

CAPITAL CASE

OCT 30 2007

No. 07A367
(07-7348)

EXECUTION DATE

IN THE
SUPREME COURT OF THE UNITED STATES

EARL WESLEY BERRY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR STAY OF EXECUTION
PENDING THE DISPOSITION OF
PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE
EXECUTION SCHEDULED FOR OCTOBER 30, 2007 AT 6:00 P.M.

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ATTORNEYS FOR PETITIONER
EARL WESLEY BERRY

FILED

OCT 29 2007

**OFFICE OF THE CLERK
SUPREME COURT, U.S.**

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EARL WESLEY BERRY,

Petitioner,

v.

STATE OF MISSISSIPPI,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**MOTION FOR STAY OF EXECUTION PENDING
THE DISPOSITION OF
PETITION FOR WRIT OF *CERTIORARI***

EXECUTION SCHEDULED FOR OCTOBER 30, 2007 AT 6:00 P.M.

TO THE HONORABLE JUSTICES OF THIS COURT:

Earl Wesley Berry, a pauper on death row in Mississippi, through his attorneys, respectfully requests that this Court stay his execution currently scheduled for Tuesday, October 30, 2007, after 6:00 p.m. pending the disposition of a petition for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. That petition for writ of *certiorari* presents the following questions:

- I. Did the Court of Appeals act contrary to this Court's precedents and inconsistent with other Courts of Appeals when it relied solely on the timeliness of Petitioner's Section 1983 challenge to Mississippi's lethal injection procedure to the exclusion of all other equitable factors, including the likelihood of success on the merits, a grant of certiorari and other actions of this Court, and Respondents' representations and failure to make any showing of prejudice, when it affirmed the lower court's ruling dismissing Petitioner's complaint and denying a stay of execution and preliminary injunction?
- II. Should this Court grant certiorari to provide guidance to the lower courts as to when a federal court may dismiss a "last minute" lawsuit in light of the differences between the Fifth Circuit and other Courts of Appeals, including the Eighth and Eleventh Circuits, in how the lower courts have treated lawsuits raising issues currently before this Court?
- III. This case also presents an important companion to *Baze et al. v. Rees, et al.*, No. 07-5439, in which the Court granted certiorari to consider the standard of review and what constitutes proof of an Eighth Amendment violation in method of execution claim.

Unlike the State of Kentucky, the State of Mississippi does not have the latitude to choose a single drug execution protocol. Instead, Mississippi's statute requires its Department of Correction to use of an ultrashort-acting barbiturate and a chemical paralytic agent. In light of the statutory constraints on the States of Mississippi the following are the questions presented:

- A. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
- B. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that there is no meaningful assessment of anesthetic depth prior to the administration of painful chemicals as would be required in the euthanization of a dog?
- C. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment if they are used without appropriate protections to offset the certain pain or suffering that will be caused if a condemned inmate is not adequately anesthetized?

Thus, as the Court considers legal questions surrounding the lethal injection protocols, *see Baze v. Rees*, No. 07-5439, it can also have before it a case involving a statutory scheme *requiring* the use of an ultrashort-acting barbiturate and a chemical paralytic agent.

Mr. Berry first sought the relief sought herein with the United States District Court for the Northern District of Mississippi. Upon the court's denying relief, Mr. Berry

appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the lower court's ruling. This Court, then, provides the only avenue for injunctive relief available to Mr. Berry.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).

Mr. Berry believes that in light of the grant of *certiorari* in *Baze*, 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. As noted below, this Court has very recently granted and affirmed stays in the wake of its grant of *certiorari* in *Baze*.

Mr. Berry also believes that he is under imminent threat of having his federal constitutional right to remain free from cruel and unusual punishment violated by the State of Mississippi. In the course of administering a death sentence—a sentence unchallenged by Mr. Berry in these proceedings—the State of Mississippi intends to employ a procedure that creates a wholly unnecessary and easily avoidable risk of gratuitous pain. However, the district court and Fifth Circuit refused to address the merits of the Eighth Amendment claims presented by Mr. Berry by finding that Mr. Berry was dilatory in filing his 42 U.S.C. § 1983 action challenging Mississippi's lethal injection procedures. As discussed in greater detail in the Petition for Writ

¹ The order of the United States District Court granting Respondents' motion to dismiss and denying Mr. Berry's request for a preliminary injunction and stay of execution is unpublished and is attached as Appendix A to his Petition For A Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit filed today with this Court. The opinion of the Fifth Circuit affirming the ruling of the District Court and denying Petitioner's Emergency Application for an Injunction and/or Stay of Execution Pending Appeal is not yet published and is attached as Appendix B to his petition for *certiorari*. Both are incorporated into this motion by reference.

of Certiorari filed in this matter, the Court of Appeals for the Fifth Circuit and the district court appear to apply an absolute bar to constitutional challenges to methods of execution raised when execution is "imminent." The Fifth Circuit affirmed the lower court's denial of a stay, finding that its "precedent requires the dismissal of 'eleventh hour' dilatory claims such as Berry's." *Berry*, slip op. at 5 (emphasis added).

