

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EARL WESLEY BERRY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

**MOTION FOR STAY OF EXECUTION PENDING
THE DISPOSITION OF PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF MISSISSIPPI**

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

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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 writ of *certiorari* to review the judgment of the Mississippi Supreme Court. That petition for writ of *certiorari* presents the following questions:

- I. Whether a State may employ its procedural default rules to deny a merits determination to a defendant who has made a substantial showing that he

is mentally retarded, and thus categorically ineligible for the death penalty under *Atkins*.

- II. Whether Mississippi may carry out this execution without first determining on an evidentiary record if its lethal injection protocol, which deviates in meaningful respects from the protocol sustained in *Baze v. Rees*, violates the Eighth Amendment.

As discussed in greater detail in the petition for a writ of certiorari, Berry presented evidence showing (i) that the Mississippi Department of Corrections classified him 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 method of execution that Mississippi plans to use to take Berry’s life is also unconstitutional. Mississippi’s lethal injection procedures, in several respects, differ meaningfully from the lethal injection procedures this Court has found permissible, and fail to ensure that Berry will not be subjected to cruel and unusual punishment in his final moments. Significantly, Mississippi uses only two grams of anesthetic, rather than the three used by

Kentucky. Because the risk that a prisoner will suffer excruciating pain is directly related to the amount of initial anesthetic, this fact alone is sufficient to distinguish the ultimate holding of this Court in *Baze*.

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 and/or the evidence regarding Mississippi's lethal injection procedure, there is a reasonable probability that four members of this Court will consider granting *certiorari* in his case and that there is a significant possibility of reversal.

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. Furthermore, the State of Mississippi intends to employ a procedure that creates a substantial risk of serious harm.

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. Any procedural rulings on the part of the state supreme court regarding the lethal injection claim are also insufficient to preclude this Court from addressing the challenge to the lethal injection procedure. Mississippi post-conviction procedure allows successive petitions based on intervening changes in the law, and *Baze* qualifies as such a decision. Also, the provisions restricting successive petitions in Mississippi are not independent of federal law.

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. Furthermore, the evidence presented to the state courts established the state's execution protocol will result in a significant risk of torture and unnecessary pain to Berry.

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

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 Respondent:

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This the 19th day of May, 2008.

/s/James W. Craig
JAMES W. CRAIG