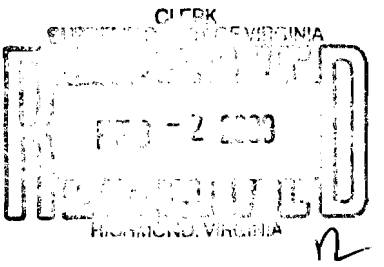
BY HAND

VIRGINIA:

IN THE SUPREME COURT



IN RE: COMMONWEALTH OF VIRGINIA, Petitioner

Record No. 080282
080283

AMENDED MEMORANDUM IN SUPPORT OF APPLICATIONS FOR WRITS OF PROHIBITION AND MANDAMUS

Introduction

For the second time *in this very case*, the same Virginia circuit court has failed to follow the clear mandate of this Court. This Court twice now has returned the case under Virginia Code § 8.01-654.2 to the circuit court for a narrow, specific purpose: to determine whether the defendant fits the definition for mental retardation. (App. 137 and 173).[1] Twice, the circuit court has failed to comply.

The first time the case was remanded, the circuit court did not conduct the retardation trial this Court had ordered; rather, it permitted Atkins to come back to this Court seeking authority to have the circuit court

[1] Atkins made the mental retardation claim during his direct appeal from a resentencing proceeding which occurred in 1999. Atkins' guilt previously conclusively had been determined when this Court affirmed that guilt judgment in 1999. Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999).

consider granting him a new trial or reduced sentence on newly-made Brady and perjury claims instead of conducting the retardation trial. This Court promptly denied such authority and expressly and clearly directed the circuit court to follow this Court's original mandate. In Re: Daryl Renard Atkins, Record No. 071750. (App. 173).

For the second time now in only a few months, the circuit court again has failed to follow this Court's explicit mandate. However, this time, not only did the court fail to follow the mandate, but it unquestionably strayed far outside any authority granted to it by this Court's mandate to conduct a retardation trial. This time, instead of proceeding with the mental retardation trial, the circuit court held a hearing on Atkins' Brady and perjury claims and then *ordered the defendant's death sentence be commuted to life.* (App. 825). This pre-trial action of the circuit court is unprecedented in Virginia, exceeds the authority granted by this Court's mandates and is without any authority under the law.

The Commonwealth thus seeks writs of prohibition and mandamus directed to the Circuit Court of York County, (1) ordering the Honorable William H. Shaw, III to vacate the January 24, 2008, pre-trial order of the Honorable N. Prentis Smiley, Jr. reducing Atkins sentence to life; (2) prohibiting the Honorable William H. Shaw, III from entering any such

orders in the future; and (3) again ordering the Honorable William H. Shaw, III to conduct the hearing mandated by this Court's two prior orders without any further delay.

Statement Of The Case

On February 13, 1998, a jury in the Circuit Court of York County convicted Atkins of the capital murder of United States Airman Eric Nesbitt and of the use of a firearm in the commission of murder and sentenced him to death. On direct appeal, this Court affirmed Atkins' convictions but reversed his death sentence, concluding that an improper sentencing verdict form required resentencing. Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999). A second jury resentenced Atkins to death, Atkins v. Commonwealth, 260 Va. 375, 534 S.E.2d 312 (2000), but the Supreme Court of the United States vacated the judgment, Atkins v. Virginia, 536 U.S. 304 (2002), and this Court thereafter remanded the case under § 8.01-654.2 to the circuit court to conduct a jury trial on Atkins' claim of mental retardation. Atkins v. Commonwealth, 266 Va. 73, 581 S.E.2d 514 (2002).[2]

[2] Section 8.01-654.2 was enacted after the decision in Atkins v. Virginia, 536 U.S. 304 (2002). As pertinent here, it provides, as a matter of Virginia policy, that defendants like Atkins (whose convictions became final before the enactment of Virginia's retardation statutes governing capital murder cases) could have their Atkins claims of retardation decided on the merits.

Section 8.01-654.2 provides that this Court may remand such claims to the trial court for determination if they are found to be non-frivolous.

