In The

Supreme Court of Virginia

RECORD NO.: 081837

MICHAEL WAYNE HASH,

Appellant,

v.

GENE M. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF OF APPELLANT

David B. Hargett
Virginia Bar Number 39953
HARGETT LAW PLC
11545 Nuckols Road, Suite C
Glen Allen, VA 23059
Telephone: 804-788-7111
Facsimile: 804-915-6301
davidhargett@hargettwatson.com

Counsel for Appellant

Gibson Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE NATURE OF THE CASE AND
THE MATERIAL PROCEEDINGS IN THE COURT BELOW 1

ASSIGNMENTS OF ERROR 3

QUESTIONS PRESENTED 3

STATEMENT OF FACTS 3

PRINCIPLES OF LAW, ARGUMENTS AND AUTHORITIES 9

I. 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. 9

II. The Court Erred in Failing to Grant Habeas Relief Specifically on Claim A(4), When the Prosecution Used of the Perjured Testimony of Paul Carter. 37

CONCLUSION 40

CERTIFICATE 41

TABLE OF AUTHORITIES

PAGES

CASES

Barker v. Commonwealth, 230 Va. 370, 337 S.E.2d 729 (1985) 22

Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976) 32

Brady v. Maryland, 373 U.S. 83 (1963) 39

Brown v. Commonwealth, 246 Va. 460, 437 S.E.2d 563 (1993) 22

Giglio v. United States, 405 U.S. 150 (1972) 38

Kyles v. Whitley, 514 U.S. 419 (1995) 18, 31, 39

Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003) 31, 35, 39

Napue v. Illinois, 360 U.S. 264 (1959) 32, 37, 39

Nix v. Whiteside, 475 U.S. 157 (1986) 18, 31

Strickland v. Washington, 466 U.S. 668 (1984) 10, 17, 18, 31

Strickler v. Greene, 527 U.S. 263 (1999) 18, 31

United States v. Agurs, 427 U.S. 97 (1976) 33

United States v. Meinster, 619 F.2d 1041 (4th Cir. 1980) 31

United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976) 32

Wiggins v. Smith, 123 S. Ct. 2527 (2003) 17, 18

STATUTE:

Virginia Code § 18.2-31 1

OTHER AUTHORITIES

Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257, 260 (2005) 11, 21

V I R G I N I A:

IN THE SUPREME COURT

MICHAEL WAYNE HASH,	)	
Appellant,	)	
	)	
v.	)	**Record No. 081837**
	)	
DIRECTOR OF THE	)	
DEPARTMENT OF CORRECTIONS,	)	
Appellee.	)	

OPENING BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Your appellant, **MICHAEL WAYNE HASH**, [*hereinafter referred to as* "Petitioner"], respectfully represents that he is aggrieved by the final decision of the Circuit Court for the County of Culpeper, dated June 16, 2008, and prays that upon review the aforesaid Final Order be reversed, and that he be granted a new trial, if the Commonwealth be so advised.

STATEMENT OF THE NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS IN THE COURT BELOW

In the underlying criminal matter, Petitioner was charged in 2000 with capital murder for the shooting death of an elderly lady and the taking of her belongings, in violation of Virginia Code § 18.2-31, occurring on or about July 13, 1996, in Culpeper County. Petitioner entered a plea of not guilty.

A jury trial commenced on February 6, 2001, with the Honorable John C. Cullen, Judge, presiding. At the conclusion of the trial, the jury found Petitioner guilty of the charged offense, and the jury set petitioner's sentence at imprisonment for life. The trial court imposed the sentence set by the jury.

On appeal, the Virginia Court of Appeals affirmed the trial court by unpublished opinion. Michael Wayne Hash v. Commonwealth, 2002 Va. App. LEXIS 541, Record No. 1290-01-4 (Va. App. Ct. Sept. 3, 2002). The Virginia Supreme Court, in Record No. 022604, denied the petition for appeal, and the Virginia Supreme Court denied the petition for rehearing on April 18, 2003.

The Petitioner filed a habeas petition in the Culpeper Circuit Court alleging various claims of ineffective assistance of counsel and prosecutorial misconduct. Limited discovery was permitted on some claims, and other claims were denied. An evidentiary hearing was ultimately held on the remaining claims. Closing arguments were made in writing, and the court issued an opinion letter dated April 30, 2008, dismissing the claims. The final order was entered June 16, 2008.

This appeal followed. Based on the petition for appeal, this Court granted review of the first two assignments of error.

ASSIGNMENTS OF ERROR

I. 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.

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

QUESTION PRESENTED

I. (Assignment of Error I) Did the circuit court err in denying habeas relief on Claim A and ruling that there was no showing of a reasonable probability of a different result?

II. (Assignment of Error II) Did the court err in failing to grant habeas relief specifically on Claim A(4), when the prosecution used the perjured testimony of Paul Carter.

STATEMENT OF FACTS

Many of the material facts of this case are in dispute. References to the criminal case trial transcript will be "Trial Tr."

The Underlying Criminal Case

Thelma Scroggins ("Scroggins") was found dead in her home on Sunday, July 14, 1996. (App. 11-15). The Culpeper County Sheriff's Department reported to the crime scene and, with the assistance of the Virginia State Police, conducted an examination of Scroggins' house. (App. 36-37, 41). Investigators took numerous photographs of the house and scene

and collected evidence. (App. 16, 36-37). Among the evidence collected were fingerprints, bloodstains, hairs, fibers, and a drinking cup. One latent print on the storm door could not be identified. (App. 24-25). The scene indicated no evidence of any struggle with Scroggins except that someone had been knocked down next to the front door. There was no evidence of any ransacking or other disturbance of furniture or other personal property. (App. 17, 38-49, 65). Furthermore, it did not appear that the perpetrator had been anywhere in the house except the living room, hallway, and bedroom. (Trial Tr. 39).

