No. 98-7715

In The
Supreme Court of the United States

October Term 1998

MARK A. SHEPPARD,

Petitioner,

v.

MARK EARLY, individually and in his capacity as Attorney General of the Commonwealth of Virginia,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
CAPITAL CASE
IMMINENT EXECUTION SCHEDULED
JANUARY 20, 1999

Timothy M. Kaine
Dana J. Finberg
MEZZULLO & McCANDLISH
1111 East Main Street
Suite 1500
Richmond, Virginia 23218
(804) 775-3100

Counsel for Petitioner

Steven D. Benjamin
Betty Layne DesPortes
BENJAMIN & DesPORTES, P.C.
11 South 12th Street, Suite 302
Post Office Box 2464
Richmond, Virginia 23218-2464
(804) 788-4444

Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

CAPITAL CASE
IMMINENT EXECUTION SCHEDULED
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QUESTIONS PRESENTED

I. Did the District Court err in holding that Sheppard presented his Fourteenth Amendment Equal Protection challenge to Va. Code § 53.1-232.1 when he moved the Court of Appeals for a stay of execution in the context of his federal habeas corpus proceedings?

II. Did the District Court err in holding that the Court of Appeals rejected Sheppard's Equal Protection arguments, on the merits, when the Court of Appeals perfunctorily denied his motion for a stay of execution made during the course of his federal habeas corpus proceedings?

III. Did the District Court err when it dismissed Sheppard's Fourteenth Amendment Equal Protection challenge to Va. Code § 53.1-232.1?

IV. Does Va. Code § 53.1-232.1, on its face and as applied by the Attorney General of the Commonwealth of Virginia, violate the Equal Protection Clause of the Fourteenth Amendment?

(a) By truncating the time that death-sentenced individuals in the Commonwealth of Virginia, and only death-sentenced individuals, have in which to prepare and file Petitions for a Writ of Certiorari to this Court?

(b) By truncating the time that this Court has to consider Petitions for a Writ of Certiorari filed by such individuals?

RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

However, Sheppard has pursued his federal habeas corpus remedies in a separate action, in which the defendant is John Taylor, the Warden of the Sussex I State Prison. Sheppard's Petition for Writ of Certiorari in his habeas corpus proceeding was filed in this Court on January 14, 1999, as was his Motion for a Stay of Execution.

In light of the January 20, 1999 execution date set by the Commonwealth of Virginia, Sheppard filed his Petition for Writ of Certiorari in the habeas proceeding under protest and subject to the equal protection claims raised in this action. If not for the unconstitutional application of Va. Code § 53.2-232.1, Sheppard's Petition for Writ of Habeas Corpus could have been filed as late as mid-February 1999, and this Court would not be forced to pass on the serious constitutional issues raised in the Petition before the scheduled execution.

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The unpublished opinion of the United States District Court for the Eastern District of Virginia (Richmond Division) (the "District Court") appears at App.0005-15. Sheppard filed an immediate appeal to the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals"), see App. at 0016-17; as of the lodging of this Petition for Writ of Certiorari, no decision has been rendered by the Court of Appeals.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The District Court entered its Final Judgment on January 12, 1999. Although Sheppard noticed an immediate appeal to the Court of Appeals, as of the lodging of this Petition no decision has been rendered by that Court.

Given the importance of the constitutional issues raised in Sheppard's action pursuant to 42 U.S.C. § 1983, as well as the fact that Sheppard is facing imminent execution on January 20, 1999, he believes that if the decision of the Court of Appeals is not issued in a timely manner, the jurisdiction of this Court may be properly invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(e), as well as Supreme Court Rule 11.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and Va. Code § 53.1-232.1. Pursuant to Rule 14.1(f), the text of these constitutional provisions and statutes are set forth in the Appendix.

STATEMENT OF THE CASE

Sheppard, a death-sentenced inmate at the Sussex I Correctional Center in Warsaw, Virginia, is scheduled to be executed by the Commonwealth on January 20, 1999. Sheppard has exhausted his direct appeals, his state habeas remedies, and has thus far been denied federal habeas corpus relief by the United States District Court for the Eastern District of Virginia (Richmond Division) (the "District Court") and the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). On January 14, 1999, Sheppard filed, under protest, his Petition for Writ of Certiorari in the Supreme Court of the United States (the "Supreme Court" or "this Court").

