IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081837

MICHAEL WAYNE HASH

Petitioner

v.

DIRECTOR OF THE DEPARTMENT
OF CORRECTIONS

Respondent

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE

Michael Wayne Hash (the petitioner) is being held pursuant to a judgment of the Circuit Court of Culpeper County entered on April 25, 2001, convicting him of capital murder and sentencing him to life imprisonment.

Petitioner's appeal to the Court of Appeals resulted in that court's affirmance of his conviction on September 3, 2002. (Record No. 1290-01-

4). A further petition to this Court was refused on February 24, 2003 and a petition for rehearing was denied on April 18, 2003. (Record No. 022604).

The petitioner filed a petition for a writ of habeas corpus in the Circuit Court of Culpeper County on April 19, 2004. After testimony was taken on October 16-17, 2007, the petition was dismissed on June 16, 2008. This Court granted a petition for appeal on January 13, 2009.

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.

QUESTIONS PRESENTED

I. Did the trial court properly find no prejudice with respect to claim A? (Assignment of Error I).

II. Did the trial court properly find no prosecutorial misconduct? (Assignment of Error II).

STATEMENT OF FACTS

Background

In July, 1996 Thelma Scroggins, aged 74, was murdered. A thorough investigation was conducted by both local and state police. A team of Culpeper County Sheriff's Deputies, led by experienced investigator David Carter, conducted numerous interviews. Unfortunately, the matter turned into a cold case, because none of the leads panned out. (App. 514-15, 541).

In 2000 the Sheriff's Office undertook a review of the case which involved a full week's review of the old reports. (App. 508). This review led to a decision to start from "ground-zero" and to the reinterviewing of potential witnesses. A discussion with Hash's father led to interviews with Alesia Shelton, the petitioner's cousin. She in turn stated that the petitioner and Eric Weakley were involved in the murder. Numerous interviews with Weakley led him to confess his role in the crime and to implicate the petitioner and Jason Kloby as the killers. (App. 508-10).

On May 17, 2000, the petitioner made a statement to the police that he, Kloby and Weakley had discussed robbing an elderly person in the neighborhood. (Comm. Exh. 45). On June 26, 2000, Paul Carter told the police that Hash had told him that he and two others had committed the

murder with a .22 caliber gun and that his cousin had informed the police about his role in the offense. (App. 438-39).

The Trial

On February 5 through February 9, 2001 the trial was held and the petitioner was convicted of capital murder. The murder scene revealed that the victim's glasses and curlers were found on the floor near the front door. (App. 13). The body itself was found further into the house. There was no sign of forced entry. (App. 17). The victim had sustained four gunshot wounds to the head. (App. 83). The caliber of the murder weapon was determined to be a .22. (App. 95).

Before the murder Alesia Shelton, cousin of the petitioner, had heard Hash and Jason Kloby discussing Ms. Scroggins. (App. 117). They were talking about how they were going to do it that night and the petitioner said that they should make her suffer. (App. 118). A few weeks after the crime Shelton heard Hash and Kloby discussing how to dispose of the gun. (App. 121).

Also after the crime, when Hash and Kloby were sitting with Shelton outside of a church, Kloby admitted to shooting the victim. (App. 323). He said Hash also had shot the victim and the petitioner "nodded his head and said yes – yeah." (App. 324).

Eric Weakley testified that he had committed the murder with Hash and Kloby. After the petitioner had knocked on the door and upon Scroggins coming to the door, Hash requested a cup of sugar. (App. 167-68). When the victim turned around to get the sugar, the petitioner struck her on the side of the head with his fist. (App. 168). She fell to the ground and Hash and Kloby began to assault her there. (App. 169). Weakley and Hash then carried her back to the bedroom and set her against a door jamb. (App. 170). The petitioner then shot her twice in the left side of her head. (App. 171). Thereafter Kloby shot her twice, first in the left side of her head and the second time in the back of the head. (App. 172-73). The petitioner then left in his car and Kloby and Weakley took the victim's truck. (App. 174-75).

The truck was later found in a wooded area where the petitioner had been arrested some time before while camping. (App. 318).

Paul Carter had been in jail with the petitioner and testified that the petitioner told him that he had committed the murder, having shot the victim twice using a .22 caliber gun. (App. 303). He also said that a cousin was "trying to tell on him." (App. 304).

The habeas judge described Carter's testimony as follows:

> 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.

(App. 567-68).

The petitioner had given a statement to the police in which he admitted discussing with Kloby and Weakley robbing an elderly neighbor. (Commonwealth's Exhibit 45). At trial Hash testified that they wanted to rob someone in the area who wasn't going to put up much of a fight. (App. 335). He assumed Kloby was talking about an old lady. (App. 335). When he discussed the matter with the police Hash told them that he drew a connection between his discussions with Kloby and Weakley and the murder. (App. 342).

Habeas Hearing

Richard Davis and Michael Hemenway, Hash's attorneys at trial, testified that in preparing to defend the petitioner they were most

concerned about Hash's statement to the police. (App. 529). They were worried because the statement involved "[p]lanning with the other two young men to go out and rob old people." (App. 529). In the statement Hash had said that Kloby had mentioned robbing someone and "they talked about it and they talked specifically about something which sounded, in our view, very dangerous to our case." (App. 529). They described that statement as "hugely problematical." (App. 530).

Both attorneys attended the Kloby trial which occurred before the petitioner's. (App. 527-28, 536). They also obtained a copy of the transcript which they reviewed for the petitioner's trial. (App. 536). Kloby had made no statement and his alibi witnesses held up better than the petitioner's. (App. 530).

The habeas court found that:

> [S]ix 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.

(App. 566).

The attorneys were troubled by Carter's testimony because he knew the details about the caliber of the gun and the petitioner's cousin's

provision of information to the police. (App. 533-34, 537-38). They knew that neither detail was "out there for public consumption." (App. 533-34). They "tried to figure out whether there was some way it was fed to him by law enforcement in some fashion. [They] couldn't do anything." (App. 533). Those same details had made Scott Jenkins, the investigator, who was originally skeptical about Carter, less skeptical about his testimony. (App. 514).

When asked about the significance of various witnesses at the petitioner's trial, Davis replied that Weakley was the most important witness since he was the one that was there and had seen what happened. (App. 531). Weakley was the most believable "[t]hat something happened . . . that he has some information about this crime." (App. 532). Davis believed that Shelton was the next most important witness. (App. 531). He believed that Carter "was the least believable in terms of them getting any information if you're going to look at his testimony and say do I believe that happened." (App. 532).

The attorneys decided to assume that Weakley was present at the killing for purposes of the defense. They did so for the following reasons:

> There was enough that Eric said which was consistent with what the Commonwealth would present to indicate the he had some accurate information, that a jury was going to conclude

> that he was either there, which he said he was, or that . . . he had gotten information.

(App. 533).

Scott Jenkins testified that the caliber of the murder weapon had not been made public and that they had researched everything they could to see whether the information had been publicized. (App. 517-18). Both Jenkins and Investigator James Mack testified that before the trial they had told Paul Carter they would not testify on his behalf. (App. 512, 521). None of the letters that Carter wrote to Jenkins indicated that Carter was certain that he would receive a sentence reduction. (App. 512-13).

The habeas court discussed Carter's efforts to get help from the Culpeper authorities:

> 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.'

(App. 570).

Finally, with respect to the transfer of Hash for the alleged purpose of having him encounter Paul Carter, the habeas court held:

> 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.

(App. 568-69).

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND NO PREJUDICE WITH RESPECT TO THE INEFFECTIVENESS CLAIM INVOLVING PAUL CARTER.

The petitioner argues that his attorneys were ineffective for failing to properly investigate and impeach the witness Paul Carter. The trial court

found that, although the attorneys had erred by not reviewing Carter's federal file, the petitioner had shown no prejudice. That finding is fully supported by the evidence.

Standard of Review

In deciding the issue of effectiveness of counsel this Court should be guided by the standards established by Strickland v. Washington, 466 U.S. 668 (1984). In that case the United States Supreme Court set forth a two-step test for determining whether a trial attorney's performance rendered the representation ineffective and thus a violation of the defendant's Sixth Amendment right to counsel. The Court stated that first the attorney's performance should be examined to see whether it was "reasonable considering all of the circumstances." 466 U.S. at 688.

