

VIRGINIA:

BEFORE THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

**VIRGINIA STATE BAR EX REL.
SEVENTH DISTRICT COMMITTEE,**

v.

CASE NO. CL15-484

GARY LEE CLOSE

VSB DOCKET NO. 12-070-091061

AGREED DISPOSITION MEMORANDUM ORDER

This matter came to be heard on July 28, 2015, by the Circuit Court for the County of Albemarle duly impaneled pursuant to Section 54.1-3935 of the Code of Virginia (1950) as amended, upon the joint request of the parties for the Court to accept the Agreed Disposition endorsed by the parties and offered to the Court as provided by the Rules of the Supreme Court of Virginia. The panel consisted of The Honorable Jane Marum Roush, Chief Judge, The Honorable Clifford L. Athey, Jr., and The Honorable Kenneth R. Melvin. The Virginia State Bar was represented by Kathryn R. Montgomery, Deputy Bar Counsel. Gary Lee Close, Respondent, was present by telephone, with his counsel, Phillip V. Anderson. The Chief Judge polled the members of the court as to whether any of them were aware of any personal or financial interest or bias which would preclude any of them from fairly hearing the matter to which each judge responded in the negative. Court Reporter Angela Sidener, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

WHEREFORE, upon consideration of the Agreed Disposition, the Certification, Respondent's Disciplinary Record and responsive pleadings of counsel.

It is **ORDERED** that the Circuit Court for the County of Albemarle accepts the Agreed

Disposition and the Respondent shall receive a Public Reprimand as set forth in the Agreed Disposition, which is attached and incorporated in this Memorandum Order. In accepting this agreement, the Court found material, among other factors, that Respondent Gary Lee Close voluntarily resigned from his position as Commonwealth's Attorney for Culpeper County mid-term and did not seek reelection, that he voluntarily retired from the practice of law, and that he was sued civilly for his handling of the criminal prosecution of Michael Wayne Hash.

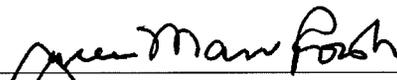
It is further **ORDERED** that the sanction is effective July 28, 2015.

The Clerk of the Disciplinary System shall assess costs pursuant to ¶ 13-9 E. of the Rules.

A copy teste of this Order shall be mailed by Certified Mail, return receipt requested to the Respondent, Gary Lee Close at his last address of record with the Virginia State Bar, 809 South East Street, Culpeper, VA 22701, and by regular mail to Phillip V. Anderson, Respondent's Counsel, at Frith Anderson & Peake, 29 Franklin Road, SW, Roanoke, VA 24011, and to Kathryn R. Montgomery, Deputy Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026, and to Barbara Sayers Lanier, Clerk of the Disciplinary System, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026.

ENTERED THIS 29 DAY OF July, 2015

CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE



Jane Marum Roush, Chief Judge
Three-Judge Circuit Court

VIRGINIA:

BEFORE THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

VIRGINIA STATE BAR EX REL)	
SEVENTH DISTRICT)	
COMMITTEE)	
)	
v.)	Case No.: CL15-484
)	
)	
GARY LEE CLOSE)	
)	

AGREED DISPOSITION FOR PUBLIC REPRIMAND

COME NOW the Virginia State Bar, by Deputy Bar Counsel Kathryn R. Montgomery, and Respondent Gary Lee Close, and his counsel, Phillip V. Anderson, pursuant to Va. Code § 54.1-3935(B) and Va. Sup. Ct. R. Part 6, § IV, ¶ 13-6(H), and hereby tender the following Agreed Disposition for a Public Reprimand arising out of the referenced matter for the Court’s consideration.

I. STIPULATION OF FACTS

1. Gary Lee Close (“Respondent”) was licensed to practice law in Virginia in 1988. He served as Assistant Commonwealth’s Attorney for Culpeper County from 1988-1990. He was elected Commonwealth’s Attorney in 1991 and assumed office in 1992. He remained the Commonwealth’s Attorney for Culpeper County until 2012 when he resigned due to concerns that the issues surrounding the aftermath of the federal habeas decision in the Michael Hash (Hash) case would serve as a distraction to the administration of justice in the county.

