VIRGINIA:

IN THE CIRCUIT COURT OF CULPEPER COUNTY

MICHAEL WAYNE HASH, NO. 322967,

Petitioner,

v. **CASE NO. CL04000124-00**

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

Upon consideration of the petition of Michael Wayne Hash for a writ of habeas corpus, the motion to dismiss of the respondent, petitioner's response to respondent's motion to dismiss and the authorities cited therein, the arguments of counsel heard on July 18, 2005 and a review of the record in the criminal case of Commonwealth v. Michael Wayne Hash which is hereby made a part of the record in this matter, the Court, for the reasons stated from the bench on July 18, 2005, dismissed the petition in part and on August 24, 2005 ordered an evidentiary hearing on the following claims:

> (1) petitioner was denied his right to effective assistance of counsel as to the Commonwealth's witness, Paul Carter, and the Commonwealth failed to disclose exculpatory, impeachment and other evidence regarding Mr. Carter;
>
> (2) petitioner was denied his right to effective assistance of counsel as to the evidence of other suspects in this case, the testimony of

Deputy Sheriff Marjorie Scott, and the closing argument of the Commonwealth's Attorney;

(3) the denial of effective assistance of counsel as to all such claims must be viewed in the aggregate within the totality of the circumstances.

(4) the denial of effective assistance of counsel as to all such claims and the denial of due process based upon prosecutorial misconduct must be viewed in the aggregate within the totality of the circumstances.

Now upon consideration of all the pleadings and arguments set forth above, the testimony given at the evidentiary hearing on October 16 and 17, 2007 and the written closing arguments of counsel, for the reasons set forth below and set forth more fully in this Court's letter opinion of April 30, 2008, the petition is dismissed.

Findings Of Fact

1. Paul Carter's Motivation For Testifying

The evidence shows that six months before trial, defense counsel had been informed by the Commonwealth's Attorney that petitioner had admitted his involvement in the crime to Paul Carter in Charlottesville during petitioner's stay at the joint security complex. Counsel was also informed that Carter had testified before for the federal authorities and that he had just been sentenced to 180 months in a drug case.

Richard Davis, one of petitioner's attorneys, testified at the hearing that he had spoken to other lawyers about Carter and what he was doing in his case. Mr. Davis further testified that he and Michael Hemenway, petitioner's

other attorney, were aware that Carter "was a cooperating witness in his own federal case and received a significant benefit and that was his mode of operation."

Mr. Davis testified that he understood that Carter later got a sentence reduction based on his testimony for the Commonwealth in petitioner's trial. Mr. Davis acknowledged that the letters written by Carter prior to the trial would have been helpful as "additional, impeachment" for Carter. Mr. Davis noted that "it wouldn't have prevented him from testifying."

Carter testified at the trial that he was not expecting anything for his testimony, but that he was aware that under Rule 35(b) you can come back within a year to have your sentence reduced for testifying in another case. Carter further testified that he "didn't know if the state applies to the federal." However he admitted that after he gave the Culpeper investigators the information about petitioner, he asked them to speak to the U. S. Attorney on his behalf.

Carter attempted to convey to the jury his concern for older people and that Mrs. Scroggins could have been somebody's grandmother. On redirect examination, the Commonwealth's Attorney asked Carter: "It's your understanding that what you're doing here today doesn't have any impact on federal sentencing, is that right?" to this question, Carter answered, "Right." On recross-examination Carter testified that the motion for substantial assistance under Rule 35(b) did not say any thing about a state case, but that he could be

wrong.

Mr. Hemenway testified that under a Rule 35(b) motion he understood substantial assistance to the government could include state or federal government. He also agreed that it would have been a good idea, knowing that Carter was serving a federal sentence to have looked at his file in the federal court, and that they did not do this. Mr. Hemenway acknowledged that the letters written by Carter could have been used at trial, and that he probably would have done so in his examination of Carter.

Petitioner's attorneys had obtained copies of the plea agreement, conviction and sentencing orders in Carter's federal case. They had also filed discovery request seeking information related to prosecution witnesses who had received any consideration for cooperating with or providing information to the United States Government or the Commonwealth on any prior occasion.

