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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN ALLEN MUHAMMAD,
Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For The Fourth Circuit
and Application For Stay Of Execution

WARDEN'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

1. Should certiorari be granted to review the Fourth Circuit's rejection of Muhammad's federal habeas corpus claim that his attorneys were ineffective because they did not claim he was "incompetent to represent himself" for the first two days of trial even though (1) competency never was an issue in the Virginia trial, (2) his attorneys deemed him very bright and capable, (3) the later-relied-upon evidence of general incompetence was not generated until Muhammad was subsequently tried in Maryland, (4) Muhammad's Virginia counsel participated actively as stand-by counsel during those two days, and (5) no inadmissible evidence came in during that time?

2. Should certiorari be granted to review the Fourth Circuit's finding that the federal district court did not abuse its discretion by granting Muhammad 180 days after its entry of a stay of execution to file his federal habeas petition, which time period was about three months shorter than the one-year statute of limitations period contained in 28 U.S.C. § 2244?

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STATEMENT OF THE CASE

I. Proceedings

A jury in the Circuit Court of Prince William County, Virginia found Muhammad guilty on November 17, 2003, of the 2002 capital murder of Dean Meyers as more than one murder in three years, Virginia Code § 18.2-31 (8), the capital murder of Dean Meyers in the commission of an act of terrorism, § 18.2-31 (13), conspiracy to commit capital murder, and the illegal use of a firearm in the commission of murder. On November 24, 2003, the jury sentenced Muhammad to death for the capital murders, and to 23 years in prison for his other crimes. The jury found the petitioner would be dangerous in the future and that his crimes involved aggravated battery and depravity of mind. *See* Va. Code § 19.2-264.4. The trial court entered final judgment on March 29, 2004.

The Virginia Supreme Court heard Muhammad's case by automatic, priority appeal. The court upheld his death sentences on April 22, 2005, *Muhammad v. Commonwealth*, 619 S.E.2d 16 (Va. 2005) (JA 1956)[1], and denied rehearing on September 23, 2005. This Court denied certiorari review on May 15, 2006. *Muhammad v. Virginia*, 547 U.S. 1136 (2006).

Shortly after affirmance on direct appeal, the Prince William County Circuit Court appointed counsel to represent Muhammad on habeas corpus review. On July 14, 2006, counsel filed a habeas corpus petition in the Virginia Supreme Court which was in violation of Virginia's rule requiring a petition no longer than fifty pages. *See* Va. Sup.

[1] References to the joint appendix filed below in the Court of Appeals will be denoted as "(JA __)." A copy of the joint appendix has been lodged with the Clerk of this Court.

Ct. Rule 5:7A(g). The court granted him an extra 17 days to file a proper petition (JA 2055), which was filed on July 31, 2006. (JA 2056). The Virginia Supreme Court dismissed the petition on June 12, 2007, *Muhammad v. Warden*, 646 S.E.2d 182 (Va. 2007) (JA 2189), and denied rehearing on September 25, 2007. This Court denied certiorari review on April 14, 2008. *Muhammad v. Kelly*, 128 S.Ct. 1889 (2008).

On October 4, 2007, the trial court ordered that Muhammad's death sentences be executed on November 5, 2007, as required by Virginia Code § 53.1-232.1. On October 10, 2007, lawyers asked the United States District Court for the Eastern District of Virginia to appoint them to represent Muhammad, and to stay the execution so that they could file a petition under 28 U.S.C. § 2254. On October 26, 2007, the district court appointed the lawyers who had asked to be appointed, and stayed the execution, directing that a petition be filed within 60 days.[2] (JA 2246).

Muhammad's counsel filed a motion asking the district court to rescind its briefing order, leaving no time limits for filing in place, and asserting a right to wait a year to file any § 2254 petition. (JA 2263). The district court rejected Muhammad's argument of entitlement to a one-year delay but, on November 20, 2007, gave Muhammad an additional 30 days to file a lengthier petition. (JA 2312).

Then, pursuant to Muhammad's repeated insistence that he needed more time to file, on January 22, 2008, the district court, while again rejecting the one-year-entitlement argument, permitted Muhammad to file a "place-holder" petition on the 90th day since the stay, but with advance permission to file an amended petition three months thereafter.

[2] Pursuant to 28 U.S.C. § 2251, the stay of execution would expire after 90 days and Muhammad would be entitled to a further stay only by filing a § 2254 petition.

(DCt. Order 1/22/08). The district court ordered the Warden not to file any response to the place-holder petition. (*Id.*). These rulings all were over the objections of the Warden.

On January 24, 2008, Muhammad filed his place-holder petition. On April 23, 2008, he filed his amended (real) petition. (JA 2406). On May 20, 2008, the Warden filed her answer and motion to dismiss the amended petition and an accompanying memorandum of law. (JA 2666). On July 24, 2008, Muhammad filed a motion asking for permission to file yet a third petition containing substantial amendments to his claims. (JA 2750). He asserted, as a justification for his request, his previously-rejected argument that 28 U.S.C. § 2244(d) entitled him to a full year to file.

On August 6, 2008, the district court denied Muhammad's motion to file another amended petition. (JA 2945). On September 24, 2008, the district court granted the Warden's motion to dismiss Muhammad's petition and lifted the stay of execution. (JA 2986). On October 23, 2008, the district court denied a certificate of appealability (COA). (JA 2995). On February 10, 2009, the United States Court of Appeals for the Fourth Circuit granted a COA. The Fourth Circuit issued its unanimous decision denying relief on August 7, 2009. *Muhammad v. Kelly*, 575 F.3d 359 (4th Cir. 2009). On September 1, 2009, the Fourth Circuit denied Muhammad's petition for rehearing with no judge of the court requesting a poll on his petition for rehearing *en banc*.

