IN THE UNITED STATES SUPREME COURT

NO. _____

In re EARL WESLEY BERRY, **PETITIONER**

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

(THIS IS A DEATH PENALTY CASE)

---

*James W. Craig
Justin Matheny
PHELPS DUNBAR LLP
111 E. Capitol Street, Suite 600
Jackson, MS 39201
Tel: 601-352-2300

David P. Voisin (MSB #100210)
P.O. Box 13984
Jackson MS 39236-3984
(601) 949-9486

James M. Priest, Jr.
Gill, Ladner & Priest, PLLC
403 South State Street
Jackson, MS 39201
(601) 352-5700

ATTORNEYS FOR PETITIONER EARL BERRY

*Counsel of record

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this original petition pursuant to 28 U.S.C. §§ 2241(a), 2241(c)(3), 2254(a) (1994). *See Felker v. Turpin*, 518 U.S. 651, 658-62 (1996).

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 20.4(a)

Petitioner Berry complied with 28 U.S.C. §2242 by filing a Motion for Leave to File Successive Petition with the United States Court of Appeals on May 15, 2008. The Motion alleged the facts set forth in this petition which prove that Petitioner is mentally retarded and therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), and requested that the Court of Appeals allow the filing of a successive petition in the United States District Court for the Northern District of Mississippi. The Motion was denied by the Fifth Circuit on May 19, 2008 (see Appendix C). Under 28 U.S.C. § 2244(b)(3)(E), Berry cannot seek a petition for a writ of certiorari with this Court to review the denial of his motion for leave to file a successive habeas petition.

Also, Berry had previously filed a successive post-conviction petition in the Mississippi Supreme Court which presented the facts proving Petitioner's mental retardation and sought an order barring his execution under Atkins under Mississippi post-conviction law and procedure. That petition was denied on May 5, 2008 (Appendix A); a timely filed motion for rehearing was denied May 15, 2008 (Appendix B). A petition for writ of certiorari from these rulings was filed in this Court on May 19, 2008.

Thus, there is no other court from which Berry can seek relief and this petition is viable under Section 2242.

STATEMENT OF ISSUES

1. Does a Federal court have authority to consider a successive petition for writ of habeas corpus which alleges that a death-sentenced petitioner is mentally retarded and therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), although the petitioner raised an *Atkins* claim in his first Federal habeas petition?

2. Does the Eighth Amendment prohibit a State from executing a prisoner who, in a motion for leave to file a successive "same issue" Federal habeas petition, presents fact-specific evidence that he is mentally retarded?

3. Has Earl Berry presented sufficient evidence of his mental retardation and ineligibility for capital punishment to warrant either the immediate issuance of the writ of habeas corpus by this Court pursuant to 28 U.S.C. §2241(a), or a transfer to an appropriate district court for "hearing and determination" under 28 U.S.C. §2241(b)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATEMENT OF THE CASE

A. Procedural History

Earl Wesley Berry ("Petitioner" or "Berry") is under a judgment and sentence of death entered by the Circuit Court of Chickasaw County, Mississippi. The Mississippi Supreme Court, by order dated May 5, 2008, has set Mr. Berry's execution for 6 p.m. on Wednesday, May 21, 2008.

Berry was indicted for the crime of capital murder in violation of MISS. CODE ANN. § 97-3- 19(2)(e) and as an habitual criminal under MISS. CODE ANN. § 97-19-81 in the Circuit Court of Chickasaw County. A jury was impaneled and Berry was found guilty of capital murder. At the conclusion of the separate sentencing phase of the trial the 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 court found Berry to be an habitual offender and sentenced him to life without parole, should the sentence of death not be carried out.

On direct appeal of his original conviction and sentence of death the Mississippi Supreme Court affirmed the conviction of capital murder but 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). *See Berry v. State*, 575 So.2d 1 (Miss. 1990), *cert. denied, Mississippi v. Berry*, 500 U.S. 928 (1991) (*Berry I*).

At the conclusion of the retrial of the sentence phase, on June 25, 1992, the jury again returned a sentence of death. This is the sentence under attack in this Court. 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). However, the Court again remanded the case for a hearing in the trial court on whether there had been a violation of *Batson*. *Berry v. State*, 703 So.2d 269 (Miss. 1997) (*Berry II*).

After holding an evidentiary hearing the Circuit Court of Chickasaw County, the trial court denied relief on the *Batson* claim. On October 11, 2001, the Mississippi Supreme Court affirmed the trial court; a timely petition for rehearing was denied on December 31, 2001. *Berry v. State*, 802 So.2d 1033 (Miss. 2001) (*Berry III*). On October 7, 2002, this Court denied Berry's petition for certiorari. *Berry v. Mississippi*, 537 U.S. 828 (2002).

On December 20, 2002, Berry's counsel, the Mississippi State Office of Post-Conviction Counsel, filed an application in the Mississippi Supreme Court for leave to file a petition for post-conviction relief in the trial court (the required procedure under Mississippi's post-conviction statute). On April 18, 2003, a Supplement/Amendment to Petition for Post-Conviction Relief was filed with the State Supreme Court. On July 1, 2004, that Court issued an opinion denying the application for post-conviction relief. A timely motion for rehearing was filed and later denied on September 30, 2004. *See Berry v. State*, 882 So.2d 159 (2004) (*Berry IV*). This motion was the first time any expert testimony on Berry's mental retardation was filed in post-conviction proceedings; but the expert was a political scientist, not a mental health professional. A petition for writ of certiorari from the State Supreme Court's rulings was denied on March 28, 2005. *See Berry v. Mississippi*, 544 U.S. 950 (2005).

