REQUEST FOR REPRIEVE

On Behalf Of Michael Carl George

TABLE OF CONTENTS

REQUEST FOR REPRIEVE
On Behalf Of Michael Carl George

I. INTRODUCTION

Michael Carl George is scheduled to be executed on Wednesday, April 14, 1993, at 11:00 p.m. Litigation over his *first* federal habeas corpus petition may have concluded by then or it may not. This much, however, is clear: if Mr. George dies on that day, Virginia's state and federal courts will have devoted -- if that is the right word -- only fourteen days to Mr. George's complete and first round of habeas litigation. Exercising both patience and perseverance, Virginia's state and federal courts typically have taken years to complete the round of habeas appeals. This is as it should be; retired Justice Lewis F. Powell, Jr., acknowledged in the Powell Commission report requested by Justice Rehnquist that:

> Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant.

Report On Habeas Corpus In Capital Cases, Criminal Law Reporter, September 27, 1989, p. 45 CrL 3240. Unfortunately, in Mr. George's case, his course of collateral review has been incomplete, unfair, unduly subject to time pressures, and without the assistance of counsel in a position to adequately represent Mr. George. Not only is Mr. George the loser from this, Virginia is too, for the quality control function provided by habeas corpus litigation cannot be expected to work when defense counsel has only a few weeks to investigate and file the petition and courts take only two weeks to consider and resolve that petition. Consequently, Mr. George asks the Governor to grant him a reprieve from his scheduled execution.

II. FACTS OF THE CASE

Michael George was convicted of capital murder and sentenced to death on Month __, 1991. As required by Virginia statute, his conviction and sentence were appealed to the Virginia Supreme Court, which affirmed. Mr. George then petitioned the United States Supreme Court for a writ of certiorari, which was denied on April __, 1992. The Attorney General informed Mr. George on Month __, 1992, that an execution date would be set if he did not request counsel. On January __, 1993, the Circuit Court of Prince William County set April 14, 1993, as the date on which Mr. George should die. On February 11, Mr. George asked the Circuit Court to appoint habeas counsel, and on February 24, the Court appointed William J. Baker to represent Mr. George.

At the same time, the Court ordered Mr. Baker to file Mr. George's habeas corpus petition by April 1, 1993. The Court did not explain how it expected Mr. Baker to perform the necessary research and investigation to prepare Mr. George's habeas petition, nor did the Court appoint an investigator or additional counsel to assist Mr. Baker in meeting the abbreviated schedule established by the Court.

Notwithstanding the burdens under which he was forced to operate by the Court's order, the approaching execution date, and his own busy trial docket, on March 29, 1993, Mr. Baker filed the habeas petition and a motion for a stay to permit the trial court to calmly deliberate the merits of the petition and to permit a normal appeal, should that be required. Late on March 31, the Attorney General filed an 18-page motion to dismiss, along with exhibits. The next morning, the Circuit Court directed Mr. Baker to be prepared to argue against the Attorney General's motion by 9:00 the next morning. Later the Court delayed

the argument for several hours to permit Mr. Baker to file a necessarily brief and hastily prepared brief in opposition to the Attorney General's motion.

On April 2, 1993 -- less than 35 days after Mr. Baker was appointed, less than five days after Mr. George's first habeas petition was filed, less than two days after Mr. Baker first received the Attorney General's motion to dismiss, and less than two hours after the Court received Mr. Baker's brief opposing that motion -- the Court heard argument on the merits of Mr. George's habeas petition. The Court concluded that the petition lacked merit. Accordingly the Court dismissed the motion and denied Mr. George's request for a stay of execution.

Mr. George noted his intent to appeal and asked the Supreme Court for a stay of execution. Mr. George pointed out that in every previous *first* appeal of the denial of habeas relief, the condemned man had enjoyed the benefit of the usual ninety day period in which to prepare his brief on appeal, and he requested that he be treated in then same way as those previous appellants. The Virginia Supreme Court denied Mr. George's request for a stay.

