what the State was required to prove, and fully discussed defenses and potential witnesses. Applicant was able to give Trial Counsel the names of

witnesses he wanted him to investigate and call at trial, and Trial Counsel was able to investigate these witnesses and the evidence against him.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 n.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.). South Carolina case law has established that even if Trial Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. "First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation." Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter).

Here, the record shows Trial Counsel was fully prepared in his defense and was familiar with the facts of the case and the law surrounding the charges. Trial Counsel credibly testified he was prepared for trial, and if he had needed more time to prepare, he would have requested a continuance. Applicant has failed to present or prove anything that Trial Counsel should have done if he had met with Applicant more before trial that would have affected the outcome of the

proceeding. Accordingly, this Court finds no deficiency in Trial Counsel's actions and no resulting prejudice. This allegation is denied and dismissed with prejudice.

Failure to investigate the facts of the case

Applicant's allegation that Trial Counsel was ineffective for failing to investigate the facts of the case is meritless. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making 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). 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) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (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." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

The testimony at the evidentiary hearing showed Trial Counsel's investigation in this case consisted of interviewing his client and other potential witnesses provided to him by Applicant, reviewing the discovery, and speaking with the attorney representing the co-defendant. In this case, the only physical evidence tying Applicant to the crime was a single fingerprint. Based on this singular piece of evidence, there was not much more independent investigation Trial Counsel could have done other than to investigate the origins of the fingerprint. The record reflects Trial Counsel cross-examined the State's witnesses thoroughly regarding the fact that they could not "date" the fingerprint evidence. He also presented counter arguments as to the print's origin, and looked into a possible alibi defense.

Applicant failed to present any specific evidence of anything Trial Counsel should have investigated which would have changed the outcome of the trial. Therefore, neither prong of the Strickland test is met, and this allegation is denied and dismissed with prejudice.

Failure to move to sever Applicant's trial from his co-defendant

Applicant's allegation that Trial Counsel was ineffective for failing to move to sever Applicant's trial from his co-defendant's trial is meritless, as there was no legal basis to make such a motion.

Joint trials with co-defendants are very common. It is in the Solicitor's discretion to choose how to prosecute the action, and very often it is the best use of the State's resources to combine co-defendants with the same or similar charges under the same facts into one trial. This is a standard practice, and it is only inappropriate when the court determines that it would be prejudicial or unfair to one defendant to be tried along with his co-defendant.

"A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011) (citing State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005)). In Spears, the South Carolina Court of Appeals held that the defendant was not prejudiced by a joint trial with his co-defendant where the evidence against both defendants for armed robbery and kidnapping was interconnected and no specific trial right was prejudiced by the joinder of these trials. The same argument applies to this case because the facts of the cases were the same, the evidence presented was connected, and neither co-defendant's case prejudiced the others in any way.

Applicant has failed to prove that he was prejudiced in any way by having a joint trial. At the PCR hearing, Trial Counsel testified that, at the time of the trial, he saw no legal reason to move to sever the trials, and discussed this decision with Applicant and chose not to make a motion to sever. Although he opined that perhaps in retrospect he should have done so, he reiterated that he was still not one hundred percent sure if he would have bifurcated the trials based on the facts of the case. Neither co-defendant gave an incriminating statement about the other, so there is no Bruton[5] violation which could form the basis for a motion to sever.

This Court finds Trial Counsel was not deficient for failing to move to sever the trials, and Applicant has failed to prove any resulting prejudice from his choice not to do so. Accordingly, this allegation is denied and dismissed with prejudice.

NEWLY DISCOVERED EVIDENCE

Applicant's allegation of newly discovered evidence that entitles him to a new trial is meritless. A party requesting a new trial based on after-discovered evidence must show that the

[5] Bruton v. United States, 391 U.S. 123 (1968); See State v. Jackson, 410 S.C. 584, 592, 765 S.E.2d 841, 845 (Ct. App. 2014) ("In a joint trial, the admission of a nontestifying codefendant's confession that incriminates another defendant violates the other defendant's right of confrontation.").

evidence: (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and, (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

Applicant alleges he discovered new evidence in that his co-defendant told law enforcement he did not know Applicant before the trial. However, Applicant did not present any evidence at the evidentiary hearing to support this claim, therefore he cannot meet his burden of proof. Even if Applicant had presented such evidence, it would not qualify as "newly discovered evidence" under the required factors in Hayden to entitle him to a new trial.

First, evidence that the co-defendant did not know Applicant would likely not change the outcome of a new trial. There was testimony presented at trial to show Applicant and his co-defendant did not know each other before the crime was committed. However, the State also presented evidence that the men attended the same work center during the same time period before the crime. Second, Applicant has not proven that such evidence was newly discovered after trial. Third, such evidence could have been discovered before the trial with due diligence. Notably, Trial Counsel testified that there was no way to prove that the two men did not know each other. Fourth, any such evidence is immaterial to the issue of guilt or innocence. The evidence showed there were multiple other participants involved in this crime, although the others were never identified or prosecuted. Applicant and his co-defendant could have become involved in the crime through their association with these unknown actors, even if they did not know each other. Finally, such evidence is merely cumulative. Applicant's statement to law enforcement that he did not know

the co-defendant was admitted into evidence, and Trial Counsel thoroughly cross-examined the State's witnesses about the possibility that the two did not know each other.[6]

Accordingly, because Applicant failed to present any evidence to support this claim and because such evidence would not satisfy all five factors of the test for newly discovered evidence under Hayden, this Court finds Applicant is not entitled to a new trial on these grounds. This allegation is denied and dismissed with prejudice.

VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 that 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 (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 that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

[6] See cross-examination of Kenneth Clark and John Hornsby, Tr. Vol. 4.

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 5th day of November, 2018.

Kristi Curtis

KRISTI CURTIS
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina