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Re: Michael Wayne Hash, No. 322967 v. Director of the Department of Corrections
Culpeper County Circuit Court – Case No. 04-L-124

Dear Counsel:

This matter comes before the Court on the Petition For a Writ of Habeas Corpus filed by Michael Wayne Hash. The Order entered August 24, 2005, dismissed certain claims raised in the Petition and provided that the remaining claims would be set for an evidentiary hearing after discovery had been completed. At such hearing, conducted on October 16 and 17, 2007, testimony was taken from the former trial attorneys for petitioner, as well as from other witnesses, and numerous exhibits were introduced into evidence. Counsel for petitioner and respondent presented written closing argument to the Court, with petitioner filing his rebuttal closing argument on February 25, 2008.

The claims addressed in this letter opinion, and as stated in the Order of August 24, 2005, include petitioner's allegation (1) that he was denied his right to effective assistance of counsel as to the Commonwealth's witness, Paul Carter, and that the Commonwealth failed to disclose exculpatory, impeachment and other evidence regarding Mr. Carter; (2) that he was denied his right to effective assistance of counsel as to the evidence of other suspects in this case, the testimony of Deputy Sheriff Marjorie Scott, and the closing argument of the Com-

monwealth's Attorney; and, (3) that the denial of effective assistance of counsel as to all such claims must be viewed in the aggregate within the totality of the circumstances.

Citing well-established principles of law from Strickland v. Washington, 466 U.S. 668 (1984) and the cases that came afterwards, the Virginia Supreme Court in Johnson v. Tice, 275 Va. 18, 27-28 (2008), stated as follows: "To prevail on a claim of ineffective assistance of counsel, a petitioner must ordinarily satisfy both parts of the two-part test set forth in Strickland. The petitioner first must show that 'counsel's representation fell below an objective standard of reasonableness.' In making this determination, the court considering the habeas corpus petition 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' If counsel's performance is found to have been deficient under the first part of the Strickland test, to obtain relief the petitioner must also show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ' " (citations omitted)

A jury convicted petitioner of the capital murder of Thelma Scroggins, and the Court imposed a life sentence as recommended by the jury. An investigation of this crime, which occurred in July of 1996, was conducted by the Culpeper County Sheriff's Office and the Virginia State Police. Although numerous individuals were interviewed by investigators with the Sheriff's office, the investigation and interviews did not lead to an arrest at that time and the matter came to a standstill.

Four years after the murder actually happened, two investigators with the Sheriff's Office, Scott Jenkins and James Mack, were assigned to undertake a complete review of the case. Old reports were reviewed and new interviews were conducted. An interview with the petitioner's father, led to an interview of petitioner's cousin, Alesia Shelton. The interview with Ms. Shelton resulted in Eric Weakley and the petitioner becoming suspects in the crime. Over a period of time Eric Weakley told the investigators repeated lies and different versions of the events which were the subject of the investigation, but ultimately implicated himself, the petitioner and Jason Kloby in the murder of Mrs. Scroggins.

An interview with the petitioner resulted in a statement that he and Jason Kloby had discussed robbing an elderly person in the neighborhood where the murder occurred. Later Paul Carter, a federal inmate at the Albemarle-Charlottesville Regional Jail told the investigators that petitioner, while housed at

the complex, told Carter that he had committed the murder with his friends using a .22 caliber gun, and that his cousin had told the police about his involvement in the crime.

FACTUAL FINDINGS AND DISCUSSION OF THE CLAIMS

1. Paul Carter's Motivation For Testifying

The petitioner claims that his attorneys were ineffective for failing to conduct an adequate investigation of Paul Carter's federal court file which would have revealed correspondence from Carter to the sentencing judge concerning Carter's desire to seek a sentence reduction for providing information related to the Culpeper murder case. Copies of the letters were introduced as exhibits at the hearing.

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

Richard Davis, one of petitioner's attorneys, testified at the hearing that he had spoken to other lawyers about Carter and what he was doing in his case. Mr. Davis further testified that he and Michael Hemenway, petitioner's other attorney, were aware that Carter "was a cooperating witness in his own federal case and received a significant benefit and that was his mode of operation."

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

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

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

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

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

2. <u>Movement Of Petitioner To The Albemarle-Charlottesville Regional Jail From The Culpeper County Jail</u>

Petitioner argues that his movement to the Charlottesville complex where he would have been in close proximity to Carter for a few days was highly suspicious, as it allowed Carter to claim that petitioner had confessed to him. Evidence introduced by the petitioner shows his mother was informed by the jail that the reason for the move was due to overcrowding. Petitioner argues this was "obviously a deceptive misrepresentation."

Petitioner argues that his attorneys, with the information they had about Carter, should have emphasized that the move was a set-up to place petitioner in the same complex with Carter.

Respondent argues that the only evidence supporting this plot was the note made by petitioner's mother, which was introduced at the hearing, indicating that Ms. Dwyer at the Culpeper jail informed her that petitioner went to the Charlottesville jail because the Culpeper jail was too crowded.

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.

Petitioner argues that despite these claimed reasons, the facts are highly suspicious, and the defense should have argued to the jury that the reason for the move was obvious.

3. Closing Argument By The Commonwealth's Attorney

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

> "You know, Paul Carter, they want to suggest to you that some how, really bothersome here, that somehow his sentencing in federal court, federal court, is connected to what's going on up here. This is a state court. That's totally different. Different prosecutors, different laws, different judges, everything is different, and I don't know what else to tell you. There's no deal with Mr. Carter. He testified to that and as to when his sentencing took place in Charlottesville, there's no evidence

> that that was somehow purchased or whatever by the Commonwealth here, none whatsoever. Those are totally difference issues."

The attorneys for the defense each made a closing argument to the jury, and Both addressed the testimony of Paul Carter. Mr. Davis stated the following:

> "Mr. Carter, and I won't be going on too much longer but I do want to say a few words about him. Mr. Carter, of course, comes in here from the federal penitentiary and he tells you that Michael Hash in the days after, I don't know, I guess in the--some days after his arrest when he was briefly transferred from Culpeper to Charlottesville, confessed to this crime and told some stuff about this crime, told him some things. Well, that's just simply not true. It's just simply not true. Mr. Carter may well have talked to Michael or talked to somebody else, a cellmate of Michael's who discussed some of the accusations in this case that Michael knew because he talked to his lawyers or that Mr. Carter got from other sources, either then or afterwards, and you'd have no way of knowing. You'd have no way of knowing. And the questions you need to ask yourself, if what we're saying is true, is this guy a good citizen, you know, who is going to come forward and tell this because it's the truth and he's worried about the rest of us, or is this somebody who would lie or just make it up or take whatever little pieces he learned and say, okay, well, I'll just change this to say instead of told me they say that I did this or Eric said that he did this and I helped him, I'll just say that he said this stuff. Pretty easy to do, you know, just change the pronouns, right, from a he to an I, from a he to a we, and how can you show whether it's the truth or not the truth. You have no way of knowing. So you have to decide whether you believe him or not. Well, first of all, Michael, given the fact that he's innocent of this case and pretty much all of the evidence proves that, establishes that, would have to be an idiot to confess to something that he didn't do and I submit to you that Michael is not an idiot. Billy might be but Michael isn't, so he didn't do

> that. Mr. Carter, ask yourself these questions. One, is he in jail; two, would he like to get out; three, does he think he has an opportunity to get out; four, would he lie. Let's go back. I mean, the first--the answer to the first two are obvious. Of course he's in jail and of course he doesn't want to be there. Nobody would want to be there. Okay. I mean, all of those would answer those question yes. Opportunity to get out. Well, people rat all the time, and I mean, it's just part of the system and it's a given and some people do it honestly and other people do it dishonestly. Okay. That's the nature of the beast and he's got his- -you know he wants to do that because- -and he says, he says when he calls up he says, asks them to call the U.S. Attorney prosecuting his case. Call him, tell him that I'm telling you this, help on my sentence, and he hung out, you know, in jail waiting sentencing for a- -well, almost two years while he was, you know, kind of working things, working deals and trying to work off his life plus five to get it down to the original fifteen (15). But he also still has his Rule 35 and he knows about it. He's not a stupid guy. I mean, this guy was a business man.... He's not a stupid man. He knows the system, he knows how it's done. And ask yourself this question. Can I trust this guy not to lie? Can I trust him, would I make a decision, would I make any decision based on his word, particularly where his self-interest is an issue. To believe this case, you would have to suspend belief and while it's true that people can be motivated to remember things in different ways, to do so you would have to discard testimony of Jeff Hash, Pam Hash, Chris Hash, Karen Hash, Thomas Smoot, Ann Smoot, Robert Kloby, Trish Neff, Deputy Graham, Thomas Pyne, Harrell Cunningham, Ken Toone, William Blithe, Sieglinde Blithe, Billy Blithe, Ursel Shelton, Rhoda Carter, Mr. Williams, all of the physical evidence, almost every piece of documentary evidence that's introduced. You'd just have to disbelieve every piece of that."

Mr. Hemenway followed Mr. Davis and addressed Mr. Carter's motive for testifying.

> "Paul Carter, once again, he's—his--Mr. Davis addressed his motive. He can say he has no motive. Of course, I have no

> motive. But he knows what he's doing. His sentence has gone down. Life imprisonment plus the five years on the gun charge. He's already down to fifteen years. As a matter of fact and as he indicated, he entered his guilty plea two years ago, February of '98. He supplies this information about Michael Hash and then I guess it's almost less than a week later week later he's getting sentenced on his federal drug charges and he's already down to fifteen (15) years, and the Rule allows him another twelve (12) months. All he asked is - - well, Mr. Davis already argued that and I won't do that anymore. But obviously he knows what he's doing and all he's got to do is get up her and sort of spurt out some information that maybe he's gotten from Michael or somebody else in the cell, Robert Gray, specifically."

In his opening statement, Mr. Hemenway made the jury aware of the concerns he had about Mr. Carter's testimony and why the jury should be skeptical in believing Mr. Carter's testimony. Mr. Hemenway told the jury:

> "Paul Carter. Paul Carter apparently will be a witness, another primary witness who allegedly will tell you what Michael Hash told to him while he was being held in what's called the Joint Security Complex over in Charlottesville. Paul Carter was convicted of a felony. He was convicted on February 8th- -February 8th of 1998. It was a federal charge of conspiracy to distribute crack cocaine. He was a kingpin. During his conspiracy he distributed a hundred to a hundred and fifty kilograms of crack cocaine in this area, up to two kilograms a day- -a week, I'm sorry. He ran an organization, it was such an organization, it was huge. He's a professional. He's smooth. And what's interesting and I ask you to pay attention to because it's the details is he gets- - he pleads guilty in 1998 in February but in the federal system he is able to reduce his sentence by testifying for the government in some capacity as long as it's testifying against somebody else, helping them bring a new case. And so his exposure went from because of the- - because of his kingpin status and the incredible amount of crack cocaine he was selling, he went from life plus five years because there a firearm charge involved, to ultimately two years later he gets

> sentenced approximately ten days after he calls up and gives a statement to the police on this case about what Michael Hash had said to him, he gets sentenced to a hundred and eighty months. And also you'll hear evidence in the federal system he has another twelve months under what's called a Rule 35B to produce more evidence, and as long as he keeps testifying against other people, he gets to further reduce his sentence. And we will ask him about the method that he goes about getting information so that when he talks to the police they'll feel that it's credible information because if the police don't give him the thumbs up or if he can't testify in court against somebody, he doesn't get his motion for substantial assistance. But that will be another primary government witness is Paul Carter. In that conspiracy he had fourteen people working under him. He was moving two kilos of crack cocaine per week, about twenty thousand dollars per kilo. He's good. Maybe he'll convince you he's telling the truth. But he has an incredible, incredible motive to tell you that Michael Hash said something to him and all he has to do, when you think about it, is get some information from Michael Hash, tell me about your case, you know, what evidence do you think they have against you or tell me something about the case. He knows how to get that information. He was in the cell with Michael for two days, then turn that around and say oh, well, Michael has confessed to me. It's not complicated and he's good. He's good at what he does."

The petitioner argues that his attorneys should have objected to the closing argument of the Commonwealth's Attorney because he was misrepresenting the law to the jury, and that the attorneys should have moved for a mistrial or at least an instruction which told the jury that a Rule 35(b) sentence reduction for a federal inmate is not limited to providing assistance on federal cases but also applies to assistance provided to law enforcement on state cases. Under these circumstances petitioner claims his attorneys were ineffective for not following this course of action in light of the closing argument of the Commonwealth's Attorney.

4. <u>Prosecutorial Misconduct</u>

Petitioner claims that based on circumstantial evidence concerning the

use of Paul Carter as a witness for the prosecution, the Court could find that the Commonwealth had information that would have been helpful to the defense, but was not revealed, and that this misconduct was a *Brady* violation. This evidence, the petitioner argued, shows that the investigators knew about Paul Carter's history of cooperating with law enforcement in many more cases than he revealed at trial and of his continued expectation of a sentence reduction in his federal case. The petitioner concludes that this knowledge by agents of the Commonwealth should be considered along with the suspicious move of Paul Carter from the Culpeper jail to the complex in Charlottesville.

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

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

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

On redirect, Investigator Jenkins testified that Carter wanted one of the investigators or someone to contact the U. S. Attorney to make him aware that Carter was cooperating with the Culpeper case. Both on cross-examination and

redirect, Investigator Jenkins testified that he never gave any promises to Carter for his testimony.

5. Evidence Of Other Suspects

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

Mr. Carter testified that early on they identified several persons of interest. Mr. Carter explained the circumstances that caused each of these individuals to come under suspicion. Also, a lady who was a resident in the area saw a small dark truck being driven down the road headed back towards Culpeper at the time of the murder, and noticed that Mrs. Scroggins' truck was not at her house when she drove by it.

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

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

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

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

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

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

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

> "I think Eric Weakley---I mean, I feel he was impeached a great deal because he gave so many inconsistent statements. But ultimately even though he said so many different things, when you've got somebody saying they either did it or were there and gave the specific details of the crime, the crime scene and what people were saying and doing, a jury who is hearing this would find that part of it and they would take that into account."

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

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

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

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

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

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

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

"I know that there were – one of the things that we were trying to do was

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

CONCLUSIONS BY THE COURT

1. Paul Carter's Motivation For Testifying

The evidence before the court supports the conclusion that Carter's motivation for testifying at the trial was his hope that it would result in a reduction of the sentence imposed upon him in his federal drug case. Carter acknowledged at the trial that he was aware that a person so convicted and sentenced could come back within a year to have the sentence reduced for testifying in another case. He also admitted that he had asked the Culpeper investigators to speak to the U.S. Attorney on his behalf.

The court finds it highly unlikely that the jury would have believed that Carter, a convicted drug dealer, contacted the police about the petitioner's statement to him and then testified at the trial because of his concern for older people, or because Mrs. Scroggins could have been a grandmother. Carter downplayed his motive for testifying, and his affirmative answer to the question if it was his understanding that his appearance "doesn't have any impact on federal sentencing," would not have been truthful, if he understood the question to mean, having a positive affect on a subsequent motion to have his original sentence reduced for his assistance in the petitioner's case.

The letters Carter wrote to the judge in his federal case, which were in his case file, would have provided additional impeachment on the issue of Carter's motivation in coming forward as a witness in the petitioner's case. Mr. Hemenway testified that he would not have expected there to be anything in Carter's file about a potential Rule 35(b) motion as the U.S. Attorney would bring such a motion, and you would not expect documentation in the file before such a motion was filed. However, the court finds that given the knowledge that Mr. Hemenway and Mr. Davis had of Carter and his method of operation, a reasonably competent attorney, knowing that Carter would be a witness in their case, would have examined the entire case file. Having failed to do so, the court finds the attorneys' performance in this regard was deficient.

However, even though the defense was denied this additional information which could have been used for impeachment purposes, in considering all of the evidence before the jury, the court does not find a reasonable probability, that, but for the deficiency in examining the court file, the result of the proceeding would have been different. As set forth in Strickland at 694, "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

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.

At the trial, Shelton testified about a conversation between petitioner and Kloby that took place in the den of petitioner's house on the day Mrs. Scroggins was killed. Shelton said she heard them talk about making her (Mrs. Scroggins) suffer for messing with them, and that they were going to do it that night. Shelton knew Mrs. Scroggins as being the "mail lady".

Some four weeks after the murder, Shelton said she witnessed another conversation between the two where Kloby admitted that he shot Mrs. Scroggins, and that afterward the petitioner shot her. Following these admissions by Kolby, Shelton said that petitioner nodded his head in agreement and laughing sarcastically, said yes.

The jury also heard Eric Weakley's testimony that he was present at the murder along with petitioner and Kloby. Although his testimony was contradictory in many instances, Weakley still implicated himself in this criminal activity along with the other two. At the trial petitioner denied shooting Mrs. Scroggins or even being at her house on the weekend in question. Although initially telling investigators he was with his girlfriend, Beverly Rosenfield, petitioner testified he stayed the weekend at the home of Mr. and Mrs. Blithe, with his best friend, Billy. He also related this to the investigators during his second interview.

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.

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

2. <u>Movement Of Petitioner To The Albemarle-Charlottesville Regional Jail From The Culpeper County Jail</u>

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.

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

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

3. Closing Argument By The Commonwealth's Attorney

Mr. Hemenway told the jury in his opening statement that Paul Carter was sentenced in federal court "...approximately ten days after he called up and gives a statement to the police on this case about what Michael Hash had said to him, he gets sentenced to a hundred and eighty months." In the closing arguments of the attorneys, they again refer to Carter's request to the investigators to call the U.S. Attorney to help out at his sentencing, and that he received a reduced sentence of fifteen years about a week after he supplied the information about petitioner.

Investigators Jenkins and Mack both testified at the hearing that they did not make any promises to Carter to help him and did not agree to testify on his behalf before the trial of petitioner. Petitioner's Exhibit #95 referred to previously supports their testimony.

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

4. Prosecutorial Misconduct

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

As previously noted, six months before the trial, Mr. Davis was informed by the Commonwealth's Attorney that petitioner had admitted his involvement in the crime to Carter, that Carter had testified before for the federal authorities, and that he had recently been sentenced to one hundred eighty months in a drug case. At the trial, Investigator Jenkins confirmed that Carter asked them to speak on his behalf at his upcoming sentencing in federal court. Both investigators testified that no promises were made to Carter for his testimony against petitioner, and the letter sent to Carter after the trial, Petitioner's Exhibit #95, supports that testimony.

Based on this evidence, the Court cannot find that the one to three letters sent to Investigator Jenkins would have made a difference in the outcome of the trial. Although petitioner cannot say what information was in the letters, evidence presented to the jury confirmed Carter's request for assistance and that no promises were given for that assistance.

As stated in Monroe v. Angelone, 323 F. 3d 286, 299-302 (4th Cir.2003), "... a Brady violation has three essential elements: (1) the evidence must be favorable to the accused; (2) it must have been suppressed by the government, either willfully or inadvertently; and (3) the suppression must have been material, i.e. it must have prejudiced the defendant at trial. ...Under Brady 'the touchstone of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.' ...Put differently, suppressed evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " (citations omitted)

It is not clear what evidence was suppressed by the Commonwealth. The evidence before the Court shows a disclosure was made of Carter's participation in the case, that he requested assistance from the investigators for his sentencing, that they did not provide this assistance or promise to do so, and this evidence was presented to the jury for their consideration. Based on the foregoing, the Court concludes that the materiality of the allegedly suppressed evidence has not been established, as there is not a reasonable probability that the result of the trial would have been different.

5. Evidence Of Other Suspects

The United States Supreme Court in Strickland v. Washington, 466 U.S. at 680 & 681, observed that "...the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investi-

gation of options. ...If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective. Counsel may not exclude certain lines of defense for other than strategic reasons. ...Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based."

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

David Carter was the lead investigator in the murder of Mrs. Scroggins until his retirement in 1999. Over that period of time he interviewed a lot of people, and identified several persons of interest, but no one was charged in the crime. Mr. Davis and Mr. Hemenway were provided numerous police reports which they copied and reviewed. They also discussed the case with Mr. Carter and he explained that the leads had gone cold and the investigation was at a dead end. Mr. Carter indicated that over the course of the investigation nothing else developed that would point them to any one person.

This situation changed four years after the murder when Investigators Jenkins and Mack undertook a review of the case, which led them to interviews with Alesia Shelton and Eric Weakley, and ultimately with the petitioner.