On September 16, 2009, pursuant to Virginia Code § 53.1-232.1, the Circuit Court of Prince William County, Virginia scheduled Muhammad's execution for November 10, 2009. On October 30, 2009, the Fourth Circuit denied Muhammad's motion to recall its mandate and for a stay of execution. The Warden received from Muhammad's counsel

an electronic copy of Muhammad's petition for a writ of certiorari and application for a stay at 4:10 p.m. on November 3, 2009.

II. The Crimes

The Virginia Supreme Court found the facts of Muhammad's crimes on direct appeal:

> On the morning of Wednesday, October 9, 2002, Dean H. Meyers ("Meyers") was shot and killed while fueling his car at the Sunoco gas station on Sudley Road in Manassas, Virginia. Meyers was shot in the head by a single bullet. The bullet entered behind his left ear, where it fragmented into multiple small pieces. The bullet fragments shattered the temporal bone and the fragments of bullet and bone then traveled through his brain and caused multiple fractures of his skull. This gunshot wound was consistent with injuries from a bullet fired from a high velocity rifle,[1] and was the cause of Meyers' death. Evidence at trial established that the bullet came from the .223 caliber Bushmaster rifle Muhammad possessed when he was arrested. An eyewitness testified that she saw Muhammad and Lee Boyd Malvo ("Malvo") in the vicinity of the shooting approximately one hour beforehand. Police interviewed Muhammad immediately after the shooting in a parking lot across the street from where Meyers was shot. In both encounters, Muhammad was driving a Chevrolet Caprice ("Caprice") in which he was later arrested. Muhammad's fingerprints were on a map police found in the parking lot where Muhammad had been interviewed.
>
> > [1]Throughout the trial, various witnesses and counsel made references to a high velocity rifle, high velocity weapon, and high velocity bullet, cartridge, or load. The technical distinctions between these terms are insignificant to the analysis in this opinion.
>
> Meyers was killed during a 47-day period, from September 5 to October 22, 2002, in which nine others were murdered and six more suffered gunshot wounds as a result of the acts of Muhammad and Malvo in concert. The murder of Meyers was the twelfth of these sixteen shootings.
>
> The first shooting occurred in Clinton, Maryland on September 5, 2002. Paul J. LaRuffa ("LaRuffa"), the owner of Margellina's Restaurant, left the restaurant at closing and proceeded to his car with his briefcase and Sony portable computer. Inside the briefcase were bank deposit bags that contained $ 3,500 in cash and credit card receipts from that evening. LaRuffa placed the briefcase and laptop on the backseat of his car, and then sat behind the steering wheel. He testified that, almost immediately after he sat down, he saw a figure to his left and a flash of light. He heard gunshots and the driver's side window shattered. When he stepped out of

his car, he realized he had been shot. The trauma surgeon who treated him testified that LaRuffa was shot six times: once in the back left side of his neck, three times in the left side of his chest, and twice in his left arm.

An employee who left the restaurant with LaRuffa, Paul B. Hammer ("Hammer"), witnessed the shooting and called "911." Hammer testified that he saw a "kid" run up to LaRuffa's car, fire shots into it, and then open the rear door and take the briefcase and portable computer. He was unable to provide a detailed description because of lighting conditions, but testified that the shooter was a male in his late teens or early twenties. The briefcase and empty bank deposit bags, along with a pair of pants and a shirt, were found six weeks later in a wooded area about a mile from the shooting. Hair on the clothing yielded DNA that was consistent with Malvo's DNA.

Four days later, on September 9, Muhammad purchased a 1990 Caprice automobile from Christopher M. O'Kupski ("O'Kupski") in Trenton, New Jersey. O'Kupski testified that before the purchase, Muhammad got into the trunk and lay down. O'Kupski also testified that, when Muhammad purchased it, the Caprice did not have a hole in the trunk or a passageway from the backseat to the trunk; the trunk was not spray-painted blue; and the windows were not tinted.

The second shooting occurred in Clinton, Maryland on September 15, 2002. Muhammad Rashid ("Rashid") was closing the Three Roads Liquor Store. Rashid testified that he noticed the Caprice outside the store shortly before closing. He testified that he was in the process of locking the front door from the outside when he heard gunshots from behind him. At the same time, a young man with a handgun rushed towards Rashid and shot Rashid in the stomach. At trial, Rashid identified Malvo as the person who shot him. Two bullets were removed from inside the store. The bullets had been shot through the front door and the trajectory of the bullets placed the shooter in a field across the street from the store.

The third and fourth shootings occurred in Montgomery, Alabama on September 21, 2002. Claudine Parker ("Parker") and Kelly Adams ("Adams") closed the Zelda Road ABC Liquor Store and walked out. They were shot immediately. Parker died as a result of a single gunshot wound that entered her back, transected her spinal cord, and passed through her lung. Adams was shot once through her neck, but lived. The bullet exited through her chin, breaking her jaw in half, shattering her face and teeth, paralyzing her left vocal cord, and severing major nerves to her left shoulder. Both gunshot wounds were consistent with injuries caused by a high velocity rifle. Testing revealed that the bullet fragments recovered from the Parker shooting were fired from a Bushmaster rifle possessed by Muhammad when he was arrested.

As the rifle shots were fired, a young man, later identified as Malvo, ran up to Parker and Adams. A police car happened to pass the scene

immediately after the shots were fired. A police officer observed Malvo with a handgun. He was going through the women's purses. The officer and another eyewitness chased Malvo. Although he escaped, Malvo dropped an "ArmorLite" gun catalogue during the chase. At trial, both the officer and the other eyewitness identified Malvo as the young man with the handgun who fled the scene. Additionally, Malvo's fingerprints were on the "ArmorLite" gun catalogue he dropped during the chase. The handgun Malvo carried that evening, a .22 caliber stainless steel revolver, was found in the stairwell of an apartment building that Malvo ran through during the chase. Forensic tests determined that this .22 caliber revolver was the same gun used to shoot both LaRuffa and Rashid.