Mr. Baker believed he could not cobble together a competent and professional brief in the limited time left to him before April 14, and he was not admitted to practice in the federal courts, so he informed Mr. George that he should request counsel and a stay in the United States District Court. Mr. George did so on April __, 1993. As of yet, the District Court has not acted on Mr. George's request. Consequently, Mr. George now asks that the Governor grant Mr. George a reprieve to enable him to deliberately, efficiently, and fairly litigate his constitutional claims.

III. A REPRIEVE WILL ACCOMPLISH TWO SALUTARY GOALS FOR MR. GEORGE AND VIRGINIA

Two salutary outcomes will result from a reprieve. The chaotic course of litigation that now plagues this case will be averted in favor of the mature and deliberate course commonly and prudently followed in these cases. Second, the possibility that Virginia will execute a man effectively unrepresented by counsel will be prevented. In short, a reprieve will return this case to the ordinary, sensible, and reasonable mode of litigation that Virginia typically has employed for capital defendants.

A. VIRGINIA SHOULD REFRAIN FROM CHAOTIC LITIGATION OF CAPITAL CASES

Nothing creates more risk for error and places more strain on the credibility of our system of justice than a hasty and superficial rush to judgment by our courts. The American Bar Association Task Force, in its report on capital litigation, noted widespread agreement among judges, prosecutors, and defenders that hasty litigation spurred on by an approaching execution date was intolerable:

> Caprice Caspar, for example, an Assistant District Attorney in Houston, remarked that the setting of execution dates "is perhaps the single most substantial impediment to the orderly administration of capital habeas cases in Texas . . . . It makes a chaotic mess out of the system of administering these cases." Termed "cumbersome," "ludicrous," and "mind-boggling," the setting

> of artificial execution dates and the "scorpion in a bottle mentality" that it engenders "undermines the system by undermining the quality of justice during eleventh-hour[1] litigation."

Toward A More Just And Effective System Of Review In State Death Penalty Cases, American Bar Association, August 1990, p. 118-19.

Describing the problems created by habeas litigation accelerated by an execution date, Judge Alvin P. Rubin of the Fifth Circuit said, "The problem is not that we have to put in the extra time; it is that work done in this manner is necessarily less thorough and that the time allowed for consideration of issues is less than is desirable." ABA Report, p. 116. The ABA Task Force concluded that the "setting and constant resetting of execution dates . . . needlessly confuses the public and foments disrespect. *Toward A More Just And Effective System*, p. 119.

Recently, Chief Justice William Rehnquist formed a committee to investigate problems in capital litigation and appointed former Justice Lewis F. Powell, Jr., as its chairman. Acknowledging that "any system of review entails some delay," the committee nonetheless concluded that "Justice may be ill-served by conducting judicial proceedings under the pressure of an impending execution. . . . The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure." *Report On Habeas Corpus In Capital Cases*, Criminal Law Reporter, September 27, 1989, p. 45 CrL 3240.

Unfortunately, the evil identified by both the Powell Commission and the ABA Task Force as a major impediment to truth and fairness -- a pellmell rush to judgment by judges

---

[1]Quite often the term 'eleventh hour' connotes successive and repetitive litigation by prisoners who have already completed their first round of habeas and are facing execution dates. Mr. Caspar is referring here to the first round of habeas. Of course, since this is Mr. George's first round of habeas, the connotations of the term "eleventh hour" insofar as they suggest successive or repetitive litigation are inapposite.

swayed by pending execution dates -- has insinuated itself into Mr. George's case. A bare __ days before Mr. George's execution was scheduled, his state habeas counsel was appointed. The appointing judge, scorning the need for competent habeas counsel to conduct a thorough review of the record and a thorough investigation of the case, decreed that Mr. George's petition be filed by April 1.