Petitioner then filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Mississippi. On October 5, 2006, the district court denied the petition. *See Berry v. Epps*, 2006 WL 2865064 (N.D.Miss. 2006) (*Berry V*). Petitioner filed a motion for a certificate of appealability (COA) with the district court. On November 2, 2006, the

district court denied the motion for COA. *See Berry v. Epps*, 2006 WL 3147724 (N.D. Miss. Nov. 2, 2006). On April 24, 2007, the Fifth Circuit issued an unpublished opinion denying COA. *See Berry v. Epps*, 230 Fed.Appx. 386 (5th Cir. 2007) (*Berry VI*). Certiorari from this ruling was denied on October 1, 2007. *Berry v. Epps*, ____ U.S. ____, 128 S.Ct. 277, 169 L.Ed.2d 202 (2007).

On October 11, 2007, the Mississippi Supreme Court entered an order setting Berry's execution date for October 30, 2007 and also denied Berry's application for leave to file a successor petition for post-conviction relief challenging the protocol used by the State of Mississippi in carrying out an execution by lethal injection based on the grant of certiorari in *Baze v. Rees*, ____ U.S. ____, 128 S.Ct. 34, 168 L.Ed.2d 809 (2007). On October 29, 2007, this Court denied this petition for writ of certiorari and the motion for a stay. *See Berry v. Mississippi*, ____U.S. ____, 128 S.Ct. 528, 169 L.Ed.2d 369 (2007).

The next day, however, this Court granted a stay of execution on the basis of the separate civil action filed in the U.S. District Court for the Northern District of Mississippi by Berry and other prisoners. *Berry v. Epps*, 128 S.Ct. 531 (2007). This civil action was based on 42 U.S.C. §1983, and was not a petition for writ of habeas corpus. *See Berry v. Epps*, 506 F.3d 402, 404-05 (5th Cir. 2007).

After the issuance of the opinion in *Baze*, this Court denied Berry's petition for writ of certiorari in the Section 1983 case. *Berry v. Epps*, __ S. Ct. __, 2008 WL 1775034 (2008).

Petitioner then filed a successive state post-conviction petition on April 29, 2008. The Mississippi Supreme Court denied this petition on May 5, 2008, and also set an execution date of May 21, 2008 at 6 p.m. *Berry v. State*, Nos. 93-DP-00059 & 2008-DR-00717 (Miss. May 5, 2008) (Attached as Appendix A).

On May 12, 2008, Petitioner Berry filed a motion for rehearing in the Mississippi Supreme Court. The Mississippi Supreme Court denied the motion for rehearing at noon on May 15, 2008. *Berry v. State*, Nos. 93-DP-00059 & 2008-DR-00717 (Miss. May 15, 2008) (Attached as Appendix B). This judgment is pending review by this Court of a Petition for Writ of Certiorari filed by Berry on May 19, 2008.

At 2 pm on May 15, Berry filed a Motion for Leave to File Second Habeas Corpus Petition in the United States Court of Appeals for the Fifth Circuit. That Motion raised the arguments presented here. On May 19, 2008, Respondents filed their response; Berry's counsel filed a rebuttal hours later. The Fifth Circuit denied Berry's Motion the same day, May 19. (Attached as Appendix C).

B. Facts Relevant to this Petition

1. Introduction. Earl Wesley Berry ("Petitioner" or "Berry") is categorically ineligible for the death penalty due to mental retardation. In support of his *Atkins* claim, Berry has presented evidence showing that (i) at age 13, his I.Q. score was measured at 72 (Exhibit 9, Excerpts from Educational Records of Earl Berry), (ii) that the officials of the Mississippi Department of Corrections classified him as mentally retarded more than twenty years ago (Exhibit 10, Excerpts of Prison Medical Records of Earl Berry), and (iii) a qualified psychologist, Dr. Marc Zimmermann, has averred "to a reasonable degree of scientific certainty, that Mr. Berry has an IQ of below 75 and/or has significantly subaverage intellectual functioning" and that these well documented mental limitations "became manifest before Mr. Berry was 18 years old." Ex. 1, Affidavit of Marc Zimmermann, Ph.D.

Notwithstanding this substantial showing of mental retardation, Earl Berry remains on death row, scheduled to be executed on Wednesday, May 21, at 6 p.m.

2. Berry's Childhood. No one who has ever spent any significant amount of time with Earl Berry doubts that he is mentally retarded. His intellectual and social limitations stood out from an early age. He had difficulty in school, socializing with family and friends, communicating with people, and taking care of his basic needs – limitations attested to by numerous family members. For example, Velma Berry, his mother, recalls that her son was late in reaching various developmental milestones. Ex. 2, Affidavit of Velma Berry. He did not walk until he was two years old, he nursed until he was four years old, he did not begin talking until he was five years old, and he did not learn to tie his shoes until he was seven or eight years old. *Id.*

Wilma's recollections are similar to those of Sarah J. Akins, who was a friend of the Berry family since the early 1970s. According to Sarah, she noticed early on that Earl had something wrong with him and seemed like he might be mentally retarded. Ex. 3, Affidavit of Sarah J. Akins.