The fifth shooting occurred in Baton Rouge, Louisiana on September 23. Hong Im Ballenger ("Ballenger"), the manager of the Beauty Depot store, closed the store for the evening. As she was walking to her car, she was shot once in the head with a bullet fired from a high velocity rifle. Ballenger died as the result of the single shot. The bullet entered the back of her head and exited through her jawbone. The wound caused massive bleeding and compromised her airway. Ballistic tests determined that the bullet fragments recovered from Ballenger were fired from the Bushmaster rifle possessed by Muhammad when he was arrested. An eyewitness saw a young man leave the scene with Ballenger's purse. At trial, this young man was identified as Malvo. Another eyewitness saw Malvo flee the scene with Ballenger's purse and get into the Caprice.

The sixth shooting occurred in Silver Spring, Maryland on October 3, 2002. At approximately 8:15 a.m., Premkumar A. Walekar ("Walekar") was fueling his taxicab. He was shot once with a bullet from a high velocity rifle. The bullet passed through his left arm and then entered his chest, where it broke two ribs, shredded portions of his lungs, and damaged his heart. A physician, who was fueling her car next to Walekar, attempted CPR but was unsuccessful. Ballistic tests established that bullet fragments recovered from the Walekar shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The seventh shooting occurred in Silver Spring, Maryland on October 3, 2002. At approximately 8:30 a.m., Sarah Ramos ("Ramos") was sitting on a bench in front of the Crisp & Juicy Restaurant in the Leisure World Shopping Center. She was shot once with a bullet from a high velocity rifle. The bullet entered the front of her head and exited through her spinal cord at the top of her neck. An eyewitness identified the Caprice at the scene prior to the shooting. Bullet fragments recovered from the Ramos shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The eighth shooting occurred in Kensington, Maryland on October 3, 2002. At approximately 10:00 a.m., Lori Lewis-Rivera ("Lewis-Rivera") was vacuuming her car at the Shell gas station on the corner of Connecticut Avenue and Knowles Avenue. She was shot once in the back

by a bullet from a high velocity rifle as she vacuumed her car. An eyewitness testified that he saw the Caprice in the vicinity of the gas station approximately 20 minutes before the shooting. Bullet fragments recovered from the Lewis-Rivera shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The ninth shooting occurred in Washington, D.C. on October 3, 2002. At approximately 7:00 p.m., a police officer stopped Muhammad for "running" two stop signs. The police officer testified that the windows of the Caprice were heavily tinted and that he could not see anyone else in the car. The police officer gave Muhammad a verbal warning and let him go.

At approximately 9:15 p.m. on that day, Paschal Charlot ("Charlot") was shot in the chest as he crossed the intersection of Georgia Avenue and Kalmia Road. This intersection was about 30 blocks from where the police officer stopped Muhammad. The bullet entered Charlot's chest and shattered his collarbone and three ribs before lacerating his lungs. Charlot died before emergency personnel arrived. Eyewitnesses testified that they saw the Caprice at the scene at the time of the shooting, and that the driver drove away without its headlights on immediately after the shooting. It had been parked in a space on the street with its trunk positioned toward Georgia Avenue. One eyewitness testified that he saw a flash of light from the Caprice at the time the shot was fired. Ballistics tests determined that the bullet fragments recovered from the Charlot shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The tenth shooting occurred in Fredericksburg, Virginia on October 4, 2002. Caroline Seawell ("Seawell") had finished shopping at a Michael's Craft Store, and was putting her bags in her minivan, when she was shot once in the back by a bullet from a high velocity rifle. The bullet severely damaged her liver and exited through her right breast. Seawell survived the shooting. An eyewitness testified that he saw the Caprice in the parking lot at the time of the shooting. Ballistics tests determined that the bullet fragments recovered from the Seawell shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The eleventh shooting occurred in Bowie, Maryland on October 6, 2002. Tanya Brown ("Tanya") took Iran Brown ("Brown") to Tasker Middle School. As Brown was walking on the sidewalk to the school, he was shot once in the chest by a bullet from a high velocity rifle. Tanya decided not to wait for emergency personnel and drove Brown to a health care center. Brown's lungs were damaged, there was a large hole in his diaphragm, the left lobe of his liver was damaged, and his stomach, pancreas, and spleen were lacerated by bullet fragments. Surgeons were able to save Brown's life and he spent eight weeks recovering in the hospital.

Two eyewitnesses testified that they saw the Caprice in the vicinity of Tasker Middle School the day before the shooting and the morning of the shooting. One of these eyewitnesses positively identified both Muhammad

and Malvo in the Caprice the morning of the shooting. They were seen in the Caprice which was parked at an intersection with a line of sight to the school. Following the shooting, police searched the surrounding area and found a ballpoint pen and a shell casing in the woods next to the school. The pen and shell casing were located in an area that had been patted down like a hunting blind. This blind offered a clear line of sight to the scene of the shooting. Tissue samples from the pen matched Muhammad's DNA. The shell casing had been fired by the Bushmaster rifle possessed by Muhammad when he was arrested, and tests determined that the bullet fragments recovered from Brown were fired from that rifle.

In the woods, police also found the first communication from Muhammad and Malvo. A tarot card, the one for death, was found with handwriting that stated, "Call me God." On the back of the card was handwriting that stated, "For you, Mr. Police. Code: Call me God. Do not release to the Press."

The twelfth shooting, discussed above, was the murder of Dean Meyers in Manassas, Virginia on October 9, 2002.

