No. _____

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
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

QUESTIONS PRESENTED

On May 5, 2008, the Mississippi Supreme Court denied petitioner Earl Wesley Berry's motion for leave to file a successive petition for post-conviction relief, and subsequently scheduled Berry to be executed by lethal injection on May 21, 2008. In denying this motion, the Mississippi Supreme Court continued its years'-long refusal to answer two questions that are essential to its authority to carry out this execution.

The first question is whether Berry is mentally retarded. For over five years – beginning with his first petition for post-conviction review shortly after this Court decided *Atkins v. Virginia* – Berry has asserted that he is mentally retarded and presented the Mississippi Supreme Court with substantial evidence supporting that claim. From the moment Berry first timely made his *Atkins* claim, this evidence has included a documented childhood IQ score of 72, state correctional records designating Berry as mentally retarded, and expert testimony and witness affidavits attesting to Berry's adaptive limitations. More recently, Berry supplemented this evidence with the affidavit of a psychologist attesting that on this record, and after full examination, Berry would most likely be found mentally retarded under the standards set forth in *Atkins* and under state law. Notwithstanding this evidence and Berry's timely presentation of his claim, Mississippi has *never* determined whether Berry is mentally retarded within the meaning of *Atkins*. Its courts have refused to answer this question – on which Mississippi's power to carry out his execution depends – because Berry's initial presentation, though it included substantial supporting evidence, did not include an expert affidavit, a procedural default under Mississippi law that Berry has since cured.

The second question is whether Mississippi's lethal injection protocol – which differs in several meaningful respects from the Kentucky protocol sustained in *Baze v. Rees* – violates the Eighth Amendment. The Mississippi Supreme Court has never decided this question on the merits, or on a full evidentiary record. Instead, it denied a challenge on the ground that the petitioner failed to meet procedural prerequisites for his claim, and denied other challenges supported by expert and eyewitness testimony – including Berry's – on the ground that its procedural rejection somehow determined the substantive sufficiency of Mississippi's protocol. The questions presented are:

I. Whether a State may employ its procedural default rules to deny a merits determination of categorical ineligibility for the death penalty under *Atkins*, notwithstanding a substantial and timely showing that a defendant is mentally retarded.

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

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STATE STATUTES

Petitioner, Earl Wesley Berry, petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The order of the Mississippi Supreme Court dismissing the Motion for Relief from Judgment for Leave to File a Successor Petition for Post-Conviction Relief [hereinafter "Motion"] is unpublished and is attached as Appendix A. The separate dissenting opinion of Justice Diaz is attached as Appendix B. The order denying a motion for rehearing is unpublished order and is attached as Appendix C.

JURISDICTION

This Court's jurisdiction to review the decision of the Supreme Court of Mississippi is invoked pursuant to 28 U.S.C. § 1257(a). The Supreme Court of Mississippi issued its order dismissing the Motion on May 5, 2008, and its order denying a motion for rehearing on May 15, 2008. The Supreme Court of Mississippi granted the motion of the State of Mississippi to set an execution date and scheduled Petitioner's execution for May 21, 2008.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Earl Wesley Berry ("Petitioner" or "Berry") is almost certainly categorically ineligible for the death penalty due to mental retardation. In support of his *Atkins* claim, Berry has presented evidence showing that (i) at age 13, his I.Q. score was measured at 72, (ii) that the officials of the Mississippi Department of Corrections classified him as mentally retarded more than twenty years ago, and (iii) a qualified psychologist, Dr. Marc Zimmermann, has averred "to a reasonable degree of scientific certainty, that Mr. Berry has an IQ of below 75 and/or has significantly subaverage intellectual functioning" and that these well documented mental limitations "became manifest before Mr. Berry was 18 years old." Notwithstanding this substantial showing of mental retardation, the Mississippi courts have repeatedly refused to decide, on the merits, whether Berry is mentally retarded, and therefore immune from capital punishment. They have done so because Berry's state-appointed lawyers failed to comply with an aspect of Mississippi procedure that did not yet exist when Berry initially raised his claim under *Atkins* – a requirement that these lawyers chronically failed to meet in Mississippi capital cases, and that Berry has since satisfied by submitting Dr. Zimmermann's opinion, in the proper format, to the Mississippi courts. Absent intervention from this Court, Berry will be executed on May 21, 2008, without any court having determined whether the Constitution categorically prohibits Mississippi from taking his life.

The Mississippi Supreme Court has also refused to examine – in both this case and others – whether the method of execution that Mississippi plans to use to take Berry's life conforms to constitutional standards, and in fact has never ordered fact-finding on Mississippi's protocol or the sufficiency of any safeguards meant to ensure its

proper implementation. This failing is particularly troubling because Mississippi's lethal injection procedures differ meaningfully from the lethal injection procedures that this Court has found permissible.

A. Berry's Childhood

If Berry were permitted a post-*Atkins* evidentiary hearing, his attorneys would be able to put forth substantial evidence that he is mentally retarded. No one who has ever spent any significant amount of time with Earl Berry doubts that he is mentally retarded. His intellectual and social limitations stood out from an early age. He had difficulty in school, socializing with family and friends, communicating with people, and taking care of his basic needs – limitations attested to by numerous family members. For example, Velma Berry, his mother, recalls that her son was late in reaching various developmental milestones. He did not walk until he was two years old, he nursed until he was four years old, he did not begin talking until he was five years old, and he did not learn to tie his shoes until he was seven or eight years old. Moreover, Velma recalls that Earl's younger brother Danny helped him with his speech because "[Earl] had a hard time putting words in sentences." His older brother James avers that because Earl had trouble walking as a child – even to the age of five – he would carry him, and did so until Earl became too heavy for James to carry.