Moreover, Velma recalls that Earl's younger brother Danny helped him with his speech because "[Earl] had a hard time putting words in sentences." Ex. 2. His older brother James avers that because Earl had trouble walking as a child – even to the age of five – he would carry him, and did so until Earl became too heavy for James to carry. Exhibit 4, Affidavit of James W. Berry.

Earl always stood out as someone who was limited mentally and socially. Velma realized when Earl was young that there was something wrong with him. He was different from other children. He was a loner, and he had trouble communicating with his brothers and sisters. "He was very quiet and generally did not interact or relate well to the other children." Ex. 2. Wilma Berry, Earl's aunt, made similar observations. As she put it, "[f]rom a young age, Earl

gave signs of being a child who was mentally challenged." Exhibit 5, Affidavit of Wilma Berry. Greg, his nephew, mentioned that he watched his uncle struggle to function as a "normal person." Exhibit 6, Affidavit of Greg Berry.

Earl Berry's difficulties with social interaction continued during school and into adulthood. Charles Pepper, a teacher at one of the schools Mr. Berry attended, recalled that Mr. Berry "appeared withdrawn most of the time. He tried to fit in but he had trouble doing that." Exhibit 7, Affidavit of Charles Pepper. James Atkins, a classmate of Mr. Berry's, found that Mr. Berry "did not seem to mature like other young people did." Exhibit 8, Affidavit of James Atkins.

Other observers noted that Earl "seemed to prefer to play with younger children rather than with children his own age" and was a "child in a grown-up's body." Exs. 4, 5, 6, and 8. For example, his brother James recalls a time when Mr. Berry lifted him up by the belt loop. The loop broke, and James fell to the floor and broke his shoulder. According to James, Earl was very upset about hurting him and "he really didn't understand what happened." Ex. 4. Greg Berry also recalls his uncle having difficulty understanding how things worked, and that, if Earl was placed in a challenging situation, "stress would completely overwhelm him. Earl would feel lost, and he would hold his head down, and shy away from the situation all together." Ex. 6.

Berry never learned to care for himself. After leaving school, he lived with his grandmother. Ex. 2; Ex. 6. He never learned to care for himself. As James recalls, Earl did not cook, clean, iron, or do laundry although all of the children were assigned such chores. Earl was unable to do them. Ex. 3. James also mentioned that his brother had to be told to bathe and change clothes. *Id.*

Mr. Berry's mother also states that her son had trouble taking care of himself. She did not trust him to go to the store, and, as James stated, Earl did not cook or clean. Ex. 2. Velma Berry also states that Earl had to be shown more than once how to do anything. She even recalled that it took him three tries to get a driver's license, and he had to take the oral examination because his reading was so poor. Ex. 2.

3. Berry's School and Institutional Records. Berry's school and institutional records likewise demonstrate that there is a substantial likelihood that he is mentally retarded. Most prominently, the first of Berry's four known IQ scores, located in his school records, reflects that he had an IQ score of 72 at age 13. Exhibit 9, Educational Records of Earl Berry.

In later years, when Berry was incarcerated on an offense before the homicide of Mary Bounds, the Mississippi State Department of Corrections' medical staff diagnosed him as mentally retarded. Exhibit 10, Excerpts from Prison Medical Records of Earl Berry. Mr. Berry was administered the Wechsler Adult Intelligence Scale ("WAIS") and had a 68 Verbal Score, a 90 Performance Score, and a Full Scale Score of 76. Exhibit 11, Prison WAIS. Because of the disparity between the verbal and performance scores, it was suspected that Berry suffered from brain dysfunction. Ex. 10 & 11.

Petitioner was tested a third time when Dr. Charlton Stanley administered portions of the "WAIS" prior to Berry's original capital murder trial. Exhibit 12, Report of Dr. Stanley. Dr. Stanley noted that Berry "is not good at reasoning through the solution to a problem," adding "[h]is social judgment could be said to be poor. He is concrete-minded, and tends to take things literally." Dr. Stanley also concluded that Berry suffers from brain damage, finding indications of dysfunction in the left parieto-occipital region of the brain and the left frontal portion of the brain. As Dr. Stanley noted, "Primary impairment would be seen on higher intellectual tasks

including school related tasks. He also has problems with judgment and abstract thinking." *Id.* Dr. Stanley's "WAIS" administration resulted in a verbal score of 77, a performance score of 91, and a full scale score of 83.

A fourth IQ test was conducted by Dr. Paul Blanton. Exhibit 13, Report of Dr. Blanton. On the WAIS-R, Mr. Berry had a verbal score of 74, a performance score of 84, and a full scale score of 76. On the Wechsler Memory Scale Revised (WMS-R), Mr. Berry scored a 54, which 'is indicative of moderately impaired global memory functions and exceeds less than one percent of scores of same-aged individuals within the normative sample."

