NO. 07-10974
IN THE UNITED STATES SUPREME COURT

OCTOBER 2007 TERM

EARL WESLEY BERRY, *Petitioner*

versus

STATE OF MISSISSIPPI, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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CAPITAL CASE

Execution set for 6:00 p.m., May 21, 2008

QUESTIONS PRESENTED

1. WHERE THE QUESTION PETITIONER PRESENTS TO THIS COURT REGARDING HIS CLAIM OF MENTAL RETARDATION WAS HELD TO BE BARRED ON THE BASIS OF ADEQUATE AND INDEPENDENT STATE LAW PROCEDURAL GROUNDS OF TIMELINESS AND THE SUCCESSIVE NATURE OF THE PETITION THIS COURT HAS NO JURISDICTION TO CONSIDER THE QUESTION AND CERTIORARI SHOULD BE DENIED.

2. WHERE THE QUESTION PETITIONER PRESENTS TO THIS COURT REGARDING HIS CLAIM OF MENTAL RETARDATION WAS HELD TO BE BARRED ON THE BASIS OF ADEQUATE AND INDEPENDENT STATE LAW PROCEDURAL GROUNDS OF TIMELINESS AND THE SUCCESSIVE NATURE OF THE PETITION THIS COURT HAS NO JURISDICTION TO CONSIDER THE QUESTION AND CERTIORARI SHOULD BE DENIED.

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BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

OPINIONS BELOW

The May 5, 2008, unpublished order of the Mississippi Supreme Court denying petitioner's motion for leave from judgment and/or motion to file a successor petition for post-conviction relief is attached to the petition for writ of certiorari in this case as Appendix A. The May 15, 2008, unpublished order of the Mississippi Supreme Court denying the motion for rehearing is attached to the petition for writ of certiorari in this case as Appendix

B. The May 5, 2008, unpublished order of the Mississippi Supreme Court setting the execution date in this case for May 21, 2009, is attached to the brief in opposition as Appendix C.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court, pursuant to the authority of 28 U.S.C.A. § 1257. He fails to do so.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Eighth and Fourteenth Amendments to the United States Constitution. He fails to do so.

STATEMENT OF THE CASE

A. Statement of Facts

On Sunday, November 29, 1987, Earl Wesley Berry got drunk. Friends took him to Sadie Anderson's apartment, in Houston, Mississippi, to sleep it off. Around 8:00 p.m. that night, his brother, Danny arrived and woke him up. Berry left the apartment, driving his grandmother's car.

While driving through town, he saw Mary Bounds walking outside the Baptist Church. Mrs. Bounds had just left choir practice at the church. Berry stopped as Mrs. Bounds was putting her purse, Bible and songbook into her car, and grabbed her. She screamed and he hit her, telling her to shut up. Berry forced Mary Bounds into his car and drove south on Highway 15.

Stopping the car beside the highway, he got Mrs. Bounds out of her car and carried her over a fence and took her some twenty yards into a field. He told her to lay down, take her pantyhose off and pull her dress up. Berry "told her then that I was going to f--k her just like that." Tr. 431. He decided he could not go through with it and took her back to his car.

Berry drove south, telling Mrs. Bounds several times to keep down. He turned off the highway, stopped and got her out of the car. As he began walking she stood by the car and begged "please". Berry began to beat her, first with his fist and then with his forearm. She fell and he picked her up and carried her into the woods. Berry then threw her down and ran.

Back in the car, Berry continued driving south. Worried about footprints, he threw his shoes, an unmatched pair of tennis shoes, out of the car. He went to his grandmother's house where his brother, James, let him in. Asking James to get some gas, Berry took off his clothes and burned them. Getting a towel, he wiped the blood from the car and then threw the towel into the pond beside the house.

When Mrs. Bounds was reported missing by her daughter, an investigation ensued. Her body was found three days later on December 2, 1987. An autopsy revealed that Mary Bounds died as a result of multiple blunt trauma to the sides of her head which resulted in subdural hematoma, hemorrhage, and bleeding within the brain.

During the investigation, blood was found on Mrs. Bounds' car and on leaves and gravel around her car. Her earrings were found in the same location. Blood was also observed on a tree and leaves where her body was found and samples of human blood

consistent with that of either petitioner or Mrs. Bounds were taken from Berry's grandmother's car.

Authorities learned from James Berry, petitioner's brother, about the events at his grandmother's house on that Sunday evening. Berry was arrested at his grandmother's house and read his *Miranda* rights. He was transported to the Chickasaw county jail where he subsequently confessed.

The Mississippi Supreme Court set forth the facts of this case in its opinion in the original direct appeal and repeated them in the direct appeal of the second sentencing hearing. *See Berry v. State*, 575 So.2d 1, 4 (Miss. 1990); *Berry v. State*, 703 So.2d 269, 274 (Miss. 1997).

B. Procedural History

Before the Court is petitioner's fifth petition for writ of certiorari challenging his sentence of death. In this petition he challenges the decision of the Mississippi Supreme Court denying his third and successive motion for relief from judgment and/or for leave to file a successor petition for post-conviction relief in the trial court.

Earl Wesley Berry was indicted during the March 1988 Term of the Circuit Court of Chickasaw County, First Judicial District for the crime of capital murder while engaged in the commission of a kidnapping and as being an habitual offender in violation of MISS. CODE ANN. §97-3-19(2)(e) (Supp. 1988) and MISS. CODE ANN. §99-19-83 (Supp. 1988). A jury found Berry guilty of capital murder and after a sentencing hearing before the same 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 trial court found Berry to be an habitual offender and sentenced him to life without parole.

On direct appeal of his original conviction and sentence of death to the Mississippi Supreme Court, Berry raised twenty-one claims of error. The court below affirmed the conviction of capital murder and 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).[1] *See Berry v. State*, 575 So.2d 1 (Miss. 1990), *cert. denied, Mississippi v. Berry*, 500 U.S. 928 (1991).[2]

The retrial of the sentence phase of this case began on June 22, 1992. On June 25, 1992, the new jury again returned a sentence of death. Berry took his automatic appeal from this second sentence to the Mississippi Supreme Court. In this appeal Berry raised eighteen claims of error. Among these was a claim that the trial court erred in limiting consideration of his mental capacity to "Substantial Impairment" and in denying a requested charge on the statutory mitigating circumstance of "mental or emotional disturbance." Appellant's Brief,

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[1]In *Turner* the Mississippi Supreme Court required the habitual sentencing hearing be conducted prior to the capital sentencing hearing. If the defendant was found to be an habitual offender during this hearing, the jury was to be instructed that if it returned a life sentence that life sentence would be without the possibility of parole.