Even if the reviewing court should find after such a review that the attorney committed errors, reversal is warranted only if petitioner can "affirmatively prove prejudice." Strickland, 466 U.S. at 693.

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694. Knowles v. Mirzayance, 556 U.S. ___ , ___S.Ct. ___, ___, 173 L.Ed.2d 251, 265 (decided March 24, 2009)(quoting same standard from Strickland).

> The issue whether trial counsel provided effective assistance presents a mixed question of law and fact. Strickland, 466 U.S. at 698; Lewis [v. Warden], 274 Va. [93,] 112, 645 S.E.2d [492,] 503 [(2007)]; Yarbrough v. Warden, 269 Va. 184, 195-96, 609 S.E.2d 30, 36 (2005). A circuit court's findings of fact and conclusions of law "are not binding upon this Court, but are subject to review to determine whether the circuit court correctly applied the law to the facts." Curo v. Becker, 254 Va. 486, 489, 493 S.E.2d 368, 369 (1997).

Johnson v. Tice, 275 Va. 18, 27,654 S.E.2d 917 (2008).

No Prejudice Shown

The mistake of the lawyers was the failure to review the record in the one federal case they knew about, where they would have found Carter's letters written to a federal judge seeking a sentence reduction in part for his testimony in the Hash case. The attorneys, however, made clear to the jury that Carter had previously obtained a tremendous sentence reduction for testifying against others and showed his efforts to get the Culpeper authorities to further help him in federal court.

In the file the attorneys would have found both the letters and the judge's responses to them. After his first two letters (App. 440-43) to Judge Michael asking for help under Rule 35b, the judge entered an order on

August 28, 2000, denying the motion and pointing out that the motion had to be filed by the United States Attorney. (App. 444-45). In October of 2000 Carter sent two more letters to the judge referring to statements he had made "about a year ago" and requesting appointment of counsel for his 35b motion. (App. 446-48). In response Judge Michael, on November 2, 2000, entered an order denying counsel and in reference to the statements said, "Apparently the government did not find these statements valuable enough to file a motion for substantial assistance at the defendant's sentencing hearing four months ago and the defendant has not articulated any reason why the statements would have become any more valuable since then." (App. 452-54).

The only other letter mailed before the trial in this case, that sent on November 8, 2000, received no reply until February 28, 2001 when the motion was again denied. (App. 458-59). It was not until March, a month after Hash's trial, that counsel for Carter was appointed in federal court. (App. 460-61).

Thus, in response to Carter's first letter requesting 35b relief the court denied his motion. His letter stating that he was sure he would obtain such relief was found by Judge Michael to refer to alleged assistance given "about a year ago" and led only to denial of any relief.

At Hash's trial the lawyers told the jury in the opening statement that Carter had been a drug kingpin, but had his likely life-imprisonment sentence reduced to 15 years by "testifying for the government." (App. 8). They told the jury about Federal Rule of Criminal Procedure 35B and said that "as long as he keeps testifying against other people, he gets to further reduce his sentence." (App. 8).

When he testified, Carter conceded that he had asked the Culpeper investigators to speak on his behalf to the United States Attorney. (App. 309). He also told the jury that two years had passed between his guilty plea and sentencing in federal court and that during that period he was testifying against another defendant to get a 5K sentence reduction for substantial assistance. (App. 311). He said that he had been faced with life imprisonment without parole but had received a 15 year sentence. (App. 312). He knew that he had just one year from July 3, 2000 to get his Rule 35B reduction. (App. 312-13, 316).

Hash's attorneys demonstrated to the jury that Carter had testified before to gain a substantial sentence reduction, knew the mechanics of the Rule 35b reduction and had sought the assistance of the Culpeper authorities to help him with his federal case.