On remand, a third jury was empanelled and found that Atkins was not retarded; however, this Court reversed that judgment in Atkins v. Commonwealth, 272 Va. 144, 631 S.E.2d 93 (2006), on June 8, 2006, based upon evidentiary and jury-selection errors. The Court again remanded Atkins' case under § 8.01-654.2 to the circuit court "for a new proceeding, consistent with this opinion, to determine whether Atkins is mentally retarded." Id.

On November 16, 2006, the circuit court scheduled the re-trial on retardation to begin on August 13, 2007. Atkins' legal team filed a motion in the circuit court on May 18, 2007, to impose a life sentence pursuant to Code § 19.2-264.5, or a new trial, based upon claims that the prosecutor withheld exculpatory evidence and suborned perjury at his 1998 trial. (App. 138-56). Atkins also took the position that the Commonwealth's Attorney should be disqualified from representing the Commonwealth at the mental retardation re-trial. (App. 161-165).

The Commonwealth opposed Atkins' motion on the grounds that the circuit court lacked jurisdiction to alter the sentence of death absent a finding by a jury that Atkins is retarded (App. 157-160), but urged the court to resolve the factual allegations which might affect the Commonwealth's Attorney's qualification to represent the Commonwealth at the trial and the evidence

which would be presented by both parties. (App. 166-168 and 191-192). The court obtained from the parties further briefing on the jurisdictional issue.

On July 23, 2007, the circuit court entered orders staying the proceedings to allow Atkins to petition this Court for an interlocutory appeal and a writ of mandamus. His petitions sought an order from this Court to permit the circuit court to consider granting a life sentence or new trial based on Atkins' new Brady and perjury claims. By Order dated September 20, 2007, this Court dismissed both petitions in one order. The Order stated as follows:

> Upon review of the record, the Court refuses the "Amended Petition of Interlocutory Appeal" in record No. 071703. This is a criminal proceeding and Code § 8.01-670.1 is not applicable. Upon consideration of the pleadings filed in Record No. 071750, the Court dismisses the petition for a writ of mandamus.
>
> The circuit court is directed to proceed with this criminal case. Such proceeding is confined to the terms of the mandate issued by the Court on October 18, 2006 remanding this case to the circuit court for a jury determination of whether Atkins is mentally retarded.
>
> This order shall be certified to the Circuit Court of York County.

(App. 173).

Subsequently, the circuit court scheduled Atkins' motion to disqualify the Commonwealth's Attorney and appointed a Special Prosecutor to represent the Commonwealth in the hearing. (App. 212). The hearing

occurred on December 13, 2007, and January 17, 2008. (App. 213-522 and 523-826). At the conclusion of the January 17 hearing, the circuit court ruled that it had found a violation of Brady v. Maryland, 373 U.S. 83 (1963), and "commute[d] the imposition of death to life." (App. 825). It made no ruling on the motion to disqualify the Commonwealth's Attorney of York County.

The circuit court entered an order on January 23, 2008, memorializing its oral rulings. (App. 827-828). Then, on January 24, 2008, the court entered two other orders. First, it ordered, "for good cause shown," that its January 23, 2008, order would be vacated. (App. 829).[3] Second, it ordered Atkins' death sentence "set aside" and imposed "a sentence of imprisonment for life without the possibility of parole." (App. 831).

Applicable Standards

This Court recently granted mandamus relief to the Commonwealth's Attorney in Fairfax County under circumstances strikingly similar to Atkins'

[3] The Clerk's office of the circuit court telephoned undersigned counsel on January 24 and informed him of this order. The Clerk's deputy stated that the court had vacated the order upon request by Atkins' counsel and his counsel's desire to change the wording of the order. The Commonwealth was not a party to any communications which may have occurred between the court and Atkins' counsel, much less even aware of Atkins' counsel's request or any hearing the court may have held on the matter.