[2]In Berry's original trial the trial court properly conducted the habitual sentencing hearing prior to the capital sentencing hearing, however, the court refused to allow petitioner to argue that a life sentence would be without parole or instruct the jury that a life sentence would be without parole.

No. 93-DP-0059 at xiv-xv.

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). The court remanded the case for a hearing in the trial court to determine whether there had been a violation of *Batson*. *See Berry v. State*, 703 So.2d 269 (Miss. 1997).

On remand the Circuit Court of Chickasaw County held a hearing on the *Batson* issue on January 16, 1998. At the conclusion of this hearing the trial court entered a written finding of fact denying relief. From this denial of relief Berry again sought relief by appealing the circuit court's decision to the Mississippi Supreme Court. On October 11, 2001, the Mississippi Supreme Court rendered its opinion affirming the trial court's denial of relief on the *Batson* issue. A timely petition for rehearing was filed and later denied on December 31, 2001. *Berry v. State*, 802 So.2d 1033 (Miss. 2001). After final affirmance of his second death sentence, Berry sought relief from this Court by filing a petition for writ of certiorari. This Court denied certiorari on October 7, 2002. *Berry v. Mississippi*, 537 U.S. 828 (2002).

Berry then filed an application for leave to file an application for leave to file a petition for post-conviction relief in the trial court on December 20, 2002, with the Mississippi Supreme Court. On April 18, 2003, petitioner filed a Supplement/Amendment to Petition for Post-Conviction Relief with the state court. Among the claims raised in petitioner's application and amendment Berry was the following claim:

II. Earl Wesley Berry is mentally retarded and is therefore constitutionally barred from being executed by the State of Mississippi.

On July 1, 2004, the court below denied post-conviction relief in a written opinion. A motion for rehearing was filed which again raised the mental retardation claim supplementing this claim with new exhibits. The motion for rehearing was later denied on September 30, 2004. *See Berry v. State*, 882 So.2d 159 (2004).

Berry then sought relief from this Court by filing a petition for writ of certiorari to the Mississippi Supreme Court. In this petition Berry raised the following claims:

I. Have the Procedures Implemented by the State of Mississippi Pursuant to the Constitutional Mandate of the Court in *Atkins v. Virginia* Been Applied to Earl Wesley Berry in an Unconstitutional, Arbitrary and Capricious Manner Thereby Denying Mississippi Death-row Inmate Berry Due Process and Equal Protection of the Laws, and Resulting in a Substantial Likelihood That Earl Wesley Berry Will Be Executed in Violation of the *Atkins* Eighth Amendment Prohibition Against the Execution of the Mentally Retarded?

II. Has the State of Mississippi Unfairly, Arbitrarily, and Unconstitutionally Rejected the Scientific Community's Well Established and Generally Accepted Principle Known as the "*Flynn Effect*" as Concerns the Administration of Inaccurate, Obsolete and Outdated I.q. Tests, and as a Result, Mississippi Death-row Inmate Earl Wesley Berry Has Been Denied His Claim of Mental Retardation, Contrary to the Mandate of *Atkins v. Virginia*, and Earl Wesley Berry Will Be Executed in Violation of the Eighth Amendment Prohibition Against the Execution of the Mentally Retarded?

Petition for Writ of Certiorari at ii.

Certiorari was denied on March 28, 2005. *See Berry v. Mississippi*, 544 U.S. 950 (2005).

Berry then challenged his conviction and sentence by filing a petition for writ of

habeas corpus with the United States District Court for the Northern District of Mississippi. *See Berry v. Epps*, No. 1:04CV328-D-D. In this petition Berry raised twelve claims for relief. Among those claims of relief was the following:

> X. Petitioner Was Denied His Constitutional Rights to Due Process and Equal Protection and Rights Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution Where it Is Unlawful to Execute a Person Who Is Mentally Ill.[3]

On October 5, 2006, the district court entered its memorandum opinion and separate order denying habeas relief.[4] *See Berry v. Epps*, 2006 WL 2865064 (N.D.Miss. Oct. 5, 2006). Petitioner then filed a motion for a certificate of appealability with the district court requesting COA on five claims, the mental retardation claim was not among them.[5] Later, on November 2, 2006, the district court entered a memorandum opinion and order denying the motion for COA. *See Berry v. Epps*, 2006 WL 3147724 (N.D.Miss. Nov. 2, 2006).

Berry timely perfected his appeal to the United States Court of Appeals for the Fifth Circuit and on November 27, 2006, filed a motion for issuance of a certificate of appealability presenting the same five claims presented to the district court. On April 25, 2007, this Court denied Berry's request for COA. *See Berry v. Epps*, 230 Fed.Appx. 386 (5th Cir. 2007). Petitioner then filed a petition for writ of certiorari with this Court challenging the denial of COA by this Court. On October 1, 2007, this Court denied certiorari. *Berry v.*

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[3]Docket Entry 38, Memorandum Opinion at 6.

[4]Docket Entry 38.

[5]There was no request for a COA on the mental retardation claim.

Epps, ___ U.S. ___, 128 S.Ct. 277, 169 L.Ed.2d 202 (2007).

On October 1, 2007, the State of Mississippi filed a motion to reset a date for the execution of the sentence of death. Berry filed a response in opposition to the motion to reset and a motion for leave to file a successor petition for post-conviction relief on October 4, 2007. On October 11, 2007, the Mississippi Supreme Court entered an unpublished order setting Berry's execution date for October 30, 2007. On October 11, 2007, the Mississippi Supreme Court entered an order dismissing Berry's motion for leave to file a successive petition for post-conviction relief holding all claims to be procedurally barred under MISS. CODE ANN. § 99-39-5(2)[6] and MISS. CODE ANN. § 99-39-27(9) and denied the request for stay of execution.[7] The state court denied Berry's motion for rehearing on October 18, 2007. Berry filed a petition for writ of certiorari from the decision denying leave to file a successive post-conviction petition with this Court. On October 29, 2007, this Court entered an order denying certiorari stating:

> The application for stay of execution of sentence of death presented to Justice SCALIA and by him referred to the Court is denied. The petition for writ of certiorari to the Supreme Court of Mississippi is denied. The judgment of the Mississippi Supreme Court relies upon an adequate and independent state ground that deprives the Court of jurisdiction.

Berry v. Mississippi, ___ U.S. ___, 128 S.Ct. 528, 169 L.Ed.2d 369 (2007).

Also, in an attempt to stop his execution Berry filed a complaint under 42 U.S.C. §

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[6]The statute of limitations bar.

[7]The bar to successive petitions.

