

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 08-60428

U.S. COURT OF APPEALS

FILED

MAY 19 2008

In Re: EARL WESLEY BERRY

CHARLES R. FULBRUGE III
CLERK

Movant

On Motion for Authorization to File
Successive Petition for Writ of Habeas Corpus
in the United States District Court
for the Northern District of Mississippi

Before DAVIS, BARKSDALE, and BENAVIDES, Circuit Judges.

BY THE COURT:

Earl Wesley Berry is to be executed on 21 May 2008. He seeks leave to file a successive habeas petition and a stay of execution. **DENIED.**

I.

Berry's death sentence arises out of a murder committed over 20 years ago, on 29 November 1987. His capital-murder conviction became final upon the Supreme Court's denial of certiorari in 2002. *Berry v. Mississippi*, 537 U.S. 828 (2002).

After state post-conviction proceedings, Berry began federal habeas proceedings in October 2005; the district court denied relief. *Berry v. Epps*, No. 1:04CV328, 2006 WL 2865064 (N.D. Miss. 5 Oct. 2006). In his federal application, Berry asserted, *inter alia*, a mental-retardation claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding unconstitutional execution of mentally-retarded defendants). He did not, however, seek a Certificate of Appealability



(COA) from the district court on that issue. Instead, he requested a COA on five other issues. On 2 November 2006, the district court denied a COA. *Berry v. Epps*, No. 1:04CV328, 2006 WL 3147724 (N.D. Miss. 2 Nov. 2006). Berry's request for a COA from this court was denied on 24 April 2007. *Berry v. Epps*, 230 F. App'x 386 (5th Cir. 2007). His petition for a writ of certiorari to the Supreme Court was denied. *Berry v. Epps*, 128 S. Ct. 277 (2007).

Berry's execution was set for 30 October 2007. This court, *inter alia*, denied a stay on 26 October 2007. *Berry v. Epps*, 506 F.3d 402 (5th Cir. 2007). On 30 October 2007, the Supreme Court granted a stay, pending its consideration of *Baze v. Rees*, 128 S. Ct. 1520 (2008) (challenging Kentucky's lethal injection method of capital punishment as violative of the Eighth Amendment). *Berry v. Epps*, 128 S. Ct. 531 (2007).

The Supreme Court rendered its decision in *Baze* on 16 April 2008, holding constitutional Kentucky's three-drug lethal injection method. On 21 April 2008, the Supreme Court denied Berry's petition for writ of certiorari, and lifted its above-referenced stay. *Berry v. Epps*, No. 07-7348, 2008 WL 1775034 (21 Apr. 2008).

Subsequent to that decision, Berry's motion for leave from judgment or leave to file a successive state-habeas petition was denied. *Berry v. Mississippi*, No. 2008-DR-00717-SCT (Miss. 5 May 2008). On that same day, the Mississippi Supreme Court reset Berry's execution for 21 May 2008. *Berry v. Mississippi*, No. 93-DP-00059-SCT (Miss. 5 May 2008).

II.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), leave to file a successive habeas petition in district court must be authorized by a court of appeals. 28 U.S.C. § 2244(b)(3)(A). In seeking such leave, Berry claims he is mentally retarded. Berry concedes he raised a mental-retardation claim in his first federal habeas petition, as discussed above. Leave

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to file a successive habeas petition must be denied if the claim to be presented was presented in a prior petition. 28 U.S.C. § 2244(b)(1). That is the case here. Berry urges various bases for § 2244(b)(1)'s not applying. AEDPA does not provide for such exceptions, nor is there other authority that would permit them.

III.

Accordingly, IT IS ORDERED that Berry's motions to file a successive habeas petition and for a stay of execution are DENIED.