case. In re: Robert F. Horan, 271 Va. 258, 634 S.E.2d 675 (2006). There, the circuit court entered an order after a pre-trial hearing which forbade the Commonwealth from seeking a death sentence. After reviewing its own precedents, this Court held that the Fairfax judge "did not have the authority to make a sentencing decision when ruling on a pre-trial motion. . . .No statute . . . authorizes [the judge] to exercise such sentencing discretion in a pre-trial context. In other words, the action taken . . . was not within her discretion." Id. at 263, 634 S.E.2d at 678-79.[4]

> "Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law." *Richlands Med. Ass'n v. Commonwealth*, 230 Va. 384, 386, 337 S.E.2d 737, 739 (1985); *accord In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. 313, 317, 576 S.E.2d 458, 461 (2003). "A ministerial act is 'one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.'" *Richlands Med. Ass'n*, 230 Va. at 386, 337 S.E.2d at 739 (quoting *Dovel v. Bertram*, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945)). "However, when the act to be performed involves the exercise of judgment or discretion on the part of the court or judge, it becomes a judicial act and mandamus will not lie." *In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. at 318, 567 S.E.2d at 461.

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[4] The capital murder case in Fairfax involved a capital murder defendant who had not yet been tried for his offense. This Court granted the petition for a writ for mandamus and thus found the request for prohibition relief moot. 271 Va. at 265, 634 S.E.2d at 680.

In Re: Horan, 271 Va. at 258-59, 634 S.E.2d at 676.

The principles governing the writ of prohibition are equally well-settled. The remedy lies not only where the lower court has no jurisdiction, but also where the inferior court has some jurisdiction but not of the type or to the extent exercised. A writ of prohibition lies "to restrain an inferior court from acting in a manner of which it has no jurisdiction, or in which it is transcending the bounds of its jurisdiction." In re: Gordon E. Hannett, 270 Va. 223, 238, 619 S.E.2d 465, 471-72 (2005).

"Prohibition lies in all cases of usurpation and abuse of power when the inferior court has no jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers." 15 M.J., "Prohibition," § 9, p. 17; Helms v. Vaughan, 84 Va. 696, 698, 5 S.E. 704, 705 (1888) ("The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those that ought to have been observed"); Burch v. Hardwicke, 64 Va. (23 Gratt.) 51, 59 (1873) ("A prohibition is a proper remedy to restrain an inferior court from acting in a matter of which it has no jurisdiction, or from exceeding the bounds of its jurisdiction.").

Argument

1. The circuit court clearly exceeded its authority when it disobeyed this Court's mandates.

This Court now has made clear at least twice that the lower court is mandated to conduct a jury trial on Atkins' claim of retardation. The lower court's written order of January 24, 2008, however, is a pre-trial judicial determination of sentence based on an entirely different matter: an assertion that Atkins' guilt determination was prejudiced by an alleged Brady violation.[5]

The order thus squarely exceeds the jurisdictional limits of this Court's mandates and is subject to the same mandamus action taken in In Re: Horan. Just as in In Re: Horan, in Atkins' case, the circuit court had a clear, unequivocal duty under the law. It was mandated by this Court *twice* to conduct the mental retardation trial. Just as in In re: Horan, it had no authority to make a sentencing decision pre-trial. The circuit court

[5] The circuit court denied Atkins' claim that the Commonwealth knowingly presented perjured testimony from Atkins' accomplice, William Jones. (App. 824, 828, 831).

exceeded its authority; thus mandamus must issue.[6]

The January 24 order recites that the lower court acted "pursuant to Section 19.2-264.5 of the Code of Virginia, and pursuant to ... authority as a court of general jurisdiction, and for good cause shown." (App. 831). However, these are the same inapplicable authorities pressed by Atkins upon this Court in the Fall of 2007 in In Re: Atkins, and the same authorities rejected by this Court in September of 2007 as a basis for the circuit court to grant relief on the irrelevant, untimely (and baseless) Brady claim. The circuit court's inexplicable reliance on those same rejected, meritless arguments in the face of this Court's express mandate to do otherwise demonstrates an unmistakable decision to ignore this Court's mandates handed down in 2006 and 2007 which ordered the circuit court to conduct a retardation trial.[7]

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[6] Furthermore, as this Court has noted in other such petitions concerning criminal matters, the Commonwealth has no adequate remedy at law. See In re: Horan, 271 Va. at 265, 634 S.E.2d at 680 ("In this instance, the Commonwealth's Attorney cannot, however, appeal [the judge's] decision refusing to conduct a penalty phase hearing upon proper evidence in accordance with Code §§ 19.2-264.3(C) and -264.4. Thus, the Commonwealth's Attorney clearly has no adequate remedy at law.").

