IN THE UNITED STATES SUPREME COURT

NO. 07-11019

In re EARL WESLEY BERRY, PETITIONER

REBUTTAL IN SUPPORT OF
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)

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As expected, Respondent makes much of course of this litigation and the alleged procedural defaults by prior counsel for Petitioner. Berry has already pointed out, in his initial Petition, that there is abundant "cause and prejudice" for any procedural defaults related to his mental retardation and its effect on his death sentence pursuant to *Atkins v. Virginia*. Petition at 27-29.

In all State post-conviction proceedings in his case, **including the one filed in October 2007**, Berry was represented by the State Office of Post Conviction Counsel's prior Director, Robert Ryan. Mr. Ryan is the lawyer appointed pursuant to the state statute which effectuated the Mississippi Supreme Court's rulings that, as a matter of Mississippi law, state post-conviction proceedings in capital cases are part of the prisoner's direct appeal. *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").

But Mr. Ryan is also the lawyer who filed Berry's first post-conviction petition without any affidavit from an expert on retardation and who, after Berry's Atkins claim was rejected by the Mississippi Supreme Court, filed, on rehearing, an affidavit from James Flynn, a political science professor. Mr. Ryan is also the lawyer who failed to follow Mississippi procedural rules for raising Atkins claims in other cases, 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), and who had collected a series of Mississippi Supreme Court opinions critical of his performance before his abrupt departure earlier this year, see Appendix A, *Berry v. State* (Miss., May 5, 2008) (Diaz, J., dissenting) at n. 2.

All of this, however, is for the most part irrelevant to the basic issue presented in this Petition: whether the "fundamental miscarriage of justice" standard applies to same-issue successive habeas corpus petitions that challenge the petitioner's eligibility for the death penalty under Atkins.

This is so because that standard – whether Earl Berry is "innocent of the death penalty" as defined in *Sawyer v. Whitley*, 505 U.S. 333 (1992) – applies both the same-claim successive petitions, *Sawyer*, and state procedural defaults, *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649 (1986).

For these reasons, this Court can simply put all of Respondent's procedural default arguments to one side and focus on the central issue: can a death-sentenced prisoner who alleges, with fact-specific evidentiary support, that he is mentally retarded, have an opportunity to be heard on Federal habeas, although he previously made a deficient argument about his ineligibility in a prior Federal petition?

That, we submit, is the central issue in this case. It is a weighty issue that is likely to be replicated as more post-Atkins cases come near to conclusion. Given the structure of successive habeas procedure under 28 USC §2244, this Petition, or one like it, is the only means by which this Court can give guidance to the Federal bench about the standard to be applied in such situations.

Respondents attempt to discount the force of Berry's evidence also warrants a brief response. Respondent points to some evidence of prior testing that supposedly places Berry

outside of the mentally retarded range. However, the 72 IQ score that Berry had in school places him squarely in the range of those who may be mentally retarded. *Chase v. State*, 873 So. 2d 1013, 1028 (Miss. 2004) (mental retardation may be present in an individual with an IQ of up to 75). Also, Dr. Stanley, who found the highest IQ score for Berry gave an incomplete version of an outdated test and thus the reliability of his results are questionable at best. Tr. 480.

Respondent complains that Dr. Zimmermann did not test Berry. Respondent neglects to mention, however, that the Mississippi Department of Corrections requires a court order before it will allow a contact visit by a psychologist. When Petitioner sought to have Dr. Zimmermann admitted to the prison to conduct testing, Respondent successfully opposed the evaluation. Order Denying Access to Petitioner for Administration of IQ Test (Dkt #51), *Berry v. Epps*, No. 1:04-CV-00328-GHD (N.D. Miss. Nov. 30, 2007).

CONCLUSION

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, stay the execution presently pending for 6 p.m. on May 21, 2008, and after review, grant the other relief requested in the Petition.

Respectfully Submitted,

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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:

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This the 21st day of May, 2008.

/s/_James W. Craig
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