The Fifth Circuit's position that a constitutional challenge to method of execution is necessarily precluded if filed when execution is "imminent" appears to be in conflict with other circuits. See *Siebert v. Allen*, ___ F.3d ___, 2007 WL 3087688 at *1-2 (11th Cir. Oct. 24, 2007), *vacated pending en banc rehearing* ___ F.3d ___ (Oct. 25, 2007); *Nooner v. Norris*, No. 07-3165 (8th Cir. Oct. 11, 2007), *application to vacate stay den.* ___ S. Ct. ___, 2007 WL 2999165 (Oct 16, 2007); *Lambert v. Buss*, 498 F.3d 446, 451-53 (7th Cir. 2007); *Hamilton v. Jones*, 472 F.3d 814, 815-17 (10th Cir. 2007); *Alley v. Little*, 186 Fed. Appx. 604, 606-607, 2006 WL 1736345 at **2-3 (6th Cir. June 24, 2006); *Beardslee v. Woodford*, 395 F.3d 1064, 1070 (9th Cir. 2005); *Cooper v. Rimmer*, 379 F.3d 1029, 1032-33 (9th Cir. 2004). In all of the cited cases, the Courts of Appeals, unlike the Fifth Circuit, appear to recognize that any undue delay in filing a challenge to method of execution must be weighed against other equitable considerations such as the likelihood of the challenge being successful on the merits.

This Court's precedent, too, does not support such a rule requiring dismissal of a constitutional challenge based solely on the time of its filing to the exclusion of all other equitable considerations. To be sure, this Court has indicated that delay in bringing a claim may weigh heavily when determining whether to dismiss, especially if the petitioner has been trying to manipulate the legal process. See *Gomez v. United States District Court*, 503 U.S. 653 (1992) (dismissing fourth habeas petition raising challenge to execution procedure); see also *Hill v.*

McDonough, 126 S. Ct. 2096, 2104 (2006).² Though important, the alleged dilatoriness of the filing is but one factor to consider.

A district court's power to dismiss a Section 1983 suit in equity due to dilatory filing, however, is based on the equitable defense of laches, and is merely a subset of that doctrine. See *Arthur v. Allen*, No. 07-13929, 2007 WL 2709942 (11th Cir., Sept 17, 2007). Laches requires a balancing of equities and hardships of the respective parties – in particular, to invoke laches, a defendant must show not only that the plaintiff was dilatory in filing but also that the defendant suffered prejudice as a result of the late filing. See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002); *Costello v. United States*, 365 U.S. 265, 282 (1961); *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. Of San Antonio*, 40 F.3d 698, 708 (5th Cir. 1994) (to prevail on defense of laches, defendant must show undue prejudice to ability to present adequate defense); *Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 880 (7th Cir. 2002).

As the State admits, it will suffer no prejudice other than a delay if Mr. Berry's execution is stayed. Mr. Berry, on the other hand, will suffer the risk of being put to death by an unconstitutional means.

This Court's intervention is now necessary to protect Mr. Berry's federal constitutional right and to ensure that death-sentenced prisoners across the country are treated uniformly in the wake of this Court's grant of certiorari review in *Baze v. Rees*, No. 07-5439. Borrowing Justice Stewart's words, should the Court not stay Mr. Berry's execution, he will be "struck by lightning," the victim of the sort of systemic arbitrariness and caprice that the Eighth

² Significantly, in *Gomez*, this Court never claimed that a late filing should always result in a dismissal, which is the position taken by the Fifth Circuit. Instead, this Court held that "a court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez*, 503 U.S. at 654.

Amendment abhors. *See Furman v. Georgia*, 408 U.S. 238, 309 (1972) (STEWART, J., concurring).