The thirteenth shooting occurred in Massaponax, Virginia on October 11, 2002. Kenneth Bridges ("Bridges") was at an Exxon gas station on Jefferson Davis Highway. He was shot once in the chest by a bullet from a high velocity rifle. The bullet damaged his lungs and heart, causing fatal internal injuries. Two eyewitnesses testified that they saw the Caprice at or near the Exxon station on the morning of the shooting. Ballistics tests determined that the bullet fragments recovered from the Bridges shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The fourteenth shooting occurred in Falls Church, Virginia on October 14, 2002. Linda Franklin ("Franklin") and her husband were shopping at a Home Depot store. As they loaded their purchases in their car, Franklin was shot and killed by a single bullet from a high velocity rifle. The bullet entered the left side of her head, passed through her brain and skull, and exited from the right side of her head. An off-duty police officer testified that she saw Malvo driving the Caprice in the vicinity of the shooting immediately after it occurred. Tests determined that bullet fragments recovered from the Franklin shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

On October 15, the day after Franklin was murdered, a Rockville, Maryland police dispatcher received a telephone call in which the caller stated:

> Don't say anything, just listen, we're the people who are causing the killings in your area. Look on the tarot card, it says, "call me God, do not release to press." We've called

> you three times before trying to set up negotiations. We've gotten no response. People have died.

The dispatcher attempted to transfer the call to the Sniper Task Force, but the caller hung up.

Three days later, on October 18, Officer Derek Baliles ("Officer Baliles"), a Montgomery County, Maryland Police Information Officer, received a telephone call. The caller told Officer Baliles to "shut up" and stated that he knew who was doing the shootings, but wanted the police officer to verify some information before he talked further. The caller told Officer Baliles to verify information concerning a shooting at a liquor store near "Ann Street." The caller gave Officer Baliles the name and telephone number of a police officer in Alabama. Officer Baliles confirmed the shootings of Parker and Adams. The caller called Officer Baliles again. Officer Baliles told him that he had verified the information concerning the shootings of Parker and Adams. The caller then said that he had to find more coins for the call and had to find a telephone without surveillance and then hung up.

On the same day, William Sullivan ("Sullivan"), a priest in Ashland, Virginia, received a telephone call from two people. The first voice, a male, told him someone wanted to speak with him. Sullivan testified that a second male voice, told him that "the lady didn't have to die," and "it was at the Home Depot." The second voice also told him about a shooting at a liquor store in Alabama and then said, "Mr. Policeman, I am God. Do not tell the press." The second voice concluded by telling Sullivan to give this information to the police.

The fifteenth shooting occurred in Ashland, Virginia on October 19, 2002. Jeffrey Hopper ("Hopper") and his wife stopped in Ashland to fuel their car and eat dinner. They left the restaurant and were walking to their car when Hopper was shot in the abdomen. Hopper survived the shooting, but underwent five surgeries to repair his pancreas, stomach, kidneys, liver, diaphragm, and intestines. In the woods near the shooting, police found a hunting-type blind similar to the one found at the Brown shooting. At the blind, police found a shell casing, a plastic sandwich bag attached to a tree with a thumbtack at eye level that was decorated with Halloween characters and self-adhesive stars, and a candy wrapper. Tests determined that the shell casing and bullet fragments recovered from the Hopper shooting came from the Bushmaster rifle possessed by Muhammad when he was arrested. Surveillance videotapes identified Muhammad in a Big Lots Store on October 19, 2002 near the shooting from which the plastic sandwich bag and decorations were likely obtained. The candy wrapper contained both Malvo's and Muhammad's DNA.

Police also found a handwritten message in the plastic sandwich bag that read:

> For you Mr. Police. "Call me God." Do not release to the Press.
>
> We have tried to contact you to start negotiation . . . These people took our call for a Hoax or Joke, so your failure to respond has cost you five lives.
>
> If stopping the killing is more important than catching us now, then you will accept our demand which are non-negotiable.
>
> (i) You will place ten million dollar in Bank of america account . . . We will have unlimited withdrawl at any atm worldwide. You will activate the bank account, credit card, and pin number. We will contact you at Ponderosa Buffet, Ashland, Virginia, tel. # . . . 6:00 am Sunday Morning. You have until 9:00 a.m. Monday morning to complete transaction. "Try to catch us withdrawing at least you will have less body bags."
>
> (ii) If trying to catch us now more important then prepare you body bags.
>
> If we give you our word that is what takes place.
>
> "Word is Bond."
>
> P.S. Your children are not safe anywhere at anytime.

The note was not found until after the deadline had passed. The day after Hopper was shot at the Ponderosa, an FBI agent operating the "Sniper Tip Line" received a call from a young male who said, "Don't talk. Just listen. Call me God. I left a message for you at the Ponderosa. I am trying to reach you at the Ponderosa. Be there to take a call in ten minutes."

On October 21, 2002, an FBI agent received a call to the FBI negotiations team which had been re-routed from the Ponderosa telephone number referenced in the note left after the Hopper shooting. A recorded voice stated:

> Don't say anything. Just listen. Dearest police, Call me God. Do not release to the press. Five red stars. You have our terms. They are non-negotiable. If you choose Option 1, you will hold a press conference stating to the media that you believe you have caught the sniper like a duck in a noose. Repeat every word exactly as you heard it. If you choose Option 2, be sure to remember we will not deviate. P.S. - Your children are not safe.

The sixteenth shooting occurred in Aspen Hill, Maryland on October 22, 2002. At approximately 6:00 a.m., Conrad Johnson ("Johnson"), a bus driver for the Montgomery County Transit Authority, was shot in the chest

at the entrance to his bus. Johnson remained conscious until rescue workers arrived, but died at the hospital. A single high velocity rifle bullet killed Johnson. The bullet entered his right chest, and caused massive damage to his diaphragm, liver, pancreas, kidneys, and intestines. Tests determined that the bullet fragments recovered from the Johnson shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested. A hunting-type blind, similar to those found at the Brown and Hopper shootings, was found in the woods near where Johnson was shot. A black duffle bag and a left-handed glove were found. A hair from the duffle bag yielded DNA that matched Muhammad's DNA. The police also found another plastic sandwich bag which contained a note and self-adhesive stars.

