NO. 07-11019

IN THE UNITED STATES SUPREME COURT

OCTOBER 2007 TERM

In re: EARL WESLEY BERRY, *Petitioner*

RESPONSE TO ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 AND MOTION TO STAY MAY 21, 2008 (6 PM) EXECUTION

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CAPITAL CASE

Execution set for 6:00 p.m., May 21, 2008

ISSUES PRESENTED

1. Where a Petitioner has filed a claim contending that he is mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002), and relief has been denied respondents would assert that any second or successive habeas petition is barred by the provisions of 28 U.S.C. § 2244(b)(1).

2. Where a Petitioner presented his Eighth Amendment claim under *Atkins* in a prior state post-conviction petition and a prior federal habeas petition and then abandoned that claim for appeal and only when a date for his execution is set presents new evidence that only suggests the possibility of mental retardation there is no constitutional violation in denying a second and successive federal habeas petition.

3. Berry has not presented sufficient evidence of his mental retardation and ineligibility for capital punishment to warrant relief under 28 U.S.C. § 2241(a) or § 2241(b) or Rule 20.4(a).

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Respondent, State of Mississippi, respectfully prays that the Original Petition for Writ of Habeas Corpus be denied in this case.

PRIOR OPINIONS

The unpublished order of the United States Court of Appeals for the Fifth Circuit denying petitioner leave to file a successive petition for writ of habeas corpus in *In re Berry*, No. 08-60428, is attached to the petition as Appendix C. The unpublished order in *Berry v. State*, No. 93-DP-00059-SCT, setting the execution date for May 21, 2008, and the unpublished order in *Berry v. State*, No. 2008-DR-00717-SCT, denying leave to file a successive petition for post-conviction relief rendered by the Mississippi Supreme Court on May 5, 2008, are attached to the opinion as a single Appendix A. The May 12, 2008, since

unpublished order of the Mississippi Supreme Court denying rehearing in both *Berry v. State*, No. 93-DP-00059-SCT and *Berry v. State*, No. 2008-DR-00717-SCT are attached to the petition as Appendix C.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court, pursuant to the authority of 28 U.S.C.A. § 2241. He fails to do so.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Eighth Amendment to the United States Constitution. He fails to do so.

STATEMENT OF THE CASE

A. Procedural History

Before the Court is petitioner's fifth petition for writ of certiorari filed with this Court which challenges his sentence of death or execution. In this petition he challenges the decision of the Mississippi Supreme Court denying his third and successive motion for relief from judgment and/or for leave to file a successor petition for post-conviction relief in the trial court.

Earl Wesley Berry was indicted during the March 1988 Term of the Circuit Court of Chickasaw County, First Judicial District for the crime of capital murder while engaged in the commission of a kidnapping and as being an habitual offender in violation of MISS. CODE ANN. §97-3-19(2)(e) (Supp. 1988) and MISS. CODE ANN. §99-19-83 (Supp. 1988). A jury

found Berry guilty of capital murder and after a sentencing hearing before the same jury returned a sentence of death. After the sentence of death was imposed the trial court conducted a hearing on the habitual offender portion of the indictment. The trial court found Berry to be an habitual offender and sentenced him to life without parole.

On direct appeal of his original conviction and sentence of death to the Mississippi Supreme Court, Berry raised twenty-one claims of error. The Mississippi Supreme Court affirmed the conviction of capital murder and reversed and remanded the sentence of death on the basis of *Turner v. State*, 573 So.2d 657 (Miss. 1990), *cert. denied, Mississippi v. Turner*, 500 U.S. 910 (1991).[1] *See Berry v. State*, 575 So.2d 1 (Miss. 1990), *cert. denied, Mississippi v. Berry*, 500 U.S. 928 (1991).[2]

The retrial of the sentence phase of this case began on June 22, 1992. On June 25, 1992, the new jury again returned a sentence of death. Berry took his automatic appeal from this second sentence to the Mississippi Supreme Court. In this appeal Berry raised eighteen claims of error. Among these was a claim that the trial court erred in limiting consideration of his mental capacity to "Substantial Impairment" and in denying a requested charge on the

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[1]In *Turner* the Mississippi Supreme Court required the habitual sentencing hearing be conducted prior to the capital sentencing hearing. If the defendant was found to be an habitual offender during this hearing, the jury was to be instructed that if it returned a life sentence that life sentence would be without the possibility of parole.

[2]In Berry's original trial the trial court properly conducted the habitual sentencing hearing prior to the capital sentencing hearing, however, the court refused to allow petitioner to argue that a life sentence would be without parole or instruct the jury that a life sentence would be without parole.

statutory mitigating circumstance of "mental or emotional disturbance." Appellant's Brief, No. 93-DP-0059 at xiv-xv.

On November 20, 1997, the Mississippi Supreme Court affirmed the sentence of death on all grounds except the claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court remanded the case for a hearing in the trial court to determine whether there had been a violation of *Batson*. *See Berry v. State*, 703 So.2d 269 (Miss. 1997).

On remand the Circuit Court of Chickasaw County held a hearing on the *Batson* issue on January 16, 1998. At the conclusion of this hearing the trial court entered a written finding of fact denying relief. From this denial of relief Berry again sought relief by appealing the circuit court's decision to the Mississippi Supreme Court. On October 11, 2001, the Mississippi Supreme Court rendered its opinion affirming the trial court's denial of relief on the *Batson* issue. A timely petition for rehearing was filed and later denied on December 31, 2001. *Berry v. State*, 802 So.2d 1033 (Miss. 2001). After final affirmance of his second death sentence, Berry sought relief from the United States Supreme Court by filing a petition for writ of certiorari. The United States Supreme Court denied certiorari on October 7, 2002. *Berry v. Mississippi*, 537 U.S. 828 (2002).

Berry then filed an application for leave to file an application for leave to file a petition for post-conviction relief in the trial court on December 20, 2002, with the Mississippi Supreme Court. On April 18, 2003, petitioner filed a Supplement/Amendment to Petition for Post-Conviction Relief with the state court. Among the claims raised in

petitioner's application and amendment was the following claim:

> II. Earl Wesley Berry is mentally retarded and is therefore constitutionally barred from being executed by the State of Mississippi.

On July 1, 2004, the Mississippi Supreme Court denied post-conviction relief in a written opinion. A motion for rehearing was filed which again raised the mental retardation claim supplementing this claim with new exhibits. The motion for rehearing was later denied on September 30, 2004. *See Berry v. State*, 882 So.2d 159 (2004).

Berry then sought relief from the United States Supreme Court by filing a petition for writ of certiorari to the Mississippi Supreme Court. In this petition Berry raised the following claims:

> I. Have the Procedures Implemented by the State of Mississippi Pursuant to the Constitutional Mandate of the Court in *Atkins v. Virginia* Been Applied to Earl Wesley Berry in an Unconstitutional, Arbitrary and Capricious Manner Thereby Denying Mississippi Death-row Inmate Berry Due Process and Equal Protection of the Laws, and Resulting in a Substantial Likelihood That Earl Wesley Berry Will Be Executed in Violation of the *Atkins* Eighth Amendment Prohibition Against the Execution of the Mentally Retarded?
>
> II. Has the State of Mississippi Unfairly, Arbitrarily, and Unconstitutionally Rejected the Scientific Community's Well Established and Generally Accepted Principle Known as the "*Flynn Effect*" as Concerns the Administration of Inaccurate, Obsolete and Outdated I.q. Tests, and as a Result, Mississippi Death-row Inmate Earl Wesley Berry Has Been Denied His Claim of Mental Retardation, Contrary to the Mandate of *Atkins v. Virginia*, and Earl Wesley Berry Will Be Executed in Violation of the Eighth Amendment Prohibition Against the Execution of the Mentally Retarded?