1983, challenging the method of execution used in Mississippi on October 18, 2007, with the United States District Court for the Northern District of Mississippi. *See Walker v. Epps*, No. 4:07-cv-00176. On October 24, 2007, the district dismissed Berry from the lawsuit on motion of the State. *See Walker v. Epps*, 2007 WL 3124551 (N.D.Miss. Oct. 24, 2007). This Court affirmed the district court's dismissal on October 26, 2007. *See Berry v. Epps*, 506 F.3d 402 (5th Cir. 2007). On October 30, 2007, this Court granted a stay pending consideration of a petition for writ of certiorari challenging this court of appeals' decision. *See Berry v. Epps*, ___ U.S. ___, 128 S.Ct. 531, 169 L.Ed.2d 370 (2007). On April 21, 2008, this Court denied certiorari. *See Berry v. Epps*, ___ U.S. ___, 2008 WL 1775034 (April 21, 2008).[8]

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[8]On May 2, 2008, Berry's counsel in the § 1983 action filed a motion for default judgment in this case as it relates to the four remaining plaintiffs based on the fact that no answer had been filed to the complaint. (Docket Entry 24) On May 5, 2008, the Clerk of the district court entered a default judgment in favor of the plaintiffs. (Docket Entry 25) On May 6, 2008, the State Defendants filed a motion to set aside the default judgment with a proposed answer attached. (Docket Entry 26) Late on May 12, 2008, counsel for the four remaining plaintiffs filed a response to the motion to set aside the default judgment and a cross motion to condition relief from the default on the striking of any procedural or time-based defenses the State Defendants may assert and further by granting Rule 60(b) relief as to separate plaintiff Earl Berry. (Docket Entry 27 & 28) At nearly midnight on May 13, 2008, plaintiffs' counsel filed a separate motion under Rule 60(b) moving to vacate the October 24, 2007, judgment of this Court dismissing him from this law suit and reinstating his challenge to the Mississippi protocol for lethal injection. Berry further requested a temporary restraining order and/or preliminary injunction staying the May 21, 2008, execution in this case. (Docket Entry 29) The State Defendants filed a response Berry's motion under Rule 60(b) for reinstatement into the § 1983 action on May 15, 2008. On May 16, 2008, the district court denied Berry's motion under Rule 60(b) for reinstatement and TRO and/or preliminary injunction. (Docket entry 32) The district court also set aside the default judgment on May 16, 2008. (Docket entry 31).

After the April 21, 2008, denial of certiorari the State of Mississippi again moved to reset the execution date in this case. On April 29, 2008, Berry filed a response to the motion to reset and a motion for leave to file a successor petition for post-conviction relief in the trial court. The State responded on May 1, 2008. On May 5, 2008, the Mississippi Supreme Court entered an order setting the date for execution of the sentence of death in this case for May 21, 2008, at 6:00 p.m. The state court also entered a separate order denying leave to file a successive petition for post-conviction relief. *See* Pet. Appx. A. On May 12, 2008, Berry filed a motion for rehearing from the denial of the successive post-conviction petition with the Mississippi Supreme Court. The state filed a response on May 14, 2008. Berry's motion for rehearing was denied by the Mississippi Supreme Court on May 15, 2008. *See* Pet. Appx. C.

Petitioner on May 15, 2008, filed a motion requesting an order allowing the filing of a successive petition for writ of habeas corpus with the United States Court of Appeals for the Fifth Circuit in an attempt to relitigate his mental retardation claim. The state filed a response in opposition to this motion on May 19, 2008. Later on May 19, 2008, the Fifth Circuit entered an order denying leave to file a successive petition for writ of habeas on the basis of 28 U.S.C. § 2244(b)(1).

Petitioner has now filed a motion for stay of execution and petition for writ of certiorari challenging the denial of his third post-conviction motion on the basis of the time bar and the successive petition bar. The respondents now file their response.

REASONS FOR DENYING THE WRIT

Petitioner raised and litigated his mental retardation in his first state post-conviction petition filed after the decision of this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002) and relief was denied on the merits on September 30, 2004.[9] This Court denied certiorari when that decision was challenged in this Court. Petitioner file a second post-conviction petition before the Mississippi Supreme Court on October 4, 2007. However, petitioner did not reurge his *Atkins* claim in that petition. After this Court denied certiorari challenging the dismissal of his challenge to the lethal injection protocol in Mississippi under 42 U.S.C. § 1983 on April 21, 2008, a date was again set for his execution. In his motion for leave to file a third successive petition petitioner filed on May 5, 2008, presented his *Atkins* claim to the court below, some three years and eight months after the denial of his first state post-conviction petition, The court below held that the claim was barred by the provisions of MISS. CODE ANN. § 99-39-5(2), the one-year statute of limitations bar, and the provisions of MISS. CODE ANN. § 99-39-27(9), the successive petition bar. The Court found that none of the statutory exceptions to these bars applied to petitioner's case.

In petitioner's second post-conviction petition filed on October 4, 2007, petitioner for the first time presented a claim challenging the protocol employed in the administration of lethal injection in Mississippi. The Mississippi Supreme Court imposed the state statutory

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[9]Petitioner also litigated his mental retardation claim on habeas review in the United States District Court for the Northern District of Mississippi and then abandoned the claim after the district court denied relief.

time bar.[10] Petitioner the filed a petition for writ of certiorari to this Court from that ruling. On October 29, 2007, this Court denied certiorari. Again in the May 5, 2008, post-conviction motion, petitioner raised the lethal injection claim. The court below held the claim barred by the statute of limitations and the successive petition bar. Since the resolution of petitioner's claim rests on the imposition of an adequate and independent state law procedural ground this Court has no jurisdiction to consider this claim.

Petitioner has presented no cognizable claim under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

ARGUMENT

1. WHERE THE QUESTION PETITIONER PRESENTS TO THIS COURT REGARDING HIS CLAIM OF MENTAL RETARDATION WAS HELD TO BE BARRED ON THE BASIS OF ADEQUATE AND INDEPENDENT STATE LAW PROCEDURAL GROUNDS OF TIMELINESS AND THE SUCCESSIVE NATURE OF THE PETITION THIS COURT HAS NO JURISDICTION TO CONSIDER THE QUESTION AND CERTIORARI SHOULD BE DENIED.

Petitioner's contention in this first question is whether the Mississippi Supreme Court can hold barred a successive claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), raised in a third and successive petition for post-conviction relief. The State asserts this claim was presented in petitioner's first petition for state post-conviction relief and decided on the merits.