[7] There can be no doubt that the circuit court understood the limits of this Court's mandates. After receiving this Court's 2007 mandate, but before conducting the hearing on Atkins' motion to disqualify the Commonwealth's Attorney, the circuit court acknowledged as follows:

The circuit court had a clear, unequivocal duty to conduct the trial required by this Court's orders, yet it refused to do so. The remanded § 8.01-654.2 proceeding is neither a trial on guilt and sentencing nor a habeas corpus proceeding. It is a post-sentencing, § 8.01-654.2 limited proceeding for the purpose of determining the factual issue of whether Atkins is retarded and thus whether his death sentence may stand under the Eighth Amendment.

This Court's September 20, 2006, mandate remanding the case to the circuit court for a re-determination of retardation did not grant additional authority to the circuit court to reduce Atkins' sentence on grounds other than retardation, much less grant a new trial. See Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939) (lower court "bound to carry the mandate of the upper court into execution and [may] not consider the questions which the mandate laid to rest"); Briggs v. Pa. R.R. Co., 334 U.S. 304, 306 (1948) ("In its earliest days, [the Supreme Court] consistently held that an inferior court has no power or authority to deviate from the mandate issued

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> [The Commonwealth] objected that the Court did not have jurisdiction because of the remand on the issue of mental retardation, and the Supreme Court agreed. They didn't say I had jurisdiction to hear your issues. They said I have jurisdiction to hear the mental retardation case and that's what I'm directed to hear."

(App. 185).

by an appellate court. . . . The rule of these cases has been uniformly followed in later days.").

This Court's 2006 mandate could not have been clearer, or more specific:

> [T]he case is remanded to the said circuit court for a new proceeding, consistent with the views expressed in the written opinion of this Court, to determine whether appellant is mentally retarded.

Commonwealth v. Atkins, Record No. 052348 (Order, Oct. 18, 2006) (App. 137).[8]

This mandate did not remand for a new trial or even a resentencing. It remanded for one purpose: to determine retardation. It did not bestow upon the lower court jurisdiction to entertain claims of newly-discovered evidence relating back to the guilt phase of trial. See Johnson v. Commonwealth, 267 Va. 53, 71, 591 S.E.2d 47, 57 (2004) (even in the context of a remanded re-sentencing proceeding, a defendant is not permitted to reopen guilt phase issues), vacated on other grounds, 544 U.S. 902 (2005).

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[8] Indeed, the Court's 1999 mandate affirmed Atkins' convictions of guilt. Yet Atkins' new Brady allegation goes to that guilt determination alone, not to any sentencing issue and certainly not to the issue of retardation.

The circuit court's assertion of its authority as a "court of general jurisdiction" does not, and cannot, relieve an inferior court from its ministerial, absolute duty to follow the orders of a superior court. That § 17.1-513 provides that such courts of general jurisdiction may hear any matter "made cognizable therein by law" simply begs the question of what matters are "cognizable" on a remand pursuant to § 8.01-654.2.[9] That remand specifically delimited the circuit court's power. The circuit court's January 24 order expressly exceeds this Court's mandates and thus also is properly the subject of a writ of prohibition. See In re: Hannett, 270 Va. at 238, 619 S.E.2d at 471-72; Burch, 64 Va. (23 Gratt.) at 59.

2. The circuit court clearly had no authority to reduce Atkins' death sentence in the absence of a jury finding of retardation.

a. Section 19.2-264.5 is inapplicable.