Earl always stood out as someone who was limited mentally and socially. Velma realized when Earl was young that there was something wrong with him. He was different from other children. He was a loner, and he had trouble communicating with his brothers and sisters. "He was very quiet and generally did not interact or relate well to the other children." Wilma Berry, Earl's aunt, made similar observations. As she put

it, "[f]rom a young age, Earl gave signs of being a child who was mentally challenged." Greg, his nephew, mentioned that he watched his uncle struggle to function as a "normal person."

Earl Berry's difficulties with social interaction continued during school and into adulthood. Charles Pepper, a teacher at one of the schools Mr. Berry attended, recalled that Mr. Berry "appeared withdrawn most of the time. He tried to fit in but he had trouble doing that." James Akins, a classmate of Mr. Berry's, found that Mr. Berry "did not seem to mature like other young people did." Other classmates noted that Earl "seemed to prefer to play with younger children rather than with children his own age" and was a "child in a grown-up's body." For example, his brother James recalls a time when Mr. Berry lifted him up by the belt loop. The loop broke, and James fell to the floor and broke his shoulder. According to James, Earl was very upset about hurting him and "he really didn't understand what happened." Greg Berry also recalls his uncle having difficulty understanding how things worked, and that, if Earl was placed in a challenging situation, "stress would completely overwhelm him. Earl would feel lost, and he would hold his head down, and shy away from the situation all together."

Berry never learned to care for himself. He never learned to cook, clean, iron, or do laundry. In fact, he had to be instructed on when to bathe and change clothes. As a result, Berry never lived alone.

B. Berry's School and Institutional Records

Berry's school and institutional records likewise demonstrate that there is a substantial likelihood that he is mentally retarded. Most prominently, the first of Berry's

four known IQ scores, located in his school records, reflects that he had an IQ score of 72 at age 13.

Mr. Berry took a second IQ test in 1981 when he was incarcerated for an offense unrelated to his murder conviction. He was administered the Wechsler Adult Intelligence Scale ("WAIS") and had a 68 Verbal Score, a 90 Performance Score, and a Full Scale Score of 76. Because of the disparity between the verbal and performance scores, it was suspected that Berry suffered from brain dysfunction.

A third "WAIS" test was administered prior to Berry's capital murder trial by Dr. Charlton Stanley, who administered the "WAIS" – although, as later noted by a second expert, this administration was incomplete. Dr. Stanley nonetheless noted that Berry "is not good at reasoning through the solution to a problem," adding "[h]is social judgment could be said to be poor. He is concrete-minded, and tends to take things literally." Dr. Stanley also concluded that Berry suffers from brain damage, finding indications of dysfunction in the left parieto-occipital region of the brain and the left frontal portion of the brain. As Dr. Stanley noted, "Primary impairment would be seen on higher intellectual tasks including school related tasks. He also has problems with judgment and abstract thinking." Dr. Stanley's "WAIS" administration resulted in a verbal score of 77, a performance score of 91, and a full scale score of 83.

A fourth IQ test was conducted by Dr. Paul Blanton – the same expert who noted irregularities in Dr. Stanley's administration of the "WAIS." On the WAIS-R, Mr. Berry had a verbal score of 74, a performance score of 84, and a full scale score of 76. On the Wechsler Memory Scale B Revised (WMS-R), Mr. Berry scored a 54, which 'is indicative of moderately impaired global memory functions and exceeds less than one

percent of scores of same-aged individuals within the normative sample." According to Dr. Blanton, Mr. Berry's level of performance on subsequent measures of neuropsychological functioning was significantly below that predicted from current levels of intellectual functioning. Similarly, the "[a]ssessment of memory functions reveals Mr. Berry to be markedly impaired at new learning and recall of both verbal and nonverbal information." Finally, Dr. Blanton found that "[f]urther neuropsychological test data reveal Mr. Berry to be impaired at executive motor and executive cognitive functions."

Additional evidence of Berry's mental retardation comes from the state prison records themselves: In 1985, officials of the Mississippi Department of Corrections diagnosed Berry as being mentally retarded.

C. Dr. Zimmermann's Affidavit

Whether this and other evidence amounts to a conclusive diagnosis of mental retardation would be the subject of the evidentiary hearing that the Mississippi courts have repeatedly denied Berry, but there is significant expert analysis indicating that mental retardation is the appropriate diagnosis. Late in the procedural history of this case, new counsel for petitioner belatedly sought to comply with Mississippi's formalistic procedural requirements by requesting a sworn affidavit by psychologist Dr. Marc Zimmermann. Dr. Zimmermann reviewed records and affidavits concerning Berry's background and concluded, to a reasonable degree of scientific certainty, that Mr. Berry has an IQ of below 75 and/or has significantly subaverage intellectual functioning. App. G ¶ 18. Likewise, based on his review of these materials, Dr. Zimmermann concluded, to a reasonable degree of scientific certainty, that additional testing will determine that Mr.