Muhammad and Malvo were captured and arrested on October 24, 2002, by agents of the FBI at a rest area in Frederick County, Maryland. They were asleep in the Caprice at the time of their capture. Inside the Caprice, police found a loaded .223 caliber Bushmaster rifle behind the rear seat. Tests determined that the DNA on the Bushmaster rifle matched the DNA of both Malvo and Muhammad. The only fingerprints found on the Bushmaster rifle were those of Malvo.

The Caprice had been modified after Muhammad purchased it from O'Kupski. The windows were heavily tinted. The rear seat was hinged, providing easy access to the trunk from the passenger compartment. The trunk was spray-painted blue. A hole had been cut into the trunk lid, just above the license plate. The hole was blocked by a right-handed brown glove that matched the left-handed glove found in the woods near the Johnson shooting. The trunk also had a rubber seal that crossed over the hole.

Inside the Caprice, police found a global positioning system (GPS) receiver, a magazine about rifles, an AT&T telephone charge card, ear plugs, maps, plastic sandwich bags, a rifle scope, .223 caliber ammunition, "walkie-talkies," a digital voice recorder, a receipt from a Baton Rouge, Louisiana grocery store dated September 27, 2002, an electronic organizer, a plastic bag from a Big Lots Store, a slip of paper containing the Sniper Task Force phone number, and a list of schools in the Baltimore area.

Police also found LaRuffa's portable computer in the Caprice. Muhammad had loaded software entitled "Microsoft Streets and Trips 2002" onto this computer on September 29, 2002. In this program, there were various maps showing particular routes and places marked with icons, some with a skull and crossbones. Icons had been added to mark the places where Walekar, Lewis-Rivera, Seawell, Brown, Meyers and Franklin were shot. There was also a Microsoft Word file titled "Allah8.rtf" that contained portions of the text communicated to police in the extortion demands.

Muhammad, 619 S.E.2d at 25-30.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY SHOULD BE DENIED

I. Muhammad Did Not Preserve His Present Competency Argument, And The Virginia Supreme Court's Rejection Of Muhammad's Ineffective Assistance Claim Was Not Unreasonable.

Muhammad asks this Court to grant certiorari on an issue he never presented to any court: whether trial counsel were ineffective because they did not argue that he was incompetent to be tried. The history of his current argument demonstrates this fact. At trial and on direct appeal, Muhammad raised no question related to competency. The record of trial reveals that Muhammad not only represented himself lucidly and coherently for the first two days of his sixteen-day guilt phase, but that he actively participated in his defense throughout.

In his state habeas corpus petition, Muhammad's primary complaints regarding that brief stint representing himself were directed against the trial court's decision to allow him to make an unwise decision. (JA 2075-81). He alleged ineffective assistance of counsel for not objecting on the basis of incompetency to represent himself, but he combined that allegation with another allegation that trial counsel were ineffective for failing to present, *during the penalty phase*, evidence of an alleged mental illness. (JA 2082-96). A fair reading of his claim reveals that it most overwhelmingly was devoted to the latter allegation, and not to his allegation that trial counsel were ineffective for not objecting on the grounds of incompetency to represent himself.

In support of his combined state habeas claim, Muhammad directed the state court to an affidavit from Dr. Cunningham that already had been considered by the trial judge when deciding to bar Dr. Cunningham's penalty-phase testimony due to

Muhammad's refusal to cooperate with a reciprocal evaluation – an issue no longer pressed by Muhammad. The affidavit gave opinions regarding the effects of Muhammad's childhood on his behavior, *but nothing about any mental illness*. (JA 2085, 1266). Muhammad also presented the state habeas court with a report prepared by Dr. Lewis in 2006, during his later Maryland trial, but that report did not contain any evidence that Lewis had worked with Muhammad's Virginia counsel, much less that she thought he was incompetent during his Virginia trial or told his Virginia counsel that she thought he was incompetent. (JA 2052).[3]

Muhammad misrepresents the record when he asserts that the state court had before it in the habeas case any evidence showing that Dr. Lewis found Muhammad incompetent, or that she had told his Virginia trial counsel that she had. Muhammad later presented the *federal habeas court* with an affidavit to that effect from Dr. Lewis, *but he never presented such evidence to the state courts and he never explained to the federal habeas court why he had withheld that information from the state court*. As the lower federal courts properly recognized, the state court's resolution of Muhammad's ineffective assistance claim, *Muhammad*, 646 S.E.2d at 192-93, therefore cannot have been unreasonable under 28 U.S.C. § 2254(d). *Muhammad*, 575 F.3d at 370-71.

Finally, in the state habeas case, Muhammad relied upon a letter prepared in 2006 – years after his Virginia trial - from a Dr. Williamson to Muhammad's Maryland trial counsel. (Petitioner's State Habeas Supplemental Appendix at 212). In that letter, Dr. Williamson thought that bi-polar disorder was "suggested" in Muhammad's Maryland

[3] Dr. Lewis said in her 2006 report that she had determined in 2003 that Muhammad had, among other things, a schizo-affective schizophrenia. (JA 2053). She made no determination of mental illness existing at the time of his crimes committed in 2002.

case, but that further mental assessment was needed for "clarification of the unresolved question of competency to stand trial." (*Id*. at 213).[4] *It contained no evidence that Dr. Williamson worked with Muhammad's Virginia counsel or told them he thought Muhammad was incompetent during his trial in Virginia*.

Not surprisingly, the Virginia Supreme Court in 2007 reasonably dismissed Muhammad's ineffective assistance claim because Muhammad failed to demonstrate that counsel had in their possession any information showing him to be mentally ill, much less incompetent to represent himself. (JA 2196). The state habeas court found that the record showed Muhammad understood the risks of self-representation, answered all the trial court's questions, and that trial counsel found him to be "a very bright man." It found no evidence presented to the contrary and no expert evidence available at the time of trial to the contrary. (*Id*.).