The autopsy established that Scroggins' had been shot four times in the head. (App. 83, 84). Firearms testing determined that the bullets were .22 caliber long bullets with "rifling" consistent with having been fired from a .22 rifle. (App. 95, 96). The rifling on the bullets was also consistent with possibly having been fired from a Butler derringer-style pistol or a Fiala handgun, which is considered a “museum” piece; however, the bullets "most likely" came from a rifle. (App. 98-99, 101-04). Investigators never recovered the firearm connected to the crime. (App. 33).

It was reported to investigators at the scene that Scroggins' pick-up truck was missing from the shed near her house, (App. 57-60), and a Lignum resident found the truck approximately four weeks later, on August 11, 1996,

in a wooded area about one mile from Scroggins' home. (App. 19, 22). The seat sat forward, very close to the steering wheel. The driver's side door was unlocked, and the driver's side window was partially open. The passenger-side door was locked, and the passenger's window was fully closed. Scroggins' purse lay on the seat, and both it and the glove box had been gone through. Contents from both, including money and credit cards, were strewn across the seat and floorboard. (App. 18, 62-63). No fingerprints of any value were retrieved from the truck or the items found therein. (App. 26, 61).

The police developed numerous suspects, but no arrests were made at the time. (See generally Pet. Exh. 1, 4-27).

In January, incoming Sheriff Lee Hart vowed publicly to solve the Scroggins' murder and other unsolved murders in the county swiftly. He assigned Deputies Jenkins and Mack to head the investigation. (App. 21, 27, 105).

Investigators questioned Aleisha Shelton ("Shelton") because she had committed a very similar crime against another person in Culpeper. (App. 67). She and a boyfriend had shot the man six times in the head with a .22 rifle, robbed him, and left him for dead. Shelton was admittedly scared that investigators might tie her to Scroggins' death. (App. 125, 326-27).

Jenkins and Mack repeatedly offered to help Shelton get her sentence reduced. (App. 68-69, 108-12, 129-30, 135-38). Shelton admittedly was interested in helping herself out. (App. 132). Jenkins and Mack continued to press Shelton, ultimately interviewing her a total of six times: 3/21/00, twice on 3/27/00, 3/28/00, 3/31/00, and 4/1/00. (App. 66). Eventually, what she knew had evolved from nothing to having overheard and even participated in conversations between Petitioner and Kloby when they specifically discussed the crime, both before and after it happened. (App. 32, 66-67).

Investigators next went to Weakley and told him Shelton's account of an alleged camping trip. (App. 71). Weakly initially adopted the camping trip story, but disclaimed any other knowledge of or involvement in the crime. (App. 72-74). Weakley later admitted the camping trip story was a lie. (App. 250-55). He then proceeded to tell investigators a different story that was "some fact and fiction." (App. 264).

Investigators interviewed Weakley a total of five times: 4/4/00, 4/8/00, 5/11/00, and twice on 5/16/00. (App. 29, 70). Like Shelton, Weakley's story evolved over time until his first and last accounts were "very different." (App. 30).

During his interviews, details in Weakley's accounts fluctuated wildly. He repeatedly contradicted himself, on details as minor as who knocked on

Scroggins' door to details as major as who shot Scroggins. Indeed, Weakley admittedly lied to investigators "many times." (App. 177, 247, 261). Despite the countless inconsistencies, contradictions, inherent implausibilities (given the physical evidence from the scene), and even outright lies in their accounts, investigators nonetheless relied on Weakley and Shelton to justify arresting Petitioner, and prosecutors later relied on them as the key witnesses at trial. In fact, during opening statement, the prosecution told the jury that "the key witnesses" in the case were Shelton, Weakley, and Paul Carter, (as well as Tommy Lightfoot, who did not testify). (Trial Tr. 224-26).

At the police station, Jenkins and Mack questioned the Petitioner intensely for nearly nine hours. (App. 329-31). It was not a "friendly" interview. They showed him a videotape of Weakley, in which Weakley implicated Petitioner in Scroggins' death. (App. 334). Petitioner repeatedly insisted he was not involved in any way in Scroggins' death. (App. 107-08, 330). Petitioner was eventually arrested on May 17, 2000, at 11:30 p.m. (App. 331).

After the Petitioner was arrested, the investigators interrogated him again, this time at 3:14 a.m., when everyone, especially Petitioner, was tired. (App. 320). Petitioner repeatedly insisted he had nothing to do with Scroggins' death. After hours of questioning, Petitioner told investigators that

he remembered Kloby talking about robbing someone to get money for drugs, and Kolby's statements were made about one year before Scroggins' death. Kloby asked Petitioner to help, but Petitioner refused. (Hash Interview, 5/17/00, p. 3-4; App. 328). Petitioner stated he had seen Kloby only one other time since then. (Hash interview, 5/17/00, p. 5). Petitioner eventually signed a written statement to this effect. This interview was videotaped and later introduced at Petitioner's trial. (App. - Physical Exhibit).

Before the Petitioner's trial, Kloby was tried by a jury in Culpeper County. The crux of the Commonwealth's case against him consisted of the testimony of Weakley and Shelton. The jury found Kloby not guilty.

The Current Habeas Case

The Petitioner filed a habeas petition in the Culpeper Circuit Court alleging various claims of ineffective assistance of counsel and prosecutorial misconduct. (See generally App. 353-405). Following closing arguments, the court issued an opinion letter dated April 30, 2008, dismissing the claims. (App. 542-64). The final order was entered June 16, 2008. (App. 565-83).

As to Habeas Claim A, as presented in the first two Assignments of Error, the court below ruled that the attorneys were deficient in their performance for failing to discover the numerous letters written by Paul Carter which contradicted his virtually unimpeached testimony. Thus, the first prong

of Strickland has been met. (App. 555). Neither party has assigned any error to the lower court's finding of deficient performance of counsel.

In the court's letter opinion, the circuit court ruled that despite the finding of deficient performance, there was not a reasonable probability of a different result under Strickland. (App. 556-57).

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. 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.

The Petitioner Is Entitled to a New Trial

The Petitioner is entitled to a new trial due to constitutionally ineffective assistance of counsel ("IAC"). The Petitioner is not seeking outright release; rather, Petitioner's remedy in this matter is a new trial, one that is fair.