2. In February 2001, Respondent prosecuted Michael Hash on capital-murder charges in the Circuit Court for the County of Culpeper for the murder of 74 year old Thelma Scroggins (Scroggins), which resulted in the conviction of Hash.

3. In 2012, Hash was granted federal habeas corpus relief by the United States District Court for the Western District of Virginia. The Court found violations of due process by Respondent's office and the Culpeper Sheriff's Office and ineffective assistance of counsel by Hash's lawyers. Hash was released from prison and has not been retried for Scroggins' murder.

4. In May 2000, shortly after being arrested, Hash was transferred, briefly, to Albemarle-Charlottesville Regional Jail (ACRJ) in Charlottesville, Virginia where Paul Carter (Carter) was being held pending sentencing on federal criminal charges. Prior to his encounter with Hash, Carter had previously provided information to law enforcement and had received benefits for his assistance, although Respondent states he was not aware of this at the time. Prior to the transfer, Respondent had a conversation with a member of the Culpeper Sheriff's Office who suggested transferring Hash to a jail where there was a "snitch." Respondent advised that if a transfer was done to make sure the informant was not provided with knowledge of the case, was not instructed, was not contacted, and if the informant contacted the Sheriff's Office, to treat the information like any other lead.

5. In June 2000, contact was made between Carter and the Culpeper County Sheriff's Office at which time Carter advised that he had information relative to the Scroggins murder investigation.

6. In June 2000, prior to Carter's sentencing for his pending federal charges and prior to the February 2001 Hash trial, investigators with the Culpeper County Sheriff's Office met with Carter, who gave a statement that Hash had confessed to murdering Scroggins.

7. In that June 2000 meeting, Carter requested that the investigators with the Culpeper County Sheriff's Office speak with the Assistant United States Attorney on his behalf on June 28, 2000. The Culpeper County Sheriff's Office investigators told Carter that nothing could or would be done in exchange for his testimony. Carter indicated that he understood and asked that the Commonwealth's Attorney be advised. The Culpeper County Sheriff's Office investigators told Carter they would relay the information as soon as possible. On July 3, 2000, Carter was sentenced by a federal court to 180 months in prison for his federal crimes. Neither Respondent nor any other representative of Culpeper County law enforcement or the prosecutor's office appeared at the sentencing hearing.

8. Respondent states that neither he nor any other representative of Culpeper County law enforcement or the prosecutor's office had any contact with any federal official prior to Carter's federal sentencing on July 3, 2000 consistent with their statements that nothing could be done in exchange for Carter's testimony.

9. Respondent states that in Respondent's 24 year legal career, he had never tried a criminal case in federal court.

10. Respondent states that at the time of the Hash prosecution in 2001, he had never had an occasion to have a witness convicted on federal charges testify in a case he was prosecuting.

11. Respondent states that prior to the Hash prosecution in 2001, Respondent had never had a reason during his legal career as a prosecutor to either read or study the Federal

Rules of Criminal Procedure, and specifically no reason to become familiar with Rule 35(b) of the Federal Rules of Criminal Procedure.

12. After meeting with the Culpeper County Sheriff's Office investigators in June 2000, Carter wrote numerous letters to U.S. District Court Judge Michael about obtaining a reduction of his federal sentence under Rule 35(b) of the Federal Rules of Criminal Procedure. In these letters, Carter stated that Respondent and the Culpeper County Sheriff's Office investigators had agreed to appear at a hearing and testify that Carter was providing substantial assistance in the Hash prosecution. Neither Respondent nor Hash's counsel knew of the existence of these letters until sometime after Hash's trial. Respondent denies that Carter's statements about him in the letters were truthful, denies that he ever agreed to appear at a hearing on Carter's behalf, and further denies that he had any knowledge of any agreement by any other representative of Culpeper law enforcement or the prosecutor's office to appear at a hearing on Carter's behalf.

13. Six months following Carter's sentencing in federal court, Hash was tried for the capital murder of Scroggins during the dates of February 5-9, 2001.

14. During his opening statement at the Hash murder trial, Respondent described Carter as one of four key witnesses for the Commonwealth.