On April 29, 2008, petitioner filed a motion for leave from judgment and/or a motion

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[10]MISS. CODE ANN. § 99-39-5(2).

to file a successor petition for post-conviction relief with the court below. In this petition petitioner again raised a claim based on this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). He also requested a stay of execution pending the consideration of the successor petition. The motion for leave to file a successor petition for post-conviction relief was dismissed on procedural grounds on May 5, 2008. That order reads, in pertinent part:

> This matter is before the Court sitting en banc on the Motion for Leave from Judgment or for Leave to File Successor Petition for Post-Conviction Relief filed by Earl Wesley Berry and the Response filed by the State of Mississippi. The Court notes that Berry requested post-conviction relief in this Court in 2002 and at that time alleged that he was mentally retarded. This Court considered the issue of mental retardation, along with the others raised by Berry, and denied Berry's application for post-conviction relief in its entirety. *See Berry v. State*, 882 So.2d 157 (Miss. 2004), *cert. denied*, 544 U.S. 950 (2005). Berry now raises two issues, which the Court considers and decides as follows.
>
> Berry first alleges, once again, that he is mentally rearded and cannot be executed pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). More specifically, Berry argues that the attorneys who filed his application for post-conviction relief in 2002 were deficient in their presentation of the issue of Berry's alleged mental retardation to this Court. Berry argues that he has now submitted sufficient proof pursuant to *Chase v. State*, 873 So.2d 1013 (Miss. 2004), such that he is entitled to an evidentiary hearing on the issue. After due consideration the Court finds that this issue is procedurally barred pursuant to MISS. CODE ANN. § 99-39-5(2) & -27(9) (Rev. 2007), and none of the statutory exceptions are applicable.
>
> . . .
>
> IT IS THEREFORE ORDERED that the Motion for Leave from Judgment or for Leave to File Successor Petition for Post-Conviction Relief filed by Earl Wesley Berry is dismissed.
>
> Pet. Appx. A at 1-2 & 3.

A motion for rehearing was filed and later denied on May 15, 2008.

In his first petition for state post-conviction relief Berry presented the following question to the Mississippi Supreme Court.

> II. Earl Wesley Berry is mentally retarded and is therefore constitutionally barred from being executed by the State of Mississippi

In addressing the claim the court below, *Berry v. State*, 882 So.2d 157 (Miss. 2004), held:

> **XI. MENTAL RETARDATION.**
>
> ¶ 78. Berry raises two issues regarding mental retardation: 1) who determines mental retardation under *Atkins*; 2) whether he is mentally retarded under *Atkins*.
>
> *Who determines whether a defendant is mentally retarded.*
>
> ¶ 79. Berry devotes a significant part of his argument discussing what role judges and juries should play in determining whether a defendant is mentally retarded. We recently addressed this issue in *Russell v. State*, 849 So.2d 95, 145-49 (Miss.2003), but the briefs in this matter were filed prior to *Russell*.
>
> ¶ 80. In *Russell*, the petitioner argued that after meeting his burden of production, the determination of whether he is mentally retarded must be submitted to the jury and proven by the State beyond a reasonable doubt. *Id.* at 146. Rejecting this position, we stated, "We find that not being mentally retarded is not an aggravating factor necessary for imposition of the death penalty, and [therefor] *Ring* has no application to an *Atkins* determination." *Id.* at 148. Our reasoning is established on the fact that *Ring/Apprendi* and *Atkins* discuss issues under the Sixth and Eighth Amendments, respectively. *See also Chase v. State*, 873 So.2d 1013 (Miss.2004).
>
> ¶ 81. We reject Berry's argument and cite the recent decision in *Russell*.
>
> *Whether Berry is Entitled to an Atkins Hearing.*
>
> ¶ 82. At the outset, we note that we previously considered Berry's mental capacity in Berry II. *See Berry II*, 703 So.2d at 293-94.[8] However, because he was sentenced pre-*Atkins*, this issue was not scrutinized under the

standards now imposed under *Atkins*.

¶ 83. In support of his claim that he is entitled to an *Atkins* hearing, Berry relies on affidavits from family members, a report from a social worker, testimony of psychologist, and in addition to other proof. Because the issue of his mental capacity and competency were prevalent throughout his trials and appeals, he also cites the record from the previous appeals. The State relies heavily on the testimony of Dr. Charlton Stanley and Dr. Paul Blanton.

¶ 84. Testifying during the sentencing phase of the original trial, Dr. Charlton Stanley, a forensic psychologist, testified that Berry had an IQ of 83, which classified him in the dull normal range of intellectual function. Though Dr. Stanley found that he suffered from organic brain damage, he testified that Berry was not mentally retarded.

¶ 85. Next, there is the evidence and testimony that was presented during resentencing. At this time, Berry called Dr. Paul Blanton, a clinical psychologist, who testified that Berry: 1) had full scale IQ of 76 (borderline intellectual functioning), and how such an IQ would affect him; 2) suffered from significant frontal lobe impairment; and 3) was not mentally retarded.

¶ 86. Second to testify was social worker Hope Stone, who testified regarding a report in which he outlined significant personal and family background information on Berry. The report showed that Berry's father suffered from mental illness and was treated at Whitfield; Berry had demonstrated poor educational performance; Berry had sustained several head traumas; Berry was treated at Whitfield in 1981; and that, from August 1987 thru November 1987, he was treated for paranoid schizophrenia at Pines Aftercare Program in Starkville.

¶ 87. Testifying last was Dr. Lewis Tetlow, a clinical psychologist, who diagnosed Berry as suffering from paranoid schizophrenia.

¶ 88. Aside from the testimony, Berry cites several affidavits from family and friends swearing, inter alia, that: 1) they had long known of that he was "slow" and lacked the appropriate mental capabilities for someone his age; 2) attended special educational classes; 3) as a child he was hospitalized for cottonseed oil poisoning.

¶ 89. To show that his intellectual deficiencies were documented prior

to age 18, a standardized tests scores from January 1972 (13 years old) were provided. The report indicates that his I.Q. was 72.[9]

¶ 90. Last, there are the notes and records from staff at the Mississippi Department of Corrections hospital at Parchman following suicide attempts in 1981 and 1985.[10] During October of 1981, Berry was hospitalized after attempting suicide (swallowed razor blades). He was subsequently placed in the psychiatric wing. Staff notes during this period indicate that they considered him mentally retarded.

¶ 91. Again in April of 1985, Berry was admitted to the hospital after attempting suicide and, again the staff's notes indicate that they considered him to be mentally retarded.

¶ 92. We recently addressed the standard for determining whether a defendant is mentally retarded as to render him or her ineligible for capital punishment. *See Chase v. State*, 873 So.2d at 1019-23. If, on post-conviction review, a defendant produces evidence that he or she has scored 75 or below on an IQ test, we are to grant an evidentiary hearing for a mental retardation determination.