In the federal district court habeas proceeding, Muhammad made the same ineffective assistance claim but presented brand new evidence. He submitted a 2007 declaration from Dr. Lewis saying she had told trial counsel she thought Muhammad was incompetent to stand trial. (JA 2549). He presented a pre-trial letter from trial counsel to the prosecutor saying that counsel intended to present Dr. Cunningham as a penalty phase expert on Muhammad's background and risk for violence, and Dr. Pincus as a penalty phase expert on his opinion that Muhammad's brain was abnormal. (Muhammad's district court appendix at 1357). He included pictures in his amended

[4] In *Muhammad v. State*, 934 A.2d 1059, 1080-1108 (Md. Special App. 2007), *cert. denied*, 943 A.2d 1245 (Md. App. 2008), the Maryland appellate court found that the Maryland trial court properly had allowed Muhammad to represent himself through his entire trial, and that he was competent to do so.

federal petition which he said were Muhammad's brain. (JA 2455). *Muhammad had presented none of this evidence to the state court and he made no attempt to explain to the federal court why he had not*.

He presented the federal district court with a drawing of what he called a "topographical display" of data which allegedly had been collected by Dr. Stejskal, Muhammad's trial expert in Virginia who had been appointed by the trial court to assist him with mitigating evidence. (JA 2456). *The drawing was not something Dr. Stejskal had prepared*. Muhammad also did not present the district court with Dr. Stejskal's actual data, any evidence that trial counsel had this drawing before or during trial, or any evidence that the drawing was what he alleged it to be. He presented the district court with a declaration from a Dr. Gur who said he had reviewed Dr. Stejskal's data *but needed more testing to show whether Muhammad's brain was dysfunctional*. Dr. Gur wanted $20,000 to do the testing. (JA 2631).

Finally, Muhammad presented the federal district court with a new affidavit from his trial counsel, *but it made no mention of Dr. Lewis or any inkling of incompetency of their former client, Muhammad*. (JA 2635). What it did reveal for the first time was the actual mitigation report counsel obtained before the Virginia trial from Dr. Stejskal. (JA 108). That report:

- stated that Muhammad was not retarded and had no psychotic symptoms or hallucinations. (JA 109, 111);
- detailed twelve "lengthy" interviews with Muhammad amounting to thirty-two hours over five months. (JA 109);
- reported an IQ of 90 described as "average low average." (JA 113);

- *specifically reviewed pretrial MRI scans of Muhammad's brain, and disclosed that a Dr. Sanders had read the scans and determined that Muhammad had a "normal brain" as well as a normal EEG*. (JA 115); and

- made no finding of mental illness, incompetency, or brain dysfunction.

Of all the evidence Muhammad presented to the federal habeas court, it was Dr. Stejskal's report alone which contained evidence prepared contemporaneously with the trial which demonstrated what trial counsel actually knew at the time of trial about any competency issues.

The Warden argued to the federal habeas court that these newly-alleged factual matters were barred from review. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) (new facts alleged in federal court are defaulted absent a showing of cause and prejudice); *Kandies v. Polk*, 385 F.3d 457 (4th Cir. 2004) (affidavits may not be considered in § 2254 proceeding unless first presented to state court), *vacated on other grounds*, 545 U.S. 1137 (2005); *Wilson v. Moore*, 178 F.3d 266, 271-73 (4th Cir.) (affidavits not properly presented to state court may not be considered in § 2254 case), *cert. denied*, 528 U.S. 880 (1999). The district court, without discussion, in a footnote stated that the claim was "exhausted" and thus the claim and new facts could be considered. (JA 2965).

The district court clearly erred in that ruling, but it nevertheless correctly found no prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), because during the two days Muhammad represented himself, stand-by counsel were heavily involved in the trial, and no evidence was admitted improperly. (JA 2965). It also found no deficient performance because there was no evidence of any mental infirmity making Muhammad incapable of self-representation: he was lucid and coherent; he answered

with clarity the court's extensive questioning about his ability to represent himself; counsel repeatedly advised him against self-representation; counsel found him very bright and knowledgeable about the case based on many months of interaction; and counsel asked to appear as stand-by counsel. (JA 2966).

The district court also found in a footnote that, while the issue of Muhammad's competence to be tried was not before the federal habeas court for review *because Muhammad made no such claim*, the record showed that Muhammad in fact was competent: he consulted with his counsel, understood the proceedings, counsel found him "bright" and articulate, and he persuaded the trial judge to let him waive counsel. (JA 2964). The district court found little weight to Muhammad's new evidence of testing, MRI's, etc., because the record showed he was competent enough to convince one experienced trial judge and two experienced capital defenders that he was able to represent himself. It concluded that "[i]t would be unreasonable to expect attorneys to override their client's wish to assert his constitutional right by adducing tests and mental evaluations not yet admitted as evidence to make him appear incompetent." (JA 2967). Indeed, the Maryland appellate court later observed, in finding no incompetence to represent himself there, that his Maryland attorneys' claim of incompetence was made over Muhammad's "strenuous" objection, and that Muhammad believed the claim was "but a stratagem to 'trump' his asserted intention to defend himself." *Muhammad*, 943 A.2d at 1081.

Muhammad argued in the Fourth Circuit that the Virginia habeas court's decision - dismissing his claim of ineffective assistance based on counsel's failure to argue he was incompetent to represent himself for two days - had been unreasonable, but

without acknowledgement of the fact that the district court had dismissed his claim *de novo*, with no reference to the state court decision, or to the requirement of deference under § 2254(d).[5] Muhammad's argument in the Fourth Circuit was premised upon a proposition no court has found even superficially supportable: that he was incompetent to decide to waive counsel and represent himself. And the reason no court has so found is because the record of his competence is so very apparent from his own words and actions as observed by the judges who tried him, the attorneys who represented him, and even by his own trial-level mitigation expert, Dr. Stejskal.