15. During opening statements of the Hash murder trial, defense counsel referenced that Carter was not credible, that he had received favorable treatment in his federal sentencing for offering testimony leading to other convictions, and that under Federal Rule of Criminal Procedure 35(b), Carter had available to him a procedural opportunity to secure a further reduction in his sentence by providing substantial assistance in the Hash case should it lead to a conviction.

16. Despite defense counsel's reference to Federal Rule 35(b) on the first day of trial, Respondent did not research Federal Rule 35(b) or determine its applicability to Carter's testimony in the Hash prosecution. Respondent knew that defense counsel's representation to the jury also made on the first day of trial that Carter had received favorable treatment at his July 2000 federal sentencing in exchange for his testimony in the Scoggins case was false.

17. On the third day of trial, Respondent called Carter as a witness in the Hash capital-murder trial.

18. Respondent states that prior to the Hash trial, Respondent had never met nor interviewed Carter.

19. Prior to calling Carter as a witness, during a break in the Hash trial, Respondent met with Carter and asked him to confirm there was no deal for his testimony. Carter agreed with Respondent's assertion that there was no deal.

20. On February 7, 2001, Carter testified during direct examination that Hash had confessed to the murder of Scroggins. Carter further testified that he had been made no promises in exchange for his testimony and that he expected nothing in return for his testimony. Respondent declares that given his certainty that nothing had been done to assist Carter with his federal sentencing in July 2000 in exchange for his testimony and further given his lack of understanding of the applicability of Rule 35 (b) to this situation, Respondent did not doubt Carter's testimony relative to his lack of expectation of assistance in exchange for testimony in the murder case. Respondent admits that now after learning of Carter's numerous letters to U.S. District Court Judge Michael, none of which Respondent was aware of at the time of trial, Carter either knew or hoped that his testimony in a state matter would qualify him for a reduction of his federal sentence and, as such, Carter's testimony on this point was either false or inaccurate.

21. Hash's counsel cross-examined Carter about Fed. R. Crim. P. 35(b) and whether Carter expected to receive a sentence reduction based on his cooperation. Carter testified that he was testifying because it was the right thing to do and that Ms. Scroggins could have been his grandmother and expressed uncertainty about whether testimony in a state matter would even qualify for a reduction of his federal sentence. Respondent declares that given his certainty that nothing had been done to assist Carter with his federal sentencing in July 2000 in exchange for his testimony and further given his lack of understanding of the applicability of Rule 35 (b) to this situation, Respondent did not doubt Carter's testimony relative to his lack of expectation of assistance in exchange for testimony in the murder case. Respondent admits that now after learning of Carter's numerous letters to U.S. District Court Judge Michael, none of which Respondent was aware of at the time of trial, Carter either knew or hoped that his testimony in a state matter would qualify him for a reduction of his federal sentence and, as such, Carter's testimony on this point was either false or inaccurate.

22. On redirect examination of Carter, Respondent asked Carter, "It's your understanding that what you're doing here today doesn't have any impact on federal sentencing, is that right?" Carter confirmed that was his understanding. Respondent declares that given his certainty that nothing had been done to assist Carter with his federal sentencing in July 2000 in exchange for his testimony and further given his lack of understanding of the applicability of Rule 35 (b) to this situation, Respondent did not doubt Carter's testimony relative to his lack of expectation of assistance in exchange for testimony in the murder case. Respondent admits that now after learning of Carter's numerous letters to U.S. District Court Judge Michael, none of which Respondent was aware of at the time of trial, Carter either knew or hoped that his

testimony in a state matter would qualify him for a reduction of his federal sentence and, as such, Carter's testimony on this point was either false or inaccurate.

23. During closing arguments on the fifth day of trial, Respondent stated:

You know, Paul Carter, they want to suggest to you that somehow, 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 was somehow purchased or whatever by the Commonwealth here, none whatsoever. Those are totally different issues.

24. Respondent states that when he made this closing argument, he was addressing the defense counsel's assertions throughout that Carter had received favorable treatment in his July 2000 federal sentencing in exchange for agreeing to offer testimony in the February 2001 Scroggins state murder case, which Respondent knew to be untrue. Respondent did not fully appreciate or understand the applicability of Federal Rule 35(b) and therefore did not have the knowledge or intent to mislead the jury. Respondent now admits, however, that in light of the applicability of Rule 35 (b) to Carter's assistance in the Hash prosecution, this portion of his closing argument was imprecise and inartful.