2. Movement Of Petitioner To The Albemarle-Charlottesville Regional Jail From The Culpeper County Jail

The record does not contain any evidence of contact between the investigators and Carter before petitioner was moved. At the hearing both investigators denied any such contact. Paul Carter's deposition was introduced as Petitioner's Exhibit #103, and in it Carter testified that he called the Culpeper County Police Department to inform them that he had information about the Michael Hash murder case; that he spoke to a detective, and later met with Investigators Mack and Jenkins. The timing of the call and meeting

indicates that the contact with the Culpeper authorities initiated by Carter would have taken place after petitioner was returned to the Culpeper jail from the Charlottesville complex.

Respondent's Exhibit #1 is a Culpeper jail record made by M. P. Dwyer documenting the transfer of petitioner to the Charlottesville complex for administrative reasons as petitioner could not be placed in the general population of the jail because one co-defendant (Weakley) was housed on side A of the jail and the other co-defendant (Kloby) was on side B. Respondent's Exhibit #2 shows that Weakley was transferred to another jail, after which petitioner returned to Culpeper. Respondent argues that this evidence could have been presented by the Commonwealth to explain the reason for the movement of petitioner to Charlottesville and his subsequent return to Culpeper.

3. Closing Argument By The Commonwealth's Attorney

Gary Close, Commonwealth's Attorney, in his response to the closing argument of the defense attorneys stated to the jury in his rebuttal argument:

> You know, Paul Carter, they want to suggest to you that some how, really bothersome here, that somehow his sentencing in federal court, federal court, is connected to what's going on up here. This is a state court. That's totally different. Different prosecutors, different laws, different judges, everything is different, and I don't know what else to tell you. There's no deal with Mr. Carter. He testified to that and as to when his sentencing took place in Charlottesville, there's no evidence that that was somehow purchased or whatever by the Commonwealth here, none whatsoever. Those are totally difference issues.

The attorneys for the defense each made a closing argument to the jury, and both addressed the testimony of Paul Carter. In his opening statement, Mr. Hemenway made the jury aware of the concerns he had about Mr. Carter's testimony and why the jury should be skeptical in believing Mr. Carter's testimony.

4. Prosecutorial Misconduct

At the hearing, Investigator Jenkins testified that he had received one and possibly three letters from Carter requesting the Culpeper investigators to speak to the prosecutor handling his federal case. Investigator Mack testified that he did not recall receiving a letter from Carter. Both investigators testified that they did not make any promises to Carter to help him and did not agree to testify on his behalf before the trial of the petitioner. Investigator Jenkins did not remember a letter containing any statement by Carter that he was expecting a sentence reduction.

Petitioner's Exhibit #95 is a copy of a letter sent by investigator Jenkins to Paul Carter after the trial thanking him for testifying. In the letter, Investigator Jenkins writes, in part: "As I told you many times before, we can never promise or do anything in return for your testimony. ...I've spoken with the Commonwealth Attorney and was told that we are not to give anything in writing on your behalf to the courts. But as I had told you before, if I'm ever asked by the U.S. Attorney in your case, I will tell him what you did concerning the Scroggins Homicide case.'

On cross-examination conducted by Mr. Davis at the trial, Investigator Jenkins testified that Paul Carter had contacted the office to make them aware that he had information he wanted to discuss with them. Investigator Jenkins was uncertain as to when the contact was made, but that he and Investigator Mack went to see Carter as soon as they found out about it. Investigator Jenkins testified that at the conclusion of Carter's statement to them, he asked them to speak on his behalf to the United States prosecutor who was prosecuting his sentencing then in federal court in Charlottesville that was coming up a little later.

On redirect, Investigator Jenkins testified that Carter wanted one of the investigators or someone to contact the U. S. Attorney to make him aware that Carter was cooperating with the Culpeper case. Both on cross-examination and redirect, Investigator Jenkins testified that he never gave any promises to Carter for his testimony.

5. Evidence Of Other Suspects

David Carter was the lead investigator in the Thelma Scroggins' murder for the Culpeper County Sheriffs Office. Mr. Carter testified that he received a call the Sunday morning after the murder on July 13, 1996, and investigated the case until his retirement in 1999. During that time he talked to a lot of people, but that it had become a "cold case."

Mr. Carter testified that early on they identified several persons of interest. Mr. Carter explained the circumstances that caused each of these

individuals to come under suspicion. Also, a lady who was a resident in the area saw a small dark truck being driven down the road headed back towards Culpeper at the time of the murder, and noticed that Mrs. Scroggins' truck was not at her house when she drove by it.

Mr. Carter was of the opinion that two, three or more individuals in Mrs. Scroggins' house at the time of the murder would have left more marks than were found.