Petition for Writ of Certiorari at ii.

Certiorari was denied on March 28, 2005. *See Berry v. Mississippi*, 544 U.S. 950 (2005).

Berry then challenged his conviction and sentence by filing a petition for writ of habeas corpus with the United States District Court for the Northern District of Mississippi. *See Berry v. Epps*, No. 1:04CV328-D-D. In this petition Berry raised twelve claims for relief. Among those claims of relief was the following:

> X. Petitioner Was Denied His Constitutional Rights to Due Process and Equal Protection and Rights Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution Where it Is Unlawful to Execute a Person Who Is Mentally Ill.[3]

On October 5, 2006, the district court entered its memorandum opinion and separate order denying habeas relief.[4] *See Berry v. Epps*, 2006 WL 2865064 (N.D.Miss. Oct. 5, 2006). Petitioner then filed a motion for a certificate of appealability with the district court requesting COA on five claims, the mental retardation claim was not among them. Later, on November 2, 2006, the district court entered a memorandum opinion and order denying the motion for COA. *See Berry v. Epps*, 2006 WL 3147724 (N.D.Miss. Nov. 2, 2006).

Berry timely perfected his appeal to the United States Court of Appeals for the Fifth Circuit and on November 27, 2006, filed a motion for issuance of a certificate of appealability presenting the same five claims presented to the district court. On April 25, 2007, this Fifth Circuit denied Berry's request for COA. *See Berry v. Epps*, 230 Fed.Appx. 386 (5th Cir. 2007). Petitioner then filed a petition for writ of certiorari with this Court

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[3]Docket Entry 38, Memorandum Opinion at 6.

[4]Docket Entry 38.

challenging the denial of COA by the Fifth Circuit. On October 1, 2007, the United States Supreme Court denied certiorari. *Berry v. Epps*, ___ U.S. ___, 128 S.Ct. 277, 169 L.Ed.2d 202 (2007).

On October 1, 2007, the State of Mississippi filed a motion to reset a date for the execution of the sentence of death. Berry filed a response in opposition to the motion to reset and a motion for leave to file a successor petition for post-conviction relief on October 4, 2007. On October 11, 2007, the Mississippi Supreme Court entered an unpublished order setting Berry's execution date for October 30, 2007. On October 11, 2007, the Mississippi Supreme Court entered an order dismissing Berry's motion for leave to file a successive petition for post-conviction relief holding all claims to be procedurally barred under MISS. CODE ANN. § 99-39-5(2)[5] and MISS. CODE ANN. § 99-39-27(9) and denied the request for stay of execution.[6] The state court denied Berry's motion for rehearing on October 18, 2007. Berry filed a petition for writ of certiorari from the decision denying leave to file a successive post-conviction petition with the United States Supreme Court. On October 29, 2007, the United States Supreme Court entered an order denying certiorari stating:

> The application for stay of execution of sentence of death presented to Justice SCALIA and by him referred to the Court is denied. The petition for writ of certiorari to the Supreme Court of Mississippi is denied. The judgment of the Mississippi Supreme Court relies upon an adequate and independent state ground that deprives the Court of jurisdiction.

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[5]The statute of limitations bar.

[6]The bar to successive petitions.

Berry v. Mississippi, ___ U.S. ___, 128 S.Ct. 528, 169 L.Ed.2d 369 (2007).

Also, in an attempt to stop his execution Berry filed a complaint under 42 U.S.C. § 1983, challenging the method of execution used in Mississippi on October 18, 2007, with the United States District Court for the Northern District of Mississippi. *See Walker v. Epps*, No. 4:07-cv-00176. On October 24, 2007, the district dismissed Berry from the lawsuit on motion of the State. *See Walker v. Epps*, 2007 WL 3124551 (N.D.Miss. Oct. 24, 2007). This Court affirmed the district court's dismissal on October 26, 2007. *See Berry v. Epps*, 506 F.3d 402 (5th Cir. 2007). On October 30, 2007, the United States Supreme Court granted a stay pending consideration of a petition for writ of certiorari challenging this Court's decision. *See Berry v. Epps*, ___ U.S. ___, 128 S.Ct. 531, 169 L.Ed.2d 370 (2007). On April 21, 2008, the United States Supreme Court denied certiorari. *See Berry v. Epps*, ___ U.S. ___, 2008 WL 1775034 (April 21, 2008).[7]

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[7]On May 2, 2008, Berry's counsel in the § 1983 action filed a motion for default judgment in this case as it relates to the four remaining plaintiffs based on the fact that no answer had been filed to the complaint. (Docket Entry 24) On May 5, 2008, the Clerk of the district court entered a default judgment in favor of the plaintiffs. (Docket Entry 25) On May 6, 2008, the State Defendants filed a motion to set aside the default judgment with a proposed answer attached. (Docket Entry 26) Late on May 12, 2008, counsel for the four remaining plaintiffs filed a response to the motion to set aside the default judgment and a cross motion to condition relief from the default on the striking of any procedural or time-based defenses the State Defendants may assert and further by granting Rule 60(b) relief as to separate plaintiff Earl Berry. (Docket Entry 27 & 28) At nearly midnight on May 13, 2008, plaintiffs' counsel filed a separate motion under Rule 60(b) moving to vacate the October 24, 2007, judgment of this Court dismissing him from this law suit and reinstating his challenge to the Mississippi protocol for lethal injection. Berry further requested a temporary restraining order and/or preliminary injunction staying the May 21, 2008, execution in this case. (Docket Entry 29) The State Defendants filed a response Berry's motion under Rule 60(b) for reinstatement into the § 1983 action on May 15, 2008. On May

After the April 21, 2008, denial of certiorari the State of Mississippi again moved to reset the execution date in this case. On April 29, 2008, Berry filed a response to the motion to reset and a motion for leave to file a successor petition for post-conviction relief in the trial court. The State responded on May 1, 2008. On May 5, 2008, the Mississippi Supreme Court entered an order setting the date for execution of the sentence of death in this case for May 21, 2008, at 6:00 p.m. The state court also entered a separate order denying leave to file a successive petition for post-conviction relief. *See* Pet. Appx. A. On May 12, 2008, Berry filed a motion for rehearing from the denial of the successive post-conviction petition with the Mississippi Supreme Court. The state filed a response on May 14, 2008. Berry's motion for rehearing was denied by the Mississippi Supreme Court on May 15, 2008. *See* Pet. Appx. B.

Petitioner on May 15, 2008, filed a motion requesting an order allowing the filing of a successive petition for writ of habeas corpus with the United States Court of Appeals for the Fifth Circuit in an attempt to relitigate his mental retardation claim. The state filed a response in opposition to this motion on May 19, 2008. Later on May 19, 2008, the Fifth Circuit entered an order denying leave to file a successive petition for writ of habeas on the basis of 28 U.S.C. § 2244(b)(1).

Even later on May 19, 2008, petitioner filed a petition for writ of certiorari

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16, 2008, the district court denied Berry's motion under Rule 60(b) for reinstatement and TRO and/or preliminary injunction. (Docket entry 32) The district court also set aside the default judgment on May 16, 2008. (Docket entry 31).

challenging the denial of his third post-conviction motion by the Mississippi Supreme Court on the basis of the time bar and the successive petition bar. *See Berry v. Mississippi*, No. 07-10974. The respondents filed their brief in opposition to the petition on May 20, 2008. That case is now pending before this Court.