Sheppard was tried and convicted of capital murder in 1993, in the Circuit Court of Chesterfield County, Virginia (the "trial court"). After unsuccessfully pursuing a direct appeal to the Supreme Court of Virginia and this Court, Sheppard began collateral proceedings attacking the constitutionality of his conviction and sentence. On October 17, 1996, Sheppard's state petition for writ of habeas corpus was dismissed by the Supreme Court of Virginia on motion of the Commonwealth, without an evidentiary hearing on any of his claims.

On May 1, 1997, Sheppard filed a Petition for Writ of Habeas Corpus in the District Court. After denying Sheppard's request for discovery and an evidentiary hearing, on February 11, 1998 the District Court entered an Order denying all relief.

The District Court denied Sheppard's timely Motion to Alter or Amend Judgment on April 6, 1998, and Sheppard filed a timely appeal to the Court of Appeals. On October 23, 1998 the Court of Appeals issued an unpublished opinion affirming the decision of the District Court. Sheppard filed a timely Petition for Rehearing and Suggestion for Rehearing In Banc, which was denied by the Court of Appeals on November 17, 1998.

On November 17, 1998, several days before the mandate of the Court of Appeals was scheduled to be issued, the Office of the Attorney General of Virginia sent a letter to the trial court requesting: (a) a hearing to set an execution date for Sheppard; and (b) an execution date of January 20, 1999. See App. at 0018-19.

In its November 17, 1998 letter, the Commonwealth invoked Va. Code § 53.1-232.1 in support of its requests that: (a) a hearing for the purpose of setting an execution date be conducted before the issuance of the Court of Appeals' mandate; and (b) an execution date be set within 60 days of the scheduling hearing. In pertinent part, Va. Code § 53.1-232.1 provides:

> In a criminal case where a sentence of death has been imposed, the trial court shall set an execution date when it is notified in writing by the Attorney General or the attorney for the Commonwealth, and the court finds that:
> . . . (iii) the United States Court of Appeals has affirmed the denial of federal habeas corpus relief. . . .
>
> The trial court shall conduct a proceeding to set the date within ten days after receiving the written notice from the Attorney General or the attorney for the Commonwealth. The execution date shall be set by the trial court . . ., but in any event shall be no later than sixty days after the date of the proceeding.

See App. at 0004.

At the Commonwealth's request, a telephonic hearing was conducted on November 23, 1998, for the purposes of scheduling Sheppard's execution. During the course of the telephonic hearing, counsel for Sheppard noted his objections to the proceeding and the relief requested by the Commonwealth. Specifically, Sheppard objected on the grounds that: (a) until the Fourth Circuit's mandate issued, the trial court lacked jurisdiction to set an execution date; and (b) by requiring that the execution be set for a date within a sixty day deadline, which is less than the time allowed by the Rules of this Court for the filing of a Petition for Certiorari, Va. Code § 53.1-232.1 violated his equal protection and due process rights under the Fourteenth

Amendment. The trial court overruled Sheppard's objections, and set his execution for January 20, 1999. See App. at 0020-21.

Sheppard's motion to the Fourth Circuit for a Stay of the Mandate and Stay of Execution was denied on November 25, 1998. See App. at 0022. Although Sheppard raised his equal protection concerns in his Motion for Stay in the Court of Appeals, see App. at 0023-28, because those claims were not a part of his habeas corpus proceedings (which attacked only the validity of his conviction and sentence), those claims were not properly before the Court of Appeals at that time. Moreover, because the order of the Court of Appeals gives no reasons for denying the Motion for Stay, it is impossible to determine the legal or factual basis for that Order.

Thus, Sheppard's January 20, 1999 execution was set, at the behest of the Attorney General of the Commonwealth of Virginia, pursuant to Va. Code § 53.1-232.1. As will be explained in detail below, on its face and as applied by the Attorney General of Virginia, § 53.1-232.1 purports to require Virginia trial courts to set executions within approximately 70 days from a decision by the Fourth Circuit denying federal habeas corpus relief. The effect of this statute is twofold: (1) it denies death-sentenced inmates in Virginia, and **only** death sentenced inmates in Virginia, the full 90 days permitted by Rule 13 of this Court for the filing of a Petition for Writ of Certiorari; and (2) it deprives this Court the opportunity to give meaningful and deliberate consideration to certiorari petitions filed by Virginia inmates sentenced to death.