The lower court "commuted" and "set aside" Atkins' death sentence under § 19.2-264.5. (App. 824, 828, 831). Section 19.2-264.5 requires a trial judge to review a defendant's motion to set aside a jury's death sentence for "good cause shown." However, that post-verdict proceeding

[9] "Cognizable ordinarily means '[c]apable of being tried or examined before a designated tribunal; within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy.' Black's Law Dictionary 259 (6th ed. 1990)." FDIC v. Meyer, 510 U.S. 471, 476 (1994).

is required to take place *before imposition of sentence*. Atkins already has had the post-verdict proceeding allowed by § 19.2-264.5. His sentence has been imposed and affirmed by this Court in 2000, and may be reduced now only upon a jury determination that he is retarded. Atkins, 272 Va. at 161, 631 S.E.2d at 102. This Court did not vacate his sentence or reconstitute the sentencing phase of his trial; it simply required an additional factual determination under § 8.01-654.2 of whether Atkins is retarded.

In a remand under § 8.01-654.2 made during a habeas corpus case for a similar determination of retardation, this Court ordered:

> Furthermore, although the statute is silent regarding the procedure to be followed once the mental retardation issue is resolved on remand, we conclude that, upon a finding that [the defendant] is not mentally retarded, the sentence of death entered on May 12, 2000 *remains in full force and effect*. Upon a finding that [the defendant] is mentally retarded, the trial court shall enter an order vacating the sentence of death and re-sentencing [the defendant] in accordance with Code § 19.2-264.3:1.1(D).

Burns v. Warden, 269 Va. 351, 354, 609 S.E.2d 608, 611 (2005) (emphasis added). Section 8.01-654.2 requires the same result in Atkins' case: if the jury determines he is not retarded, his death sentence remains in full force and effect; if the jury determines he is retarded, the circuit court must vacate the death sentence and proceed to sentence him to life. However,

there is no longer any authority vested in the circuit court under § 19.2-264.5.

b. The circuit court had no authority to reduce sentence as a remedy for a Brady violation.

Inexplicably, the circuit court not only exceeded this Court's mandates, failed even to rule on the pre-trial motion for disqualification which was at issue and exceeded its own statutory authority, but then created an unprecedented remedy for an alleged Brady violation: a reduced sentence. There is no authority in Virginia, or elsewhere to the Commonwealth's knowledge, which would permit a court to reduce a lawfully-imposed sentence as a remedy for a proven Brady claim involving impeachment of a testifying accomplice[10], even if the claim, *unlike* here, had been proven under the applicable constitutional standards.[11]

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[10] In Teleguz v. Commonwealth, 273 Va. 458, 490, 643 S.E.2d 708, 728 (2007), the trial court was able to consider a sentence reduction for an alleged Brady claim during the sentencing phase under § 19.2-264.5's "good cause" provision because Teleguz's death sentence had not yet been imposed and was still before the trial court for that post-verdict review. The trial court found no materiality to the Brady claims and thus no "good cause" to reduce the sentence and this Court affirmed those rulings on direct appeal.

[11] Atkins failed to establish that the disputed information was material: that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). The circuit court rejected Atkins' claim of a knowing use of perjury under Napue v. Illinois,

360 U.S. 264 (1959). (App. 824, 828, 831). It thereby rejected any allegation that the Commonwealth manufactured or presented false evidence.

Taking the evidence in its best light for Atkins, the disputed information which is claimed to have been withheld was that the prosecutor, in an unrecorded portion of a recorded interview with Jones and Jones' counsel, told Jones' counsel that Jones' testimony differed from the physical evidence and that inconsistent testimony would not do either of them any good, and that Jones' later description of events was different. However, it is undisputed that the prosecutor provided to Atkins a full transcript of the recorded interview with Jones and his attorney which *revealed all of Jones' inconsistent statements.* It was also clear that Jones gave differing descriptions of the events during the disclosed recording before any unrecorded exchange. (cf. App. 705, 712). After providing the transcript, the Commonwealth's Attorney then discussed the inconsistencies with Atkins' counsel. (App. 603). Atkins therefore had a complete record of Jones' inconsistencies and in fact extensively cross-examined Jones on those inconsistencies at trial, including numerous instances where his testimony *still* differed from his prior statements and from the physical evidence. (App. 779; App. 57- 213).