According to Dr. Blanton, Mr. Berry's level of performance on subsequent measures of neuropsychological functioning was significantly below that predicted from current levels of intellectual functioning. Ex. 13. Similarly, the "[a]ssessment of memory functions reveals Mr. Berry to be markedly impaired at new learning and recall of both verbal and nonverbal information." Finally, Dr. Blanton found that "[f]urther neuropsychological test data reveal Mr. Berry to be impaired at executive motor and executive cognitive functions." *Id.*

4. Current Expert Testimony. Significant expert analysis undertaken at the instance of Petitioner's current counsel indicates that mental retardation is the appropriate diagnosis for Earl Berry. Psychologist Dr. Marc Zimmermann from Baton Rouge, Louisiana reviewed records and affidavits concerning Berry's background and concluded, to a reasonable degree of scientific certainty, that Mr. Berry has an IQ of below 75 and/or has significantly subaverage intellectual functioning. Ex. 1, ¶ 18.

Likewise, based on his review of these materials, Dr. Zimmermann has concluded, to a reasonable degree of scientific certainty, that additional testing will determine that Mr. Berry is mentally retarded. Ex. 1, ¶ 20. Specifically, Dr. Zimmermann found evidence that Mr. Berry

had adaptive functioning deficits in the area of functional academic skills. He also found evidence of deficits in the areas of communications, social/interpersonal skills, self-care, and work, leisure, health, and safety. *Id.* ¶ 31. Moreover, these deficits and limitations became manifest prior to the age of 18. *Id.* at ¶ 32. Based on a review of the results of prior testing, Dr. Zimmermann concluded that Mr. Berry was not malingering, but added that he is willing to administer additional appropriate tests to assess whether he is malingering. Ex. 1, ¶ 19.

Dr. Zimmermann also explains the importance of the "Flynn Effect," the documented phenomenon that IQ scores rise 0.3 points for each year after a test is published.[1] As Dr. Zimmerman explained, the "Flynn Effect" means that each of Berry's test scores must be adjusted downward to assess the true extent of his mental functioning. As applied to Berry's second IQ test score of 76:

> If we allow for this phenomenon and multiply 0.3 by the number of years (26) between the time the WAIS was published (1955) and the date Mr. Berry was administered the WAIS . . . (1981), we arrive at a figure of 7.8, which when subtracted from the Full Scale IQ Gambrell found (76), we arrive at an actual full scale IQ score of 68, which is within the range which could be considered Mentally Retarded.

Applying the same metric to Berry's subsequent IQ tests, Dr. Zimmerman found that each of Berry's scores was "within the range which could be considered Mentally retarded": His

[1] See Exhibit 14, Affidavit of James Flynn. A number of courts have addressed the Flynn Effect and found that it should be considered in evaluating IQ results. *See Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005) (instructing district courts to consider the persuasiveness of expert evidence on the Flynn Effect); *Williams v. Campbell*, No. 04-0681-WS-C, 2007 WL 1098516, at *47 (S.D. Ala. Apr. 11, 2007) (acknowledging potential unreliability of IQ scores that do no take into account the Flynn Effect); *People v. Superior Court*, 155 P.3d 259 (Cal. 2007) (California Supreme Court upholding lower court finding of mental retardation that accepted and applied the Flynn Effect in interpreting the defendant's IQ scores); *State v. Burke*, 2005 WL 3557641, at *12-13 (Ohio App. 2005) (concluding trial courts must consider evidence presented on the Flynn Effect); *U.S. v. Parker*, 65 M.J. 626, 629-30 (N.M. Ct. Crim. App. 2007) (finding courts should standardize IQ scores for the standard error of measurement and the Flynn Effect in determining whether an offender qualifies as mentally retarded under *Atkins*).

1988 score of 76 (on the subsequently published WAIS-R) would be adjusted to 74; and Berry's 1988 score of 83 on the WAIS – a test that, according to Dr. Zimmerman, was by then "obsolete" – would be adjusted to 73. Ex. 1.

Thus, "[f]actoring in the Flynn effect, Mr. Berry has obtained IQ scores of 68, 73, and 74 (as well as the 72 noted on his school records)." Every one of these scores is below 75, and thus below "the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5.

Based on his review of this extensive evidence of Mr. Berry's deficits in adaptive functioning, Dr. Zimmermann concluded, "to a reasonable degree of scientific certainty, that further testing and evaluation will demonstrate that Mr. Berry has significant deficits in adaptive functioning in at least two areas. He has a strong deficit in functional academic skills, and the materials also suggest deficits in communications, social/interpersonal skills, self care, and work, leisure, health, and safety." Exh. 1, ¶ 31.

Also, under accepted definitions of mental retardation, there must be evidence of the onset of problems prior to age 18.

Dr. Zimmermann had no trouble concluding that Mr. Berry satisfies this criterion:

> Based on the materials that I have reviewed, I conclude, to a reasonable degree of scientific certainty, that the onset of these deficits and limitations became manifest before Mr. Berry was 18 years old. School records indicate significant academic problems. Furthermore, as noted previously, Velma Berry reports that her son was late in reaching various developmental milestones. For example, he did not learn to speak until he was five years old, and the entire family regarded him as slow. Furthermore, the experts who evaluated him found brain dysfunction and suggested that his head trauma incurred at a young age may explain many of Mr. Berry's deficits.

Exh. 1, ¶ 32.

REASONS FOR GRANTING THE WRIT

I.