Petitioner has now filed an original petition for writ of habeas corpus with this Court attacking the decisions of the Mississippi Supreme Court and the Fifth Circuit denying him leave to file successive post-conviction petitions in either state or federal court. The respondents now file their response to the original petition for writ of habeas corpus.

B. Statement of Facts

On Sunday, November 29, 1987, Earl Wesley Berry got drunk. Friends took him to Sadie Anderson's apartment, in Houston, Mississippi, to sleep it off. Around 8:00 p.m. that night, his brother, Danny arrived and woke him up. Berry left the apartment, driving his grandmother's car.

While driving through town, he saw Mary Bounds walking outside the Baptist Church. Mrs. Bounds had just left choir practice at the church. Berry stopped as Mrs. Bounds was putting her purse, Bible and songbook into her car, and grabbed her. She screamed and he hit her, telling her to shut up. Berry forced Mary Bounds into his car and drove south on Highway 15.

Stopping the car beside the highway, he got Mrs. Bounds out of the car and carried her over a fence and took her some twenty yards into a field. He told her to lay down, take

her pantyhose off and pull her dress up. Berry "told her then that I was going to f--k her just like that." Tr. 431. He decided he could not go through with it and took her back to his car.

Berry drove south, telling Mrs. Bounds several times to keep down. He turned off the highway, stopped and got her out of the car. As he began walking she stood by the car and begged "please". Berry began to beat her, first with his fist and then with his forearm. She fell and he picked her up and carried her into the woods. Berry then threw her down and ran.

Back in the car, Berry continued driving south. Worried about footprints, he threw his shoes, an unmatched pair of tennis shoes, out of the car. He went to his grandmother's house where his brother, James, let him in. Asking James to get some gas, Berry took off his clothes and burned them. Getting a towel, he wiped the blood from the car and then threw the towel into the pond beside the house.

When Mrs. Bounds was reported missing by her daughter, an investigation ensued. Her body was found three days later on December 2, 1987. An autopsy revealed that Mary Bounds died as a result of multiple blunt trauma to the sides of her head which resulted in subdural hematoma, hemorrhage, and bleeding within the brain.

During the investigation, blood was found on Mrs. Bounds' car and on leaves and gravel around her car. Her earrings were found in the same location. Blood was also observed on a tree and leaves where her body was found and samples of human blood consistent with that of either petitioner or Mrs. Bounds were taken from Berry's grandmother's car.

Authorities learned from James Berry, petitioner's brother, about the events at his grandmother's house on that Sunday evening. Berry was arrested at his grandmother's house and read his *Miranda* rights. He was transported to the Chickasaw county jail where he subsequently confessed.

The Mississippi Supreme Court also set forth the facts of this case in its opinion in the original direct appeal and repeated them in the direct appeal of the second sentencing hearing. *See Berry v. State*, 575 So.2d 1, 4 (Miss. 1990); *Berry v. State*, 703 So.2d 269, 274 (Miss. 1997).

REASONS FOR DENYING THE WRIT

Petitioner presented his *Atkins* claim in his first state post-conviction petition filed on December 20, 2002, after the decision of this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002) and relief was denied on the merits on September 30, 2004. *See Berry v. State*, 882 So.2d 157, 174-76 (Miss. 2004). Petitioner presented two questions regarding his *Atkins* claim to this Court in his petition for writ of certiorari after post-conviction relief was denied. This Court denied certiorari when that decision was challenged in this Court. *See Berry v. Mississippi*, 544 U.S. 950 (2005).

Petitioner then challenged the decision of the state court by filing a petition for writ of habeas corpus with the United States District Court for the Northern District of Mississippi. The district court considered the claim and addressed the *Atkins* claim in its memorandum opinion denying habeas relief on October 5, 2006. *See Berry v. Epps*, 2006

WL 2865064, 33-35. Berry did not seek a COA on the mental retardation claim from the district court thereby abandoning the claim from further federal review.

The respondents would assert that 28 U.S.C. § 2244(b)(1) prohibits the granting of a successive habeas on a claim that was presented in a prior petition.

The Eighth Amendment is not offended where a death sentenced inmate is given the opportunity to present an *Atkins* claim, have it decided on the merits and then abandons the claim by the denial of a successive "same issue" federal habeas petition.

Petitioner has failed to present sufficient evidence of the credibility and quality which entitled him to the immediate issuance of a writ of habeas corpus by this Court under 28 U.S.C. § 2241(a), or a transfer to the appropriate district court for a further determination of the issue under 28 U.S.C. § 2241(b).

Petitioner has failed to demonstrate the "exceptional circumstances" required by Rule 20.4(a) for the granting of an original writ of habeas corpus by this Court. Petitioner is not entitled to habeas relief.

Petitioner has presented no cognizable claim under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

ARGUMENT

1. Where a Petitioner Has Filed a Claim Contending That He Is Mentally Retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002), and Relief Has Been Denied, Respondents Would Assert That Any Second or Successive Habeas Petition Is Barred by the Provisions of 28 U.S.C. § 2244(b)(1), Further Petitioner has Failed to Demonstrate the Exceptional Circumstances that Merit the Issuance of the Writ of Habeas Corpus

under This Court's Rule 20.4(a).

Petitioner contends that in denying his motion to file a successive petition for writ of habeas corpus the United States Court of Appeals for the Fifth Circuit ignored the teachings of *Panetti v. Quarterman*, ___ U.S. ___, 127 S.Ct. 2842 (2007), with regard to the granting of successive petitions. Respondents would assert that petitioner's reliance on the Court's holding in *Panetti*, is misplaced. First, the respondents are not asserting the claim is barred even though it was raised in petitioner's first habeas, but not considered because it was premature as in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Second, this is not the case where the claim was dismissed for the failure to exhaust in an earlier petition, and the respondents are attempting to have the claim barred as a successive petition as in *Slack v. McDaniel*, 529 U.S. 473 (2000). Nor is it a case in which the respondents are asserting that petitioner is barred from filing a successive petition because he did not rase his claim in his first habeas petition as in *Panetti*. While Panetti had raised his competency to be tried in a prior petition he had never raised his *Ford* claim in a prior habeas petition. In explaining the posture of the case and discussing the jurisdiction of the Court, the Court held:

> We first consider our jurisdiction. The habeas corpus application on review is the second one petitioner has filed in federal court. Under the gatekeeping provisions of 28 U.S.C. § 2244(b)(2), "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed" except under certain, narrow circumstances. *See* §§ 2244(b)(2)(A)-(B).
>
> The State maintains that, by direction of § 2244, the District Court lacked jurisdiction to adjudicate petitioner's § 2254 application. Its argument is straightforward: "*[Petitioner's] first federal habeas application, which was*

fully and finally adjudicated on the merits, failed to raise a Ford claim," and, as a result, "[his] subsequent habeas application, which did raise a Ford claim, was a 'second or successive' application" under the terms of § 2244(b)(2). Supplemental Brief for Respondent 1. The State contends, moreover, that any *Ford* claim brought in an application governed by § 2244's gatekeeping provisions must be dismissed. *See* Supplemental Brief for Respondent 4-6 (citing §§ 2244(b)(2)(A)-(B)).