Muhammad's different argument in this Court is that counsel were ineffective because they did not make a motion to have him declared incompetent to be tried. He faults the Fourth Circuit for adjudicating the claim he presented to them and not the one he makes now, and he cites cases from other courts finding counsel ineffective where the defendants were incompetent to be tried. He says the Fourth Circuit erroneously determined the prejudice prong of the *Strickland* test by ruling that there was no reasonable probability that the result of the trial would have been different had counsel objected to Muhammad's self-representation. He says the court should have determined whether there was a reasonable probability that Muhammad would have been found incompetent to be tried had counsel objected. But, as shown, the record simply will not bear such a transformation of his claim. The lower federal courts found

[5] Of course, the district court's *de novo* rejection of his claim, based as it was on so much of the same record evidence as Muhammad chose to present to the state court, was ample demonstration of the reasonableness of the state court's decision under § 2254(d). And the Maryland courts' decisions finding no incompetence which *post-dated* the trial in Virginia are, at the very least, evidence greatly undermining, if not obliterating, any claim of prejudice associated with Muhammad's Virginia claim of ineffective counsel.

as an historical fact that Muhammad always had claimed ineffective assistance in connection to his short-lived *pro se* appearance at trial, *not incompetence to be tried*. Moreover, the federal habeas courts have looked at his claims, both ineffective assistance *and* incompetence to be tried, and found them singularly lacking.

Muhammad presents no conflict among the lower courts on his claim. The cases he cites all relate to claims of incompetence to be tried, or to claims that trial counsel were ineffective for not alleging at trial the incompetence of the defendant to be tried. (Pet. at 15). None of those cases addresses the claim presented in Muhammad's case, much less the changing nature of his claim between state and federal habeas courts demonstrated here. The Virginia Supreme Court faithfully and reasonably applied *Strickland* and found no reasonable probability of a different result had counsel complained that Muhammad was incompetent to represent himself. *See Strickland*, 466 U.S. at 695 ("the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."). The record shows dispositively that counsel did not believe he was incompetent, but rather very competent, and Muhammad demonstrated that competence to everyone in the courtroom. The later, Maryland court decision also finding him competent only reinforces the reasonableness of the Virginia court's decision. The Fourth Circuit faithfully applied the governing standard of *Strickland v. Washington* to the fact-bound claim Muhammad presented to them and also the mandatory deference due the state court decision in § 2254(d). Muhammad demonstrates no error, no unsettled issue, no conflict, and no other reason why the Court would want to grant certiorari on this settled issue.

II. Muhammad's Novel Claim About The District Court's Order To File Within 180 Days Of The Grant Of A Stay Presents No Issue Of Constitutional Law, Conflict In The Lower Courts, Or Other Issue Which Would Compel A Grant Of Certiorari Review.

Muhammad makes the pointless assertion that Virginia stands alone in having federal district courts which hear habeas cases actually order death-sentenced state inmates to file their § 2254 petitions before the statute of limitations in § 2244 has run. Of course, he presents no proof of that sweeping assertion but, even if true, it presents no issue worthy of certiorari review. Muhammad fails to acknowledge that, unlike most, if not all, States, Virginia has a 60-day statute of limitations on the filing of its own state court habeas petitions, which runs from the conclusion of direct appeal through certiorari review in this Court. *See* Va. Code § 8.01-654.1. The effect of this state statute is that, unlike in most other States, Virginia death-sentenced inmates arrive on the federal habeas court's doorstep with most of their "one-year," § 2244 statute of limitations time period still intact. Most inmates in other States have little or no time left of the § 2244 time period when they arrive at the federal habeas court.

What he also fails to acknowledge is the fact that Virginia, unlike most other States, imposes on her courts a mandatory duty to set an execution date within 60 days after state habeas review is completed in the Virginia Supreme Court. *See* Va. Code § 53.1-232.1. The effect of this state statute is that, unlike in most other States, Virginia death-sentenced inmates arrive on the federal habeas court's doorstep about 60 days after state habeas review has been completed, and with an active execution date which the federal court must stay in order to hear any § 2254 petition the inmate wishes to file. The federal district courts in Virginia take the admonitions of this Court regarding stays

very seriously. *See Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (the state "retains a significant interest in meting out a sentence of death in a timely fashion"), *citing In Re: Blodgett*, 502 U.S. 236, 238 (1992) ("In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter"); *Delo v. Blair*, 509 U.S. 823 (1993) (*per curiam*) (it is "an abuse of discretion for a federal court to interfere with the orderly process of a State's criminal justice system" by granting a stay of execution on a frivolous habeas corpus claim). The absence of these procedures in most States results in most death-sentenced inmates arriving on non-Virginia federal habeas courts' doorsteps with hardly any of the "one-year," § 2244 statute of limitations time period remaining, and usually with no execution date to stay.

Muhammad would have this Court, in effect, nullify Virginia's legislated mandate that her habeas cases proceed expeditiously. He asks this Court to grant to Virginia death-row inmates the unnecessary post-conviction delay they benefit from in other States which do not have statutes of limitations for the filing of post-conviction review and which do not have mandatory execution dates. This Court should not consider Muhammad's proposal to single out Virginia and punish her legislative policy choice to expedite its post-conviction review process by adding that time back in once the inmate arrives in the federal habeas court, especially in light of the utter lack of any authority for his "right to one year of delay" theory. As shown below, Congress' intent, clearly expressed in §§ 2244 and 2251, is exactly to the contrary.

A. Muhammad's argument does not constitute error cognizable in this case under § 2253(c)(2).

Section 2253(c)(1) of title 28 of the United States Code provides as follows:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from … the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court ….

Paragraph (c)(2) provides as follows:

> A certificate of appealability may issue under paragraph (1) only if the appellant has made a substantial showing of the denial of a constitutional right.