Claims of IAC are governed by Strickland v. Washington, 466 U.S. 668 (1984). The court below ruled that the attorneys were deficient in their performance under Strickland. To this specific ruling, no error has been assigned by either party. Thus, the question of deficient performance is not before this Court.

The only real question presented is fairly straightforward: But for counsel's deficient performance, is there a reasonable probability that the jury

would have a reasonable doubt that the Petitioner was guilty of the charged offense?

For the Petitioner's trial, the Commonwealth declared during opening that the "key witnesses" in the case consisted of Weakley, Shelton, Paul Carter, and another witness who never testified. Thus, it cannot be denied that Paul Carter was one of the three key witnesses in the case, along with Weakley and Shelton.

Despite the wild and substantially-impeached accusations by Weakley and Shelton that Petitioner committed the crime and confessed to participating in the murder, the case against Petitioner was exceptionally weak. If the jury had heard – and read – the overwhelming evidence that Paul Carter repeatedly and materially lied under oath about his motive for testifying and other matters, a rationale juror would have reasonable doubt respecting guilt.

Paul Carter

Collectively, the omitted evidence – proof that Paul Carter was motivated by a sentence reduction, was capable of being rewarded for his testimony, had a much more extensive history as a snitch, and lied under oath at trial about all three of these truths – created a reasonable doubt that did not otherwise exist.

The impact of Paul Carter's own letters – timely written in his own hand and repeatedly making claims opposite of his trial testimony – would have thoroughly impeached Paul Cater and demonstrated that Paul Carter could, would, and did commit perjury in his claims that the Petitioner told him that he was involved in the shooting. Paul Carter knew what he was doing, and he did it well. In fact, Paul Carter – who was serving a fifteen-year sentence – walked out of prison a free man after testifying against the Petitioner.

"[C]ommentators have recognized that despite rules of disclosure and trial safeguards, ***there is an inherently high risk that cooperating witnesses will testify falsely and will be believed by juries, thus resulting in convictions of the innocent***." Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257, 260 (2005) (emphasis added).

Paul Carter's testimony, without any real impeachment, was that the Petitioner gave a full confession of the murder of Scroggins. Confession evidence is very powerful evidence. If the jury believed Paul Carter, a jury would believe that Petitioner confessed to the murder because he committed the murder. Despite the wild accusations by Weakley and the proven fabrications by Shelton, the jury would put all that aside and convict Petitioner if the jury believed that Petitioner confessed.

However, the most "believable" evidence presented at trial has been proven intentionally false. Paul Carter testified that he knew that federal prisoners could reduce their sentence by giving assistance to the government. (App. 312-13). He also admitted asking Culpeper investigators to speak with the federal prosecutor in his case. (App. 310). However, he testified that the investigators made no promises to help him, that he expected nothing for his testimony against Petitioner, and that he assisted the prosecution because he cared about older people and the victim could have been someone's grandmother. (App. 305, 313). In fact, Carter testified that he had assisted the government before in only one other case. (App. 305, 311-13, 316).

On redirect, Carter again testified that he did not believe his assistance in Petitioner's prosecution, a state case, could affect his federal sentence. The redirect examination continued as follows:

> Commonwealth: It is your understanding that what you're doing here today doesn't have any impact on federal sentencing, is that right?
>
> Carter: Right.
>
> Commonwealth: That's all the questions I have. Thank you.

(App. 316).

The bottom line is that Carter knew he could get a sentence reduction. In fact, he was certain that he would get a sentence reduction. He sought it

vigorously as it was the sole driving force for each and every act of cooperation or assistance that he provided to reduce his mandatory life imprisonment. Carter was unquestionably expecting a sentence reduction as a reward for his testimony against the Petitioner. Carter was actively seeking a sentence reduction even prior to his testimony at Petitioner's trial. In August 2000, six months prior to the trial, Carter wrote to U.S. District Court Judge Michael:

> Thank you for not throwing the book at me. [Referring to his original sentence on July 3, 2000, where he was facing life, but received only 180 months and 60 months to be served concurrently, or 15 years total.]
>
> **Rule 35b say that I have a right to come back for a sentence reduction if some of the information I gave led to arrest or a guilty plea.** The information is to a capital murder case in Culpeper County. I have talk to the D.A. of Culpeper Gary Close and the two lead detectives in this case and they are willing to come to court for me to tell how my information help assist them in there case and help got there man for murder.

(App. 440) (emphasis added). Paul Carter repeated this exact statement in his next letter: "I would like to get my sentence reduce before they ship me down the road." (App. 443).

In his letter dated October 26, 2000, Paul Carter stated, without any equivocation, "I'm very sure that I will receive the motion for Rule 35 b." (App. 447-48). Again, on November 7, 2000, Paul Carter declared, "the information

that I gave for the capital murder case in Culpeper County - the man got to go to trial. I'm very sure that I would be granted the Rule 35(b) motion." (App. 496). Paul Carter also wrote, "On my sentencing date July 3, 2000 to my knowledge my lawyers ... told me that I would be given substantial assistance motion." (App. 449-50).

As set forth in the habeas petition, Paul Carter's letters also discuss all of the assistance he has given the government on various levels and in a multitude of cases. On September 29, 1998, Carter wrote a letter to U.S. District Court Judge Michael stating as follows:

> On May 20 1998 I was in your courtroom to sign my plea for 15 to 30 years. I have read about the Federal guidelines and the only way to get out of the guidelines is to assist the government. I have helped the government in every way possible and to the agents who will say the same. I have helped in a murder case that has put myself in danger. I have gone to the Grand Jury that indicted several people. I also have helped the Eastern District on bigger drug dealers. So you can see that I have been working hard to get out of my 15 to 30 guideline.

(Pet. Exh. 38).

Later on, Paul Carter described his help in other cases, including testifying as a witness in two federal cases: "I also was one of two key witness in the Eastern district that cause the four top druger to plea out. I testify in federal court in the Western district. I also had help from the street that lead to a crack bust at Holiday Inn on 5th exit in 1999 that officer Hill

made." (App. 449-50). At trial, Paul Carter testified that he testified once before, against one dude. Furthermore, Carter's post-trial letters demonstrate that he "took the stand hoping" that he would get a sentence reduction. (App. 455-57).