¶ 93. *Chase* requires that, in order to merit an *Atkins* hearing, the defendant or petitioner must produce the affidavit of a qualified expert stating that the defendant or petitioner is mentally retarded. Here, other than Dr. Blanton's testimony that Berry was probably not mentally retarded, there is no evidence in the record which would compel us to remand for an evidentiary hearing on the issue of mental retardation. *See Scott v. State*, 878 So.2d 933 (Miss.2004). This claim is without merit.

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8. At that time, Berry claimed the death sentence was disproportionate considering he was "a paranoid schizophrenic functioning with brain damage and an impaired intellectual capacity" the death sentence was disproportionate. *Id.* at 293. Relying on *Edwards v. State*, 441 So.2d 84, 93 (1983), Berry argued that his sentence ought to be vacated. *Id.* We noted that a "diagnosis of paranoid schizophrenia does not necessarily prohibit the imposition of the death penalty." *Id.* at 293. Rejecting the claim that his circumstances closely paralleled those from *Edwards*, we distinguished his claim for several reasons, including: 1) there was expert testimony that he was competent to be executed; 2) the evidence was neither overwhelming nor uncontradicted; 3) he had never been diagnosed, treated, or institutionalized for his afflictions prior

to killing Mary Bounds. *Id.*

9. The State discounts the results by arguing that report is not certified.

10. Apparently, Berry has attempted suicide on several occasions.

882 So.2d at 174-76.

Therefore, this claim was presented to the Court on post-conviction review and decided against petitioner. Petitioner challenged this ruling by filing a petition for writ of certiorari to the Mississippi Supreme Court. In this petition Berry raised the following claims:

> I. Have the Procedures Implemented by the State of Mississippi Pursuant to the Constitutional Mandate of the Court in *Atkins v. Virginia* Been Applied to Earl Wesley Berry in an Unconstitutional, Arbitrary and Capricious Manner Thereby Denying Mississippi Death-row Inmate Berry Due Process and Equal Protection of the Laws, and Resulting in a Substantial Likelihood That Earl Wesley Berry Will Be Executed in Violation of the *Atkins* Eighth Amendment Prohibition Against the Execution of the Mentally Retarded?
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> II. Has the State of Mississippi Unfairly, Arbitrarily, and Unconstitutionally Rejected the Scientific Community's Well Established and Generally Accepted Principle Known as the "*Flynn Effect*" as Concerns the Administration of Inaccurate, Obsolete and Outdated I.Q. Tests, and as a Result, Mississippi Death-row Inmate Earl Wesley Berry Has Been Denied His Claim of Mental Retardation, Contrary to the Mandate of *Atkins v. Virginia*, and Earl Wesley Berry Will Be Executed in Violation of the Eighth Amendment Prohibition Against the Execution of the Mentally Retarded?

Petition for Writ of Certiorari at ii.

Certiorari was denied on March 28, 2005. *See Berry v. Mississippi*, 544 U.S. 950 (2005).

Berry then sought habeas relief and raised the mental retardation claim in his first

habeas petition.[11] The district court denied relief on the claim. Petitioner abandoned his claim as he did not seek a COA from the district court[12] or the Fifth Circuit on this question.

Because this claim had been raised and decided in a prior post-conviction petition, the State argued that petitioner's attempt to relitigate the claim of mental retardation was barred by the statute of limitations provisions found in MISS. CODE ANN. § 99-39-5(2) and the successive petition provisions found in MISS. CODE ANN. § 99-39-27 (9).

Petitioner makes the assertion that he has continually maintained that he is mentally retarded since the decision in *Atkins*. However, petitioner abandoned the claim after the federal district court ruled against him on habeas review. Further, petitioner failed to raise this claim in his motion for leave to file a successive petition for post-conviction relief filed in October, 2007. Therefore, petitioner's contention that he has continually maintained that he is mentally retarded is not true as he could have challenged the federal district court's decision on appeal and/or he could have presented the claim in the October, 2007, successive petition. He did neither.

Looking to the bars imposed by the court below we first consider the statute of limitations bar found in MISS. CODE ANN. § 99-39-5 (2). This section reads:

> (2) A motion for relief under this article shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or

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[11] *See Berry v. Epps*, 2006 WL 2865064 (N.D.Miss. Oct. 5, 2006).

[12] *See Berry v. Epps*, 2006 WL 3147724 (N.D.Miss. Nov. 2, 2006).

> sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. *Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence* or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. *Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.*

Petitioner's claim was barred by the statute of limitations because it was not filed within one-year of the date on which his conviction and sentence became final in state court, December 20, 2001, the date the mandate was issued after direct appeal. Even if raising the *Atkins* claim in his first petition some how restarted the clock on the state post-conviction filing time, which it did not, the claim was not filed within one year of the date on which the first petition for post-conviction relief was denied, September 30, 2004.

The second statutory bar imposed by the Mississippi Supreme Court is the successive petition bar found in MISS. CODE ANN. § 99-39-27(9), which reads:

> (9) *The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article.* Excepted from this prohibition is an application filed pursuant to Section 99-19-57(2), Mississippi Code of 1972, raising the issue of the convict's supervening insanity prior to the execution of a sentence of death. A dismissal or denial of an application relating to insanity under Section 99-19-57(2), Mississippi Code of 1972, shall be res judicata on the issue and shall likewise bar any second or successive applications on the issue. *Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme*

> *Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence*. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. [Emphasis added.]

Petitioner raised and litigated his mental retardation claim in his first state post-conviction petition and it was denied in September, 2004. Petitioner then filed an application to file a successive petition without presenting the mental retardation claim. That petition was dismissed in October, 2007. The current application was the third attempt to seek state post-conviction review. Thus, having had one petition denied and another dismissed, the instant application fell squarely within the statutory prohibition to filing a successive petition found in the statute.

The statutory exceptions found in both statutes are basically the same. First, a petitioner can rely on an intervening decision of the Mississippi Supreme Court or of this Court "which would have actually adversely affected the outcome of his conviction or sentence." There is no intervening decision in this case. *Atkins* was decided on June 30, 2002. Berry's first petition for post-conviction relief was not filed until December 20, 2002, and that petition was allowed to be supplemented on April 18, 2003. The Mississippi Supreme Court decided the case on the basis of *Atkins*. The court below applied *Atkins* to this case and denied relief. This Court later denied certiorari from this decision. Therefore, there is no intervening decision within the meaning of the Mississippi post-conviction statute

that would allow the filing of a time barred or successive petition for post-conviction relief.