Berry is mentally retarded. App. G ¶ 20. Specifically, Dr. Zimmermann found evidence that Mr. Berry had adaptive functioning deficit in the area of functional academic skills. He also found evidence of deficits in the areas of communications, social/interpersonal skills, self-care, and work, leisure, health, and safety. *Id.* ¶ 31. Moreover, these deficits and limitations became manifest prior to the age of 18. *Id.* at ¶ 32. Based on a review of the results of prior testing, Dr. Zimmermann concluded that Mr. Berry was not malingering, but added that he is willing to administer additional appropriate tests to assess whether he is malingering. App. G ¶ 19.

Dr. Zimmermann's affidavit also explains the importance of the "Flynn Effect," the documented phenomenon that IQ scores rise 0.3 points for each year after a test is published. As Dr. Zimmermann explained, the "Flynn Effect" means that each of Berry's test scores must be adjusted downward to assess the true extent of his mental functioning. As applied to Berry's second IQ test score of 76:

> If we allow for this phenomenon and multiply 0.3 by the number of years (26) between the time the WAIS was published (1955) and the date Mr. Berry was administered the WAIS . . . (1981), we arrive at a figure of 7.8, which when subtracted from the Full Scale IQ Gambrell found (76), we arrive at an actual full scale IQ score of 68, which is within the range which could be considered Mentally Retarded.

Applying the same metric to Berry's subsequent IQ tests, Dr. Zimmermann found that each of Berry's scores was "within the range which could be considered Mentally retarded": His 1988 score of 76 (on the subsequently published WAIS-R) would be adjusted to 74; and Berry's 1988 score of 83 on the WAIS – a test that, according to Dr. Zimmermann, was by then "obsolete" – would be adjusted to 73.

Thus, "[f]actoring in the Flynn effect, Mr. Berry has obtained IQ scores of 68, 73, and 74 (as well as the 72 noted on his school records)." Every one of these scores is

below 75, and thus below "the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5; *Chase*, 873 So.2d at 1028.

D. Berry's Post-*Atkins* Attempts To Raise His Mental Retardation Claim

In April 2003, within months of this Court's decision in *Atkins*, and while his first petition for state collateral review was still pending, Berry filed a "Supplement/Amendment to Petition for Post-Conviction Relief with Attachments" that argued, in relevant part, that he was mentally retarded and therefore immune from execution pursuant to *Atkins*. Exhibit 3 to this Amendment was a standardized test result showing an IQ of 72. Exhibit 4 was a Discharge Summary from the hospital at the Mississippi Department of Corrections showing that in 1985, staff officials diagnosed Mr. Berry as being mentally retarded. Berry additionally presented "affidavits from family members, a report from a social worker, [and] testimony of [a] psychologist," among other evidence, in support of his mental retardation claim. *Berry v. State*, 882 So.2d 157, 175 (Miss. 2004).

On May 20, 2004, while Berry's petition for post-conviction relief was still pending, the Mississippi Supreme Court issued its first decision describing how *Atkins* would be implemented in that State. *See Chase v. State*, 873 So.2d 1013 (Miss. 2004). In addition to establishing the definition of mental retardation that would be used by the Mississippi courts, the *Chase* decision set forth the procedures that were to be followed in considering an *Atkins* claim. *Id.* at 1023-30. Under *Chase*, a "trial court must determine whether the defendant has established, by a preponderance of the evidence, that the defendant is mentally retarded" based on expert opinion and other relevant materials, presented at a hearing for the trial court's consideration." *Id.* at 1029. *Chase* also set

forth that "no defendant may be granted a hearing on the issue of Eighth Amendment protection from execution, due to alleged retardation" unless the defendant's motion seeking such a hearing includes "an affidavit from at least one expert, qualified as described above, who opines, to a reasonable degree of certainty, that: (1) the defendant has a combined [IQ] of 75 or below, and; (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded . . ." *Id.* at 1029.

The Mississippi Supreme Court subsequently denied Berry's petition for leave to seek post-conviction relief. With respect to Berry's *Atkins* claim, the court noted that it had "previously considered [petitioner's] mental capacity," but conceded that "because he was sentenced pre-*Atkins*, this issue was not scrutinized under the standards now imposed under *Atkins*." *Berry*, 882 So.2d at 175. The court then recited some of the central evidence of Berry's limited mental functioning that had been presented during Berry's two sentencing proceedings – including Berry's childhood IQ score of 72 and the Department of Corrections records stating that Berry was mentally retarded. *Id.* at 175-76. However, the Mississippi Supreme Court did not determine whether Berry was mentally retarded under the standards articulated in *Atkins* and *Chase*. Nor did it order the trial court to conduct an evidentiary hearing at which this ostensibly conflicting evidence of Berry's mental retardation could be weighed – as is ordinarily done in Mississippi. According to the state court, Berry had no right to a determination of this question because his *Atkins* claim – presented more than one year before the *Chase* requirements were established, and supported by substantial documentation indicating

mental retardation – was not additionally backed by an "affidavit of a qualified expert stating that [Berry] is mentally retarded." *Id.* at 176.

Berry's motion for rehearing with respect to his *Atkins* claims was denied on the same grounds, as was this aspect of his petition for federal habeas corpus relief. See *Berry v. Epps*, 2006 WL 2865064 (N.D. Miss. Oct. 5, 2006), *certificate of appealability denied* 230 Fed. Appx. 386 (5th Cir. 2007).