In his view of the case as defense attorney, Mr. Davis said that everything they read, including the early interviews, did not go anywhere of value. In the final analysis, the defense was left with Eric Weakley who admitted his involvement in the murder and implicated the petitioner and Kloby. Even though Weakley's statements were contradictory in many instances, some parts were also consistent with the Commonwealth's case, and Mr. Davis did not think it made sense to attempt to prove that Weakley was not present at the murder. The defense was further complicated by petitioner's statement to police of his conversations with Kloby and Weakley about robbing somebody in the area.

Mr. Hemenway also related that they had met with Mr. Carter and discussed the other suspects and his investigation of the crime. Because Weakley gave inconsistent statements, Mr. Hemenway felt they were in a good position to impeach Weakley and cast doubt on the case against petitioner, leaving Weakley as the perpetrator of the crime.

David Carter and other investigators were not able to develop any evidence that directly linked the persons of interest to the murder, or to Eric Weakley around the time of the crime. Under these circumstances the Court concludes that it is unlikely that such evidence would have been allowed at the trial. "Proffered evidence 'that merely suggest a third party may have committed the crime is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted.' " Johnson v. Commonwealth, 259 Va. 654, 681 (2000)

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

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

The events at the Ken Toone residence and the camping trip in 1995 were actually introduced to the jury through the cross-examination of Eric Weakley by Mr. Davis.

Weakley testified that the petitioner, his brother, his brother's wife, and Jason Kloby vandalized the house that was "...sort of empty" because the Toones were moving out. Weakley recalled that it was a couple of days after that incident that he went camping with petitioner and Kloby. Weakley acknowledged that Deputy Sheriff Marjorie Scott picked up petitioner and Kloby and placed juvenile vandalism charges against them, and that he was also arrested on a marijuana charge. He also stated that the juvenile court judge ordered him not to have further contact with petitioner and Kloby.

Later in cross-examination Weakley testified that he only went camping on one occasion in the late spring or early summer of 1995 when Deputy Sheriff Scott picked up the boys for the Toone incident, that he never went camping with Kloby and petitioner in 1996, and that he never went camping with Alesia Shelton. Weakley's testimony contradicted that part of Shelton's testimony about her camping with Weakley, Kloby, Ken Toone and petitioner shortly after the murder. Shelton said it was during that camping event that petitioner and Kloby disposed of a black handgun that she saw in Kloby's hand.

The part of Deputy Sheriff Scott's testimony that had not been mentioned in the cross-examination of Weakley about the camping trip, was that petitioner had a rifle in his tent and that Deputy Sheriff Scott was expecting to find some type of firearm based on an earlier report.

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

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

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

In his closing argument, Mr. Close said that the significance of petitioner, Kloby and Weakley being caught at the place where they were camping in 1995 was to show their familiarity with the location where Mrs. Scroggins' truck was later recovered. Nothing else was argued by the Commonwealth's Attorney related to that camping event.

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

deficient and the petitioner did not suffer such prejudice so as to deprive him of a fair trial.

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

Petitioner claims the errors of his attorneys and the resulting prejudice must be viewed in the aggregate, and that his denial of due process based upon prosecutorial misconduct along with the ineffective assistance of counsel claims must also be viewed in the aggregate within the totality of the circumstances.

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

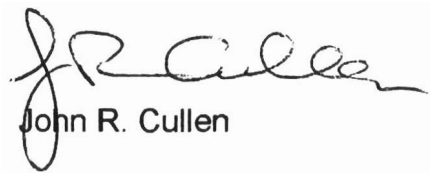
Since the Court has concluded that the performance of the attorneys in each claim did not result in prejudice so as to deprive the petitioner of a fair trial, the claims cannot now be aggregated and considered collectively. "Having rejected each of the petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." Lenz v. Warden, 267 Va. 318, 340 (2004). In Morrisette v. Warden, 270 Va. 188, 194-195 (2005), the Supreme Court, citing its ruling in Lenz dismissed a claim that "...the cumulative effect of trial counsel's deficient performance prejudiced him."

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

Based upon the conclusion made by the Court after considering the totality of the evidence in this case, the Petition for a Writ of Habeas Corpus is denied. Mr. Murphy is to draft an appropriate order, which incorporates this letter

opinion by reference, and submit it to Mr. Hargett for his endorsement prior to entry by the Court.

Sincerely yours,



John R. Cullen

✓ cc: Court file

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