Sheppard instituted the instant action, pursuant to 42 U.S.C. § 1983, to enjoin the Commonwealth of Virginia, acting through its officials, from depriving him of his equal protection rights and to enjoin the Commonwealth from further violations. See App. at 0029-59. He sought a preliminary injunction and a hearing was conducted on his motion on January 11, 1999. Prior to the hearing, the Commonwealth filed a Motion to Dismiss in which it did not

address in detail the merits of Sheppard's equal protection claim, but instead attacked the action on procedural grounds. At the January 11, 1999 hearing, both the procedural issues and the merits of Sheppard's claims were addressed. See App. 0060-93.

On January 12, 1999, the District Court issued an opinion granting the Commonwealth's Motion to Dismiss on the ground that Sheppard had raised his equal protection arguments in the context of the prior stay motion in his habeas proceedings to the Court of Appeals, and that the Court of Appeals had rejected the equal protection arguments on the merits. Despite the fact that the District Court expressed its views that Sheppard had raised serious questions regarding the constitutionality of the statute under attack, the District Court erroneously held that it felt constrained, due to the Court of Appeals' supposed resolution of Sheppard's prior stay motion, to dismiss his claims. Sheppard filed a Notice of Appeal in the District Court on January 12, 1999, see App. at 0016-17, but as of the lodging of this Petition the Court of Appeals has yet to rule.

As explained below, the District Court's decision to dismiss the action was clearly erroneous, as was that court's decision to deny Sheppard's Motion for Preliminary Injunction.

ARGUMENT

By singling out death-sentenced inmates, and truncating the time in which they can seek the full panoply of available federal habeas corpus relief, the Commonwealth is violating those individuals' equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution. There is no rational or legitimate reason for denying death-sentenced individuals the opportunity to exhaust their federal habeas corpus remedies under the same time constraints afforded to other individuals seeking federal habeas corpus relief. Indeed, the only plausible explanation behind Va. Code § 53.1-232.1 is that it reflects the Commonwealth's governmental bias and animus against a politically powerless and unpopular class of persons.

It cannot be disputed that, in recent years, habeas corpus "reform" on both the state and federal levels has severely restricted the remedies available to death sentenced individuals seeking relief. In light of the severe restrictions Congress and the courts have placed on "successor petitions," it has become all the more imperative that death sentenced inmates pursuing their first federal petitions for a writ of habeas corpus be allowed meaningful, considered and fair opportunity to pursue relief all the way through the Supreme Court. The Commonwealth, by enacting and implementing the deadlines contained in Va. Code § 53.1-232.1, essentially emasculates this opportunity in a manner that has not gone unnoticed by several sitting Justices on this Supreme Court. See Breard v. Greene, __ U.S. __, 118 S. Ct. 1352 (1998) (discussed in § D.1 below).

A. If Necessary, This Court Should Consider This Petition Pursuant To Supreme Court Rule 11 And 28 U.S.C. § 2101(e).

Sheppard's Petition presents critically important questions regarding the constitutional validity of the statute pursuant to which the Commonwealth of Virginia sets executions, as well as serious questions regarding the statute's application by the Attorney General of Virginia. As stated by the District Court, Sheppard has raised serious questions regarding the unconstitutionality of the statute, which he alleges violates the Fourteenth Amendment Equal Protection rights of individuals sentenced to death by the Commonwealth of Virginia.

Sheppard has sought an immediate appeal in the Court of Appeals. Given the imminence of his execution, and the uncertainty of when the Court of Appeals will rule on that appeal, in an abundance of caution Sheppard has decided to lodge this Petition in this Court in advance of the Court of Appeals' decision. However, should the Court of Appeals not rule in a timely manner, Sheppard believes that the jurisdiction of this Court may properly be invoked pursuant to 28 U.S.C. 2101(e) and Supreme Court Rule 11. As recognized by this Court in Turner v. City of

Memphis, 369 U.S. 350 (1962), cases seeking injunctive relief to prevent ongoing violations of the Fourteenth Amendment present issues of such public importance as to justify deviation from normal appellate practice and require immediate determination in this Court. See also S. Ct. R. 11; 28 U.S.C. § 2101(e).

B. The Court of Appeals Did Not Reject Sheppard's Equal Protection Claims On The Merits.

The Commonwealth asserted below that Sheppard's equal protection challenge to Va. Code § 53.1-232.1 is barred by the Court of Appeals' November 25, 1998 order denying Sheppard's Motion for a stay **in his habeas proceedings**. Nothing could be further from the truth, and the District Court clearly erred by dismissing Sheppard's action on that ground.