Importantly, as the attorneys recognized, no matter how well they demonstrated that Carter was lying about his motivation for testifying, they could not disprove that Hash had told him about the murder. The presence in Carter's statement of an identification of the caliber of the gun used in the crime and of a reference to Alesia Shelton's informing against Hash rightfully concerned the lawyers. (App. 533-34, 537-38). Investigator Jenkins said that although originally skeptical about Carter, he became less so when Carter revealed those details. (App. 514). Even if the attorneys fully established that Carter was testifying solely to obtain a sentence reduction, that did not foreclose the possibility that Hash had unwisely told him about the crime and thereby given Carter a windfall. Was it the case that Carter, who would have lied to obtain a sentence reduction, did not have to lie here because Hash had actually confessed to him? If Hash had not, how did Carter know these details?

The police had kept the caliber of the weapon out of the papers and had not even told Weakley about it. (App. 75, 517). In fact, Jenkins and his colleagues "researched everything we could to see if --- you have to see that information hasn't been publicized that would be parroted back to you in an interview." (App. 518). Hash's lawyers also "looked into this, that it was not public consumption, so that the very specific thing about the

exact caliber of the gun that nobody else knew about." (App. 538). It was even less likely that Shelton's role in the case had been disclosed before trial.

The petitioner has never explained how Carter could have known these details if he did not obtain them from Hash. It was these details that the Commonwealth's Attorney relied upon in summation when discussing Carter's testimony. (App. 348).

The petitioner now argues that the acquittal of a separately tried codefendant proved the prejudice of any error in impeaching Carter. The attorneys, however, denied petitioner's contention that the main difference between his trial and Kloby's was Paul Carter. They had attended Kloby's trial (App. 527-28, 536) and emphasized the important distinction of petitioner's videotaped statement, played for the jury, admitting his discussion with Kloby and Weakley about robbing an elderly person in the neighborhood. (App. 529). The actual elderly victim, of course, lived in Hash's neighborhood. Kloby made no such statement. That statement was "hugely problematic" for Hash's attorneys. (App. 530).

Moreover, the attorneys said that Kloby's alibi witnesses were more convincing. (App. 530). The habeas judge concluded:

> Petitioner testified that Mrs. Scroggins was their "mail lady" for the first two or three years they lived in the area, and that

> occasionally he would see her walking with another lady. Petitioner admitted that he, Weakley and Kloby talked about robbing somebody in the area who wasn't going to put up much of a fight, and that he assumed they were talking about an old lady. Petitioner testified that Kloby spoke to him on two other occasions about robbing somebody in the area, once by telephone and another time at the mall.
>
> In referring to the conversations confirmed by petitioner, Mr. Davis testified that "... they talked specifically about something which sounded, in our view, very dangerous to our case." Mr. Davis also observed that Kloby did not make a statement, and that was one of the reasons why he did not testify at his trial. This testimony by the defendant Hash, along with that of Carter, was not presented in Kloby's trial where the jury hearing that case found Kloby not guilty.

(App. 556-57). Carter was not the only, or even the most important, difference between the trials.

Additionally, of course, Carter's real significance lay in his possession of details of the crime and investigation not known to the public. As pointed out above, the inability to explain that knowledge rendered impeachment of Carter's veracity ineffective in reducing the impact of his testimony. Until the petitioner could explain how Carter knew those details, he could not effectively discount Carter's testimony. The attorneys were unable to provide that explanation and Hash could not do so at the habeas evidentiary hearing. The petitioner has not shown that further impeachment of Carter, without explaining his knowledge of inside facts, would have changed the outcome of the trial.

The petitioner also suggests that testimony from Investigator Mack that the Commonwealth's case was "iffy" before Crater became available demonstrates the prejudice. Of course, that assessment was one made of the case before trial. The evidence presented at the trial and at the habeas hearing showed that the additional evidence, including the petitioner's statement, made the case much stronger.

The habeas court concluded as follows:

> [E]ven 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.

(App. 576-77).

In its opinion letter the court also pointed to Shelton's testimony about the petitioner's conversation with Kloby on the day of the murder. She heard them talking about making Scroggins suffer for having messed with them. He pointed to her testimony about a later conversation where Kloby admitted the crime, involved Hash and Hash nodded his consent. The petitioner had at first offered a false alibi for his location at the time of the crime. (App. 556).

