

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re Earl Wesley Berry

**MOTION FOR STAY OF EXECUTION PENDING
THE DISPOSITION OF ORIGINAL
PETITION FOR WRIT OF HABEAS CORPUS**

EXECUTION SCHEDULED FOR MAY 21, 2008, AT 6:00 P.M.

TO THE HONORABLE JUSTICES OF THIS COURT:

Earl Wesley Berry, through his attorneys, respectfully requests that this Court stay his execution currently scheduled for Wednesday, May 21, 2008, after 6:00 p.m. pending the disposition of a petition for a writ of habeas corpus filed 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).

In the petition, Berry raises three 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)?

As discussed in greater detail in the habeas petition, Berry is mentally retarded and thus ineligible for the death penalty. The evidence in support of his position includes: (i) his classification by the Mississippi Department of Corrections as mentally retarded over twenty years ago, (ii) at age 13, his I.Q. score was measured at 72, 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.”

Notwithstanding this substantial showing of mental retardation, the Mississippi Supreme Court has repeatedly refused to decide, on the merits, whether Berry is mentally retarded, and therefore immune from capital punishment. They have done so because Berry’s state-appointed lawyers failed to comply with an aspect of Mississippi procedure that did not yet exist when Berry initially raised his claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) – a requirement that these lawyers chronically failed to meet in Mississippi capital cases, and that Berry has since satisfied by submitting Dr. Zimmermann’s opinion, in the proper format, to the Mississippi Supreme Court.

The Fifth Circuit denied leave to file a successive habeas petition to raise this challenge in light of Dr. Zimmermann’s affidavit, but that court found that it lacked authority to address an issue that had been raised in a prior habeas petition. 28 U.S.C. § 2244(b)(1).

A stay of execution is warranted where there is (1) a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of *certiorari* or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

Berry believes that in light of his evidence of mental retardation, there is a reasonable probability that this Court will consider granting habeas corpus relief or transferring the application for “hearing and determination” before the district court. 28 U.S.C. § 2241(b).

Berry also believes that he is under imminent threat of having his Eighth Amendment right to be free from cruel and unusual punishment violated. This Court has held that mentally retarded offenders are categorically ineligible for capital punishment.

Respondent will likely oppose the stay, arguing that the Mississippi Supreme Court’s decision to deny relief rested on adequate and independent state law grounds. However, as discussed more fully in the petition, those arguments are baseless. The execution of a mentally retarded offender should not occur regardless of any possible procedural rule because, as previously stated, the Eight Amendment categorically prohibits the execution of the mentally retarded. In addition, the state court denied Berry a hearing on his mental retardation claim not because he did not raise it earlier, and not because he produced no evidence to support the claim, but only because he failed to comply with a rule that was announced after he first raised his *Atkins* claim. In the alternative, in his petition, Berry establishes “cause” for any default.

Finally, it is clear that irreparable harm will result if no stay is granted. Absent a stay of execution, Berry will be executed without any court having given him a hearing on his mental retardation claim.

For these reasons, Berry respectfully requests that his execution be stayed pending the consideration and disposition of a petition for a writ of habeas corpus.

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

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