Sheppard's November 23, 1998 Motion for Stay to the Court of Appeals was made in the context of his federal habeas corpus proceeding. Thus, as Sheppard concedes, the standard of review applicable to that request was the Barefoot standard, which focuses solely on the merits of the claims alleged **in the habeas action**. See Barefoot v. Estelle, 463 U.S. 880 (1983). Sheppard's habeas corpus action did not include an equal protection challenge to Va. Code § 53.1-232.1 because that statute, and its unconstitutional application to Sheppard's case, has nothing at all to do with the validity of his underlying conviction and sentence (the subject of the habeas corpus proceeding). Instead, although Sheppard's Motion to Stay clearly mentioned his equal protection concerns, those claims were not properly before the Court of Appeals when that Court issued its cursory order denying a stay, and could have played no part in the Court of Appeals' Barefoot analysis.[1] Thus, it is more likely than not that, if the Court of Appeals

[1]At the time the Court of Appeals issued its order, no § 1983 action challenging Va. Code § 53.1-232.1 had been filed in any forum.

considered these equal protection arguments at all, it "rejected" them on procedural grounds rather than on the merits. Any other result would mean that a party can raise claims and have them adjudicated, for the first time, in the Court of Appeals – a result that ignores the fact that United States Courts of Appeals are courts of limited **appellate** jurisdiction. See 17 Moore's Federal Practice 3d, § 120.11[2][b] ("Appellate jurisdiction in [the Courts of Appeals] is, in general, limited to review of district court decisions").

Moreover, it strains the language of the Court of Appeals' cursory Order denying Sheppard's motion for a stay to assume that the Court of Appeals considered and rejected the merits of the arguments that Sheppard raises in his § 1983 action challenging the constitutionality of Va. Code § 53.1-232.1. As this Court has recognized, cursory dispositions by Courts of Appeals are insufficient to indicate that claims have been considered and rejected on the merits. See Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Co., 117 S. Ct. 1731 (1997) ("the Court of Appeals' ambiguous statement that petitioners' request was 'without merit' does not establish that it actually considered and rejected petitioners' ... argument"). As mentioned above, if the Court of Appeals considered Sheppard's arguments regarding Va. Code § 53.1-232.1 at all (hardly an established fact), it is probable that the Court of Appeals determined that those arguments were not properly before it in the context of Sheppard's habeas proceeding.

C. The District Court Erred in Dismissing Sheppard's Claims.

As explained above, the equal protection claims raised in Sheppard's action pursuant to 42 U.S.C. § 1983 were not properly before the Court of Appeals in the context of the stay motion presented in his habeas corpus proceedings. Moreover, there was no decision by the Court of

Appeals on the merits of the equal protection claims that would have barred the District Court from resolving those claims in the context of Sheppard's § 1983 action. Thus, and particularly in light of the District Court's finding that Sheppard had raised serious questions regarding the constitutionality of Va. Code § 53.1-232.1, see App. at 0012-13, the District Court erred in dismissing Sheppard's § 1983 action and in denying his request for preliminary injunctive relief.

D. Va. Code § 53.1-232.1 Clearly Violates Fourteenth Amendment Equal Protection Guarantees.

As explained by this Court:

> The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The Clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise.

See New York City Transit Authority v. Beazer, 440 U.S. 568, 588 (1979). That question is raised in this case due to the application and impact of Va. Code § 53.1-232.1 and, as explained below, the answer is that § 53.1-232.1 violates fundamental principles of equal protection guaranteed by the Fourteenth Amendment.

1) Va. Code § 53.1-232.1 Is Unconstitutionally Underinclusive On Its Face.

By its terms, § 53.1-232.1 applies only in capital cases in Virginia. The statute severely truncates the period of time afforded to death sentenced individuals to seek certiorari review from this Court after the Court of Appeals has denied federal habeas corpus relief. It essentially forces death sentenced individuals to file their petitions for a writ of certiorari within 70 days of the decision of the Court of Appeals and, because executions are scheduled to occur within those 70 days, it forces this Court to conduct a rushed review of the issues presented.

In stark contrast, all other individuals convicted of crimes in Virginia and who seek federal habeas corpus relief are afforded the full 90 days allowed by Rule 13 of this Court for the filing of a petition for writ of certiorari. Moreover, those individuals are guaranteed that this Court will be able to conduct careful, meaningful and deliberate consideration of the issues raised in their petitions for writ of certiorari.