The State acknowledges that *Ford-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition. See* Supplemental Brief for Respondent 6. The State nevertheless maintains that its rule would not foreclose prisoners from raising *Ford* claims. Under *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), the State explains, a federal court is permitted to review a prisoner's Ford claim once it becomes ripe if the prisoner preserved the claim by filing it in his first federal habeas application. Under the State's approach a prisoner contemplating a future *Ford* claim could preserve it by this means.

. . .

Our earlier holding does not resolve the jurisdictional question in the instant case. *Martinez-Villareal* did not address the applicability of § 2244(b) "where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." *Id.*, at 645, 118 S.Ct. 1618, n. Yet the Court's willingness to look to the "implications for habeas practice" when interpreting § 2244 informs the analysis here. *Id.*, at 644, 118 S.Ct. 1618. We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions to govern a filing in the *unusual posture* presented here: a § 2254 application raising a *Ford*-based incompetency claim *filed as soon as that claim is ripe*.

127 S.Ct. at 2852-53.

The Court continued in *Panetti*:

There is, in addition, no argument that petitioner's actions constituted an abuse of the writ, as that concept is explained in our cases. Cf. Felker, 518 U.S., at 664, 116 S.Ct. 2333 ("[AEDPA's] new restrictions on successive

> petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ'"). To the contrary, we have confirmed that claims of incompetency to be executed remain unripe at early stages of the proceedings. *See Martinez-Villareal*, 523 U.S., at 644-645, 118 S.Ct. 1618; *see also ibid.* (suggesting that it is therefore appropriate, as a general matter, for a prisoner to wait before seeking resolution of his incompetency claim); *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (remanding the case to the District Court to resolve Ford's incompetency claim, even though Ford had brought that claim in a second federal habeas petition); *Barnard v. Collins*, 13 F.3d 871, 878 (C.A.5 1994) ("[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ"). *See generally McCleskey v. Zant*, 499 U.S. 467, 489-497, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).
>
> In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's "second or successive" bar. There are, however, exceptions. We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.
>
> *The statutory bar on "second or successive" applications does not apply to a Ford claim brought in an application filed when the claim is first ripe.* Petitioner's habeas application was properly filed, and the District Court had jurisdiction to adjudicate his claim.
>
> 127 S.Ct. at 2854-55. [Emphasis added.]

Unlike the case in *Panetti*, this case does involve a claim of abuse of the writ, because petitioner has already litigated this claim in a previous habeas petition. For that same reason this case does not fall under the provisions of 28 U.S.C. § 2244(b)(2). As much as petitioner would like to fit himself into the exception to 28 U.S.C. § 2244(b)(2), announced in *Panetti*, that shoe will not fit. Petitioner is attempting to relitigate an *Atkins* claim that was raised and

adjudicated in his first habeas petition. This claim, unlike *Panetti's* is not being filed in this case "as soon as that claim is ripe."

Petitioner's mental retardation claim became ripe with the announcement of the decision in *Atkins* on June 30, 2002. Petitioner was aware if that fact and raised his *Atkins* claim in his first state court post-conviction petition filed on December 20, 2002. In his petition he raised the following claim:

> II. Earl Wesley Berry is mentally retarded and is therefore constitutionally barred from being executed by the State of Mississippi

The Mississippi Supreme Court addressed the claim in *Berry v. State*, 882 So.2d 157 (Miss. 2004), holding:

> **XI. MENTAL RETARDATION.**
>
> ¶ 78. Berry raises two issues regarding mental retardation: 1) who determines mental retardation under *Atkins*; 2) whether he is mentally retarded under *Atkins*.
>
> *Who determines whether a defendant is mentally retarded.*
>
> ¶ 79. Berry devotes a significant part of his argument discussing what role judges and juries should play in determining whether a defendant is mentally retarded. We recently addressed this issue in *Russell v. State*, 849 So.2d 95, 145-49 (Miss.2003), but the briefs in this matter were filed prior to *Russell*.
>
> ¶ 80. In *Russell*, the petitioner argued that after meeting his burden of production, the determination of whether he is mentally retarded must be submitted to the jury and proven by the State beyond a reasonable doubt. *Id.* at 146. Rejecting this position, we stated, "We find that not being mentally retarded is not an aggravating factor necessary for imposition of the death penalty, and [therefor] *Ring* has no application to an *Atkins* determination." *Id.* at 148. Our reasoning is established on the fact that *Ring/Apprendi* and

Atkins discuss issues under the Sixth and Eighth Amendments, respectively. *See also Chase v. State*, 873 So.2d 1013 (Miss.2004).

¶ 81. We reject Berry's argument and cite the recent decision in *Russell.*

Whether Berry is Entitled to an Atkins Hearing.

¶ 82. At the outset, we note that we previously considered Berry's mental capacity in Berry II. *See Berry II*, 703 So.2d at 293-94.[8] However, because he was sentenced pre-*Atkins*, this issue was not scrutinized under the standards now imposed under *Atkins*.

¶ 83. In support of his claim that he is entitled to an *Atkins* hearing, Berry relies on affidavits from family members, a report from a social worker, testimony of psychologist, and in addition to other proof. Because the issue of his mental capacity and competency were prevalent throughout his trials and appeals, he also cites the record from the previous appeals. The State relies heavily on the testimony of Dr. Charlton Stanley and Dr. Paul Blanton.

¶ 84. Testifying during the sentencing phase of the original trial, Dr. Charlton Stanley, a forensic psychologist, testified that Berry had an IQ of 83, which classified him in the dull normal range of intellectual function. Though Dr. Stanley found that he suffered from organic brain damage, he testified that Berry was not mentally retarded.

¶ 85. Next, there is the evidence and testimony that was presented during resentencing. At this time, Berry called Dr. Paul Blanton, a clinical psychologist, who testified that Berry: 1) had full scale IQ of 76 (borderline intellectual functioning), and how such an IQ would affect him; 2) suffered from significant frontal lobe impairment; and 3) was not mentally retarded.

¶ 86. Second to testify was social worker Hope Stone, who testified regarding a report in which he outlined significant personal and family background information on Berry. The report showed that Berry's father suffered from mental illness and was treated at Whitfield; Berry had demonstrated poor educational performance; Berry had sustained several head traumas; Berry was treated at Whitfield in 1981; and that, from August 1987 thru November 1987, he was treated for paranoid schizophrenia at Pines Aftercare Program in Starkville.

¶ 87. Testifying last was Dr. Lewis Tetlow, a clinical psychologist, who diagnosed Berry as suffering from paranoid schizophrenia.

¶ 88. Aside from the testimony, Berry cites several affidavits from family and friends swearing, inter alia, that: 1) they had long known of that he was "slow" and lacked the appropriate mental capabilities for someone his age; 2) attended special educational classes; 3) as a child he was hospitalized for cottonseed oil poisoning.

¶ 89. To show that his intellectual deficiencies were documented prior to age 18, a standardized tests scores from January 1972 (13 years old) were provided. The report indicates that his I.Q. was 72.[9]

¶ 90. Last, there are the notes and records from staff at the Mississippi Department of Corrections hospital at Parchman following suicide attempts in 1981 and 1985.[10] During October of 1981, Berry was hospitalized after attempting suicide (swallowed razor blades). He was subsequently placed in the psychiatric wing. Staff notes during this period indicate that they considered him mentally retarded.

¶ 91. Again in April of 1985, Berry was admitted to the hospital after attempting suicide and, again the staff's notes indicate that they considered him to be mentally retarded.