All of these statements flatly contradict Paul Carter's testimony and the prosecution's representations at trial. This information unquestionably establishes Carter's modus operandi, his history as an informant, and his expectation of a reward for his assistance to the government.

In fact, the main evidence presented at trial about Paul Carter's motive in testifying was that Paul Carter was not expecting a sentence reduction and more important, *as a matter of law*, was not capable of getting a sentence reduction in exchange for his testimony.

Additionally, the fact that Paul Carter was very active in helping law enforcement on any case possible would have shed light on the fact that Petitioner was moved from the Culpeper County Jail to the Charlottesville-Albemarle Regional and back to the county jail within a matter of a few days.

According to Ms. Hash, the jail informed her that the reason for the move was due to overcrowding, (Pet. Exh. 87), which was obviously a deceptive representation. (Pet. Exh. 88). Despite the later-claimed reasons, the facts are highly suspicious, and the defense could have argued to the jury

that the reason for the move – knowing what they should have known about Paul Carter's history as a snitch – was obvious. Petitioner was moved so that Paul Carter could later claim that he talked with Petitioner. It was more than a mere coincidence. It was too convenient, too easy. The jury – if they had known about all of the other cases that Paul Carter had worked, or if they had known about all the efforts by Paul Carter to make Petitioner his ticket to get out of jail – would have viewed any after-claimed reasons for the move with great suspicion and doubt.

Truly, as anxious as Paul Carter was to get his sentence reduction, he waited a full month from the alleged conversation with Petitioner to contact the Commonwealth's Attorney in Culpeper; he needed that time to get as much information as he could to get his story straight and to make his chance for freedom as good as possible.

Armed with all of the information about Paul Carter, the jury would have every reason to believe that the move was nothing but a set up. Yet, at trial, the defense did nothing to emphasize the reasons behind the move, focusing instead on the simple fact that Petitioner was not in the regional jail for very long – a fact which had little or no significance without the information about Paul Carter, his history, his quest.

Perhaps the most egregious lie perpetrated on the jury was when Paul Carter claimed to be testifying simply because he cared about old people, and he compounded that lie when he testified that he could not even receive benefit because his case was a federal case.

But for counsel's deficient performance, all of these arguments and more could have been during closing argument for the defense. Instead, during closing, the jury heard the affirmation that Paul Carter could not possibly be testifying to get a sentence reduction because such a reduction was not available to him.

IAC Claims Are Analyzed under Strickland

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court announced a two-part test to determine if counsel's assistance was ineffective: "First, the defendant must show that counsel's performance was deficient." Id. at 687; accord, e.g., Wiggins v. Smith, 123 S. Ct. 2527, 2535 (2003). This performance is to be judged by an objective standard of reasonableness. Strickland, 466 U.S. at 688.

The second prong of Strickland requires a showing that the Petitioner was prejudiced by counsel's performance. Strickland, 466 U.S. at 687. "[A] reasonable probability is a probability sufficient to undermine confidence in

the outcome." Strickland, 466 U.S. at 694; accord, e.g., Wiggins v. Smith, 123 S. Ct. at 2542.

The phrase "reasonable probability," despite its language, should not be confused with "probable" or "more likely than not." Strickler v. Greene, 527 U.S. 263, 289-91 (1999); Kyles v. Whitley, 514 U.S. 419, 434 (1995); Nix v. Whiteside, 475 U.S. 157, 175 (1986).

Rather, the phrase "reasonable probability" seems to describe a fairly low standard of probability, albeit somewhat more likely than a "reasonable possibility." Strickler v. Greene, 527 U.S. at 291; cf. id. at 297-301 (Souter, J., concurring & dissenting) (arguing that any difference between "reasonable probability" and "reasonable possibility" is "slight").

A court analyzing Strickland's"prejudice" component "must consider the totality of the evidence before the judge or jury." Strickland, 466 U.S. at 695. Accordingly, the determination of prejudice necessarily is affected by the quantity and quality of other evidence against the defendant. See id.

The Supreme Court observed that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at 696 (emphasis added).

The Prejudice Prong Is Established

There are two clear and substantial reasons to find that documentary proof of Paul Carter's incentive to fabricate calls into question the reliability of the outcome and would carry a reasonable probability of a different result in the present case: (1) Facing the same testimony from Weakley and Shelton, Kloby was acquitted by a jury; and, (2) Inv. Mack testified under oath that the case was "iffy" without Paul Carter but an "eight out of ten" with Paul Carter.

First, in a separate trial without Paul Carter, **Kloby was found not guilty despite the testimony of Eric Weakley and Alesia Shelton**. This fact establishes that even with the testimony of Weakley and Shelton there is a reasonable probability that a jury would harbor reasonable doubt.

The case against Kloby was substantially similar to the case against Petitioner, including the claims of Weakley as an "eyewitness" and the allegation by Shelton that Kloby and Petitioner confessed. The major difference between the two trials was the additional testimony of the jailhouse snitch, Paul Carter. There was no snitch at the Kloby trial.

Second, Inv. Mack considered the Commonwealth's case against Petitioner to be "iffy at best" without Paul Carter and an "8 out of 10" with Paul Carter. Inv. Mack testified under oath, "Before Mr. [Paul] Carter came along with this information, we had one witness which was involved in the crime

come across and give information as to the happenings, what happened at the scene, and we had one other, which was a female, who was incarcerated also. But she was a relative of Mr. Hash and the more information that we could get together, that's what Mr. Carter done for us, is brought just that extra information." (App. 413-14).

The examination continued as follows:

Q: Let me ask you, at that point, did you feel comfortable with going to trial with those two witnesses alone?

A: No, sir. ...

Q: So I'm not putting words in your mouth. So at that point with those two people, you had an "iffy" case, would you say, sir?

A: Yes, sir.