Mr. Carter said he talked to Mr. Hemenway and Mr. Davis before the trial and told them that all the leads had gone cold and they had gotten to a dead end. "At that time we had nothing that we could actually go back and indicate bringing it up again on any of the suspects that were still of interest but we didn't have -there was nothing pertinent at that time that would bring one person in above the other."

Mr. Davis testified concerning the interviews by investigators during the course of the murder investigation, and that the attorneys were provided access to the police reports which they reviewed, copied and read. Mr. Davis said that in his view, the interviews and everything they read didn't go anywhere of value, and that it appeared that Eric Weakley was involved in the case. "There's the fundamental problem with somebody coming in and admitting to it," referring to Weakley's statement to the police. Mr. Davis also commented that another troublesome aspect of the case involved petitioner's statement to the police concerning the discussion with "the other two young

men to go out and rob old people."

Mr. Davis testified on cross-examination that "There was enough that Eric said which was consistent with what the Commonwealth would present to indicate that he had some accurate information, that a jury was going to conclude that he was either there, which he said he was, or that, you know, that he had gotten information." When asked if it would make sense to try and say that Eric Weakley was not present at the murder, Mr. Davis responded that "... it didn't make sense for us to try to defend Eric Weakley in that way."

Mr. Hemenway testified that during their investigation of the case they spoke with David Carter and reviewed a lot of police reports prepared by him. In the meeting with Mr. Carter they discussed the other suspects and his investigation of the crime. In explaining the significance of Eric Weakley's testimony with respect to other suspects, Mr. Hemenway said:

> Well, just for presenting a case to a jury you've got somebody that's admitting that he's there, giving specifics about the details of the inside of the house and ultimately specifics, accurate information about the actual shooting of the victim and things like that, consistent information about the truck and things like that. I mean, if that's the Commonwealth's case is that -the jury is hearing that and we were in a good position to impeach him and cast doubt on the case that way, but also be able to point a finger at Eric Weakley as being the perpetrator.

When asked if he believed that the jury would believe Eric Weakley and find that he was actually there, Mr. Hemenway answered as follows:

> I think Eric Weakley---I mean, I feel he was impeached a great deal because he gave so many inconsistent statements. But ultimately even though he said so many different things, when you've got

somebody saying they either did it or were there and gave the specific details of the crime, the crime scene and what people were saying and doing, a jury who is hearing this would find that part of it and they would take that into account.

6. Claim C2 Involving Vandalism At The Toone Residence And Deputy Sheriff Marjorie Scott's Investigation

Although not mentioned in Petitioner's closing argument, petitioner claims his attorneys were ineffective in failing to move in limine or object at trial to testimony about his activities involving the Toone residence and the campsite shortly thereafter where Deputy Sheriff Marjorie Scott observed petitioner in a tent with a rifle a year or so before the murder.

At the trial, Deputy Scott testified that in March of 1995 during the course of an investigation of vandalism/breaking and entering at Ken Toone's residence, she took the petitioner and Jason Kloby into custody. She discovered them camping with Eric Weakley and petitioner had a rifle in his tent. In August of 1996, Mrs. Scroggins' truck was found in the same area where the boys had been camping a year or so earlier.

In his opening statement, the Commonwealth Attorney told the jury that they would hear that Mrs. Scroggins' pickup truck was found in an area not far from where she lived. And, that of more significance, Deputy Sheriff Marjorie Scott would tell the jury that "... about a year and a half earlier she had gone in and found Mike Hash in a tent, laying in a tent asleep along with Jason Kloby was in the area, in that very same area where the truck was picked up --

found."

Mr. Davis testified that when Deputy Sheriff Scott started talking about the particulars of what she was investigating, that perhaps an objection would have been appropriate or something more cautionary should have been done to have kept the information from the jury. Mr. Davis said he was concerned about the jury speculating about why the police had picked up the petitioner, and that they established the vandalism charge against the petitioner was dismissed.

At the trial Mr. Davis questioned Weakley about the occasion when he went camping with petitioner and Kloby around the time the Toone house was vandalized. Weakley testified that this was the only time he had been camping with petitioner and denied going on a camping trip with Kloby and petitioner in 1996. This evidence contradicted the testimony of Alesia Shelton concerning a camping trip after the murder with petitioner, Kloby, Weakley and Ken Toone, when she said petitioner and Kloby disposed of the supposed murder weapon.

Mr. Davis testified at the hearing about this discrepancy in the evidence.