¶ 92. We recently addressed the standard for determining whether a defendant is mentally retarded as to render him or her ineligible for capital punishment. *See Chase v. State*, 873 So.2d at 1019-23. If, on post-conviction review, a defendant produces evidence that he or she has scored 75 or below on an IQ test, we are to grant an evidentiary hearing for a mental retardation determination.

¶ 93. *Chase* requires that, in order to merit an *Atkins* hearing, the defendant or petitioner must produce the affidavit of a qualified expert stating that the defendant or petitioner is mentally retarded. Here, other than Dr. Blanton's testimony that Berry was probably not mentally retarded, there is no evidence in the record which would compel us to remand for an evidentiary hearing on the issue of mental retardation. *See Scott v. State*, 878 So.2d 933 (Miss.2004). This claim is without merit.

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8. At that time, Berry claimed the death sentence was disproportionate

considering he was "a paranoid schizophrenic functioning with brain damage and an impaired intellectual capacity" the death sentence was disproportionate. *Id.* at 293. Relying on *Edwards v. State*, 441 So.2d 84, 93 (1983), Berry argued that his sentence ought to be vacated. *Id.* We noted that a "diagnosis of paranoid schizophrenia does not necessarily prohibit the imposition of the death penalty." *Id.* at 293. Rejecting the claim that his circumstances closely paralleled those from *Edwards*, we distinguished his claim for several reasons, including: 1) there was expert testimony that he was competent to be executed; 2) the evidence was neither overwhelming nor uncontradicted; 3) he had never been diagnosed, treated, or institutionalized for his afflictions prior to killing Mary Bounds. *Id.*

9. The State discounts the results by arguing that report is not certified.

10. Apparently, Berry has attempted suicide on several occasions.

882 So.2d at 174-76.

Therefore, this claim was presented to the state court on post-conviction review and decided against petitioner. Petitioner challenged this ruling by filing a petition for writ of certiorari to the Mississippi Supreme Court with this Court. In this petition Berry presented the following questions:

I. Have the Procedures Implemented by the State of Mississippi Pursuant to the Constitutional Mandate of the Court in *Atkins v. Virginia* Been Applied to Earl Wesley Berry in an Unconstitutional, Arbitrary and Capricious Manner Thereby Denying Mississippi Death-row Inmate Berry Due Process and Equal Protection of the Laws, and Resulting in a Substantial Likelihood That Earl Wesley Berry Will Be Executed in Violation of the *Atkins* Eighth Amendment Prohibition Against the Execution of the Mentally Retarded?

II. Has the State of Mississippi Unfairly, Arbitrarily, and Unconstitutionally Rejected the Scientific Community's Well Established and Generally Accepted Principle Known as the "*Flynn Effect*" as Concerns the Administration of Inaccurate, Obsolete and Outdated I.Q. Tests, and as a Result, Mississippi Death-row Inmate

> Earl Wesley Berry Has Been Denied His Claim of Mental Retardation, Contrary to the Mandate of *Atkins v. Virginia*, and Earl Wesley Berry Will Be Executed in Violation of the Eighth Amendment Prohibition Against the Execution of the Mentally Retarded?

Petition for Writ of Certiorari at ii.

Certiorari was denied by this Court on March 28, 2005. *See Berry v. Mississippi*, 544 U.S. 950 (2005).

Petitioner then presented his *Atkins* claim in his first habeas petition filed with the United States District Court for the Northern District Court of Mississippi under a heading which read:

> CLAIM X: UNCONSTITUTIONAL TO EXECUTE ONE WHO IS MENTALLY ILL

On October 5, 2006, the district court issued its memorandum opinion denying habeas relief specifically addressing the *Atkins* claim.[8] The district court held:.

> **Claim X. Mental Illness**
>
> Petitioner raises a claim that Mississippi's post-conviction procedure was ineffective in protecting his rights in light of the United States Supreme Court decision *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), arguing that the evidence of his mental retardation that was

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[8]The respondents would also point out that petitioner likely would have been allowed to present the affidavit of the psychologist he now presents in his first habeas petition without risking a dismissal for failure to exhaust his state court remedies. The Fifth Circuit has held that so long as the new evidence presented in support of a claim on habeas review "supplements, but does not fundamentally alter" the claim presented in state court the evidence will be considered. *See Anderson v. Johnson,* 338 F.3d 382, 386 (5th Cir. 2003). Petitioner made no attempt to supplement the evidence presented to the state court with the "new" evidence he now presents. Petitioner has presented no valid reason, petitioner did not attempt, supplement his first habeas petition with this material.

presented to the Mississippi Supreme Court entitled him to an evidentiary hearing to determine whether he is eligible for the death penalty. (Pet.¶ 527). Petitioner alleges he has stated a prima facie case of mental retardation as defined by the American Association of Mental Retardation ("AAMR") and endorsed by the United States Supreme Court. Petitioner offers support for his claim by directing by the Court to affidavits from his family members, hospital records, educational records, social history, and childhood Intelligence Quotient ("IQ") scores, all of which were attached to his petition for rehearing following the denial of post-conviction relief and are alleged to evidence an onset of mental retardation prior to Petitioner reaching eighteen years of age. (Pet.¶¶ 519-524).[33]

In *Atkins*, the United States Supreme Court has held that it is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment to execute persons suffering from mental retardation. 536 U.S. at 321, 122 S.Ct. at 2252. The Court expressly left it to the individual states to develop a procedure for establishing a claim of mental retardation to properly restrict the imposition of the death penalty. *Id.* at 317, 2250. In response to *Atkins*, the Mississippi Supreme Court set forth the procedure for establishing a claim of mental retardation in *Chase v. State*, 873 So.2d 1013 (2004). The *Chase* court relied upon *Atkins* in its determination that a diagnosis of mental retardation requires the evaluation of both IQ and adaptive functioning. *Id.* at 1021.[34]

Trial judges are to make determinations of mental retardation for Eighth Amendment purposes by a preponderance of the evidence presented by both the defendant and the state. *Id.* at 1028. The procedure for making such determinations is as follows:

> We hold that no defendant may be adjudged mentally retarded for purposes of the Eighth Amendment, unless such defendant produces, at a minimum, an expert who expresses an opinion, to a reasonable degree of certainty, that:
>
> > 1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association;
> >
> > 2. The defendant has completed the Minnesota Multi phasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.

Id. at 1029. The court also established that an evidentiary hearing on the issue of mental retardation may be had only when the defendant has filed a motion seeking a hearing and attaching to it an affidavit from a qualified expert, which is a "licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation," who "opines, to a reasonable degree of certainty, that: (1) the defendant has a combined Intelligence Quotient ("IQ") of 75 or below, and; (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded, as defined herein." *Id.*

Petitioner first raised the issue of whether he is entitled to an *Atkins* hearing in his application for post-conviction relief. The Mississippi Supreme Court noted Petitioner's mental capacity was raised and addressed during Petitioner's direct appeal from his re-sentencing trial, but it considered the claim on post-conviction review as *Atkins* had been decided in the interim. *Berry IV*, 882 So.2d at 175. The court determined Petitioner was not entitled to an *Atkins* hearing, as he failed to produce the evidence required by *Chase*, and the court further found the record evidence did not warrant a hearing. *Id.* at 176.[35] In reviewing the evidence Petitioner presented in support of his claim, which included the testimony and reports of psychologists Dr. Charlton Stanley and Dr. Paul Blanton, the court found an evidentiary hearing was not required as both psychologists testified Petitioner was not mentally retarded. *Id.*

A careful review of the record fails to yield the support necessary to warrant an evidentiary hearing on Petitioner's claim of mental retardation. At the original trial, Dr. Stanley testified to Petitioner's "dull normal range" of intelligence, and in response to the inquiry of whether Petitioner was mentally retarded, Dr. Stanley replied, "[n]o sir, not even close." (Trial Tr. vol. 5, 588, lines 18-20, TR-89-DP-199, October 26, 1988). Later in the same line of questioning, Dr. Stanley stated that mental retardation was "not a factor in this case." (Trial Tr. vol. 5, 589, lines 6-10). At re-sentencing, Dr. Blanton also stated his opinion that Petitioner was not retarded. (Re-Sentencing Trial Tr. vol. 7, 485, June 24, 1992).

