No. 07-10974

IN THE
SUPREME COURT OF THE UNITED STATES

EARL WESLEY BERRY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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

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CAPITAL CASE – IMMINENT EXECUTION

REPLY BRIEF FOR PETITIONER

Absent intervention from this Court, petitioner Earl Wesley Berry will be executed at 6:00 p.m. on May 21, 2008 without Mississippi ever having answered either of two essential constitutional questions: (1) whether Berry is mentally retarded; and (2) whether Mississippi's untested lethal injection protocols satisfy constitutional standards. The State's response offers no persuasive reason to deny the Petition.

I. Review Of Berry's *Atkins* Claim Is Plainly And Urgently Warranted.

Mississippi's brief in opposition nowhere addresses the essential question raised by Berry's petition: May Mississippi invoke procedural bars to avoid answering the question, plainly raised, whether Berry is mentally retarded within the meaning of *Atkins v. Virginia*, and therefore categorically ineligible to be executed under the Eighth Amendment? Three essential points, none contested in earnest by Mississippi's opposition brief, demonstrate that this question is squarely presented:

1. The Mississippi courts have ***never*** determined, on the merits, whether Berry is mentally retarded. Instead, in 2004 and again in 2008, the Mississippi Supreme Court concluded that Berry was procedurally barred from litigating the issue of whether the Eighth Amendment categorically prohibits his execution.
2. Berry initially raised this claim in 2003, shortly after *Atkins* was decided by this Court.
3. Berry's *Atkins* claim, from the outset, has been supported by substantial evidence indicating that he is mentally retarded.

In light of these facts, it is clear that there is a substantial chance that Berry is mentally retarded, and therefore a significant likelihood that the Mississippi lacks the power to take his life. *Atkins v. Virginia*, 538 U.S. 304, 321 (2002). The only question is whether Mississippi may execute Berry without ever deciding whether it is constitutionally barred from doing so.

It may not. It is firmly established that "[i]f the Constitution renders the fact or timing of [a prisoner's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Panetti v. Quarterman*, 127 S. Ct. 2842, 2855-56 (2007). What that means in this context – in which Berry put forth substantial evidence of his mental retardation in a timely manner (albeit in a *form* that Mississippi subsequently decided was insufficient) – is that Mississippi has an affirmative obligation to decide whether Berry in fact is mentally retarded.

Mississippi makes no attempt at all to argue the contrary point: that *even if* Berry is mentally retarded – and despite Berry's ample demonstration that he likely is mentally retarded – it may kill him, because he procedurally defaulted. What respondent ignores is that the issue of Berry's likely mental retardation is unlike almost any other: If Berry is mentally retarded, that conclusion deprives Mississippi of its constitutional ability to execute him. If he is not, then Berry's mental limitations (which are undeniably substantial) do not prevent Mississippi from going forward with the execution. Because this issue goes to the essence of Mississippi's power, and because Berry in fact raised this issue to Mississippi's highest court in a timely fashion and with the support of substantial evidence, Berry's procedural failings, however denominated, cannot vest Mississippi with a power to kill that it otherwise lacks.

Unable or unwilling to argue this substantive point, Mississippi instead rests on the claim that the very same procedural defaults that it has used to justify its refusal to decide the merits of

Berry's *Atkins* claim also deprive this Court of jurisdiction to grant relief and require a determination of whether Berry is categorically immune from the death penalty. This argument lacks all merit.

First, it is firmly established that where a petitioner has made a substantial showing that he is categorical ineligibility to be executed, and thus "actually innocent of the death penalty," procedural bars must yield to the overriding concern that a miscarriage of justice be averted. *See, e.g.*, *Sawyer v. Whitley*, 505 U.S. 333 (1992). Mississippi offers no principled reason why that fundamental rule should apply only in the habeas context, and indeed, there is none. And in fact, the Mississippi courts have substantially agreed, repeatedly excusing procedural defaults to ensure that substantial justice is done. *See, e.g.*, *Stevenson v. State*, 674 So. 2d 501, 505 (Miss. 1996). Their discretionary failure to do so here, where the State's power to carry out the sentence of death depends on the answer to that question, cannot bar this Court from acting.

Second, Mississippi's conclusory assertion that this Court lacks jurisdiction over Berry's claims because there have been procedural defaults is wrong. Those procedural defaults are the beginning of Berry's questions presented; they do not provide the answer. There is no doubt that this Court has jurisdiction to determine whether Mississippi can invoke procedural defaults to execute a person that it was placed on notice, in a timely and substantial fashion, that it may not have the authority to execute. "[T]he adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). Moreover, this Court has consistently held that if a federal question has been amply and timely presented so as to enable the state court to take appropriate action, and no legitimate state interest is served by the state's application of a procedural rule purporting to bar review of that question,

then that procedural rule cannot serve as an adequate and independent state ground. See *Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990); *Lee v. Kemna*, 534 U.S. 362, 375-78 (2002).

The federal question that the Mississippi state courts have refused to answer is whether Berry is mentally retarded under *Atkins*. Berry, despite having severely deficient counsel and having significant mental impairments, put this question before the Mississippi courts shortly after *Atkins* was decided. The evidence he presented to the Mississippi courts at that time included a childhood IQ score of 72, records from the State Department of Corrections designating him as mentally retarded, and affidavit upon affidavit attesting to his severe adaptational limitations. In the face of this compelling evidence, Mississippi's refusal to determine whether Berry was mentally retarded under such circumstances was surely a "resort to an arid ritual of meaningless form, and would further no perceivable state interest." *Osborne*, 495 U.S. at 124 (citation and quotation marks omitted). The writ should issue, along with a stay of execution, so that this Court can decide whether, after a death-row inmate has made a substantial showing of mental retardation, a State is obligated to make a factual determination of whether the inmate is mentally retarded before carrying out this planned execution.

II. Review Of Berry's *Baze* Claim Is Plainly Warranted.

Mississippi argues that this Court does not have jurisdiction to consider Berry's *Baze* claim due to procedural defaults. However, as noted above, this Court has jurisdiction to determine whether, in fact, Berry's procedural default obviated Mississippi's obligation to consider his claim.

Mississippi also argues that the Kentucky procedures approved by this Court do not meaningfully differ from its own procedures. We disagree for the reasons set forth in the Petition for a Writ of Certiorari, most prominently that the Mississippi courts have never

conducted in inquiry of how Mississippi's protocol is carried out. At a minimum, the Court should GVR so that Mississippi can consider this issue in the first instance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This the 20th day of May, 2008.

/s/James_W. Craig
JAMES W. CRAIG