> I know that there were -one of the things that we were trying to do was illustrate that the versions that Weakley gave and the versions that Alesia Shelton gave concerning events of the evening of the homicide, as well as at subsequent occasions when they were supposedly together, all of the parties allegedly were together, that they gave different versions, including who was present at which trip and so forth and I think we did do that with Weakley.

Conclusions Of Law

1. Paul Carter's Motivation For Testifying

The Court finds that given the knowledge that Mr. Hemenway and Mr. Davis had of Carter and his method of operation, a reasonably competent attorney, knowing that Carter would be a witness in their case, would have examined the entire case file. Having failed to do so, the court finds the attorneys' performance in this regard was deficient.

However, even though the defense was denied this additional information which could have been used for impeachment purposes, in considering all of the evidence before the jury, the court does not find a reasonable probability, that, but for the deficiency in examining the court file, the result of the proceeding would have been different.

The attorneys for petitioner were able to show that Carter had received a substantial reduction in his sentence for testifying against others and that he had asked the Culpeper investigators to help him in his federal case. Conceding that Carter's motivation in coming forward was to help himself, it still does not explain how Carter obtained the information about the caliber of the weapon used in the homicide and that petitioner's cousin (Alesia Shelton) was telling on the petitioner.

In considering the totality of the evidence before the jury, this court concludes that the petitioner has not met the burden of showing a reasonable probability that, but for counsel's error in failing to investigate Carter's federal

file, the result of the trial would have been different.

2. Movement Of Petitioner To The Albemarle-Charlottesville Regional Jail From The Culpeper County Jail

Petitioner's claim that he was relocated from the Culpeper jail to the Charlottesville complex for the intended purpose of placing Paul Carter in a position to later testify against petitioner is not supported by the evidence. As previously noted, the petitioner was moved because the three suspects were being held together in an over crowded jail.

Given the concerns voiced by the attorneys about the Commonwealth's evidence related to other issues in the case, the Court concludes that a reasonable course of action would not have included an argument to the jury concerning a theory that involved the relocation of petitioner for the purpose of placing him with Carter, and/or contacts by the investigators with Carter prior to such relocation, as there was a lack of evidence to support either proposition. Such an argument without any evidence may well have caused some members of the jury to question other aspects of the defense for which there was supporting evidence, or at least some evidence.

On this claim petitioner has not met the evidentiary burden under Strickland that he suffered prejudice sufficient to undermine confidence in the outcome of the proceeding as a result of the failure of his attorneys to present such an argument.

3. Closing Argument By The Commonwealth's Attorney

The evidence does not support petitioner's claim that his attorneys' representation was deficient in failing to object and move for a mistrial because the Commonwealth's Attorney misrepresented the law in his closing argument. When reviewed in the context of the references made by the attorneys for the petitioner about Carter's original sentencing event, and the testimony of the investigators, the Court concludes that an objection to Mr. Close's argument would have not been sustained, and that a mistrial would have not been granted. Based on the evidence the Court concludes that a deal had not been made with Carter prior to his sentencing and that favorable action was not taken by the Commonwealth to help Carter secure his reduced sentence of fifteen years. Failing to raise an objection to the argument of the Commonwealth's Attorney and move for a mistrial was not ineffective representation resulting in prejudice to petitioner.

4. Prosecutorial Misconduct

The Court concludes that the evidence from the hearing does not support the petitioner's claim of misconduct by the Commonwealth's agents in withholding information that would have been helpful to the defense.

Based on this evidence, the Court cannot find that the one to three letters sent to Investigator Jenkins would have made a difference in the outcome of the trial. Although petitioner cannot say what information was in the letters, evidence presented to the jury confirmed Carter's request for

assistance and that no promises were given for that assistance.

The Court concludes that the materiality of the allegedly suppressed evidence has not been established, as there is not a reasonable probability that the result of the trial would have been different.

5. Evidence Of Other Suspects

In considering the totality of the evidence before the jury, and the evidence from the hearing, this Court concludes that the attorneys for petitioner made a reasonable investigation into the evidence related to the other persons of interest and thereafter made a reasonable decision to pursue a defense on the theory that Eric Weakley was involved in the murder.

The Court further concludes that the attorneys adequately investigated the evidence related to the early suspects in the case, and that their performance based on the strategy they chose to pursue, after considering this evidence, was not deficient and did not deprive petitioner of a fair trial. Petitioner has not shown that there is a reasonable probability the result of the trial would have been different had the attorneys adopted a strategy which attempted to show that someone other than Weakley had committed the crime.