Dr. Stanley's September 28, 1988, report identifies Berry as having a full-scale IQ of 83 on the Wechsler Adult Intelligence Scale ("WAIS"). Dr. Blanton's October 28, 1988, report identifies a Wechsler Adult Intelligence

Scale-Revised ("WAIS-R") score of 76. Attached to Petitioner's motion for rehearing following the denial of post-conviction relief is an affidavit from Dr. James Robert Flynn on the "Flynn Effect," which premises that norm IQ scores across a population will increase as the test upon which the scores depend ages. Dr. Flynn's August 8, 2004, affidavit opines Petitioner's true IQ is under 75 and that he meets the diagnostic criterion for mental retardation. Dr. Flynn offers support for his opinion by noting that the 1988 testings were only one month apart, yet Berry scored 83 on one and 76 on the other, due to the age of the respective tests.

The reports of Dr. Stanley and Dr. Blanton fail to satisfy the *Chase* standards for obtaining an evidentiary hearing, as the reports fail to indicate Petitioner has the requisite IQ. *See Chase*, 873 So.2d at 1029 n. 20 ("defendants with an IQ of 76 or above do not qualify for Eighth Amendment protection"). Moreover, the affidavit from Dr. Flynn fails to meet the requirements of *Chase*, as Dr. Flynn is a political scientist-not a licensed psychiatrist or psychologist-as the standard requires. *Petitioner has failed to supplement his petition with the evidence necessary to warrant an evidentiary hearing on the issue of mental retardation.* As *Atkins* left it to the individual states to develop procedures to ensure the death penalty was constitutionally restricted in regard to mentally retarded offenders, and he has failed to establish compliance with the Mississippi procedure, Petitioner has failed to establish he is entitled to relief on this claim.[36] The Court finds the Mississippi Supreme Court did not reach a decision contrary to, or involving an unreasonable application of, clearly established Supreme Court precedent, nor was it unreasonable in its determination of facts with regard to Petitioner's claim.

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33. Petitioner relies upon the Grayson Memo for his argument. (Pet. ¶ 530). As previously noted, to the extent this argument relies on such, it is inadequately briefed and will not be considered in the Court's analysis.

34. The American Association on Mental Retardation ("AAMR") defines mental retardation as: (1) subaverage general intellectual functioning (*i.e.*, an IQ of approximately 70 or below) existing concurrently with (2) related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (3) onset before the age of eighteen (18). AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION,

CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed.1992). The Diagnostic and Statistical Manual of Mental Disorders defines mental retardation as follows: The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C). American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000)("DSM-IV-TR").

35. As Petitioner's application for post-conviction relief was already pending at the time *Chase* was handed down, the failure of Petitioner to produce the requisite affidavit would not have prevented a hearing to make a mental retardation determination had the record contained a qualified opinion that Petitioner was mentally retarded. *See, e.g., Scott v. State*, 878 So.2d 933, 948 (Miss.2004).

36. Petitioner filed numerous documents in support of his mental retardation claim and attached them to his application for state post-conviction relief. Among those filed documents were the report of Hope Stone, who prepared a social history; the report of Dr. Lewis Tetlow, a clinical psychologist, who documented Petitioner's diagnosis of paranoid schizophrenia; affidavits from friends and family members who allege Petitioner has always been "slow" and was enrolled in Special Education classes in school; as well as staff notes from the hospital at Parchman, wherein it is recorded that the staff believed Petitioner to be mentally retarded. (Records filed with post-conviction brief). These documents contain no information relevant to Petitioner's compliance with the procedure for raising an *Atkins* claim, and are as such omitted from the body of the discussion.

2006 WL 2865064, 33 -35. [Emphasis added.]

Petitioner then filed a motion requesting that a Certificate of Appealability be granted on five claims, however, the mental retardation claim was not among the five claims he presented to the district court. *See Berry v. Epps*, 2006 WL 3147724, *1 (N.D.Miss. Nov. 2, 2006).

The district court denied the certificate of appealability on November 2, 2006. *Id.* at 5. Further, Berry did not request that this Court grant a COA on the mental retardation claim or that the COA be expanded.[9] Petitioner clearly abandoned his mental retardation claim when the district court denied habeas relief on this claim.

When this Court denied certiorari in the federal habeas case on October 1, 2007, petitioner's execution was reset for October 30, 2007. Petitioner filed a motion for leave to file a successive petition for state post-conviction relief with the Mississippi Supreme Court. However, no claim relating to *Atkins* was presented to the state court in his motion. The Mississippi Supreme Court dismissed that motion as barred by the statutory time limitation bar and the successive petition bar. This Court denied certiorari from that dismissal on October 29, 2007. *See Berry v. Mississippi*, ___ U.S. ___, 128 S.Ct. 528, 169 L.Ed.2d 369 (2007). On October 30, 2007, this Court granted a stay pending the consideration of a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit which had affirmed the dismissal of Berry's 42 U.S.C. § 1983 suit challenging the protocol for the administration of lethal injection in Mississippi.[10] *See Berry v. Epps*, ___ U.S. ___, 128 S.Ct. 531, 169 L.Ed.2d 370 (2007). On April 21, 2008, the United States Supreme Court denied certiorari. *See Berry v. Epps*, ___ U.S. ___, 2008 WL 1775034 (April 21, 2008). After the

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[9]On April 24, 2007, the Fifth Circuit denied petitioner's request for the issuance of a COA on the grounds before the Court. *See Berry v. Epps*, 230 Fed.Appx. 386 (5th Cir.), *cert. denied*, ___ U.S. ___, 128 S.Ct. 277, 169 L.Ed.2d 202 (2007).

[10]*See Berry v. Epps*, 506 F.3d 402 (5th Cir. 2007).

April 16, 2008, decision in *Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520 (2008), this Court denied petitioner's petition for certiorari in the § 1983 case on April 21, 2008. *See Berry v. Epps*, ___ U.S. ___, 2008 WL 1775034 (Apr. 21, 2008).

On April 29, 2008, after the State of Mississippi had requested that an execution date be set, petitioner filed a motion for leave to file yet another successive state post-conviction petition. In this motion petitioner, for the first time in over three and a half years, asserted he was mentally retarded within the meaning of *Atkins* before the Mississippi Supreme Court. This is hardly raising the *Atkins* claim "as soon as that claim [became] ripe".

The respondents rely not on 28 U.S.C. § 2244(b)(2) as that section simply does not apply to the case at bar, but on the provisions of 28 U.S.C. § 2244(b)(1), which reads:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application *shall* be dismissed. [Emphasis added.]