The second, exception is that the petitioner "has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence." Clearly, this evidence was available at the time of trial as there was testimony during his trial that he was not mentally retarded. Petitioner used that evidence, coupled with the so called "Flynn Effect," to argue that he was retarded. Even if it can be said that such evidence was not available until after the *Atkins* decision petitioner did not obtain the affidavit of Dr. Marc Zimmerman until April 26, 2008, three days before filing the latest post-conviction motion. Petitioner made no competent showing of why this information was not presented in his original post-conviction motion or in his second post-conviction motion. The claim was ripe on and after June 30, 2002, he litigated the claim and now nearly six years after the *Atkins* decision he wants to ligate it once again.

Clearly, petitioner did not fall into either of the exceptions to the statute of limitations found in the Mississippi statute.

Petitioner relies on the decision in *Panetti v. Quarterman,* ___ U.S. ___, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), in support of his claim that the Mississippi Supreme Court erred in barring his claim. However, the State would assert that *Panetti* offers petitioner no relief. This Court in addressing the § 2244(b) question, held:

> We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions *to govern*

> *a filing in the unusual posture presented here: a § 2254 application raising a Ford-based incompetency claim filed as soon as that claim is ripe.*
>
> 127 S.Ct. at 2853.

Panetti's *Ford* claim was not ripe when he filed his first habeas petition and his first habeas petition was denied prior to the filing of the *Ford* claim. However, petitioner's *Atkins* claim became ripe on June 30, 2002, when *Atkins* was decided. Petitioner raised his claim under *Atkins* in his first state post-conviction and in his first federal habeas petition. This is not the procedural or factual scenario found in *Panetti*. The respondents would assert that it has no application to this case.

Petitioner also contends that for five years he has "repeatedly presented substantial evidence of his mental retardation" and the Mississippi courts have "refused to decide whether Berry is among the class of persons" who are exempt from the death penalty by *Atkins*. These statements are simply not true. The Mississippi Supreme Court has not been asked to decide anything with regard to this claim between the final denial of post-conviction relief on September 30, 2004, and the filing of this third and successive post-conviction motion on April 29, 2008. This hardly shows the diligence petitioner touts in his petition. As stated elsewhere in this brief, petitioner abandoned his mental retardation claim by not seeking a COA after an adverse ruling by the federal district court on his mental retardation claim on habeas review. Berry also filed a request for leave to file a successive petition for writ of habeas corpus in October, 2007, shortly before his scheduled October 30, 2007, execution date. He failed to raise the mental retardation claim in that application. His

arguments that the Mississippi courts have repeatedly refused to consider his claim are specious.

Berry places his main reliance on the affidavit of Dr. Marc Zimmerman who, while never having examined or tested petitioner, opines that he is mentally retarded. *See* Pet. Appx. G. In attacking the IQ scores obtained by earlier psychologist and their opinion that petitioner is not mentally retarded, Dr. Zimmerman has relied on the "Flynn Effect"[13] to reduce petitioner's scores on the earlier test that were administered to him.[14] Dr.

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[13]The "Flynn Effect" has not been recognized as scientifically valid by the United States Court of Appeals for the Fifth Circuit. *See In re Mathis*, 483 F.3d 395, 398, n. 1 (5th Cir. 2007) *citing In re Salazar*, 443 F.3d 430, 433 n. 1 (5th Cir.2006).

[14]The United States District Court for the Northern District of Georgia in *Ledford v. Head*, 2008 WL 754486 * 6-8 (N.D. Ga. March 19, 2008) also rejected the use of the "Flynn Effect". The *Ledford* Court's rejection of the "Flynn Effect" was based on the fact that it is only used in cases dealing with the death penalty to reduce IQ scores. The district court held:

> The Court was not impressed by the evidence concerning the Flynn effect. There was testimony at the hearing that the Flynn effect is a "generally recognized phenomenon," *but experts for both petitioner and respondent agreed that it is not used in clinical practice to reduce IQ scores*. (Hearing Tr. at 320-21, 439.) Both Dr. King and *Dr. Zimmermann testified that they have never seen it utilized except in capital cases*. (*Id.*) *Dr. Zimmermann specifically stated: "I don't think I've seen anybody who is doing this in clinical practice*." (*Id.* at 320-21.) Dr. King added: "I've never seen it done except in capital litigation cases." (*Id.* at 439.) The Court is hesitant to apply a theory that is used solely for the purpose of lowering IQ scores in a death penalty context.
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> 2008 WL 754486, *7.

This is the same Dr. Zimmerman, who in this case, has relied so heavily on the Flynn effect in his affidavit in this case. *See also "WAIS-III IQs of Criminal Defendants with a Mental Retardation Claim Should Not Be Reduced for the Flynn Effect,"* American Journal of Forensic Psychology, Volume 25, Issue 4, 2007, pages 41-63.

Zimmerman's affidavit does not prove that Berry is mentally retarded.[15] Because the issue of mental retardation was fully litigated in the first state post-conviction petition the Court below found he was not entitled to file a successive petition again raising the claim because it was both time barred and successive petition barred.

The simple fact is that petitioner litigated his mental retardation claim before the state court in his first state post-conviction petition and presented the claim to this Court on certiorari. He then litigated the claim on federal habeas review and abandoned the claim after an adverse decision by the district court.

Petitioner did not demonstrate to the Court below that he fell within either of the two exceptions to the time bar or the successive petition bar in order that this claim could be relitigated.

Petitioner relies on this Court's decision in *Dretke v. Haley*, 541 U.S. 386 (2004), to argue that "procedural defaults do not bar the door to the review of a substantial claim of 'actual innocence, whether of the sentence or of the crime charged.'" 541 U.S. at 393-94. *Haley* was a federal habeas case. There the Court was discussing the manner in which a claim barred on an adequate and independent state law ground could, with the showing of cause and prejudice, be addressed by a federal habeas. However, this Court pointed out in

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[15]Petitioner has switched gears in his argument before this Court. He now argues that Dr. Zimmerman's affidavit shows that petitioner is "potentially" mentally retarded, whereas in state court he argued that the affidavit showed that petitioner was, if fact, mentally retarded.

the decision . . . "*an adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment,*. . . . 541 U.S. at 392. [Emphasis added.] In the certiorari case at bar the court below relied on adequate and independent state procedural grounds to deny petitioner's successive petition. Therefore, this Court has no jurisdiction to review the judgment of the Mississippi Supreme Court and the petition for writ of certiorari should be denied.

2. WHERE THE QUESTION PETITIONER PRESENTS TO THIS COURT REGARDING HIS CLAIM OF MENTAL RETARDATION WAS HELD TO BE BARRED ON THE BASIS OF ADEQUATE AND INDEPENDENT STATE LAW PROCEDURAL GROUNDS OF TIMELINESS AND THE SUCCESSIVE NATURE OF THE PETITION THIS COURT HAS NO JURISDICTION TO CONSIDER THE QUESTION AND CERTIORARI SHOULD BE DENIED.