Under the Principles of *Panetti v. Quarterman* , A Successive Same-Issue Federal Habeas Petition Seeking Adjudication Whether the Petitioner Is Mentally Retarded and Thus Ineligble for Capital Punishment Is Not Barred by AEDPA; the Writ of Habeas Corpus Must Remain Available To Determine if a Death-Sentenced Prisoner Is "Innocent of the Death Penalty"

We acknowledge that ordinarily, a second petition for writ of habeas corpus that raises a claim previously adjudicated in the prisoner's first petition is subject to dismissal on its face pursuant to 28 U.S.C. §2244(b)(1). Berry's prior Federal habeas corpus petition did raise a claim under *Atkins. Berry v. Epps*, 2006 WL 2865064 (N.D.Miss. 2006), *certificate of appealability denied, Berry v. Epps,* 230 Fed.Appx. 386 (5th Cir. 2007).

The Fifth Circuit's denial on May 19, 2008, of Berry's motion for leave to file a successive petition under *Atkins* rested exclusively on that procedural history. The Court of Appeals held that:

> [L]eave to file a successive habeas petition must be denied if the claim to be presented was presented in a prior habeas petition. 28 U.S.C. §2244(b)(1). That is the case here. Berry urges various bases for §2244(b)(1)'s not applying. AEDPA does not provide for such exemptions, nor is there other authority that would permit them.

App. C at page 3.

The Fifth Circuit's analysis ignores the fact that, just last Term, this Court allowed the filing of a "same-issue" successive petition raising the prisoner's ineligibility for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986), notwithstanding the lack of any express exception in

AEDPA for *Ford* claims. "The Court has declined to interpret 'second or successive' as referring to all §2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior §2254 application." *Panetti v. Quarterman*, 127 S.Ct. 2842, 2853 (2007), *citing Slack v. McDaniel*, 529 U.S. 473, 487, 120 S.Ct. 1595 (2000). *See also Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998).

In *Panetti*, this Court held that:

> The phrase "second or successive" is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996.

Id., 127 S.Ct. at 2853. This includes the Court's prior holdings on the pre-AEDPA doctrine of "abuse of the writ." *Id.*, 127 S.Ct. at 2854-55.

There was no particular novelty in this Court's refusal in *Panetti* to constrain habeas corpus within the narrowest interpretations of statutory enactments. In *Schlup v. Delo*, 513 U.S.298, 319 n.35 (1995), this Court noted "the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence." In *McCleskey v. Zant,* 499 U.S. 467, 489, 111 S.Ct. 1454, 1467 (1991), the Court noted that the doctrine of abuse of the writ of habeas corpus "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *See also Brecht v. Abrahamson*, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993) ("We have filled the gaps of the habeas corpus statute with respect to other matters").

In addition to pre-AEDPA case law, the *Panetti* Court also interpreted Section 2244(b)(1) in light of AEDPA's purposes: "[t]he statute's design is to further the principles of comity, finality, and federalism," *id.* at 2854, *citing Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029 (2003) *and Day v. McDonough*, 547 U.S. 198, 205-06 (2006).

The Court also rejected any interpretation of Section 2244(b)(1) that would "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti*, 127 S.Ct. at 2854.

The review Petitioner seeks is consistent with this Court's historic role in administering the writ of habeas corpus so as to do justice, with due regard for legislative enactments, but without giving those enactments the last word. Each of the considerations from *Panetti* discussed above support the proposition that a prisoner who raises serious factual issues as to his membership in any of the three groups with "bright-line" ineligibility for capital punishment under the Eighth Amendment – not just those found to be insane under *Ford* -- should be allowed to proceed in the district court to prove that he is, in fact, ineligible to be executed.

1. Pre-AEDPA Precedent Allows Successive Petitioners An Opportunity to Prove They Are "Innocent of the Death Penalty." First, under pre-AEDPA case law, the merits of a claim of ineligibility were procedurally viable, even in a successive ("same-claim") petition, to avoid a "fundamental miscarriage of justice" and prevent the execution of one who is "innocent of the death penalty." *See Sawyer v. Whitley*, 505 U.S. 333 (1992); *see also Magwood v. Culliver*, 481 F. Supp.2d 1262, 1280 (M.D.Ala. 2007) (finding habeas petitioner "innocent of the death penalty" based on violation of due process that rendered him ineligible for execution).

This Court developed the "fundamental miscarriage of justice" exception in the face of arguments that previous Congressional actions related to habeas corpus imposed a strict scheme requiring the dismissal of successive petitions. In 1966, Congress amended 28 U.S.C.§2244(b) to eliminate the "ends of justice" language that had been the basis of this Court's holding in *Sanders v. United States*, 373 U.S. 1, 15-17, 83 S.Ct. 1068, 1077-78 (1963), that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice."

Congress then, in 1976, promulgated Rule 9(b) of the Rules Governing Habeas Corpus Proceedings in part to deal with the problem of repetitive filings.

Yet, in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616 (1986), seven members of this Court held that the 1966 statutory amendments and the 1976 rules changes did not require the automatic dismissal of successive habeas corpus petitions. *Kuhlmann*, 477 U.S., at 451, 106 S.Ct., at 2625 plurality opinion); *id.,* at 468-471, 106 S.Ct., at 2634-2636 (Brennan, J., dissenting); *id.,* at 476-77, 106 S.Ct., at 2638-39 (Stevens, J., dissenting).

As this Court later explained the development:

> Thus, while recognizing that successive petitions are generally precluded from review, Justice Powell's plurality opinion expressly noted that there **are "limited circumstances under which the interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment."**

Schlup, 513 U.S. at 320, 115 S.Ct. at 863, *citing Kuhlmann*, 477 U.S. at 452, 106 S.Ct. at 2626 (plurality) (boldfaced emphasis added).