Federal habeas corpus review, in all cases, extends through attempts to secure relief from this Court. See 28 U.S.C. §§2254, 2266.[2] It is clear that Va. Code § 53.1-232.1 treats similarly situated individuals (here, individuals who have been convicted of crimes in the Commonwealth) differently, and that the statue has a special, adverse impact on individuals under penalty of death. This disparate impact is critical because it affects a crucial right of individuals facing the death penalty – the right to a complete and meaningful appellate process. Because capital punishment is absolute and unique, a capital defendant has a heightened need for a fair opportunity to be heard on any matter at issue, at any stage of the proceedings. See Lankford v. Idaho, 500 U.S. 110 (1991). Moreover, meaningful appellate review (including certiorari review by this Court during federal habeas corpus proceedings) is an important safeguard against improper imposition of the death penalty. See, e.g., Parker v. Dugger, 498 U.S. 308 (1991); Buchanan v. Angelone, 103 F.3d 344 (4th Cir. 1996).

In a recent case, three Justices of this Court criticized the expedited manner through which the Commonwealth sets executions and the consequences that this practice has on certiorari review. See Breard v. Greene, ___ U.S. ___, 118 S.Ct. 1352 (1998). In that case Breard, a citizen of Paraguay, raised several issues regarding violations of his rights under the

[2] In Sheppard's case, the District Court entered on Order staying his execution "pending habeas corpus review." Because federal habeas corpus review includes an opportunity to seek certiorari from this Court, Sheppard objected to the setting of his execution as a violation of the District Court's stay order. The trial court overruled this objection, and set the execution for January 20, 1999.

Vienna Convention. These issues were raised, for the first time, in his one and only attempt to seek federal habeas corpus relief. The Fourth Circuit denied relief on February 18, 1998, see Breard, ___ U.S. at ___, and the Commonwealth set Breard's execution for April 14, 1998. Id. Justices Stevens, Breyer and Ginsburg filed dissents from this Court's denial of a stay and certiorari, in which they each criticized the Commonwealth's unnecessary rush to execution.

In the strongest dissent, Justice Stevens wrote:

> The Court of Appeals' decision denying petitioner's first application for a federal writ of habeas corpus became final on February 18, 1998. Under this court's rules, a timely petition for a writ of certiorari to review that decision could have been filed as late as May 19, 1998. See Rule 13.1 ("[A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this court within 90 days after entry of the judgment"). Ordinary review of that petition pursuant to our rules would have given us additional time thereafter to consider its merits in the light of the response filed by the Commonwealth of Virginia. We have, however, been deprived of the normal time for considered deliberation by the Commonwealth's decision to set the date of petitioner's execution for today. **There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases**. . . . I would therefore grant the applications for a stay, and I respectfully dissent from the decision to act hastily rather than with the deliberation that is appropriate in a case of this character.

See id. at ____ (emphasis added).

Echoing Justice Stevens' concerns, Justice Breyer wrote:

> Virginia is now pursuing an execution schedule that leaves less time for argument and for Court consideration than the Court's rules provide for ordinary cases. Like Justice Stevens, **I can find no special reason here to truncate the period of time that the Court's rules would otherwise make available.**

See id. at ___ (emphasis added). Finally, Justice Ginsburg wrote that "I would grant the application for a stay of execution in order to consider **in the ordinary course** the instant petition, Breard's first federal petition for writ of habeas corpus." Id. (emphasis added).

2) Va. Code § 53.1-232.1 Is Unconstitutional As Applied.

There is nothing in the language of Va. Code § 53.1-232.1 that obligates the Attorney General of Virginia to immediately notify the trial court of the Court of Appeals' decision denying habeas corpus relief. Nevertheless, that is the unquestioned policy and practice of the Attorney General. As a result of this policy and practice, death-sentenced individuals in Virginia are afforded less time to seek habeas review from this Court than any other persons in the Commonwealth, and this Court is denied adequate time to consider their claims.

At the hearing held before the District Court, the Attorney General did not contest that he could wait thirty days, sixty days or even longer before notifying the trial court of the Court of Appeals' decision and triggering the deadlines contained in Va. Code § 53.1-232.1. See App. at 0060-93. In fact, the Attorney General did not deny that he could wait until **after** a Petition for Writ of Certiorari is filed in this Court (and it is resolved) before notifying the trial court pursuant to the statute. Id.