Q: And then Mr. Carter comes in?

A: Uh-huh.

Q: All right. I think you have said it, but on a scale of one to ten, how would you value, as far as the conviction you got, Mr. Carter's testimony?

A: Scale of one to ten, I would say eight.

Q: So he was a substantial witness?

A: Certainly.

(App. 417-18).

At the trial, the only evidence from Paul Carter which was factually significant was his claim that Petitioner confessed to the murder. Although the details are important including the claim that Paul Carter possessed information not available to the public[1], Paul Carter's testimony would have absolutely no value for the Commonwealth without the ultimate assertion that the Petitioner confessed to murder. The record reveals that, on his claim that the Petitioner confessed, Paul Carter was not impeached. Thus, the jury was given no choice but to believe that Carter was not expecting anything in return for his testimony against Petitioner.

---

[1]The jury very well could have found that the Petitioner talked to Paul Carter and supplied some information about his case or the evidence against him. It is equally possible that Paul Carter used the entire month (from the time he met Petitioner to the time that he contacted law enforcement) to collect information from any number of sources, or that Paul Carter was intentionally or inadvertently provided information about the case by law enforcement. "Prepped at length and in secret, skilled at lying, armed with important facts that may have been inadvertently (or deliberately) fed to them by the prosecution, cooperators often appear highly confident and credible on the witness stand. Because the cooperator's testimony is developed in secret and without documentation, his polished, incriminating account is largely unassailable on cross-examination." Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257, 260 (2005). Yet, Paul Carter's claim that the Petitioner actually confessed to the murder is the crux of the case, and with the irrefutable proof of Carter's lies, the jury would have every reason to disbelieve Carter's testimony.

The truth is that the letters written by Paul Carter proved beyond any shadow of a doubt that Paul Carter was both expecting a sentence reduction and very much knew that he was legally capable of obtaining a sentence reduction. The circuit court recognized that the evidence "supports the conclusion that Carter's motivation for testifying at the trial was his hope that it would result in a reduction of [his federal] sentence." (App. 555).

The single most important circumstance in evaluating a witness's credibility is any ***motive to fabricate***. Witness bias, the more general means to describe a motive to fabricate, trumps all other facts and details and holds a special place in American jurisprudence. For example, the right to cross-examine a witness to show bias or motivation to falsify, when not abused, is absolute. See Brown v. Commonwealth, 246 Va. 460, 464, 437 S.E.2d 563, 564-65 (1993); Barker v. Commonwealth, 230 Va. 370, 376, 337 S.E.2d 729, 733-34 (1985).

The written words in Paul Carter's letters are irrefutable proof that Paul Carter is the type of person who could sit in the witness chair and flat out lie under oath as to both his motivation for testifying and the possibility of a benefit for testifying, not to mention his true history of repeatedly assisting the government as a snitch.

Shelton and Weakley

Shelton was living at a group home in Richmond at the time of Scroggins' death. (App. 115). Shelton testified she had furlough the weekend of July 12 to 14 and stayed at the Hash residence. She claimed that the Petitioner's parents, Jeff and Pam Hash, were out of town for the weekend. (App. 116).

Shelton testified that on Saturday afternoon, July 13, she walked through the den in the Hash residence and overheard a conversation between Petitioner and Kloby, during which they plotted to harm Scroggins (i.e., tie her up and poor hot water on her). (App. 117-19). Shelton went on to describe that she drove with a boyfriend to Fredericksburg later that night and passed Scroggins' house. She claimed to have seen a small blue car belonging to Petitioner's parents parked on the side of the road at a telephone building not far from Scroggins' house. (App. 119-20). Later that night she allegedly returned to the Hash residence to spend the night and slept in the bedroom where Petitioner's brother, Chris, and his wife, Karen, lived. (App. 156-57).

Shelton testified she was back in Culpeper again less than one month later and went camping with the Petitioner, Kloby, Weakley, and another boy, Ken Toone. (App. 120). She testified she overheard Petitioner and Kloby discussing disposing of a black handgun, which Kloby had in his hand. She

claimed Kloby then went into the woods and returned without the gun. (App. 120-22). Shelton testified that the next morning, she, the Petitioner, and Kloby rode bicycles to the church across the road from Scroggins' house. She claimed that although it was a Sunday morning, she saw no other people at the church and no cars in the church parking lot. (Trial Tr. 814).

The three allegedly sat on a wooden picnic table under a tree and Kloby proceeded to talk about the crime. (App. 321-22). Kloby supposedly claimed he and Petitioner knocked on the door and told Scroggins' their car was broken and they needed to use her phone. Then, according to statements allegedly heard by Shelton, Kloby shot her at the front door, and Petitioner shot her near a piano, where she fell and pulled something to the floor with her. According to Shelton, Kloby and Petitioner then proceeded to steal money and jewelry from Scroggins. (App. 323). When Kloby was finished, Petitioner allegedly nodded his head as if in agreement, but then told Kloby, "you couldn't do nothing like that," to which Kloby agreed and the two started laughing. (App. 324).

Weakly testified that he was staying with his brother, Fenton, the weekend of July 12 through 14, and that his mother drove him to visit Kloby both Friday and Saturday. He claimed he was at Kloby's house most of Friday, July 12, and all of Saturday, July 13. He claimed that on Saturday,

Kloby's parents were not present, that Petitioner was already there when he arrived, and that he, Petitioner, and Kloby cooked out and played football all day. (App. 180-83, 186, 195, 197, 199, 290).

Weakley described that he, Kloby, and Petitioner arrived at Scroggins' house around 8:00 or 9:00 that night. (App. 174). They parked on the side of her house. (App. 166, 207). They drove Kloby's mother's car, which was a little, gray four-door. (App. 165, 232). Petitioner knocked on the door and asked to borrow some sugar. (App. 168). When Scroggins' turned to get the sugar, Petitioner followed her through the house and hit her with his fist on the side of the head. The boys then attacked her, proceeding to "kick her and hit her" "in the face, stomach, and ribs." (App. 168-69). Then Kloby pulled out a big, black handgun and ordered Petitioner and Kloby to take Scroggins' to a back bedroom. (App. 212-13).