In April 2008, Berry, now represented by new counsel, filed a successive petition for post-conviction relief, in which he formally complied with Mississippi procedure by submitting the Zimmermann affidavit for the first time. He explained why this claim had not been adequately presented to the state supreme court previously, pointed to a number of Mississippi decisions that overlooked procedural bars to correct illegal sentences, and also argued that the Eighth Amendment precludes state courts from applying a default to a prisoner who was categorically ineligible for the death penalty. In its response, the State did not contest Petitioner's evidence of mental retardation; instead, it successfully urged the state court to dismiss the Motion on procedural grounds alone. Thus, the Mississippi courts have never determined whether, under the standards articulated in *Atkins* and *Chase*, Berry is mentally retarded and therefore ineligible for the death penalty. As the Mississippi Supreme Court stated, "this issue was not scrutinized under the standards now imposed under *Atkins*." *Berry*, 882 So.2d at 175. That scrutiny has never occurred.

F. Berry's Challenges To Mississippi's Lethal Injection Procedures

After this Court granted certiorari in *Baze*, Berry filed a motion for leave to file a successor petition for post-conviction relief with the Mississippi Supreme Court to

challenge the lethal injection procedure. The state court found the challenge procedurally barred. Berry sought rehearing, arguing that a favorable resolution in *Baze* would be an intervening decision of law. In denying the motion for rehearing, the state supreme court observed that it had "determined that the State of Mississippi's lethal injection procedure does not amount to cruel and unusual punishment." App. F (Order of Oct. 18, 2007) (citing *Jordan v. State*, 918 So. 2d 636, 662 (Miss. 2005)). Justice Dickinson dissented, pointing out the Court did not make a substantive finding in *Jordan*; rather, the issue was found procedurally barred. App. E. This Court denied certiorari, finding that "[t]he judgment of the Mississippi Supreme Court relies upon an adequate and independent state ground that deprives the Court of jurisdiction." *Berry v. State*, 128 S. Ct. 528 (2007).

Berry also filed a § 1983 challenge to the lethal injection procedures in federal court. The State successfully moved to dismiss Berry from the litigation because he waited too long to file suit. *Berry v. Epps,* 506 F.3d 402 (5th Cir. 2007), *cert denied,* __ S. Ct. ___, 2008 WL 1775034 (U.S. Apr. 21, 2008).

After *Baze* was decided, Petitioner returned to the state court, pointing out that *Baze* was now an intervening decision that clarified the Eighth Amendment standard for determining the constitutionality of a state's execution protocol, and submitting an expert affidavit discussing the grave shortcomings in the Mississippi protocol.

The Mississippi Protocol uses the same three drugs, in the same order, as does Kentucky, and in that respect Petitioner Berry's case is similar to *Baze*. Mississippi, however, uses only two grams – not three – of sodium thiopental. Exh. 15, page 1. *Compare Baze*, 128 S. Ct. at 1528 (plurality op.) (discussing increase to 3 gram dosage

used in Kentucky after *Baze* litigation began), 128 S. Ct. at 1564 (Breyer, J., concurring) (only four States use the lower 2 gram dosage). App. H (Decl. of Mark Heath, M.D.) at ¶41 (lower dosage of thiopental was used in the clearly painful execution of prisoner Angel Diaz in Florida).

Moreover, the available evidence shows that Mississippi does not use the safeguards that the plurality in *Baze* found significant to reduce the risk of serious harm during an execution. In fact, the Mississippi procedure deviates in several important ways, not just from Kentucky's practice, but from the practice used in other States. For example:

- Mississippi employs a 2 gram dose of sodium thiopental, one gram lower than all but three other States;
- Mississippi requires a maximal concentration in preparing the mixture of thiopental with intravenous fluid;
- Mississippi does not have minimum qualifications for the IV execution team;
- There is no standardized time to administer each of the three chemicals;
- Mississippi has no "back-up plan" in the event of failed IV insertion or other errors in administration of the chemicals.

Petitioner attached an affidavit from Dr. Heath, who summarized the basic problems with the Mississippi Protocol:

> a. **The MDOC injection team as described is not qualified to mix and prepare execution drugs or syringes.** The MDOC's apparent failure to require drug mixing and syringe preparation by a licensed pharmacist invites failure through under dosage of critical drugs. Numerous other states appropriately require the use of licensed pharmacists to prepare and dispense the drugs and the syringes.
>
> b. **The MDOC's intention to mix the maximal possible concentration of thiopental is bizarre and unacceptable. No other state to my knowledge mixes thiopental in this manner.** It is the standard for other states to specify the

concentration that is to be mixed, and it is a concentration that is far below the maximal possible concentration. Thiopental is a caustic solution, and if it leaks from veins during the execution process, it could in such highly concentrated form cause excruciating pain. There is no legitimate or sensible possible reason for mixing and administering thiopental in this manner. It falls below any acceptable medical standard, and it falls below the standards of every other state's lethal injection procedures.

c. The MDOC's failure to have appropriately qualified and trained personnel monitor the condemned inmate after the administration of thiopental to ensure that there has been no IV access issue and to assure that the inmate has reached an appropriate plane of anesthesia prior to the administration of drugs which would cause suffering is contrary to all standards of practice for the administration of anesthetic drugs and creates a severe and unnecessary risk that the condemned will not be adequately anesthetized before experiencing asphyxiation and/or the pain of potassium chloride injection. This failure represents a critical and unacceptable departure from the standards of medical care and veterinary care, and falls below the lethal injection protocols of other states.