This Court thus decided that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Schlup*, 513 U.S. at 321, *quoting Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649 (1986). And using a similar formulation, this Court applied the "fundamental miscarriage of justice" test to same-claim successive petitions. *Schlup*.

In *Sawyer*, *supra*, this Court expressly applied the "fundamental miscarriage of justice" test to same-claim successive petitions that challenged only the prisoner's sentence. The Court reasoned:

> The present case requires us to further amplify the meaning of "actual innocence" in the setting of capital punishment. A prototypical example of "actual innocence" in a colloquial sense is the case where the State has convicted the wrong person of the crime.
>
> . . . .
>
> It is more difficult to develop an analogous framework when dealing with a defendant who has been sentenced to death. The phrase "innocent of death" is not a natural usage of those words, but we must strive to construct an analog to the simpler situation represented by the case of a noncapital defendant. In defining this analog, we bear in mind that the exception for "actual innocence" is a very narrow exception, and that to make it workable it must be subject to determination by relatively objective standards.

Sawyer, 505 U.S. at 340. The Court concluded that where a petitioner had made a showing, by clear and convincing evidence, that he was ineligible for the death penalty, this "innocence of the death penalty" would meet the "fundamental miscarriage of justice" standard and warrant habeas relief, even in the case of procedural bars or (in Sawyer's case, had he prevailed) successive petitions. *Sawyer*, 505 U.S. at 350.

Without doubt, a prisoner who is not eligible for capital punishment under the Eighth Amendment proportionality requirement fits this standard – the presently insane under *Ford*, the offender who was a juvenile at the time of the crime under *Roper*, and mentally retarded prisoners under *Atkins*. In each case, as in *Schlup* and *Sawyer*, "relatively objective standards" – i.e., a bright-line test -- can be employed to allow Federal Courts to expeditiously determine whether a successive petitioner can possibly meet the test. *See Sawyer*, 505 U.S. at 340 & n.7,

Consequently, then, the historical development of habeas corpus in pre-AEDPA case law – a central factor in the *Panetti* analysis -- favors the proposition that a successive petitioner who

proffers evidence he is ineligible for the death penalty under *Atkins* should be allowed an opportunity to prove his allegations.

2. The Purposes of AEDPA – Comity and Federalism – Do Not Preclude The Use of the Writ to Enforce Eighth Amendment Limitations on the State's Power to Punish.

The second factor considered in *Panetti* was this Court's due deference for comity and federalism. But these considerations are not offended by the issuance of the writ of habeas corpus, even in a successive petition, in favor of prisoners who have proved that they are members of a group that is constitutionally exempt from capital punishment under the Eighth Amendment. Historically, comity and federalism have been invoked to prevent prisoners from deliberately bypassing prior opportunities to raise multiple challenges to their convictions and sentences, a concern most often associated with the doctrines of procedural default and waiver. *Coleman v. Thompson*, 501 U.S. 722, 751 (1991).

But the ineligibility of an offender to be executed is not a "right" that the prisoner can "waive." It is, instead, a constitutional limitation on the authority of the State. As this Court has explained on many occasions, "the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status." *Penry v. Lynaugh*, 492 302, 329-30 (1989), *citing Ford v. Wainwright*. 477 U.S. 399 (1986).

Penry v. Lynaugh is instructive on the issue of comity. Although this Court did not then find the death penalty disproportionate when imposed upon the mentally retarded, it considered whether comity and federalism (as implemented through the nonretroactivity doctrine of *Teague v. Kane*) would be offended by such a ruling. That question was answered in the negative:

> In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the

> power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "**There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.**"

Penry, 492 U.S. at 330, quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring and dissenting).

As this Court thus explained in *Penry*, there is an important distinction to be made between constitutional rights and categorical exemptions. A constitutional right may be forfeited for failure to raise it in an appropriate or timely fashion. See *Coleman v. Thompson*, *supra*. Categorical exemptions from the death penalty derive from constitutional rights under the Eighth Amendment, but they are wholesale exemptions. The rationale underlying these exemptions forbids the punishment itself for an entire class of people.

This Court has declared that the States may not seek to execute (1) offenders who were juveniles at the time of the crime, (2) offenders who are mentally incompetent at the time of their execution; and (3) offenders who are mentally retarded. The basis for these categorical exclusions is the Court's determination that the death penalty is a disproportionate punishment for persons whose youth or mental condition render them less culpable than other offenders.

Thus, *Atkins* recognized that "society views mentally retarded offenders as categorically less culpable than the average criminal," because of their impaired ability "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." 536 U.S. at 316, 318. As such, mentally retarded offenders will not be among the "worst of the worst", or those among "the most deserving of execution. *Id.* at 319. These deficiencies also make it less likely that the "execution of the mentally retarded will measurably advance the

deterrent or the retributive purpose of the death penalty." *Id.* at 321. It followed that executing the mentally retarded is "excessive" punishment. *Id.* at 321.

Reasoning similar to that in *Atkins* underlies the decisions that created the other categorical exemptions. For example, juveniles, like those who are mentally retarded, are not as culpable or foresighted as fully formed adults, and their execution thus cannot serve the same retributive or deterrent purposes. "The same conclusions follow from the lesser culpability of the juvenile offender. . . the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper v. Simmons*, 543 U.S. 551, 571.