25. Respondent states that his questioning of Carter and his closing argument were based on the Respondent's certain knowledge that nothing had been done by him or the Culpeper County Sheriff's Office in 2000 that in any way impacted Carter's July 2000 federal sentencing. Respondent further states that due to his lack of understanding of Fed. R. Crim. P. 35(b), he did not appreciate that Carter's testimony in a state proceeding could possibly qualify for a substantial assistance motion to reduce an already levied federal sentence.

26. In July 2001, based on Carter's testimony in the state's prosecution of Hash, Carter's federal sentence was reduced pursuant to Fed. R. Crim. P. 35(b). One of the Culpeper Sheriff's Office investigators testified at Carter's hearing as to Carter's substantial assistance in the Hash prosecution. Carter was thereafter released from prison for time served.

27. Respondent states that at all times prior to and during the Hash trial, he did not understand that Carter's assistance with the state-court prosecution in February 2001 could be used as basis for a reduction of Carter's July 2000 federal sentence pursuant to Fed. R. Crim. P. 35(b); however, Respondent acknowledges that the issue having been raised in defense counsel's opening statement, that Respondent would have been aware of this fact had he exercised reasonable diligence in familiarizing himself with Fed. R. Crim. P. 35(b).

28. Other than these proceedings, Respondent has no disciplinary record with the Virginia State Bar and has never been subject to any professional discipline by the Virginia State Bar, either private or public.

II. NATURE OF MISCONDUCT

Such conduct by Respondent Gary Lee Close constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

* * * *

III. PROPOSED DISPOSITION

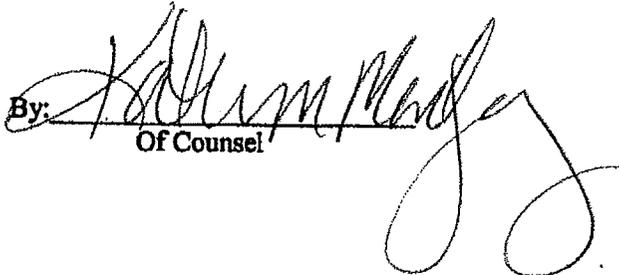
Accordingly, pursuant to Va. Code § 54.1-3935(B) and Va. Sup. Ct. R. Part 6, § IV, ¶ 13-6(H), Deputy Bar Counsel and Respondent tender, for the three-judge panel's approval, this Agreed Disposition of a Public Reprimand as representing an appropriate sanction if this matter were heard through an evidentiary hearing by this panel for the agreed to violation of Rule 1.3.

Respondent, his counsel, and the bar agree that if the Agreed Disposition is approved by the Court and the Court imposes the agreed upon sanction, the disposition will be final and non-appealable. Respondent waives any and all rights to appeal.

(THE REMAINDER OF THIS PAGE IS INTENTIONALLY BLANK. THE PARTIES' ENDORSEMENTS FOLLOW ON THE NEXT PAGE)

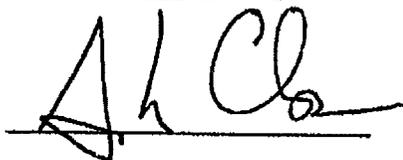
Respectfully submitted,

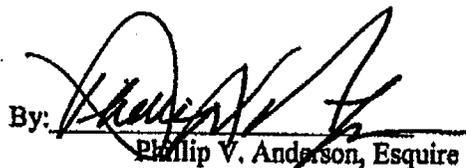
VIRGINIA STATE BAR

By: 
Of Counsel

Kathryn R. Montgomery (VSB No.42380)
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
Phone: 804/775-0543
Fax: 804/775-0597
montgomery@vsb.org
Deputy Bar Counsel

GARY LEE CLOSE



By: 
Phillip V. Anderson, Esquire

Phillip V. Anderson (VSB No. 23758)
FRITH ANDERSON & PEAKE, P.C.
29 Franklin Road, S.W.
Post Office Box 1240
Roanoke, Virginia 24006-1240
Phone: 540/772-4600
Fax: 540/772-9167
panderson@faplawnfirm.com
Counsel for Respondent Gary Lee Close