App. H.

In response, the State presented an affidavit from Lawrence Kelly, Superintendent of the Department of Corrections. Mr. Kelly aimed to show that Mississippi had sufficient safeguards and stated that he was present during recent executions and that two paramedics mix the drugs and remain in proximity to the inmate during the execution process.

Although Petitioner notified the state court that he intended to file a rebuttal, as he is allowed to do under state law, the court dismissed the Motion before he could file the rebuttal. As a result, Petitioner submitted a second affidavit from Dr. Heath in a Motion for Rehearing. Dr. Heath identified additional flaws with the protocol that were even more apparent in light of Mr. Kelly's affidavit, including:

- "a continued deficiency in MDOC's procedures regarding the articulation of plans to deal with the real possibility that peripheral IV access (ie in the arms or legs) cannot be achieved by the EMT. . . . The persistent failure of the MDOC and Superintendent Kelly to articulate the plans, if any, for this

circumstance places the MDOC procedures below the level set and met by other states and jurisdictions." (¶7)

- During a recent Mississippi execution:
"the pancuronium (listed as "Pavulon") was injected only one second after the "Last Visible Movement". Specifically, the last visible movement is stated to have occurred at 630:53, and the pancuronium is stated to have been injected at 630:54. This is very troubling, because no meaningful assessment of anesthetic depth or consciousness could have been performed between the time of the last visible movement and the injection of the paralytic drug. There is no way of knowing whether, if the paralytic drug had not been given so rapidly, Mr. Wilcher would have continued to move, and/or moved in a way that indicated or confirmed inadequate anesthesia. It is not clear to me how or why the decision was made to give the pancuronium at this time. . . . We now do not know whether Mr. Wilcher stopped moving because of the onset of anesthesia or because of the onset of paralysis. It is important to find out why the MDOC is performing the execution in this precarious and gratuitously risky fashion, and it is highly likely that such an inquiry would lead the MDOC to significantly alter its procedures so as to conform with the processes employed by other states." (¶ 10)

- "The duration of this same execution was "longer than executions in other states, where the procedure is typically accomplished and completed (including the assessment of death) in well under five minutes. Because Mr. Wilcher was paralyzed by pancuronium we do not know what he was experiencing during the 10 minute period between the pancuronium injection and the pronouncement of death." (¶ 11)

- "Superintendent Kelly's affidavit refers to practice sessions (also referred to as mock executions or training sessions) undertaken by the MDOC. It is very important to note that there is no evidence that these practice sessions include preparation for the exigencies and unplanned events that are foreseeable during lethal injection procedures." (¶ 12)

App. I.

Other eyewitnesses corroborate that there is no method of monitoring anesthetic depth during the execution process. According to Cliff Johnson and Angela Parnell McRae, who witnessed Bobby Wilcher's execution, the executioners were not in the same room; instead, representatives of the Department of Corrections, Governor's office, Mr. Kelly, a chaplain, and most likely a coroner were present in the execution room. No

one with any qualifications was present to monitor anesthetic depth or whether the IV lines remained properly inserted.

Dr. Heath declared that "it is my opinion, to a reasonable degree of medical certainty, that the procedures used by MDOC in conducting executions by lethal injections present a substantial risk of serious harm to the prisoner being executed." (¶ 14). The Mississippi Supreme Court has never examined whether Dr. Heath's opinion is correct.

REASONS FOR GRANTING THE WRIT

I. BECAUSE BERRY MADE A TIMELY AND SUBSTANTIAL SHOWING THAT HE IS MENTALLY RETARDED, MISSISSIPPI MUST DETERMINE WHETHER THE EIGHTH AMENDMENT BARS BERRY'S EXECUTION BEFORE TAKING HIS LIFE.

This Court's precedents place a limited category of offenders – most notably mentally retarded people, juveniles, and the insane – beyond the power of the state to punish with death. The Constitution prohibits their execution. There is a strong basis to believe that Berry is mentally retarded and therefore ineligible for the death penalty. Shortly after this Court held that mentally retarded people are ineligible for the death penalty, Berry argued before the Mississippi Supreme Court that he was mentally retarded, and submitted substantial evidence that he was mentally retarded, including documentation from the Mississippi Department of Corrections. But because Berry's state-appointed lawyer did not file the appropriate affidavit at the right time, the merits of his plainly substantial *Atkins* claim have never been adjudicated.

A death row inmate's *Atkins* claim cannot be so lightly forfeited. On the contrary, as this Court's precedents on insanity determinations plainly show, "[o]nce a prisoner seeking a stay of execution has made a substantial threshold showing of insanity," a State

is *obligated* to provide the prisoner with an opportunity to litigate the issue at a proceeding that accords with the minimum requirements of due process. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2856 (2007) (quoting *Ford v. Wainwright*, 477 U.S. 399, 426) (Powell, J. concurring). This is necessarily so, for the Constitution "places a substantive restriction on the State's power to take the life of an insane prisoner." *Ford*, 477 U.S. at 405 (plurality op.). *See also Panetti*, 127 S. Ct. at 2855 ("*Ford* identifies the measures a State *must* provide when a prisoner alleges incompetency to be executed.") (emphasis added). Thus, notwithstanding that *Ford* tasked the States with "developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," 477 U.S. at 416-17, both *Ford* itself and *Panetti* make clear that this delegation is not without bounds. The obligation to determine whether an insanity claim has merit is fundamental.