A petition that almost certainly leaves out important and conceivably viable claims[2] was filed on March 29, and within three days the state moved to dismiss. State habeas counsel responded to the motion to dismiss only hours before the hearing on the petition, the motion to dismiss, and the request for stay. This hearing occurred on April 2. The state judge, having afforded Mr. George's state collateral proceedings less than five full days for review and deliberation, dismissed the petition and denied Mr. George's request for a stay. Appeal of this decision consumed __ days, rather than the usual several months or years. The Supreme Court's decision was announced on April __, 1993, leaving __ days for the entire federal habeas proceeding. So far the federal courts have endeavored to collapse their ordinarily lengthy proceedings into the meager time left; perhaps this will pass for justice.

Only those persons crediting the trial process with infallibility can draw comfort from collateral review as abbreviated and cursory as that provided to Mr. George. Reasonable people recognize that mature and deliberate consideration of capital habeas petitions enhances our system of justice, and they make allowance for such consideration. In Mr. George's

---

[2]For example, the petition included only one claim for ineffective assistance of counsel. There may be no such viable claims, but the conclusion that there are none can only be made after a thorough investigation not possible in 30 days for a busy criminal lawyer. Thus that the petition was filed prematurely -- though of course of necessity -- is indisputable.

case, reason has yet to emerge. So that it might, for his own good and for that of the Commonwealth, Mr. George asks Governor Wilder, to reprieve his scheduled execution.

B. VIRGINIA SHOULD EXECUTE NO ONE WHO IS EFFECTIVELY WITHOUT COUNSEL

Not once in the post-*Furman* era has Virginia executed anyone who was without counsel. This was true even of those condemned men who had completed their first round of collateral proceedings. Notwithstanding the General Assembly's recent passage of a statute requiring appointment of counsel in capital habeas cases, Virginia now threatens to execute a man who is effectively without counsel. This avoidable outcome would be an intolerable first.

Mr. George was represented at state habeas by William J. Baker, who though hampered by lack of time and resources, did as well as he could. Mr. Baker is not admitted to practice in federal courts, and this requires that new counsel, totally unacquainted with the case, be appointed to escort Mr. George through his first federal habeas proceeding. If thirty days is not enough time to adequately investigate and prepare a habeas petition -- and it is not enough -- then __ days manifestly is too little. This is not a no-fault divorce, this is an arcane and complex capital case. Giving Mr. George a lawyer with no time to investigate and prepare necessarily is the same as giving Mr. George an incompetent lawyer. Both Mr. George and the public will be hard-pressed to recognize the difference between a lawyer with no time to prepare and no lawyer at all. Yet that is the result mandated by the courts' refusals to stay Mr. George's execution.

This need not happen. A reprieve will permit Mr. George's attorney to investigate and prepare an adequate habeas petition. If that petition lacks merit, then in good time, the

Commonwealth's justice will be carried out. The deliberate process applied to every other case previously resulting in execution generally has demonstrated the reliability of the judgments of juries and courts. An important and essential component of that demonstration is the fact that all men previously executed by Virginia have been zealously defended by their lawyers to the end. If that component is missing, the public certainly would question whether Virginia had invested this case with the instruments of fairness supplied in every previous case. Why our tested and proven process should now be truncated is a riddle -- a riddle without a good answer. Accordingly, Mr. George requests that his execution be reprieved so that he and the Commonwealth can benefit from the deliberate and considered process appropriate in this capital case.

IV. CONCLUSION

The accelerated conduct of Michael George's postconviction litigation threatens the established and proven process by which Virginia demonstrates the reliability and justice of its death verdicts. Chaotic and abbreviated litigation of postconviction petitions cannot claim the public's respect or support any more than execution of persons effectively without representation can. Accordingly Mr. George asks the Governor to reprieve his scheduled execution so that he and Virginia can resume the pursuit of comprehensive and defensible resolution of his claims.

Michael Carl George