According to Weakley, the Petitioner and Weakley dragged Scroggins through the living room and to a back bedroom where they propped her up against a doorframe. (App. 169-71). According to Weakley, Scroggins was screaming a lot, and Kloby and Petitioner were fighting about who was going to shoot her first. (App. 171). After the first shots were fired, Weakly ran through the house "frantic" and "freaked out." He allegedly ran through the living room and the kitchen trying to find they way out of the house until he

finally found the front door. (App. 173-74). Kloby and Petitioner then also exited through the front door, and when they left, the house was "real quiet." (App. 229-30).

Weakly testified that he and Kloby then got in Scroggins' truck, which was facing out, and pulled out and left, presumably leaving Petitioner to flee in Kloby's mother's car. (App. 174-75, 235). Weakley rode on the passenger side of Scroggins' truck with the window down. (App. 240-42). Once they arrived in town, Weakley suddenly jumped out of the truck at a red light. (App. 175, 244). He then went to spend the night at his brother's house. (App. 178).

Weakley's testimony stood in direct contradiction with Shelton's testimony. For example, Weakley testified that he was with Kloby and Petitioner at Kloby's house all day and evening on Saturday, July 13. Shelton claimed she was with Kloby and Petitioner and Petitioner's house that Saturday afternoon. Weakley also claimed the three drove Kloby's mother's gray car to Scroggins' house. Shelton testified she saw Petitioner's parents blue car there.

Not only was Weakley's testimony inconsistent with that of Shelton, but it also was irreconcilable with the objective, physical evidence from the death scene. For example, Weakley testified that they parked Kloby's Mom's car

beside the Scroggins home. However, investigators found only tire marks from Scroggins' truck and no evidence of any other vehicle at the house that night. (Def. Trial Exh. 2; Pet. Exh. 4).

Weakley also testified that Kloby and Petitioner attacked Scroggins, hitting and kicking her in the face, stomach and ribs, yet the autopsy showed no signs of this type of abuse. Weakley also claimed he ran wildly through the house. Yet, the perpetrator had not been anywhere in the house except the living room, hallway and bedroom, and the doors to remaining parts of the house were closed and latched. (App. 38-39, 57).

Weakley also claimed they dragged Scroggins through the living room and down a narrow hallway to set her against a bedroom doorway. However, the hallway was very narrow and partially obstructed by a desk and an antique washstand, leaving only two to three feet of room to walk in the hallway. (App. 47-48, 406-07). In addition, none of the drops of blood trailing from the front door, through the living room, and into the hallway had not been step on, smeared, or disturbed in any way. (App. 39). Weakley testified Scroggins' house was "real quiet" when they left. However, the television was audible from outside the house when people went to check on Scroggins the next morning.

Shelton's testimony was also inconsistent with the objective evidence. Shelton claimed Kloby shot Scroggins at the front door and Petitioner shot her by the piano. However, Scroggins was only shot in the back bedroom. In addition, Shelton, like Weakly, contended that the boys used a black handgun to shoot Scroggins. However, the prosecution's forensic evidence established Scroggins' was killed by bullets fired from that a .22 rifle. While an unusual Derringer or Fiala pistol might also have been used, neither of these was similar to what Shelton and Weakly claimed they saw.

Shelton's testimony were also refuted by records from the United Methodist Group Home where Shelton lived from February 1996 to mid-August 1996. They proved that her last furlough was July 11 through 14, 1996, and that she had no others until she was released in mid-August. (Trial Tr. 815, 1304; Def. Trial Exh. 8, 9, 10). Petitioner's father, Jeff Hash, testified Shelton only came to their house once from the group home, that she was not at their house on the weekend of July 13 when Scroggins' died, that the Hashes were not out of town that weekend, and that she never had a key to the Hash house. (Trial Tr. 839-40, 847-49). Numerous others corroborated that Shelton was not at the Hash residence that weekend. (Trial Tr. 999, 1012-13, 1015, 1023-31, 1079, 1081-82, 1083, 1100-01, 1116, 1131-32). Similarly, Shelton's mother testified that when Shelton had furlough from the

group home, she came to her mother's house, not the Petitioner's house, and that she never left Shelton at the Hash residence if Petitioner's parents were not home. (Trial Tr. 954-56, 959).

Shelton was also refuted by other, credible witnesses. Ken Toone was no longer living in Culpeper at this time and testified that he had never been camping trip with any of them. (Trial Tr. 968, 970-72). Chris and Karen Hash testified that they were living at the Hash residence and were at the house the weekend of July 13 and that Shelton did not sleep in their room that night. (Trial Tr. 983-86, 995-96, 999, 1015, 1023-31). Rhoda Carter, who was a long-time member at the church across the road from Scroggins', testified that the church parking lot was always full of vehicles on Sunday mornings, especially the first Sunday in August, when the church celebrates homecoming. (Trial Tr. 1059-60, 1062-64). She further testified that the church no longer had any wooden picnic tables in 1996. (Trial Tr. 1058-59). Robert Williams, Sr., caretaker for the church grounds, corroborated that the church no longer used wooden picnic tables after 1994. (Trial Tr. 1205-06).

Numerous witnesses also refuted Weakley, corroborating that Kloby was not with Weakly the weekend of July 13, that Weakley was never at their house that weekend, and that Kloby was with his brother and some friends that Saturday night. (Trial Tr. 888-96, 909-10, 925-29, 936-9420).

One of these witnesses was Culpeper Sheriff's Deputy Terry Graham who visited the Kloby residence about an unrelated matter at 5:14 p.m. on Saturday, July 13. The only persons present where Kloby, his mother, and another man. Neither Petitioner nor Weakley were there, much less enjoying a cook-out at the time. (Trial Tr. 917-21).