Atkins likewise determined that the Constitution "places a substantive restriction on the State's power to take the life of a mentally retarded offender." 538 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). Following that determination by this Court, Berry raised his *Atkins* claim by supplementing his then-pending petition for post-conviction relief, and placed IQ test scores, institutional records, the prior trial testimony of a psychologist, and affidavits attesting to his limited adaptive functioning before the Mississippi Supreme Court. *Berry*, 882 So.2d at 175.[1] Presented with this evidence, which plainly amounted to a "substantial threshold showing" of mental retardation, *cf. Ford*, 477 at 426, the Mississippi courts were obligated to determine whether Berry, in fact, is mentally retarded, just as they would have been obligated to determine whether

[1] Moreover, they did so *prior* to that court's determination in *Chase* that an expert affidavit must accompany a claim for *Atkins* relief.

he were ineligible to be executed if he had made a "substantial threshold showing of insanity." *See Ford, supra.* That is, they were not entitled simply to say, "not enough" because Berry did not comply with a procedural requirement that did not exist when he first presented his *Atkins* claim, or "too late" when he subsequently fulfilled that requirement. On the contrary, "[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*, 127 S. Ct. at 2855-56 (quoting *Ford v. Wainwright*, 477 U.S. at 411-12. The Mississippi Supreme Court's decision that, because of a procedural default, it was unnecessary to take *any* steps to determine whether Berry is mentally retarded within the meaning of the Eighth Amendment, as established by *Atkins*,[2] and thus unnecessary to take *any* steps to determine whether Berry is one of the "class of individuals [who lie] beyond the State's power to punish by death," was clearly out of bounds.[3] As this Court has consistently recognized in the habeas context,

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[2] While it is true that prior to *Atkins* Mississippi courts had made some inquiry into Berry's mental functioning, as the Mississippi Supreme Court itself acknowledged, "this issue was not scrutinized under the standards now imposed under *Atkins*." *Berry v. State*, 882 So.2d 157, 175 (Miss. 2004).

[3] The State's view that Berry must be charged with his lawyer's failing is particularly troubling here. First, by all accounts, Berry suffers from substantial mental deficiencies, and thus cannot be expected to police the performance of his attorneys. Moreover, the record is replete with evidence that his prior attorney – the former Director of the State Office of Post-Conviction Counsel – displayed chronic deficiencies in complying the requirements imposed by *Chase*: Berry's case was one of *several* in which the prior Director simply failed to supply an expert affidavit in support of an Atkins claim. *See Mitchell v. State*, 886 So. 2d 704, 712-13 (Miss. 2004); *Gray v. State*, 887 So. 2d 158, 169 (Miss. 2004); *Bishop v. State*, 882 So. 2d 135, 151 (Miss. 2004). These failings likely relate to gross shortcomings in the resources and funding offered to the State Office. The Director was, in fact, the only attorney in the State Office as of January 2003. A Westlaw search discloses that before his appointment as Director of the State Office, Mr. Ryan had never been listed as lead counsel for a death-sentenced prisoner in a post-conviction case. The State Office nonetheless "assumed direct representation" in 24 out of 27 capital cases that were pending in post-conviction proceedings. This was due, in part, to motions filed by the Attorney General seeking the removal of private counsel from several cases. As a justice of the Mississippi Supreme Court has since noted, these circumstances led to serious deficiencies in the petitions filed by the State Office. See Appendix B, *Berry v. State* (Diaz, J., dissenting) at n. 2.

procedural defaults do not bar the door to review of a substantial claim of "actual innocence, whether of the sentence or of the crime charged." *Dretke v. Haley*, 541 U.S. 386, 393-94 (2004) (emphasis added); *see also Sawyer v. Whitely*, 505 U.S. 333, 340-41 (1992). This principle expressly extends to a claim that a a death-row inmate is "actually innocent" of the death penalty, in the sense that he is categorically immune from the imposition of capital punishment. This principle is particularly applicable here because the default at issue – the failure to provide an expert affidavit – in no way hampered the Court's ability to understand the nature of the claim being raised or the State's ability to respond.

The principle at issue is readily apparent when the example of juvenile offenders is considered. If a prisoner were belatedly discovered to be 14 years old, it is inconceivable that his execution would be allowed to proceed because, for example, his lawyer initially submitted school records to substantiate his age when the State required a birth certificate. Fourteen-year olds cannot be executed, and when a State has substantial notice that an individual sentenced to death may in fact be fourteen, the State is obligated to determine that individual's age. *See Panetti*, *supra*. There is no meaningful difference between the categorical ban on the execution of juveniles, the insane and people with mental retardation. All arise from the conclusion that certain classes of people who have limited abilities to understand the consequences of their actions and form mature moral judgments are fundamentally less culpable than other offenders, and from the observation that the justifications for capital punishment apply to such individuals with greatly diminished force. *See, e.g. Atkins*, 536 U.S. at 318 (recognizing that "society views mentally retarded offenders as categorically less culpable than the average criminal,"

because of their impaired ability "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.").