As explained below, because there is no rational reason for the manner in which Va. Code § 53.1-232.1 is being implemented by the Attorney General, the statute is unconstitutional as applied.

3) Va. Code § 53.1-232.1 Flunks Even Rational Basis Review.

It is difficult to conceive of a rational or legitimate reason supporting the Commonwealth's unequal treatment of death sentenced individuals exercising their rights to seek federal habeas corpus relief. While the Commonwealth certainly has an interest in achieving

finality in criminal cases, this interest applies equally across the wide spectrum of criminal cases. There simply is no legitimate or rational reason for the disparate treatment death sentenced individuals receive by virtue of Va. Code § 53.1-232.1 and its unfair application by the Attorney General.

In fact, this Court should be particularly suspicious of Va. Code § 53.1-232.1 because it circumscribes "a class of persons characterized by some unpopular trait or affiliation," and "create[s] or reflect[s] ...[a] likelihood of bias on the part of the ruling party." See Beazer, 440 U.S. at 592. It is difficult to conceive of a more unpopular class of persons than those convicted of capital murder and sentenced to death. This unpopularity, however, cannot support the Commonwealth's unconstitutional efforts to circumscribe these individuals' attempts to seek certiorari review from this Court during federal habeas corpus proceedings.

That the passage of Va. Code § 53.1-232.1 was motivated by a bias against persons sentenced to death is illustrated by the legislative history of the statute. The statute was proposed in 1995 by the Attorney General of Virginia. In the Attorney General's "statement of purpose and need" submitted in support of the truncated deadlines, he bemoans the "delay" occurring between "the end of federal habeas proceedings and the setting of an execution date." See App. at 0094-96. In a passage designed to justify the proposed deadlines, the Attorney General wrote:

> Probably the most extreme example of the problems created by permitting such delay is the notorious Roger Coleman case. The United States Supreme Court disposed of Coleman's case in June of 1991. An execution date should have been set immediately, but no date was set until February of 1992, when Coleman's execution was scheduled for the following May. **During the eleven-month delay, Coleman was able to mount an extensive public relations campaign that made him a "coverboy" for Time Magazine and the darling of the national media.** In addition, he filed a massive new round of state and federal litigation which was not resolved until just minutes before he was executed.

See id. (emphasis added).

It is not difficult to detect the bias and animosity flowing from this purported justification, particularly from the highlighted language. It may be understandable that the Commonwealth would prefer that the searching light of public and media scrutiny not be directed towards its capital punishment system – especially, God forbid, coverage sympathetic to the condemned – but this is not sufficient justification to permit the Commonwealth to trample Fourteenth Amendment equal protection guarantees.

The legislative history of § 53.1-232.1 is also notable because it demonstrates that the statute is not narrowly drawn to achieve its stated objectives. In the "statement of purpose and need," the Attorney General wrote:

> This proposal would ensure that execution dates are set at the end of the state habeas review process (so that federal habeas proceedings are promptly instituted) and at the **end** of federal habeas review (so that the chance of successive or repetitive litigation is minimized or eliminated).

See App. at 0095.[3] As noted above, federal habeas review encompasses certiorari review by this Court; this process ends when this Court either grants or denies relief under its ordinary procedures. To achieve its stated purpose, the statute should provide for the setting of executions within a certain time after a decision by this Court -- not by the Court of Appeals. Thus, the statute actually fails to achieve its stated purpose of having executions set at the **end** of the federal habeas corpus process, particularly in light of the manner in which the statute is being applied by the Attorney General.

[3] This statement presupposes that all successor litigation is without merit, hardly a proven proposition.

In M.L.B. v. S.L.J., 519 U.S. 102 (1996), this Court stated that "[t]his Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Id. at 110. By cutting short the time allowed to death sentenced individuals to seek certiorari review by this Court, Va. Code § 53.1-232.1 epitomizes such "unreasoned distinctions." Thus, both facially and as applied, Va. Code § 53.1-232.1 violates the Fourteenth Amendment Equal Protection rights of individuals under penalty of death in Virginia.

E. Sheppard Was Entitled To Preliminary Injunctive Relief.

1) The Standard For Preliminary Injunctive Relief.