Weakley's testimony also did not match previous versions he had given investigators. Weakley claimed prior to trial that they had kicked in Scroggins' door. (App. 22). He claimed Scroggins had been mutilated by an axe. (App. 247-49). He claimed Kloby had beaten Scroggins with a broken chair leg. (App. 285-88). He claimed they stole items from Scroggins' house, including a two-carat diamond ring, a rare necklace, and an expensive vase, and sold them for money. (App. 269-70).

As if all of Weakley's wild accusations and inconsistent statements were not enough, Weakley brought the question of credibility to a whole new level. At trial, Weakley testified under oath that he was a compulsive liar and that no one, including he, could tell when he was lying or telling the truth. (App. 256, 262). He explained that he regularly mixed "fact and fiction" and often could not tell the truth from fiction. (App. 271, 288). During his testimony, Weakley even expressed an inability to know

truth from falsehood. Indeed, Weakley testified that he did not know whether he lies more when under oath or less. (App. 288).

In short, there is ample support for the finding that there is a reasonable probability of a different outcome, such as the acquittal enjoyed by Kloby. This Court does not need to find that the jury *more likely than not* would have found Petitioner not guilty; "more likely than not" is not the standard. The law is that "a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under Strickland." Nix v. Whiteside, 475 U.S. 157, 175 (1986); Strickler v. Greene, 527 U.S. 263, 289-91 (1999); Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Additional Case Law to Consider

There are numerous cases where the testimony of one witness, who has a motive to fabricate, has resulted in a new trial when that motive is not presented at trial. See Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003) (affirming habeas relief where, without suppressed evidence, petitioner was unable to effectively counter the Commonwealth's portrayal of a snitch as "trustworthy"); United States v. Meinster, 619 F.2d 1041, 1044-45 (4th Cir. 1980) ("When the terms of a 'deal' between the government and a witness create a motive for falsification, the jury's perception of the witnesses'

testimony is likely to be affected."); United States v. Sutton, 542 F.2d 1239, 1243 (4th Cir. 1976) ("The prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its key witness."); Boone v. Paderick, 541 F.2d 447, 448 (4th Cir. 1976) ("Had the jury known of the prosecution witness' compelling motivation to establish ... guilt, there is a reasonable likelihood its verdict might have been different.").

Indeed, the United States Supreme Court has cautioned that subtle factors, such as the credibility of one particular witness, can have a great impact on the outcome of the case. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264, 269, (1959)

In the present matter, Paul Carter was the only credible witness to offer evidence that Petitioner had confessed to the murder. Accordingly, the prosecutor stressed in closing argument that Paul Carter could not get assistance in a different court, with different judges and different prosecutors, implying that Carter had no incentive to lie. Paul Carter's trial testimony was not only relevant to Petitioner's conviction, it was crucial, supporting a

reasonable probability that the Petitioner would have been acquitted if counsel had discovered and presented the readily available impeachment evidence for Paul Carter.

The fact that Paul Carter's letters would have caused such irreparable harm to Paul Carter's credibility leads to the inevitable conclusion that the confidence in the result of the pleadings has been undermined. As such, the result is unreliable.

As stated by the United States Supreme Court:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. **It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.** This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, **if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.**

United States v. Agurs, 427 U.S. 97, 112-13 (1976) (emphasis added).

In the present case, the documentary proof of Paul Carter's lies created a reasonable doubt that did not otherwise exist. As evidenced by the result at the Kloby trial, the verdict in the Petitioner case was already of questionable

validity. The additional evidence of Paul Carter's letters was more than sufficient to create a reasonable doubt.

In the case of Beverly Monroe, Zelma Smith was a jailhouse snitch who was proven to have lied about her motivation for testifying against Beverly Monroe. The evidence against Beverly Monroe was similar to the evidence of Weakley and Shelton as used against Petitioner. Furthermore, Zelma Smith was just as critical to the prosecution of Beverly Monroe as Paul Carter was to the prosecution of Petitioner. However, in the Beverly Monroe case, the Fourth Circuit, which is recognized as the most conservative court in the country, affirmed the granting of habeas relief based on the Fourth Circuit's finding that the evidence regarding Zelma Smith which was not presented to the jury undermined confidence in the outcome and demonstrated a reasonable probability of a different result. The Fourth Circuit's opinion, in part, states as follows:

> Faced with a dearth of evidence on premeditation and malice, the Commonwealth's Attorney needed to convince the jury to credit the testimony of Zelma Smith. Smith was the only witness to offer evidence that Monroe had planned her crime in advance of the event. Accordingly, the prosecutor stressed in closing argument that "Zelma Smith got on that stand and was . . . direct and straightforward, and looked you right in the eye and told you exactly what had transpired." The five items of Habeas Evidence relating to Smith, however, undermine these representations. On Smith's testimony alone, the prosecution had suppressed: (1) the Smith gun deal; (2) the Smith sentence deal; (3) Smith's informant

> history; (4) Smith's inconsistent statements; and (5) the Lundy information (collectively, the "Smith Habeas Evidence"). **Without the Smith Habeas Evidence, Monroe was unable to effectively counter the Commonwealth's portrayal of Smith as a trustworthy witness.** If the prosecution had complied with its disclosure obligations, however, Smith's testimony would have been significantly undermined, and there is a reasonable probability that the first-degree murder prosecution of Monroe would have collapsed.
>
> **With respect to the two Smith deals -- the Smith gun deal and the Smith sentence deal -- the Commonwealth now contends (seeking to minimize the importance of the Smith Habeas Evidence) that it was obvious to the jury that Smith expected consideration from the prosecution in exchange for her trial testimony. At trial, however, the prosecutors insisted during closing argument (astoundingly, in light of what is now known) that Smith had no incentive to lie, telling the jury that:**
>
>> as hard as it might be for you to believe, the absolute truth is that she did not ask for any consideration for her testimony from the Commonwealth in this case. And it's absolutely true that the Commonwealth has not promised her anything.
>
> Contrary to the prosecution's representation to the jury, the Commonwealth had (as the district court found) provided substantial consideration to Smith in exchange for her testimony against Monroe. Habeas Opinion at 53-54. And the two deals between the Commonwealth and Smith in exchange for her testimony seriously undermine Smith's credibility.