As this shared logic makes clear, to execute a person who is categorically exempt serves no purpose within the accepted framework justifying capital sentences - which is precisely why those persons are exempt. The interest being protected is not only that of the individual; there is also a societal interest at stake. Placing juveniles, persons who are mentally retarded, and the insane beyond the power of the state to punish by death protects society from being complicit in an immoral act. *See Ford*, 477 U.S. at 410 ("Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment"); *Atkins*, 536 U.S. at 321 ("We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty."). That societal interest is not the prisoner's to waive, and – post *Atkins* – a death row inmate's mental retardation claim cannot be lightly forfeited because, simply put, "a criminal defendant may not be put to death if he is found to be mentally retarded." *Rogers v. State*, 575 S.E.2d 879 (Ga. 2003) (When Rogers' mental retardation claim was raised, he attempted to waive the claim and volunteer for execution; state court refused to allow this, holding that a mental retardation claim cannot be waived once sufficient evidence of mental retardation has been presented.); *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003) (granting petitioner leave to file successive petition raising an *Atkins* claim upon a threshold showing of mental retardation). For that reason, when a death-row

inmate raises a timely, plausible and well-supported claim of mental retardation, a State must take reasonable steps to determine whether that claim is correct. Otherwise, the State simply cannot know whether it possesses the power under the Constitution to execute that individual. Here, no court has never determined, after *Atkins*, whether Berry is mentally retarded. Accordingly, Mississippi's interest in carrying out his execution must yield until that determination has been made.

While there may be legitimate concerns about inmates using last-minute claims of ineligibility to game the system, that prospect can be suitably addressed by requiring any such claim to be substantial on its face and to be raised in a way that gives the State a reasonable opportunity to consider it. *See generally*, *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); *Lee v. Kemna,* 534 U.S. 362, 376 (2002) (citing with approval the "general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take corrective action is sufficient to serve legitimate state interests."). Certainly those criteria are satisfied here, and there was plainly no gamesmanship whatsoever. Berry has repeatedly presented substantial evidence of his mental retardation over the course of a five-year period, beginning shortly after *Atkins* was decided. From the beginning, that evidence included a childhood an I.Q. score of 72, a determination by officials of Mississippi's Department of Corrections, the sworn trial testimony of a psychologist, and a stream of affidavits attesting to his adaptive skills limitations. Berry never withdrew his assertion that he is ineligible for execution under

Atkins, and recently supplemented his claim with an unrebutted affidavit from a recognized expert in the field. And yet, for five years, the Mississippi courts have refused to decide whether Berry is among the class of persons who, under the Eighth Amendment, are categorically exempt from the penalty of death, citing a procedural default. At least in circumstances such as these, the States should be required to set aside their procedural default rules, and decide, on the merits and "with the high regard for truth that befits a decision affecting the life or death of a human being," *Panetti*, 127 S. Ct. at 2855, whether they have the power to execute a prisoner who has advanced a well-supported claim of mental retardation.

Requiring a state to set aside procedural defaults to address a substantial showing of ineligibility for execution will not be unduly burdensome – few minimally capable lawyers whose clients have plausible *Atkins* claims will fail to raise them in a timely and appropriate fashion, and even fewer courts would refuse to consider the merits of a potentially meritorious *Atkins* claim. Allowing the execution of persons constitutionally exempt from the death penalty, on the other hand, would gravely undermine public confidence in the administration of justice (consider again the logically indistinguishable example of the 14-year-old) and, more pertinently for present purposes, would violate both the Eighth amendment and the Due Process Clause.

For these reasons, this Court should require that when a State has substantial notice that an individual may be categorically ineligible for the death penalty by reason of mental retardation, the State must take further measures to determine that eligibility notwithstanding the possible existence of a procedural default in state court.

II. BECAUSE BERRY HAS MADE A SUBSTANTIAL SHOWING THAT MISSISSIPPI'S LETHAL INJECTION PROTOCOL VIOLATES THE

EIGHTH AMENDMENT, MISSISSIPPI SHOULD BE REQUIRED TO DETERMINE THE CONSTITUTIONALITY OF ITS PROCEDURE BEFORE TAKING HIS LIFE.

This Court's recent decision in *Baze* relied heavily on key findings of fact by the trial court. 128 S. Ct. at 1533-38. For example, the Kentucky protocol specifies that:

- "members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman," *id.* at 1533

- "these IV team members, along with the rest of the execution team, participate in at least 10 practice session per year . . . [which] encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers," *id.* at 1534;

- during an execution, "the IV team [must] establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences . . . . these redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected. *Id.* at 1534; and

- There are two persons in the execution chamber "to watch for signs of IV problems, including infiltration." *Id.* at 1534.

The Chief Justice's plurality opinion made clear that ***"[i]n light of these safeguards***, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation." *Id.* (emphasis added). The same cannot be said of Mississippi, which lacks similar safeguards. In contrast to Kentucky:

- Mississippi does not have minimum qualifications for the IV execution team;

- Mississippi has no "back-up plan" in the event of failed IV insertion or other errors in administration of the chemicals;

Moreover, Dr. Heath has noted further deficiencies in the Mississippi procedure:

- The protocol employs a 2 gram dose of sodium thiopental, a dose that is one gram lower than that applied by all but three other states;[4]
- The protocol requires a maximal concentration in preparing the mixture of thiopental with intravenous fluid;
- There is no standardized time to administer each of the three chemicals.
- There is no evidence that the training provided to personnel includes preparation to address foreseeable problems.