Weakley's testimony, implicating himself in the crime, showed Hash also to have been involved and the attorneys did not think it tactically advisable to attempt to show that Weakley had not been involved in the crime. They could offer no explanation of why Weakley would confess to involvement in the murder if he had not been there. Weakley's testimony was further corroborated by the petitioner's own statement to the police that he had discussed robbing an elderly neighbor with Kloby and Weakley. (App. 556-57). Although Weakley's testimony showed inconsistencies with other testimony, he correctly testified to the assault at the door and the three shots to the left side of the victim's head and the one to the back of her head.

It should be remembered that he was 16 years old at the time of the murder and was not questioned about the crime until four years later.

Inconsistencies in his testimony would be expected, but there was no doubt that he knew exactly into which part of the victim's body each of the four shots had been fired Once the jury accepted Weakley's presence at the scene, his implication of Hash, Hash's discussion of a similar crime with Kloby and Weakley, Shelton's testimony and Carter's knowledge of the details discussed above fully established Hash's guilt to such an extent that introduction of Carter's letters would not have made a difference, particularly in view of the impeachment of Carter already presented.

The petitioner suggests that with the letters he could have argued that his transfer to Charlottesville was made to allow Carter to claim that Hash had confessed to him. The habeas court, however, ruled;

> 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.

(App. 577). The prosecutor could have used that same evidence at trial to dispel any such claim.

Unlike the case of Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003), to which the petitioner devotes much attention, Hash's case does not involve a witness providing the only evidence on an element of the offense or the suppression of five categories of impeachment evidence by the

prosecution. Here, the petitioner tried, but failed, to prove suppression of exculpatory evidence. Moreover, there is absent in Monroe the otherwise unknowable details in the informer's testimony present here.

It was that other testimony and Carter's knowledge of details available only from Hash that precluded a showing of prejudice.

II. THE TRIAL COURT PROPERLY FOUND THAT THERE HAD BEEN NO PROSECUTORIAL MISCONDUCT.

The petitioner argues that the Commonwealth's Attorney knowingly presented perjured testimony. This claim is different from the claim of a failure to disclose exculpatory evidence presented in the habeas court. In any event, having no real evidence of any misconduct by the prosecutor, Hash argues that inferences could be made from circumstantial evidence. The record does not support this claim.

Waiver

Petitioner's claim A involved alternative claims of ineffectiveness for failure to discover, and prosecutorial misconduct for failure to disclose, various items of information related to Paul Carter. (App. 389-90). Specific to the particular issue discussed here, Hash alleged that the Commonwealth had violated various constitutional provisions because it

> ***failed to disclose*** the following – any and all exculpatory, impeachment, and other evidence regarding:
>
> * * *

> (4) the Commonwealth's use of testimony by Paul Carter when the Commonwealth knew or should have known such testimony was perjured.

(App. 389) (emphasis added). The petition then set forth the argument on this claim under the caption, "The Commonwealth's Lack of Disclosure" and presented a claim under Brady v. Maryland, 373 U.S. 83, 87 (1963). (App. 400-04).

In his initial post-hearing argument Hash argued only that the Commonwealth had been guilty of a Brady violation for not advising the petitioner of what it knew about Carter's efforts to get help with his 35b motion. (Petitioner's Closing Argument 29-30). Only in his rebuttal argument did the petitioner raise the claim of use of perjurious testimony under Napue v. Illinois, 360 U.S. 264, 271 (1959). (Petitioner's Rebuttal Closing Argument 36-38). The habeas court in its letter opinion found no Brady violation, but did discuss the alleged Napue violation. (App. 558-59).

No motion to amend the petition was made and, thus, this new issue was not properly before the habeas court and should not be considered by this Court. Rule 5:25. See Mechtensimer v. Wilson, 246 Va. 121, 122-23, 431 S.E.2d 301, 302 (1993).

There Was No Prosecutorial Misconduct

In any event, if the Court should address this claim, it will find no support for Hash's contentions.

Standard Of Review

"Because entitlement to habeas relief is a mixed question of law and fact, the circuit court's findings and conclusions are not binding upon this Court, but are subject to review to determine whether the circuit court correctly applied the law to the facts." Curo v. Becker, 254 Va. 486, 489, 493 S.E.2d 368, 369 (1997) (citing Williams v. Warden of Mecklenburg Correctional Ctr., 254 Va. 16, 24, 487 S.E. 2d 194, 198 (1997)).