Petitioner next contends that the Mississippi protocol for administering lethal injection violates this Court's decision in *Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520 (2008), because it is not substantially similar to the Kentucky protocol approved by the Court. Petitioner presented this claim to the Mississippi Supreme Court for the first time on October 4, 2007. That claim was held to be procedurally barred by the Mississippi Supreme Court based on the time bar and the successive petition bar. This Court denied petitioner's petition for writ of certiorari on that claim on October 29, 2007.

Petitioner once again presented the claim relating to the protocol for administration of lethal injection in his petition filed on April 29, 2008, to the court below. The state responded that this Court's decision in *Baze, supra*, did not represent an intervening decision

which "would have actually adversely affected the outcome of his conviction or sentence" that would fit within an exemption to the time bar or to the successive petition bar. The Mississippi Supreme Court, on May 5, 2008, held the claim to be procedurally barred from reconsideration. The order reads:

> Berry next argues that the State of Mississippi's lethal injection protocol violates the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution. Berry acknowledges that the United States Supreme Court in ***Baze v. Rees***, U.S. , 2008 U.S. LEXIS 3476 (April 16, 2008) (No. 07-5439) (plurality opinion), rejected an Eighth Amendment challenge to Kentucky's lethal injection procedure, but Berry argues that Mississippi's procedure is substantially different than Kentucky's. This Court has determined that the State of Mississippi's lethal injection procedure does not amount to cruel and unusual punishment. *Jordan v. State*, 918 So.2d 636, 662 (Miss. 2005). Berry relies on an affidavit by Dr. Mark Heath, an anesthesiologist, which enumerates alleged flaws in Mississippi's procedure. The State relies on the following language in the *Baze* plurality opinion, 2008 U.S. LEXIS 3476 at *47:
> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.
>
> After due consideration this Court finds that this issue is procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) & -27(9) (Rev. 2007), and none of the statutory exceptions are applicable. For these reasons, the Motion for Leave from Judgment or for Leave to File Successor Petition for Post-Conviction Relief should be dismissed.
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> IT IS THEREFORE ORDERED that the Motion for Leave from Judgment or for Leave to File Successor Petition for Post-Conviction Relief filed by Earl Wesley Berry is dismissed.

Pet. Appx. A at 2-4.

Therefore, the state court applied the adequate and independent state statutory bars to the claim and found that none of the exceptions to these bars applied.

The State then asserts that the written protocol and unwritten practice and procedures used in conducting an execution in Mississippi by lethal injection were substantially similar to those found in Kentucky and that petitioner was not entitled to a stay of execution based on *Baze*.

This Court described the Kentucky protocol in its opinion in *Baze*, stating:

> Shortly after the adoption of lethal injection, officials working for the Kentucky Department of Corrections set about developing a written protocol to comply with the requirements of § 431.220(1)(a). Kentucky's protocol called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. In 2004, as a result of this litigation, the department chose to increase the amount of sodium thiopental from 2 grams to 3 grams. App. 762-763, 768. Between injections, members of the execution team flush the intravenous (IV) lines with 25 milligrams of saline to prevent clogging of the lines by precipitates that may form when residual sodium thiopental comes into contact with pancuronium bromide. *Id.*, at 761, 763-764. The protocol reserves responsibility for inserting the IV catheters to qualified personnel having at least one year of professional experience. *Id.*, at 984. Currently, Kentucky uses a certified phlebotomist and an emergency medical technician (EMT) to perform the venipunctures necessary for the catheters. *Id.*, at 761-762. They have up to one hour to establish both primary and secondary peripheral intravenous sites in the arm, hand, leg, or foot of the inmate. *Id.*, at 975-976. Other personnel are responsible for mixing the solutions containing the three drugs and loading them into syringes. *Id.*, at 761.
>
> Kentucky's execution facilities consist of the execution chamber, a control room separated by a one-way window, and a witness room. *Id.*, at 203. The warden and deputy warden remain in the execution chamber with the prisoner, who is strapped to a gurney. The execution team administers the drugs remotely from the control room through five feet of IV tubing. *Id.*, at 286. If, as determined by the warden and deputy warden through visual

> inspection, the prisoner is not unconscious within 60 seconds following the delivery of the sodium thiopental to the primary IV site, a new 3-gram dose of thiopental is administered to the secondary site before injecting the pancuronium and potassium chloride. *Id.*, at 978-979. In addition to assuring that the first dose of thiopental is successfully administered, the warden and deputy warden also watch for any problems with the IV catheters and tubing.
>
> A physician is present to assist in any effort to revive the prisoner in the event of a last-minute stay of execution. *Id.*, at 764. By statute, however, the physician is prohibited from participating in the "conduct of an execution," except to certify the cause of death. KY.REV.STAT. ANN. § 431.220(3). An electrocardiogram (EKG) verifies the death of the prisoner. App. 764. Only one Kentucky prisoner, Eddie Lee Harper, has been executed since the Commonwealth adopted lethal injection. There were no reported problems at Harper's execution.
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> 128 S.Ct. at 1528.

In order to demonstrate that the decision in *Baze* was not an intervening decision within the meaning of the statutory exemptions, the state submitted a copy of the Mississippi protocol supplemented by the affidavit of the Superintendent of the Mississippi State Penitentiary setting forth additional requirements and actions taken during a lethal injection execution. *See* Respondents' Exhibits A & B.

First, petitioner contended that Mississippi only uses a 2 gram dose of thiopental (sodium pentothal), and that was a substantial difference, since Kentucky uses 3 grams. However, this Court did not reject the use of 2 grams rather than 3 grams of thiopental in the opinion in *Baze*. Three other states, including Georgia, use only 2 grams of thiopental.[16] The

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[16]The State furnished the court below a copy of the memorandum opinion and order entered in by the United States District Court for the Northern District of Georgia entered on May 2, 2008, in *Alderman v. Donald*, No. 1:07-cv-1474, rejecting a claim that the use of 2

state also pointed out that during the four executions conducted in Mississippi by lethal injection there had never been any problem with the 2 gram dosage having the desired result.