And at least part of the prohibition against the execution of the insane – the exact situation encountered in *Panetti* -- derives from the absence of any retributive fact when exercised against a "madman." "[T]oday as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose. Thus, it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes of executions generally." *Ford v. Wainwright*, 477 U.S. 399, 421 (1986).

As this shared logic makes clear, to execute a person who is categorically exempt serves no purpose within the accepted framework justifying capital sentences - which is precisely why those persons are exempt. In the post-*Atkins* world, a death row inmate's mental retardation claim cannot be waived because, simply put, "a criminal defendant may not be put to death if he is found to be mentally retarded." *Rogers v. State*, 575 S.E.2d 879 (Ga. 2003) (When Rogers' mental retardation claim was raised, he attempted to waive the claim and volunteer for execution; state court refused to allow this, holding that a mental retardation claim cannot be

waived once sufficient evidence of mental retardation has been presented); *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003) (granting petitioner leave to file successive petition raising an *Atkins* claim upon a threshold showing of mental retardation.).

Equally importantly, placing juveniles, persons who are mentally retarded, and the insane beyond the power of the state to punish by death protects society from being complicit in an immoral act, as well as protecting the individual from excessive punishment. *See Ford*, 477 U.S. at 410 ("Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment"); *Atkins*, 536 U.S. at 321 ("We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.").

Thus, if this Court deemed a prisoner's factually specific proffer of categorical ineligibility to be limited by AEDPA, or worse, barred by Section 2244(b)(1) it - and our society - would be complicit in an execution deemed illegal, unconstitutional, and immoral. Comity and federalism do not, in any sense, require deference to such an act.

3. No Clear Congressional Intent to Foreclose Review. The third part of the *Panetti* analysis also supports the viability of a petition presenting serious allegations of ineligibility to be executed. The Court there held that it would not "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti*, 127 S.Ct. at 2854.

Is there any clear indication that Congress intended that a member of a class of prisoners ineligible for execution could be executed, only because it was not until a successive petition that

the prisoner presented serious proof that he was (1) a juvenile; (2) insane; (3) mentally retarded? Surely not.

4. Procedural Defaults Do Not Bar This Petition. A final point must be made to foreclose an assertion made previously by Respondents. The State has argued in both the Mississippi Supreme Court and the U.S. Court of Appeals for the Fifth Circuit that the Atkins issue is procedurally barred. The complete answer to this assertion is that the function of the "fundamental miscarriage of justice" exception is to allow consideration of claims that would otherwise be foreclosed from this Court's review under the doctrine of procedural default. *See Murray v. Carrier*, *supra*; *Schlup v. Delo*, *supra*; *Sawyer v. Whitley*, *supra*.

But if some version of the "cause and prejudice" test for excusing the *Atkins* claim alleged in this petition be needed, Berry meets that test abundantly. The only reason Berry was not previously granted a hearing on mental retardation in the first set of post-conviction and Federal habeas proceedings was that his prior attorney – the prior Director of the State Office of Post-Conviction Counsel – failed to comply with the Mississippi Supreme Court's requirements in *Chase v. State*, 873 So. 2d 1013 (Miss. 2004). That lawyer filed, in support of Berry's retardation claim, only the affidavit of James Flynn, a political scientist, rather than of a mental health professional as required by *Chase*.

The State's view that Berry must be charged with his lawyer's failing – and its concomitant effect on the first Federal habeas petition (see below) -- is particularly troubling here. First, by all accounts, Berry suffers from substantial mental deficiencies, and thus cannot be expected to police the performance of his attorneys. Moreover, the record is replete with evidence that his prior attorney – the former Director of the State Office of Post-Conviction Counsel – displayed chronic deficiencies in complying the requirements imposed by Chase:

Berry's case was one of several in which the prior Director simply failed to supply an expert affidavit in support of an Atkins claim. See *Mitchell v. State*, 886 So. 2d 704, 712-13 (Miss. 2004); *Gray v. State*, 887 So. 2d 158, 169 (Miss. 2004); *Bishop v. State*, 882 So. 2d 135, 151 (Miss. 2004).

These failings relate to gross shortcomings in the resources, funding and staff of the State Office, which was the agency created by the Mississippi Legislature after the Mississippi Supreme Court declared that in capital cases, the use of state post-conviction by prisoners was considered "part of the appeals process" and thus that prisoners would be "assured competent counsel." *Jackson v. State,* 732 So. 2d 187 (Miss. 1999); *Puckett v. State*, 834 So. 2d 676, 677 (Miss. 2003) ("Puckett was clearly entitled to appointed competent and conscientious counsel to assist him with his pursuit of post-conviction relief"). *Compare Evitts v. Lucey,* 469 U.S. 387, 394 (1985) (procedures used for system of appeals "must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution").

The Director was, in fact, the only attorney in the State Office as of January 2003. Exhibit 15, Affidavit of Robert Ryan. A Westlaw search discloses that before his appointment as Director of the State Office, Mr. Ryan had never been listed as lead counsel for a death-sentenced prisoner in a post-conviction case. The State Office nonetheless "assumed direct representation" in 24 out of 27 capital cases that were pending in post-conviction proceedings. This was due, in part, to motions filed by the Attorney General seeking the removal of private counsel from several cases. Id. As a justice of the Mississippi Supreme Court has since noted, these circumstances led to serious deficiencies in the petitions filed by the State Office. See Appendix A, *Berry v. State* (Miss., May 5, 2008)(Diaz, J., dissenting) at n. 2.