In *Felker v. Turpin*, 518 U.S. 651 (1996), another case dealing with 28 U.S.C. § 2244(b)(2), this Court held:

> Section 2244(b) addresses second or successive habeas petitions. Section 2244(b)(3)'s "gatekeeping" system for second petitions does not apply to our consideration of habeas petitions because it applies to applications "filed in the district court." § 2244(b)(3)(A). *There is no such limitation, however, on the restrictions on repetitive and new claims imposed by §§ 2244(b)(1) and (2). These restrictions apply without qualification to any "second or successive habeas corpus application under section 2254."* §§ 2244(b)(1), (2).
>
> Whether or not we are bound by these restrictions, *they certainly inform our consideration of original habeas petitions*.

518 U.S. at 662-63. [Emphasis added.]

The Court also held:

> The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners. But we have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch 75, 94, 2 L.Ed. 554 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996).
>
> The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." In *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), we said that "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.*, at 489, 111 S.Ct., at 1467. *The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a "suspension" of the writ contrary to Article I, § 9.*
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> 518 U.S. at 664. [Emphasis added.]

The Court then referred to provisions of Rule 20.4(a) which sets forth the standards for granting original writs of habeas corpus by quoting the rule. The Court then concluded:

> Reviewing petitioner's claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court. *Neither of them satisfies the requirements of the relevant provisions of the Act*, let alone the requirement that there be "exceptional circumstances" justifying the issuance of the writ.
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> * * *
>
> The petition for writ of certiorari is dismissed for want of jurisdiction.

The petition for an original writ of habeas corpus is denied.

518 U.S. at 665.

The Court found that the petition did not meet the standards of § 2244 or Rule 20.4(a). Respondents would assert that the same reasoning applies here with the exception that § 2244(b)(1), is the pertinent statutory provision. Petitioner has not shown that he satisfies the provisions of § 2244(b)(1), This is a successive petition under the statute and should be dismissed.

The respondents are not asking that petitioner's habeas petition be procedurally barred because he did not raise this claim, the respondents are asking that this petition be denied because he has raised the claim and litigated it before the state and federal courts in previous petitions for relief. Under petitioner's reasoning no previously decided habeas claim could ever be barred from reconsideration.

Petitioner contends that he has continually maintained that he is mentally retarded since the decision in *Atkins*. This not true, petitioner abandoned his *Atkins* claim after the federal district court ruled against him on habeas review. Petitioner did not seek a COA on this claim thereby precluding any further federal review of this claim in his first habeas petition. Further, petitioner failed to raise this claim in the motion for leave to file a successive petition for post-conviction relief filed with the Mississippi Supreme Court on October 4, 2007. This is not an example of continually and repeatedly pressing his claim before the courts.

Neither has petitioner explained why he has waited until the last minute to attempt to raise this claim again. The "new" evidence he presents in support of this original habeas has been discoverable for years. Yet he furnishes an affidavit from Dr. Marc Zimmerman not signed until April 26, 2008, which states that in his professional opinion Berry is retarded. The problem is that Dr. Zimmerman has never tested or examined petitioner and relies only on prior IQ test and the affidavits of petitioner's family members to reach his conclusion. However, Dr. Zimmerman does not accept the prior scores obtained by the earlier psychologists or their opinions regarding mental retardation. Instead, Dr. Zimmerman has reduced Berry's earlier IQ scores based on the so-called "Flynn Effect."[11] Dr. Zimmerman reliance on the Flynn effect has been questioned before and he has stated that it is only used in death penalty cases.[12] It is clear that Dr. Zimmerman must use the Flynn effect to come

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[11]The "Flynn Effect" has not been recognized as scientifically valid by the United States Court of Appeals for the Fifth Circuit. *See In re Mathis*, 483 F.3d 395, 398, n. 1 (5th Cir. 2007) *citing In re Salazar*, 443 F.3d 430, 433 n. 1 (5th Cir.2006).

[12]The United States District Court for the Northern District of Georgia in *Ledford v. Head*, 2008 WL 754486 * 6-8 (N.D. Ga. March 19, 2008) also rejected the use of the "Flynn Effect". The *Ledford* Court's rejection of the "Flynn Effect" was based on the fact that it is only used in cases dealing with the death penalty to reduce IQ scores. The district court held:

> The Court was not impressed by the evidence concerning the Flynn effect. There was testimony at the hearing that the Flynn effect is a "generally recognized phenomenon," *but experts for both petitioner and respondent agreed that it is not used in clinical practice to reduce IQ scores*. (Hearing Tr. at 320-21, 439.) Both Dr. King and *Dr. Zimmermann testified that they have never seen it utilized except in capital cases. (Id.) Dr. Zimmermann specifically stated: "I don't think I've seen anybody who is doing this in clinical practice."* (*Id.* at 320-21.) Dr. King added: "I've never seen it done except in capital litigation cases." (*Id.* at 439.) The Court is hesitant to apply

to the conclusion that petitioner is mentally retarded. Thus, he is artificially deflating prior IQ scores to reach petitioner's desired result. Dr. Zimmerman's affidavit does not prove that Berry is mentally retarded.[13] Further, Dr. Zimmerman's affidavit is hardly credible.

The respondents would point out that Berry was examined by two different psychologist prior to his original capital murder trial and again by a different psychologist before the resentencing trial. Berry was examined by Dr. Charlton Stanley, a board certified forensic psychologist, and Dr. Paul Blanton, a clinical psychologist, prior to the original trial and Dr. Lewis M. Tetlow, a clinical psychologist, prior to the resentencing trial. During the original sentencing trial Dr. Stanley was called to testify for the defense. *See* Tr. 89-DP-0199 at 559-599. Dr. Stanley testified that Berry had a full scale I.Q of 83, which falls into the dull normal range intellectual functioning. Tr. 89-DP-0199 at 562; 575; 588-89; 594-95. Dr. Stanley even stated in his testimony that mental retardation "is not a factor in this case." Tr. 589.

During the retrial of the sentence phase, Berry called Dr. Paul Blanton to testify. Dr.

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a theory that is used solely for the purpose of lowering IQ scores in a death penalty context.
2008 WL 754486, *7.
This is the same Dr. Zimmerman, who in this case, has relied so heavily on the Flynn effect in his affidavit in this case. *See also* "*WAIS-III IQs of Criminal Defendants with a Mental Retardation Claim Should Not Be Reduced for the Flynn Effect*," American Journal of Forensic Psychology, Volume 25, Issue 4, 2007, pages 41-63.

[13]Petitioner has switched gears in his argument before this Court. He now argues that Dr. Zimmerman's affidavit shows that petitioner is "potentially" mentally retarded, whereas in state court and in the Fifth Circuit he argued that the affidavit showed that petitioner was, if fact, mentally retarded.

Blanton testified that when he tested Berry he obtained a full scale I.Q. of 76 which falls into the borderline range of intellectual functioning. Tr. 93-DP-0059 at 473; 479; 485-86. Dr. Blanton also stated that he had reviewed Dr. Stanley's report and noted that Dr. Stanley had obtained a full scale I.Q. of 83. Tr. 93-DP-0059 at 479. Dr. Tetlow testified that he administered the "first half of the Wechsler Adult Intelligence Scale, and I did just that part of it because he had been administered the test before, and I wanted to see if there was any change, which there was not." Tr. 93-DP-0059 at 515.