In the Fourth Circuit, courts determine whether to grant a motion for preliminary injunctive relief based on the four-part test announced in Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc., 550 F.2d 189 (4th Cir. 1977). Under the Blackwelder test, the movant must demonstrate that an injunction is justified based upon the following factors: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant if the injunction is issued; (3) the movant's likelihood of success on the merits; and (4) the public interest. Id. at 193. Of these factors, "the two more important factors are those of irreparable harm to plaintiff without a decree and the likelihood of harm to the defendant with a decree." Id. at 196.

In Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 811 (4th Cir. 1991), the Court of Appeals made clear that the first factor to be considered is the "likelihood of irreparable harm to the plaintiff." Id. at 812. This is because "the basis of injunctive relief ... has always been irreparable harm and inadequacy of legal remedies." Id. (citations omitted). If a

movant demonstrates irreparable harm, then the district court must balance the respective hardships to the parties if preliminary injunctive relief is granted or denied. Id.

The "hardship balancing" test determines the extent to which a plaintiff must establish a likelihood of success on the merits of his claims -- the third prong of the Blackwelder test. As the Court of Appeals explained in Direx Israel:

> [T]he outcome of the hardship test fixes the degree of proof required for establishing the likelihood of success by the plaintiff. **If the hardship balance tilts sharply and clearly in the plaintiff's favor, the required proof of likelihood of success is substantially reduced.** Similarly, if the hardship to plaintiff is minimal or nonexistent ... then the burden on the plaintiff to establish likelihood of success on the merits becomes considerably greater. ...

952 F.2d at 812 (emphasis added).

Finally, the district court must consider the public interest. Applying this test, Sheppard was entitled to a preliminary injunction and the District Court erred in not granting his requested relief.

2) Sheppard Will Suffer Irreparable Harm.

As in all death cases where the threat of execution is imminent, the irreparable harm confronting Sheppard is both presumed and indisputable. A miscarriage of justice would result if the irremediable act of execution is taken before his challenge to his conviction and sentence of death can be fairly heard and finally adjudicated. For obvious reasons, this injury is not subject to redress if the injunctive relief requested through Sheppard's § 1983 action is denied or is withheld after a trial on the merits – a trial which may not occur before Sheppard's scheduled execution on January 20, 1998.

3) The Potential Harm to the Commonwealth is De Minimis.

The Commonwealth has argued that it will suffer great harm if preliminary injunctive relief is granted and it is prohibited from: (1) setting further executions in accordance with Va. Code § 53.1-232.1; and (2) carrying out executions previously set pursuant to the timing provisions of that statute (including Sheppard's). These claims of harm by the Commonwealth, however, cannot withstand judicial scrutiny.

If Sheppard prevails on the merits of his equal protection challenge to § 53.1-232.1, the only effect on the Commonwealth will be a relatively small delay in the speed with which it has been able to execute individuals convicted of capital crimes (and who do not ultimately obtain relief from this Court). The Commonwealth will be free to set executions for a date **after** this Court, after receiving a petition for writ of certiorari filed in accordance with the ordinary deadlines set forth in Rule 13, issues its decision denying habeas corpus relief. In a state where executions are currently taking place within five years of convictions for capital crimes, a delay of less than several months (at most) can hardly be said to inflict any "damage" upon the Commonwealth and its interests.

4) Sheppard's Likelihood of Success on the Merits is Overwhelming.

In this case, it is clear that the balance of hardships swings dramatically in Sheppard's favor. Thus, under Blackwelder, the required showing of a likelihood of success on the merits for issuance of preliminary injunctive relief was "substantially reduced." See 952 F.2d at 812. Nevertheless, as explained above, Sheppard's likelihood of success on the merits is overwhelming. In fact, the District Court found that Sheppard had raised serious questions regarding the constitutionality of Va. Code § 53.1-232.1, see App. at 0013; having done so, it should have entered the requested preliminary injunctive relief.

CONCLUSION

For the foregoing reasons, Sheppard's Petition for Writ of Certiorari should be granted and this Court should grant Sheppard's request for preliminary injunctive relief.

Respectfully submitted,
MARK A. SHEPPARD

By: _____
Counsel

Timothy M. Kaine (VSB No. 24165)
Dana J. Finberg (VSB No. 34977)
MEZZULLO & McCANDLISH
1111 East Main Street
Suite 1500
Richmond, Virginia 23219

Stephen D. Benjamin (VSB No. 18722)
Betty Layne DesPortes (VSB No. 34360)
BENJAMIN & DesPORTES, P.C.
11 South 12th Street, Suite 302
PO Box 2464
Richmond, Virginia 23218-2464

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