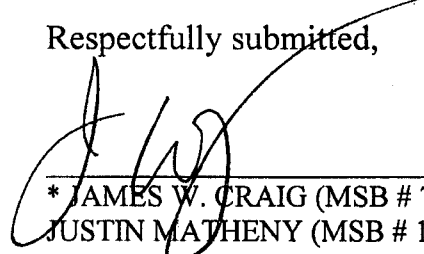
Finally, it is clear that irreparable harm will result if no stay is granted. Absent a stay of execution, Mr. Berry's *bona fide* claim will not be resolved prior to the unconstitutional administration of his lethal injection by the State of Mississippi, resulting in a significant risk of torture and unnecessary pain to Mr. Berry for which he will be unable to seek any redress. Further, if Mr. Berry's execution is not stayed, his execution will be arbitrary. As Respondents have admitted, Kentucky's protocol for administering lethal injection is similar to Mississippi's and presents the same risks to persons subjected to it. Before he is executed, and in light of this Court's grant of *certiorari* in *Baze*, Mr. Berry is entitled to know by what constitutional standard his imminent lethal injection will be measured.

The public interest is not well-served, either, by permitting lethal injections pursuant to materially indistinguishable protocols to continue while this Court considers the weighty issue of whether the risk of torture inherent in those protocols conforms with the Eighth Amendment's proscription against cruel and unusual punishment. Indeed, for this reason, this Court, lower federal courts, and state courts have granted or affirmed the granting of stays to other death-sentenced inmates facing execution with this type of protocol. *See Norris v. Jones*, ___ S. Ct. ___, 2007 WL 2999165 (October 16, 2007) (affirming grant of stay of § 1983 action); *See Emmett v. Johnson*, ___ S. Ct. ___, 2007 WL 3018923 (October 17, 2007) (granting stay pending disposition of appeal of § 1983 action); *Turner v. Texas*, ___ S. Ct. ___, 2007 WL 2803693 (Sept. 27, 2007) (staying execution date pending the filing and disposition of cert petition challenging state lethal injection procedures); *Siebert v. Allen*, No. 07-14956 (11th Cir. October 25, 2007) (vacating panel opinion and staying execution pending en banc consideration)

In re Chi, 2007 WL 2852629 (Tex. Crim. App. Oct. 2, 2007); *ACLU v. Skolnik*, No. 50354 (Nev. S. Ct. October 15, 2007)³; Order, *State of Arizona v. Landrigan*, No. CR-90-0323-AP, filed October, 2007); Order, *Alderman v. Hall*, Case No. S08W0263 (Ga. S. Ct. October 18, 2007); Order, *Osborn v. Hall*, Case No. S08W0267 (Ga. S. Ct. October 22, 2007).

For these reasons, Mr. 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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ATTORNEYS FOR PETITIONER EARL BERRY

³Available at <http://www.nvsupremecourt.us/documents/cases/ACLUvs.SkolnikStayOrder.pdf>.

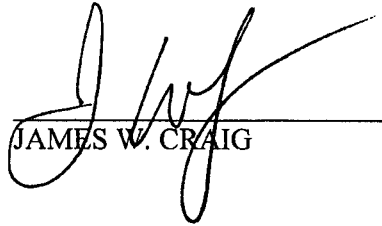
CERTIFICATE OF SERVICE

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

Marvin L. White, Jr.
Assistant Attorney General
Carroll Gartin Justice Building
Jackson MS 39201

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

This the 29th day of October, 2007.



JAMES W. CRAIG

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2007

EARL WESLEY BERRY,

Petitioner,

vs.

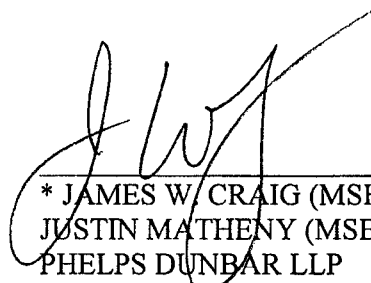
CHRISTOPHER EPPS, Commissioner of the
Mississippi Department of Corrections,
LAWRENCE KELLY, Superintendent of
the Mississippi State Penitentiary at Parchman,
and JOHN DOES 1-50,

Respondents

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Earl Wesley Berry, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner has recently been granted leave to proceed *in forma pauperis* in connection with federal habeas corpus proceedings and has asked to be allowed to proceed *in forma pauperis* in *Berry v. Mississippi*, No. 07-7275 (petition for writ of certiorari filed on or about October 25, 2007). Petitioner's affidavit in support of this motion is attached hereto.

This the 29th day of October 2007.