Monroe, 323 F.3d at 314 (emphasis added).

Similarly, in the prosecution of the Petitioner, Paul Carter was the only credible witness to offer evidence that the Petitioner had confessed to the murder. Accordingly, the prosecutor stressed in closing argument that Paul

Carter could not get assistance in a different court, with different judges and different prosecutors, implying that Carter had no incentive to lie. **Without Paul Carter's letters, the Petitioner's attorneys were unable to effectively counter the Commonwealth's portrayal of Carter as a trustworthy witness.** If the attorneys had acted as reasonable counsel in the investigation of Paul Carter, however, Carter's testimony would have been significantly undermined, and there is a reasonable probability that the capital murder prosecution of Petitioner would have collapsed.

The Fourth Circuit continued in the Monroe case and ultimately stated:

> [C]ontrary to the Commonwealth's current position, Smith's trial testimony was not only relevant to Monroe's conviction, it was crucial. In sum, had the Smith Habeas Evidence been properly disclosed, there is a reasonable probability that Monroe would not have been convicted of first-degree murder.

Monroe, 323 F.3d at 315-16.

Similarly, in the present matter, taken as a whole, the letters of Paul Carter proved that Paul Carter lied about his history as an informant, his motivation for testifying, and his belief that he could not get any assistance whatsoever for testifying in this case, and would have rendered Carter's testimony far less credible. In fact, the Commonwealth virtually concedes as much, asserting that Carter's testimony that he was expecting nothing was not believable. To the contrary, Paul Carter's testimony was the Commonwealth's

major evidence against Petitioner, raising the "iffy" case to an "8 out of 10" in the eyes of law enforcement.

II. The Court Erred in Failing to Grant Habeas Relief Specifically on Claim A(4), When the Prosecution Used of the Perjured Testimony of Paul Carter.

There is no doubt that Paul Carter's testimony was perjured, and every indication is that the investigators knew or should have known that Paul Carter was lying under oath.

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N. Y. 2d 554, 557; 136 N. E. 2d 853, 854-855; 154 N. Y. S. 2d 885, 887:
>
> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

The fact that the Commonwealth's Attorney advised defense counsel that Paul Carter had assisted the government previously demonstrates knowledge gained by the Commonwealth. The Commonwealth cannot turn a blind eye or a deaf ear to the repeated requests by Paul Carter for a sentence reduction. Likewise, the Commonwealth cannot hide behind a claim that there are no letters by Paul Carter to law enforcement; in fact, the evidence is that some letters by Paul Carter were sent to law enforcement.

The Sheriff's Office had a file on Paul Carter that has since disappeared. The investigators had a habit of feeding and prodding witnesses such as Weakley and Shelton. The highly suspicious transfer of Petitioner was the result of additional governmental activity.

Under the totality of the circumstances, the Commonwealth knew or should have known that Paul Cater was committing perjury in his testimony against Petitioner. Additionally, the Commonwealth knew or should have known that Paul Carter could – in fact – obtain a sentence reduction in federal court by testifying in a state court, and the Commonwealth did nothing to correct Paul Carter's erroneous and perjured testimony. In fact, the Commonwealth took advantage of this information and argued at closing that Paul Carter could not get assistance in a different court, with different judges and different prosecutors. See, e.g., Giglio v. United States, 405 U.S. 150

(1972) (ruling that a prosecutor's knowing creation of a false impression requires new trial "if there is any reasonable likelihood that the false testimony could have affected the verdict").

Thus, seeking to bolster Carter's credibility, the prosecution improperly vouched for Carter's belief that assistance in a state case could not help him get a sentence reduction in federal court, representing that there is no connection between what is going on in state court and federal court. Such argument was completely false and contrary to the knowledge of the prosecution. The prosecutor insisted during closing argument (astoundingly, in light of what is now known) that Paul Carter had no incentive to lie. See Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003) (affirming habeas relief in very similar circumstances).

The uncorrected perjured testimony is yet another independent reason to grant habeas relief in the form of a new trial. See, e.g., Napue v. Illinois, 360 U.S. 264 (1959); Kyles v. Whitley, 514 U.S. 419, 437 (1995) (stating that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); see also Brady v. Maryland, 373 U.S. 83 (1963) (suppression of evidence favorable to an accused upon request violates due process where

the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution).

CONCLUSION

For the foregoing reasons, the Petitioner prays that this Honorable Court grant this Petition for Appeal, and, upon review, reverse the decision of the circuit court and grant habeas relief.

Respectfully Submitted,

MICHAEL WAYNE HASH

By: _____
Counsel

David B. Hargett, Esquire
Virginia State Bar No. 39953
HARGETT LAW, PLC
11545 Nuckols Road, Suite C
Glen Allen, VA 23059
Office: (804) 788-7111
Facsimile: (804) 915-6301
email: dbh@hargettwatson.com
Counsel for Appellant

CERTIFICATE

The undersigned certifies as follows:

1. *The name and address of the appellant is:* **MICHAEL WAYNE HASH**, #322967, Wallens Ridge State Prison, Big Stone Gap, VA 24219

2. *The name, address, telephone number of counsel for the appellant is:* David B. Hargett, Esq., Hargett Law, PLC, 11545 Nuckols Road, Suite C, Glen Allen, Virginia 23059, (804) 788-7111

3. *The name of the appellee is:* Gene M. Johnson, Director

4. *The name, address, telephone number of counsel for the appellee is:* Eugene Murphy, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, (804) 786-2071

5. The transcript of the evidentiary hearing has been filed, and the underlying criminal record has been made part of the habeas record.

6. There are no parties to this action not represented by counsel.

7. On this ***March 19, 2009***, sufficient copies of the foregoing were hand-delivered to the Clerk of the Virginia Supreme Court, and sufficient copies of the Opening Brief and Appendix were mailed by first class mail, or hand-delivered, to counsel for the appellee.

8. Counsel for the Appellant is ***court-appointed***.

9. Counsel for Appellant desires to ***state orally and in person*** the reasons for granting a new trial.

David B. Hargett, Esquire