The state also pointed out that the Mississippi protocol requires a "maximal concentration in preparing the mixture of thiopental with intravenous fluids." *See* Resp. Ex. A. Petitioner reled on the affidavit of Dr. Mark Heath to argue that a "licensed pharmacist" should be required to mix the drugs. Further, Dr. Heath contends without explanation that using the maximal concentration is "bizarre and unacceptable." This Court spoke to the question of the mixing and concentration of the thiopental in its opinion. The Court held:

> Petitioners contend that there is a risk of improper administration of thiopental because the doses are difficult to mix into solution form and load into syringes; because the protocol fails to establish a rate of injection, which could lead to a failure of the IV; because it is possible that the IV catheters will infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein; because of inadequate facilities and training; and because Kentucky has no reliable means of monitoring the anesthetic depth of the prisoner after the sodium thiopental has been administered. Brief for Petitioners 12-20.
>
> As for the risk that the sodium thiopental would be improperly prepared, petitioners contend that Kentucky employs untrained personnel who are unqualified to calculate and mix an adequate dose, *especially in light of the omission of volume and concentration amounts from the written protocol. Id.*, at 45-46. The state trial court, however, specifically found that "*[i]f the manufacturers' instructions for reconstitution of Sodium Thiopental are followed, . . . there would be minimal risk of improper mixing, despite converse testimony that a layperson would have difficulty performing this task.*" App. 761. We cannot say that this finding is clearly erroneous, *see Hernandez v. New York*, 500 U.S. 352, 366, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion), particularly when that finding is substantiated by

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grams as opposed to 3 grams created a substantial difference from the Kentucky protocol.

> expert testimony describing the task of reconstituting powder sodium thiopental into solution form as "[n]ot difficult at all. . . . *You take a liquid, you inject it into a vial with the powder, then you shake it up until the powder dissolves and, you're done. The instructions are on the package insert.*" 5 Tr. 695 (Apr. 19, 2005).
>
> 128 S.Ct. at 1533. [Emphasis added.]

The Court's opinion clearly rejects the claim that the omission of the volume and concentration amounts from the written protocol was a problem. Here the State has included the concentration of the sodium pentothol to be achieved in its protocol and petitioner now argues that this makes it unlike the Kentucky protocol. Further, the Court held that the drugs could be mixed by a layman. In any event, the drugs used in carrying out executions in Mississippi are mixed by a certified practicing paramedic with twenty years of experience. *See* Resp. Ex. B.

The state also pointed out that petitioner's argument that Mississippi does not have minimum qualifications for the IV insertion team. While the protocol does not so list any qualifications for the members of the IV insertion team, the pattern and practice employed in the executions carried out by the State of Mississippi are "substantially similar" to that used in Kentucky. The insertion of the IV lines prior to an execution is performed by two certified practicing paramedics with over twenty years of experience each. For each execution there is a primary certified practicing paramedic and an alternate or assistant certified practicing paramedic in attendance. The primary certified paramedic has participated in all four executions that have been conducted in the State of Mississippi by

lethal injection. *See* Resp. Ex. B. The current alternate or assistant certified paramedic as been employed since 2007 and has participated in one execution.

The state also pointed out that the while the protocol does not address training or practice sessions that prior to each execution there are four practice sessions. Two during the week prior to the scheduled execution and two more within forty-eight hours of the execution. Between December, 2005, and today there have been twenty (20) practice or training sessions in addition to the two (2) executions that were carried out during that time period. This is not substantially different that the Kentucky procedure.

The state responded to petitioner's contention that there is no standardized time for the administration of the three chemicals. The reason for this is simple. Each individual is different. The second and third drugs are administered only after it has been determined that the sodium pentothal has had the expected result and the prisoner does not exhibit any signs of consciousness. *See* Resp. Ex. B. Prior to the administration of each drug after the sodium pentothal the IV lines are flushed with normal saline solution. This is not substantially different than the Kentucky procedure.

The state pointed out that there is a "back-up plan" in the event of failed IV insertion or other errors to administration of the chemicals. A simple reference to the written protocol demonstrated this fact. *See* Resp. Ex. A. The protocol reads:

> The angiocath shall be inserted into the vein of the left arm and secured in place. The flow of Normal Saline shall be started and administered at a slow rate of flow.

> Step 1 shall be repeated for the right arm. This line shall be held in reserve as a contingency line in case of a malfunction or blockage in the first line.
>
> Resp. Ex.. A.

Clearly, there is a back-up plan in the event of a malfunction of the primary IV line.

The state also pointed out that petitioner's contention that there must be medical personnel present to assess anesthetic depth was rejected in *Baze*. *See* 128 S.Ct. at 1533-34. The Court held that the presence of the warden was sufficient. In Mississippi Superintendent of the penitentiary and Commissioner of the Department of Corrections are present in the execution chamber.[17] The Superintendent is within three feet of the inmate. This is not substantially different from the Kentucky procedure. Based on the protocol and the affidavit of the Superintendent, the State contended that *Baze* did not represent an intervening decision within the meaning of the statute as it did not "actually adversely affected the outcome of his conviction or sentence." This is because Mississippi's procedure for administering lethal injection is not substantially different from that found in Kentucky and therefor *Baze* does not represent an intervening decision under either the time bar or the successive petition bar.

The plurality opinion in *Baze*, clearly held:

> . . . *A stay of execution may not be granted on grounds such as those asserted here* unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. *A State with a lethal injection protocol substantially similar to the protocol we uphold*

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[17]There is also a doctor present in the execution chamber within five feet of the inmate.

today would not create a risk that meets this standard.

128 S.Ct. at 1537. [Emphasis added.]

The Mississippi Supreme Court found that the statutory exemption to application of the time bar and the successive petition bar were not present and held petitioner's successive petition barred. Therefore, the state court imposed an adequate and independent state law procedural bar to this claim. This Court is without jurisdiction to consider this question. *See Dretke v. Haley*, 541 U.S. 386, 392 (2004). The petition for writ of certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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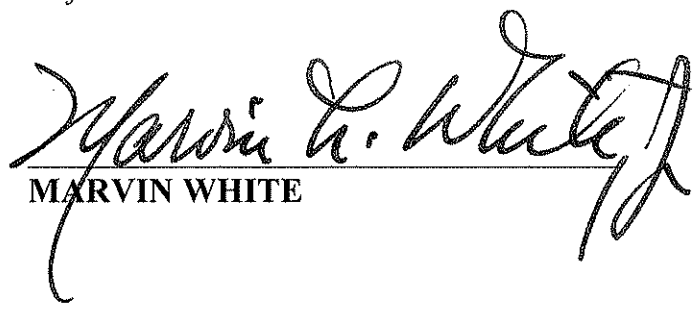
BY: 
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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, hereby certifies that I have this day caused to be mail, first-class postage prepaid, a true and correct copy of the foregoing BRIEF IN OPPOSITION, further counsel hereby certifies that he has also emailed a PDF copy of the same to the following:

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This the 20th day of May, 2008.

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