Significantly, Atkins chose to testify in his own defense, disputing Jones' testimony. As a matter of law, the jury rejected Atkins' trial testimony. "[A] fact-finder, having rejected a defendant's attempted explanation as untrue, may draw the reasonable inference that his explanation was made falsely in an effort to conceal his guilt." Covil v. Commonwealth, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004) (citing cases); Wright v. West, 505 U.S. 277, 296 (1992) ("if the jury did disbelieve West, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt"). In this case, it is beyond question that there is no "reasonable probability" that a jury would have acquitted Atkins of capital murder had the prosecutor's allegedly undisclosed statements been revealed before trial.

The circuit court, moreover, did not make findings to support its conclusions. To the contrary, it admitted that it "ha[d] not reviewed the transcript of the direct and cross-examination of Jones." (App. 822). The judge also admitted that, after ten years, his personal recollection of the trial testimony was flawed. (App. 581, 815). The circuit court thus had no basis to determine whether the cross-examination could have been more thorough, much less whether Jones would have been more effectively

Atkins cited no precedent below permitting such an extraordinary remedy in his § 8.01-654.2 case. The circuit court relied on no such authority in its ruling commuting Atkins' sentence. The remedy for a Brady violation in a case involving an imposed sentence of death, where the violation has been found to be material under United States v. Bagley, 473 U.S. 667 (1985), see Muhammad v. Warden, 274 Va. 3, 4, 646 S.E.2d 182, 186 (2007), is a new trial, not commutation of sentence. The circuit court's action was without authority and thus is appropriately addressed by a writ of mandamus to vacate its order and of prohibition to prevent similar future action.[12]

Conclusion

Atkins' newly-minted Brady claim, his urging of the circuit court to ignore this Court's 2007 specific order which expressly limited the judge's action to conducting a retardation trial, his request of the circuit court that

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impeached. Indeed, in announcing its ruling, the circuit court found that "*a new trial would be a waste of everybody's time, because there's no question that Jones and Atkins murdered Nesbitt.*" (App. 824-825) (emphasis added). That factual observation cannot be reconciled with the court's finding of a Brady violation.

[12] The circuit court originally asserted that it had "commuted" Atkins death sentence. (App. 825, 828). Its later order, purporting instead to "set aside" the death sentence, was entered without any notice to the Commonwealth. However, there is, without question, absolutely no statutory, constitutional or other authority for a circuit court ever to commute a death sentence.

his retardation claim *not be presented to a jury* and, instead, that the court substitute its own personal determination of sentence, *all had absolutely no jurisdictional basis for adjudication by the circuit court.*

This Court should grant the application for a writ of mandamus directing the respondent circuit court judge to vacate its order of January 24, 2008. The Court should grant the application for a writ of prohibition directing the respondent circuit court judge that he may not order a new trial or reduce Atkins' sentence on the basis of Atkins' Brady claim. The Court should again direct the circuit court to conduct the mental retardation trial pursuant to the Court's previous mandates.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Petitioner

By: _____
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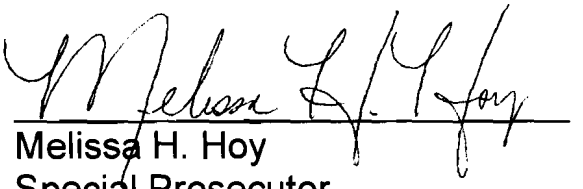
Certificate Of Service

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 Gloucester County Circuit Court, 7400 Justice Drive, P.O. Box 576, Gloucester, Virginia 23061, and was 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 was served by mail upon John A. Gibney, Jr., ThompsonMcmullen, P.C., 100 Shockoe Slip, Third Floor, Richmond, Virginia 23219, counsel for the Honorable N. Prentis Smiley, Jr.



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