6. Claim C2 Involving Vandalism At The Toone Residence And Deputy Sheriff Marjorie Scott's Investigation

The part of Deputy Sheriff Scott's testimony that had not been mentioned in the cross-examination of Weakley about the camping trip, was that petitioner had a rifle in his tent and that Deputy Sheriff Scott was expecting to

find some type of firearm based on an earlier report.

On cross-examination, Deputy Sheriff Scott testified that petitioner was thirteen going on fourteen when she encountered him at the campsite, and that the charge of vandalism could have been dismissed upon completion of probation.

Later during the trial, Mr. Davis established that the rifle on the camping trip was a different caliber than the type used in the murder, and that the vandalism charge was ultimately dismissed by the juvenile court.

. The Court finds that Mr. Davis' use of the incident where Deputy Sheriff Scott picked up the boys while they were camping, would have confirmed with Weakley that it was the same occasion when he went camping with Kloby and petitioner. The circumstances surrounding this camping event focused Weakley's attention to a specific time, late spring/early summer of 1995, as opposed to the camping event described by Shelton after the murder in 1996. The use of this event to impeach Shelton was a reasonable strategy on the part of petitioner's attorneys. As Davis reasoned, it kept the jury from speculating as to why a deputy sheriff was looking for petitioner at the campsite and it impeached Shelton's version of another camping trip. Mr. Davis was also able to show that the vandalism charge could be regarded as a minor event because of the age of the petitioner when it occurred and because it was ultimately dismissed.

The Court concludes, based on the evidence before it, that the petitioner's attorneys reasonably related the events of the vandalism of the Toone residence together with the camping trip about which Eric Weakley and Deputy Sheriff Scott testified to impeach the damaging testimony of the later camping events related by Alesia Shelton; and, that the attorneys lessened the prejudicial impact of Deputy Scott's testimony relating to the petitioner by establishing the petitioner's age at the time of the incident, and by showing the vandalism charge was ultimately dismissed. In this regard, the performance of the attorneys was not deficient and the petitioner did not suffer such prejudice so as to deprive him of a fair trial.

7. Claims D. and E. -Cumulative Effect Of The Deficiencies Of Defense Attorneys And The Commonwealth's Action

As set forth in this opinion, the Court has concluded that the evidence does not show a reasonable probability that, but for the attorneys' error in failing to investigate Carter's federal file, the result of the trial would have been different, and that the materiality of the allegedly suppressed evidence has not been established.

Since the Court has concluded that the performance of the attorneys in each claim did not result in prejudice so as to deprive the petitioner of a fair trial, the claims cannot now be aggregated and considered collectively. "Having rejected each of the petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived

petitioner of his constitutional right to effective assistance of counsel." Lenz v. Warden, 267 Va. 318, 340 (2004). In Morrisette v. Warden, 270 Va. 188, 194-195 (2005), the Supreme Court, citing its ruling in Lenz dismissed a claim that ... the cumulative effect of trial counsel's deficient performance prejudiced him."

Given the lack of materiality of the evidence allegedly suppressed by the Commonwealth, the Court cannot conclude that considered collectively such" ... material would have undermined essential aspects of the Commonwealth's case," and deprived the petitioner of a fair trial. Monroe v. Angelone, 323 F. 3d 286 (4th Cir. 2003).

For the foregoing reasons, the Court ~~believes~~ concludes that all the remaining claims should be dismissed and the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted. ~~It is further~~

The letter opinion of the Court dated April 30, 2008, a copy of which has been filed with the Clerk in File #6 of the record in this case at pages 1247 to 1269, is incorporated in this Order by reference.

The Clerk is directed to forward a certified copy of this Order to the petitioner, David B. Hargett, Esquire, counsel for the petitioner and Eugene Murphy, Senior Assistant Attorney General, counsel for the respondent.

Enter this 16th day of June 2008

Judge

Seen and objected to with respect the finding
that defense counsel erred in not reviewing Paul Carter's federal file:

COPY
MAILED
6-17-08

Counsel for Respondent

Seen and objected to: for the reasons stated in the pleadings.

COPY
MAILED
6-17-08

Counsel for Petitioner

ASSIGNMENT OF ERRORS

1. The circuit court erred in denying habeas relief on Claim A regarding "snitch" testimony from Paul Carter and ruling that, although counsel's performance was constitutionally deficient, there was no reasonable probability of a different result.

2. The court erred in failing to grant habeas relief specifically on Claim A(4), when the prosecution used the perjured testimony of Paul Carter.