App. H.

Individually and collectively, as Dr. Heath concluded, these practices raise substantial questions about whether any individual application of Mississippi's lethal injection protocol will result in the infliction of excruciating, and constitutionally unacceptable, levels of pain on the inmate.

These concerns are greatly compounded by the fact that Mississippi has never engaged in a substantive inquiry of whether its protocol violates the Eighth Amendment – notwithstanding the Mississippi Supreme Court's representation, in denying Berry's Motion – that it has. When the state court rejected Berry's request for an evidentiary hearing on his lethal injection challenge, it asserted: "This Court has determined that Mississippi's lethal injection procedure does not amount to cruel and unusual punishment." App. A, at 2 (citing *Jordan v. State*, 918 So. 2d 636, 662 (Miss. 2005). But as Justice Dickinson pointed out in his separate written opinion entered on November 1, 2007:

> there was "no substantive finding regarding the constitutionality of the death penalty in Jordan. Instead, because the issue was not raised with the

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[4] As this Court observed in *Baze*, the proper application of sodium thiopental is critical because, the 3-drug lethal injection protocol would otherwise create "a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.* at 1533.

> trial court, this Court held the issue was procedurally barred. The Jordan Court then pointed out that the defendant had failed 'to support his claim that lethal injection is a cruel and unusual method of execution with any sworn proof as required by Miss. Code Ann. § 99-39-9(1)(e)."

App. E, at 3.

Thus, in denying Earl Berry's most recent challenge to the state's method of execution, which included two affidavits from an expert anesthesiologist and affidavits from eyewitnesses, the state supreme court relied on its prior decision in *Jordan* as a dispositive *substantive* holding even though (i) Jordan was decided on *procedural* grounds (ii) the record in *Jordan* did not contain any evidence about the deficiencies of Mississippi's lethal injection procedure, and (iii) *Jordan* was decided before this Court's decision in *Baze* clarified the standard to employ in addressing a challenge an execution protocol.

The Mississippi Supreme Court has thus concluded that the State's lethal injection protocol satisfies the Eighth Amendment – and, ostensibly, that it never need reach the merits of this question again – without *ever* examining this highly fact-intensive question on the basis of an evidentiary record. *Cf. Baze*, 128 S. Ct. at 1529 (noting that Kentucky court conducted a "7-day bench trial during which the trial court received the testimony of approximately 20 witnesses, including numerous experts" before deciding that the Kentucky protocol was constitution). With the state court's reliance on *Jordan* as having settled the matter once and for all, no inmate in Mississippi will ever have the opportunity to be heard on a challenge to the lethal injection procedures. In fact, no inmate will even have the opportunity to conduct discovery to obtain the type of evidence on which this Court so heavily relied in *Baze*.

This is highly improper. Just as a state court may not "refuse to enforce the right arising from the laws of the United States," *Testa v. Katt*, 330 U.S. 386, 393 (1947), it cannot manipulate procedural rules to foreclose the opportunity to enforce federal rights. *See Howlett by and through Howlett v. Rose*, 496 US. 356 (1990); *Michel v. Louisiana*, 350 U.S. 91, 93 (1955) (state rule "raised an insuperable barrier to" the vindication of federal rights). In this case, the state courts transformed a prior decision relying on state procedural rules into a binding substantive holding with preclusive effect. In essence, the Mississippi Supreme Court has closed the courthouse doors to consideration of the merits of this Eighth Amendment challenge.

In so doing, the state court has denied Earl Berry and all other potential plaintiffs of an opportunity to conduct discovery and be heard. "An essential principle of due process is . . . [an] 'opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (the right to be heard had been part of "the central meaning of due process"); *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring) ("if there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard'") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Under the state court's treatment of the Eighth Amendment challenge to the execution procedures, no inmate will ever have a meaningful opportunity to seek discovery, present evidence for consideration to a judicial factfinder, or challenge and rebut any evidence that the State may present to support. In short, all death-sentenced inmates in Mississippi have been stripped of their right to be heard on this

crucial issue despite the existence of compelling evidence that Mississippi's procedures create a substantial risk of serious harm. *See also Simmons v. South Carolina*, 512 U.S. 154 (1994) (due process requires an opportunity to challenge or rebut the State's evidence).

It should be pointed out that the state court also mentioned that certain procedural bars were applicable. App. A, p. 2. These bars, however, are not applicable. The state post-conviction statute allows for the filing of successive petitions in light of intervening decisions of this Court. Miss. Code Ann. § 99-39-5(2) and § 99-39-27(9). Baze, which for the first time announced a rule for determining a challenge to an execution procedure, is such a decision. By sidestepping the clear applicability of this exception to procedural bars, the state court only compounded the due process problem of denying a judicial forum and an opportunity to be heard.

Accordingly, this Court should grant review to determine whether Mississippi's protocol satisfies the Eighth amendment standard enunciated in *Baze*. In the alternative, this Court should GVR for an evidentiary hearing on the nature and validity of Mississippi's lethal injection regime.

CONCLUSION

A stay of execution should issue and the petition for a writ of certiorari should be granted. In the alternative, this Court should issue a stay of execution, grant a GVR, and order the Mississippi Supreme Court to make provisions for an evidentiary hearing on the nature and validity of Mississippi's lethal injection protocol.

Respectfully submitted,

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This the 19th day of May, 2008.

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