Nor is this petition barred, as argued by the State in the Fifth Circuit, because Berry's prior Federal counsel used the same deficient State Court expert in the first Federal petition, and then did not seek COA review of the *Atkins* issue. Had prior Federal counsel filed a new affidavit, espondents would surely have objected under Section 2254(e)(2) and the doctrine announced by *Keeney v. Tomayo-Reyes,* 504 U.S. 1, 112 S.Ct. 1715 (1992). That the State Court lawyer's faulty presentation of the issue may have infected the first Federal habeas proceeding, however, does not answer the arguments raised by Berry.

Nonetheless, Petitioner does not here assert a separate claim for ineffective assistance of counsel, recognizing that such is not cognizable pursuant to 28 U.S.C. §2254(i). Rather, Petitioner asserts – and only in the alternative, given his reliance on the "fundamental miscarriage of justice" exception, that Berry's prior counsel's deficient performance is cause to excuse any procedural defaults relied upon by the State.

Conclusion. In short, this case is to *Atkins* as *Panetti* was to *Ford* – the case that demonstrates that the writ of habeas corpus must remain available, even on "same issue" successive petitions, to determine whether prisoners are "innocent of the death penalty." Thus, this Court should grant review to consider the important question whether a prisoner who raises a factually specific claim that he is ineligible for the death penalty under *Atkins* is entitled to file a successive Federal habeas corpus petition, notwithstanding the fact that an *Atkins* claim had been previously raised in the prisoner's prior Federal petition.

II.

Petitioner Berry is Entitled to the Writ of Habeas Corpus to Prevent the State of Mississippi From Executing Him In Direct Violation of the Eighth Amendment

Given the analysis above, the proffer of facts submitted by Berry here (and previously to the Court of Appeals) was sufficient to allow the filing of his successive petition for writ of habeas corpus and for a Federal court – whether this Court under its original jurisdiction, or a district court assigned pursuant to 28 U.S.C. §2241(b) – to adjudicate whether he is mentally retarded and therefore ineligible for the death penalty under *Atkins*.

PRAYER FOR RELIEF

Earl Berry has presented compelling proof that he is mentally retarded and therefore ineligible for the death penalty. He respectfully requests that this Court grant his petition for habeas corpus, order briefing and argument on the issues presented herein, and stay the execution presently pending for 6 p.m. on May 21, 2008.

Following argument, or by summary order, Petitioner requests that this Court either:

(1) grant the writ of habeas corpus pursuant to 28 U.S.C. §2241(a) and order the State to re-sentence Petitioner at a hearing which excludes the death penalty as a sentencing option, or, in the alternative,

(2) transfer this case to the United States District Court for the Northern District of Mississippi, pursuant to 28 U.S.C. §2241(b), for "hearing and determination" whether Petitioner is ineligible for execution under *Atkins*.

Respectfully Submitted,

James W. Craig, Counsel of Record
Justin Matheny
PHELPS DUNBAR LLP
111 E. Capitol Street, Suite 600
Jackson, MS 39201
Tel: 601-352-2300
Fax: 601-360-9777

David P. Voisin (MSB #100210)
P.O. Box 13984
Jackson MS 39236-3984
(601) 949-9486

James M. Priest, Jr.
Gill, Ladner & Priest, PLLC
403 South State Street
Jackson, MS 39201
(601) 352-5700

ATTORNEYS FOR PETITIONER EARL BERRY

VERIFICATION

I, James W. Craig, Counsel of Record for the Petitioner, verify pursuant to 28 U.S.C. §2242 that the above and foregoing Petition is supported by the following sworn statements and verified exhibits:

Exhibit 1:	Affidavit of Marc Zimmermann, Ph.D.
Exhibit 2:	Affidavit of Velma Berry
Exhibit 3:	Affidavit of Sarah Akins
Exhibit 4:	Affidavit of James Berry
Exhibit 5:	Affidavit of Wilma Berry
Exhibit 6:	Affidavit of Greg Berry
Exhibit 7:	Affidavit of Charles Pepper
Exhibit 8:	Affidavit of James Akins
Exhibit 9:	Excerpts from Educational Records of Earl Berry
Exhibit 10:	Excerpts from Prison Medical Records of Earl Berry
Exhibit 11:	Prison WAIS Results
Exhibit 12:	Report of Dr. Charlton Stanley
Exhibit 13:	Report of Dr. Paul Blanton
Exhibit 14:	Affidavit of James Flynn, Ph.D.
Exhibit 15:	Affidavit of Robert Ryan

Respectfully submitted,

BY: _____
James W. Craig

Dated: May 20, 2008

CERTIFICATE OF SERVICE

I, James W. Craig, hereby certify that I have served the foregoing pleading via electronic mail on the following counsel for Respondents:

Marvin L. White, Jr.
Assistant Attorney General

Jason Davis
Special Assistant Attorney General

Carroll Gartin Justice Building
Jackson MS 39201

E-mail: swhit@ago.state.ms.us
jdavi@ago.state.ms.us

This the 20th day of May, 2008.

/s/ James W. Craig
JAMES W. CRAIG