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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2007

EARL WESLEY BERRY,

Petitioner,

vs.

CHRISTOPHER EPPS, Commissioner of the
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LAWRENCE KELLY, Superintendent of
the Mississippi State Penitentiary at Parchman,
and JOHN DOES 1-50,

Respondents.

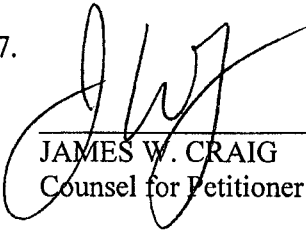
CERTIFICATE OF SERVICE OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, James W. Craig, a member of the Bar of this Court, hereby certify that on this 29th day of October, 2007, I served the foregoing pleading via electronic mail and hand delivery on the following counsel for Respondents:

Marvin L. White, Jr.
Assistant Attorney General
Carroll Gartin Justice Building
Jackson MS 39201

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

This the 29th day of October, 2007.



JAMES W. CRAIG
Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2007

No. 07-

EARL WESLEY BERRY

Petitioner

versus

STATE OF MISSISSIPPI

Respondent

AFIDAVIT IN SUPPORT OF MOTION FOR
PERMISSION TO APPEAL IN FORMA PAUPERIS

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. '1746; 18 U.S.C. '1621)

Signed: Earl Berry

Date: 10-22-2007

My issues on appeal are: to be determined by my counsel.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.



Income source:	Average monthly	
	Amount during the Past 12 months	Amount expected next month
	You	You
Employment	\$ 0	\$ 0
Self-employment	\$ 0	\$ 0
Income from real property such as rental income)	\$ 0	\$ 0
Interest and dividends	\$ 0	\$ 0
Gifts	\$ 0	\$ 0
Alimony	\$ 0	\$ 0
Child support	\$ 0	\$ 0
Retirement (such as social security pensions, annuities, insurance)	\$ 0	\$ 0
Disability (such as social security insurance payments)	\$ 0	\$ 0
Unemployment payments	\$ 0	\$ 0
Public-assistance (such as welfare)	\$ 0	\$ 0
Other (specify): <u>N/A</u>		
Total monthly income: \$ 0		

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Not applicable.
3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Not applicable.
4. How much cash do you and your spouse have? \$ 0 .

Below, state any money you or your spouse have in bank accounts or in any financial institution.

FINANCIAL INSTITUTION	TYPE OF ACCOUNT	AMOUNT YOU HAVE	AMOUNT YOUR SPOUSE HAS
Inmate Account	Trust Account		N/A

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Not applicable.

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

None.

7. State the persons who rely on you or your spouse for support

None.

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$0	N/A
Are real-estate taxes included? [<input type="checkbox"/>] Yes	N/A	
Is property insurance included? [<input type="checkbox"/>] Yes	N/A	
Utilities (electricity, heating fuel,	\$ 0	

water, sewer, and Telephone)		
Home maintenance (repairs and upkeep)	\$ 0	
Food	\$ 0	
Clothing	\$ 0	
Laundry and dry-cleaning	\$ 0	
Medical and dental expenses	\$ 0	
Transportation (not including motor vehicle payments)	\$ 0	
Recreation, entertainment, newspapers, magazines, etc.	\$ 0	
Insurance (not deducted from wages or included in Mortgage payments)	\$ 0	
Homeowners or renters	\$ 0	
Life	\$ 0	
Health	\$ 0	
Motor Vehicle	\$ 0	
Other: _____		N/A
Taxes (not deducted from wages or included in Mortgage payments) (specify): _____		\$ 0
Installment payments		\$ 0
Motor Vehicle	\$ 0	
Credit card (name): _____		\$ 0
Department store (name): _____		\$ 0
Other: _____		\$ N/A
Alimony, maintenance, and support paid to others		\$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)		\$ 0
Other (specify): _____		N/A
Total monthly expenses:		\$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid--or will you be paying--an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? \$ _____

If yes, state the attorney's name, address, and telephone number:

- 11. Have you paid--or will you be paying-- anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? \$ _____

If yes, state the person's name, address, and telephone number:

- 12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

I have been incarcerated at Mississippi State Penitentiary since 1999.

- 13. State the address of your legal residence.

Unit 32C, Mississippi State Penitentiary, Parchman, MS 38738.

Your daytime phone number: ~~(662) 745-6611~~ ext. 3480.

Your age: 48 Your years of schooling: _____

Your social-security number: 426-12-7068

Signed under penalty of perjury: Earl Berry Date: 12-22-07