BY HAND

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
FEB - 2 2009
RICHMOND, VIRGINIA

VIRGINIA:

IN THE SUPREME COURT

COMMONWEALTH OF VIRGINIA, Record No. 080283
PETITIONER

AMENDED APPLICATION FOR WRIT OF PROHIBITION

The Commonwealth of Virginia, by counsel, applies to this Court for a writ of prohibition directed to the Honorable William H. Shaw, III, Judge for the Circuit Court of York County and the City of Poquoson, prohibiting the Court from enforcing the January 24, 2008, pre-trial order of the Honorable N. Prentis Smiley, Jr., reducing the sentence of death imposed by the jury in the capital murder trial of Commonwealth v. Daryl Renard Atkins and prohibiting the Court from entering any order in this case reducing the death sentence without a jury determination of mental retardation.

The petitioner applies to this Court pursuant to Article VI, § 1 of the Constitution of Virginia, § 17.1-309 of the Code of Virginia and Rule 5:7 of the Rules of the Supreme Court of Virginia. The reasons requiring the issuance of the writ of prohibition are set forth in the accompanying memorandum of law which is incorporated herein by this reference.

The Commonwealth states that the taking of evidence is not necessary for the proper disposition of this application.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Petitioner

By:
Counsel

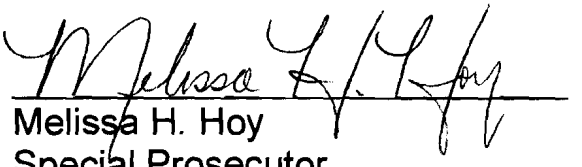
Mark A. Krueger
Special Prosecutor
Deputy Commonwealth's Attorney, Chesterfield County

Melissa H. Hoy
Special Prosecutor
Assistant Commonwealth's Attorney, Chesterfield County

9500 Courthouse Road Extension
P. O. Box 25
Chesterfield, Virginia 23832

CERTIFICATE OF SERVICE

On February 2, 2009, a copy of the foregoing document was served by mail upon the Honorable William H. Shaw, III, Judge of the Circuit Court of York County and City of Poquoson, at the Gloucester Circuit Court, 7400 Justice Drive, P.O. Box 576, Gloucester, Virginia 23061, and served by mail upon Joseph A. Migliozzi, Jr., Esquire, Regional Capital Defender, 207 Granby Street, Suite 200, Norfolk, Virginia 23510, counsel for Daryl Atkins and by mail to John A. Gibney, Jr., ThompsonMcMullen, P.C., 100 Shockoe Slip, Third Floor, Richmond, Virginia 23219, attorney for the Honorable N. Prentis Smiley, Jr.


Melissa H. Hoy
Special Prosecutor
Assistant Commonwealth's Attorney,
Chesterfield County

VIRGINIA:

IN THE SUPREME COURT

IN RE: COMMONWEALTH OF VIRGINIA,
Petitioner RECORD NO. 080283

AFFIDAVIT

COMMONWEALTH OF VIRGINIA, County of Chesterfield, to-wit:

This day personally appeared before me, the undersigned, Melissa H. Hoy, who after first being sworn, stated that the attached amended application for writ of prohibition is true and accurate to the best of his knowledge.

Melissa H. Hoy

Melissa H. Hoy, Assistant Commonwealth's Attorney
for Chesterfield County and Special Prosecutor

Subscribed and sworn to before me this 2nd day of February, 2009.

BONNIE W. MAULER NOTARY PUBLIC MY COMMISSION NUMBER 114743 COMMONWEALTH OF VIRGINIA

Bonnie W. Mauler

Notary Public
My commission expires: 2-28-2011