A case in which the knowing use of perjured testimony is shown will be reversed where "the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. " Napue v. Illinois, 360 U.S. at 271.

No Knowledge Of Alleged Perjury Shown

The petitioner argues the Commonwealth knew that Paul Carter was testifying perjuriously. The only specific allegation of perjury that the petitioner lists is Carter's statement that his testimony would have no effect on his federal sentence. (App. 316). Without any support in the record the petitioner argues that the Commonwealth knew or should have known this

to be untrue. In the evidentiary hearing in this matter the petitioner presented absolutely no evidence of the Commonwealth Attorney's knowledge of any of Carter's letters to Judge Michael or of the mechanics of Rule 35(b).

As this Court has said, "In order to find that a violation of Napue occurred in this case, we must determine first that the testimony identified by [the petitioner] was false, second that the prosecution knew of the falsity, and finally that the falsity affected the jury's judgment." Teleguz v. Commonwealth, 273 Va. 458, 643 S.E.2d 708 (2007) (citing Napue, 360 U.S. at 269-71). "When a petitioner asserts that his conviction was obtained by the prosecution's knowing use of perjured testimony, the petitioner bears the burden of proving that the conviction was founded on perjured testimony, and that the prosecution knowingly used that testimony to secure the conviction." Angelone v. Dabney, 263 Va. 323, 326, 560 S.E.2d 253, 255 (2002).

Here, there is absolutely no evidence that the Commonwealth's Attorney or any other Culpepper law enforcement personnel knew that Carter was writing to the federal judge in an effort to obtain a sentence reduction. Scott Jenkins testified only that the petitioner had asked him to

contact the federal authorities. Carter admitted on the stand that he in fact asked them to do so. (App. 309).

On the other hand, rather than hiding Carter's efforts to reduce his federal sentence, the Commonwealth advised defense counsel of such efforts before trial. The petitioner himself points out that at the beginning of the case the Commonwealth's Attorney had advised defense counsel that Carter had previously assisted the federal government. (Def. Br. 38). Obviously, the Commonwealth Attorney's mere provision of information about Carter does not justify the inference that he was familiar with Rule 35(b).

The petitioner makes much of the following statement by the prosecutor during closing argument in reference to Carter's likely gain from his testimony.

> 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.

(App. 352).

The petitioner argued below that this statement was a misrepresentation of the law and that Hash's attorneys were ineffective for not objecting to it. The habeas court ruled:

> 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.

(App. 578). An appeal of that ruling was denied by this Court.

The attorneys explained that the statement did not involve a misrepresentation of the law and was not incorrect. (Habeas Tr. 113-14, 186-87). The statement was clearly true in saying that the case involved "different prosecutors, different laws, different judges." It is also true that there was no deal and that Carter's sentence reduction under U.S.S.G. § 5K had had nothing to do with his testimony in the Hash trial. The petitioner continues to insist that the statement says something that it does not. He has yet to point to what it says that is untrue or incorrect. Moreover, the prosecutor's statement cannot possibly be read as evidence that he knew Carter to be lying.

The petitioner argues that prosecutorial misconduct was shown by the movement of Hash to the Charlottesville jail where he encountered Carter. As pointed out above, the habeas court found that move to be explained by the desire to keep the three co-defendants separate. Like this claim, the general claim that the prosecutor knew Carter to be committing perjury is not supported by the record.

Moreover, as shown above, there is no reason to believe that Carter's allegedly perjurious statement that he could receive no federal benefit for his state testimony would have made any difference to the outcome. As shown above, even if Carter's motive was made even more clear to the jury, his knowledge of the details of the murder investigation and the other evidence of Hash's guilt would have led the jury to convict.

CONCLUSION

For the foregoing reasons the judgment of the Circuit Court of Culpeper County dismissing the petition for a writ of habeas corpus should be affirmed.

Respectfully submitted:

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By: _____
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CERTIFICATE OF SERVICE

On April 10, 2009, the required number of copies of this brief were hand-delivered to the Clerk of this Court and three copies were mailed to David B. Hargett, Esquire, 11545 Nuckols Road, Suite C, Glen Allen,, Virginia 23059, counsel for petitioner.

_____
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