Berry also presented the state and federal courts with a standardized test score sheet that he purported to be from the school records of Earl Berry. The test scores from petitioner's school records do not support a claim that he is retarded. As Berry continually points out this document shows that he in the fifth grade he had an I.Q. of 72. An I.Q. of 72 falls within the borderline range of mental functioning, not in the mentally retarded range. Thus, this record from the fifth grade does not support a claim of mental retardation when viewed in light of other testing and what the defense experts testified to in both of Berry's trials.

Respondents would also point out that Berry testified in his own behalf at the guilt phase of the original trial in 1988. During his testimony, he denied that he committed the murder and testified that the confession obtained from him by law enforcement officers was coerced. Berry also testified as to his work experience. He testified that he worked in the lumber business cutting "pine and hard oak." He stated that he operated a "hundred thousand

rig" which is a "skidder."[14] He further stated that he also operated a chain saw in this work. Tr. 89-DP-0199 at 609-611. Hardly the type of equipment to be operated by a person who is mentally retarded. Berry further stated that he also operated a chain saw in this work. *Id.* In the second sentencing hearing Hope Stone, a social worker who compiled a social history of Berry's life, testified that his history showed that the jobs that he had he could do. Tr. 93-DP-0059 at 508.

In addition to the school document Berry presents the Court with documents from the Mississippi Department of Corrections. His Exhibit 10 to the petition petitioner presents the records of an admission to the prison hospital from April 22, 1985 to April 24, 1985. This documents have notations in them of "suicidal gestures/mentally retarded" and "mild mental retardation." These records do not indicate that any testing was done to determine whether Berry was mentally retarded. However, Berry's Exhibit 11 is the report from the Mississippi Department of Corrections of the administration of a battery of psychological test administered on December 7, 1981. This report shows that Berry was found to have IQ of 76, after the administration of the WAIS. An IQ of 76 is not within the range of mental retardation. Clearly, these records do not support Berry's claim that he is mentally retarded. These State would submit that these prison medical records do not contain any information demonstrate that Berry has been found to be mentally retarded as indicated by any recognized

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[14]A skidder is a piece of heavy machinery used in the logging industry. It is a four-wheel drive vehicle that has a blade on one end and an articulated hydraulic grappling arm on the other. It is used to collect the felled logs and carry them out of the woods and load them on to trucks for transport.

test or formal psychological diagnosis. These exhibits do not create the clear and convincing evidence necessary to sufficient to support the granting of a successive petition for writ of habeas corpus. In fact, mental health professional who has actually administered an intelligence test to Berry has ever found him to be mentally retarded. Because the issue of mental retardation was fully litigated in the first state post-conviction petition the Court below in his first round of habeas corpus he is not entitled to file a successive petition again raising the claim. Berry has failed to demonstrate the exceptional circumstances for relief under Rule 20.4(a).

Petitioner then asserts that a claim of actual innocence or miscarriage of justice claims can never be barred. But he states that even if he must show cause and prejudice to overcome the procedural bar to filing a successive petition he has shown it in this case. He rests his case for cause on a claim of ineffective assistance of state post-conviction counsel. However, 28 U.S.C. § 2254(i) states:

> The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

He argues that because Mississippi appoints counsel for death sentenced inmates for post-conviction review litigation that it has created a right to constitutionally effective counsel. He relies on a partial quote from the case of *Jackson v. State*, 732 So.2d 187 (Miss. 1999), to argue that post-conviction review in Mississippi is now a part of the direct appeal in a capital case. However, the full quote from the Mississippi court reads:

> We further find that in capital cases, state post-conviction efforts, though collateral, have become part of the death penalty appeal process at the state level. We therefore find that Jackson, as a death row inmate, is entitled to appointed and compensated counsel to represent him in his state post-conviction efforts.
>
> 732 So.2d at 191.

He argues that because the state court has made post-conviction a part of the appeals process that he is entitled to rely on this Court's precedent of *Evitts v. Lucey*, 469 U.S. 387 (1985), which extended the effective assistance of counsel to direct appeal. The Mississippi Supreme Court was only stating the obvious, post-conviction petitions will be filed in every death penalty case. It did not hold that they were part of the direct appeal. Petitioner also overlooks the later opinion in *Wiley v. State*,842 So.2d 1280 (Miss. 2003)

> ¶ 13. Wiley asserts that he is entitled to funds for "investigation, analysis, and presentation of facts outside of the appellate record," under Mississippi law as set out in *Jackson* despite that the right to counsel in post-conviction proceedings is discretionary. He relies on this Court's comments regarding *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), in his argument that he is entitled to litigation expenses and compensated counsel. The United States Supreme Court found in *Murray* that there was no constitutional right to counsel provided by the state in post-conviction proceedings. *See also Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). As *Murray* dealt with a Virginia case, this Court in *Jackson* found that Mississippi inmates have been unable to obtain counsel or help from institutional lawyers, and that Jackson was entitled to compensated counsel. 732 So.2d at 191.
>
> 842 So.2d at 1284.

Petitioner also fails to recognize that this Court's decision in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), was a case in which the state had furnished post-conviction counsel.

Petitioner had no right to constitutionally effective counsel on state post-conviction review.

Respondents would submit that petitioner's attempt to equate this case with that found in *Panetti* – "this case is to *Atkins* as *Panetti* was to *Ford*" – simply does not wash. Berry raised and litigated his *Atkins* claim in his first federal habeas petition. Panetti had never presented his claim in a habeas petition because it was not ripe when he filed his first petition.

Looking to the requirements of this Court's Rule 20.4(a), respondents would assert that petitioner has failed demonstrate the "*exceptional circumstances* warranting the exercise of the Court's discretionary powers" to grant an original writ of habeas corpus under 28 U.S.C. § 2241(a) or (b). This petition represents an abuse of the writ because the claim was litigated in a prior habeas and then abandoned. The provisions of 28 § 2244(b)(1) prevent the granting of this petition for writ of habeas corpus.

II. Petition Is Not Entitled to a Writ of Habeas Corpus as His Execution Will Not Be a Violation of the Eighth Amendment.

Based on the arguments made above, the respondents would assert that petitioner has not made a sufficient showing of exceptional circumstances to merit granting of this original petition for writ of habeas by this Court. The petition for writ of habeas corpus should be denied. Further, to the extent that petitioner requests a stay of execution in this document, that motion should also be denied.

CONCLUSION

For the above and foregoing reasons the original petition for writ of habeas corpus filed in ths case should be denied.

Respectfully submitted,

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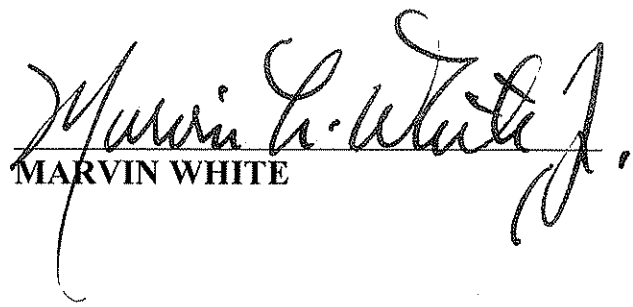
MARVIN WHITE
ASSISTANT ATTORNEY GENERAL
Counsel of Record

BY: 
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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, hereby certifies that I have this day caused to be mail, first-class postage prepaid, a true and correct copy of the foregoing RESPONSE TO ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 AND MOTION TO STAY MAY 21, 2008 (6 PM) EXECUTION, further counsel hereby certifies that he has also emailed a PDF copy of the same to the following:

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This the 21st day of May, 2008.

MARVIN L. WHITE, JR.