Paragraph (c)(3) provides as follows:

> The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Muhammad's complaint that the district court erred by ordering him to file his habeas petition 180 days after granting a stay could not constitute "a substantial showing of the denial of a constitutional right," and no court has so found. Indeed, Muhammad's concession below (Petitioner's Opening Brief in 4CTA at 92) that his complaint must be reviewed only for an abuse of discretion was dispositive. Courts do not have discretion to deny constitutional rights.

B. The district court did not abuse its discretion.

No controlling precedent ever has held that inmates are entitled to use the one-year limitations period in 28 U.S.C. § 2244 as a *filing* delay; such periods are simply the outside *limit* on when a court still has authority to accept for consideration a § 2254 petition. Indeed, this Court in another context has made clear that such limitations periods do not entitle a state inmate to the last day of the period for filing. *See Netherland v. Tuggle*, 515 U.S. 951 (1995) (*per curiam*) (vacating 90-day stay which the

Fourth Circuit had granted on the basis of this Court's Rule 13 allowing 90 days to file a certiorari petition, and noting that the 90-day limit on filing certiorari petitions was *not a matter of right*).

The district court, over the Warden's objection, granted Muhammad *two extensions of time* amounting to a six-month delay in filing after the stay was granted, which itself greatly prejudiced the Commonwealth. *See Nelson,* 541 U.S. at 644; *In Re: Blodgett*, 502 U.S. at 238; *Delo*, 509 U.S. 823 (1993). *See also* Fourth Circuit Judicial Council Order 113 (Fourth Circuit, in its supervisory role, imposing upon courts in the Fourth Circuit the decisional time requirements in 28 U.S.C. § 2266 regardless of whether the State has qualified as an "opt-in" state under § 2261). That time period exceeds the time most non-Virginia death-sentenced inmates have to file a federal habeas petition after completion of state review, and the ruling certainly was not an abuse of discretion.

Moreover, contrary to Muhammad's manufactured "uniform nationwide rule" which he asserts was intended by Congress (Pet. 26), Congress, in 2006, in its amendment to the Effective Death Penalty Act, announced its contrary intention. *It therein expressly provided that States would be permitted to execute death-sentenced inmates who have not filed a § 2254 petition by the 90th day following a grant of a stay by the district court*. 28 U.S.C. § 2251(a)(3) (terminating preliminary stays granted after appointing counsel where no "habeas corpus proceeding is pending" under § 2251

(a)(1&2)).[6] That amendment hardly supports the one year entitlement to filing which Muhammad now argues because, if no petition has been filed within 90 days of a stay, that stay expires by operation of law and the State is free to carry out its death sentence. In light of this clear mandate from Congress, Muhammad's current argument simply cannot be maintained. The Fourth Circuit's decision finding that the district court did not abuse its discretion, *Muhammad*, 575 F.3d at 374, involves no unresolved issue, no issue in conflict in the lower courts, and no other reason justifying a grant of certiorari review.

III. Muhammad is not entitled to a stay of execution.

This Court has made clear that a stay of execution may not be granted unless Muhammad establishes that there is "a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari" *and* that there is "a significant possibility of reversal of [the Fourth Circuit's] decision" if certiorari were granted. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Inmates "must satisfy all of the requirements for a stay" as required under *Barefoot. Hill v. McDonough*, 547 U.S. 573, 584 (2006). For the reasons set forth herein, Muhammad cannot meet this standard because he presents this Court with no issue that deserves certiorari review or significant possibility of reversal.

Muhammad now proposes a different standard. He proposes that the Court institute stays in all Virginia execution cases. His asserted reason is that Virginia sets

[6] *McFarland v. Scott*, 512 U.S. 849 (1994), which previously had held that a habeas application was pending upon the filing of a motion for appointment of counsel, was abrogated in 2006 in § 2251 (a)(2) when Congress made clear the habeas application was *not* pending until the petition actually was filed.

executions of death sentences to take place before the 90 days allowed by this Court's Rule 13 has run. What Muhammad does not understand is that the setting of execution dates in Virginia is not an arbitrary practice; rather, it is a statutory mandate of the Virginia General Assembly. Va. Code § 53.1-232.1. What he fails to acknowledge is that, in practice, the statutory time frame for setting an execution date usually provides Virginia inmates with at least 90 days in which to prepare and file a certiorari petition in this Court. In Muhammad's case, the Fourth Circuit denied him federal habeas relief on August 7, 2009. He did not file his certiorari petition until November 3, 2009, four days short of 90 days later.

Significantly, the Virginia General Assembly overhauled Virginia's post-conviction processes in death penalty cases in 1995 – *a year before the United States Congress did the same thing in the Effective Death Penalty Act*. Part of that important reform was the mandatory setting of execution dates which work to ensure that no death penalty case is sitting idle: death row inmates do not pursue *any* litigation unless an execution date is in place. The single most important benefit which has been derived from requiring an execution date to be set at the conclusion of federal habeas corpus review in the Court of Appeals has been the elimination of most frivolous, successive federal habeas petitions in Virginia. That important interest in finality of state court judgments should be encouraged, not discouraged.

Muhammad's lawyers are experienced Virginia capital litigators. They are well aware of Virginia's statute requiring the setting of an execution date. Yet Muhammad comes to this Court now complaining because *he* waited until the eleventh hour to file his petition. He does not appear in this Court with clean hands, and thus is not entitled to a

stay on that basis alone. *See Nelson*, 541 U.S. at 650 ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief") (citing *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.,* 503 U.S. 653, 654 (1992) *(per curiam)*. This Court has made clear that Virginia inmates are not entitled to claim this Court's 90-day limit on filing certiorari petitions as a right. *Netherland v. Tuggle*, 515 U.S. at 952 (1995); *Autry v. Estelle*, 464 U.S. 1, 2-3 (1983). Muhammad has not demonstrated that he is entitled to the extraordinary equitable relief he seeks.

CONCLUSION

The petition for a writ of certiorari and application for a stay of execution should be denied.

Respectfully submitted,

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