Serial: 147343

IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-DR-00717-SCT

EARL WESLEY BERRY *Petitioner*

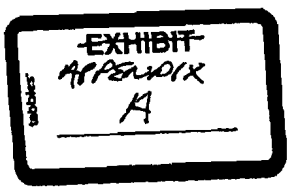
v.

STATE OF MISSISSIPPI *Respondent*

ORDER

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 retarded 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.

Berry next argues that the State of Mississippi's lethal injection procedure violates the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United State Constitution. Berry acknowledges that the United States Supreme Court, in ***Baze v. Rees***, 553 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.

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.

SO ORDERED, this the 5th day of May, 2008.

WILLIAM L. WALLER, JR., PRESIDING JUSTICE
FOR THE COURT

DIAZ, P.J., DISSENTS WITH SEPARATE WRITTEN OBJECTION.

GRAVES, J., NOT PARTICIPATING.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-DR-00717-SCT

Earl Wesley Berry

v.

State of Mississippi

DIAZ, PRESIDING JUSTICE, SEPARATE WRITTEN OBJECTION TO ORDER DISMISSING MOTION FOR LEAVE FROM JUDGMENT TO FILE SUCCESSOR PETITION FOR POST-CONVICTION RELIEF:

Twenty years have passed since Earl Wesley Berry was first sentenced to death for the murder of Mary Bounds. No one can deny that justice has been agonizingly slow. However, we are governed by a system which is designed to ensure that the most fundamental rights of every citizen are protected, even the vilest of society. When this system fails, as the supreme court of this State, we have no choice but to recognize the failure and attempt to correct it.

With this in mind, I must dissent to today's order. As an indigent defendant sentenced to the ultimate and final punishment, Berry is "entitled to appointed competent and conscientious counsel to assist him with his pursuit of post-conviction relief." ***Puckett v. State***, 834 So. 2d 676, 680 (Miss. 2002). He has now presented this Court with substantial evidence that but for his post-conviction attorney's deficient performance, he would have been granted an opportunity to pursue his claim that he is mentally incompetent pursuant to *Atkins*. Because Berry has been denied competent post-conviction counsel, and because he has presented sufficient evidence that he meets the requirements to proceed in the trial court

for a determination of mental retardation, the procedural bar cannot and should not be applied to this claim.

In a previous opinion, this Court rejected Berry's ***Atkins*** claim, because he failed to produce an affidavit of a qualified expert stating that he was mentally retarded. ***Berry v. State***, 882 So. 2d 157, 176 (Miss. 2004). Berry has now presented the Court with such evidence, but the Court finds that this claim is procedurally barred. Because Berry's counsel did not comply with ***Chase v. State***, 873 So. 2d 1013 (Miss. 2004), – the decision setting forth the requirements of a successful ***Atkins*** claim – this Court denied his petition for post-conviction relief. ***Berry***, 882 So. 2d at 176.

Attached to his current motion is an affidavit from Berry's previous attorney detailing his own deficient performance in numerous cases, including the one presently before us.[1]

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[1]The affidavit points out at least eleven other cases where the attorney admits that he was unable to provide adequate representation – ***Eskridge v. State***, Case No. 2000-DR-01079-SCT; ***Mitchell v. State***, 886 So. 2d 704 (Miss. 2004); ***Walker v. State***, 913 So. 2d 198 (Miss. 2005); ***Gray v. State***, 887 So. 2d 158 (Miss. 2004); ***Stevens v. State***, 867 So. 2d 219 (Miss. 2003); ***Holland***, 878 So. 2d 1 (Miss. 2004); ***Grayson v. State***, 879 So. 2d 1008 (Miss. 2004); ***Bishop v. State***, 882 So. 2d 135 (Miss. 2004) , ***Simmons v. State***, 869 So. 2d 995 (Miss. 2004); ***Knox v. State***, 901 So. 2d 1257 (Miss. 2005); ***Puckett v. State***, 879 So. 2d 920 (Miss. 2004). In three of these cases, Berry's prior counsel raised a claim of mental retardation but failed to produce the type of evidence required by ***Chase***. *See* ***Mitchell***, 886 So. 2d at 712-13 ("[n]o such showing [as required by ***Chase***] has been made in Mitchell's application for post-conviction relief"); ***Gray***, 887 So. 2d at 169 ("Gray provides neither affidavits of experts opining his mental retardation, nor is there any qualified opinion contained in the trial record"); ***Bishop***, 882 So. 2d at 151 (denying ***Atkins*** hearing for failure to provide an affidavit). However, in numerous other cases where this Court has considered ***Atkins*** claims, and where Berry's prior counsel was not the lead attorney, we have granted an evidentiary hearing because the attorneys provided the relevant information. *See* ***Russell v. State***, 849 So. 2d 95 (Miss. 2003); ***Chase v. State***, 873 So. 2d 1013 (Miss. 2004); ***Brown v. State***, 875 So. 2d 202 (Miss. 2004); ***Conner v. State***, 904 So. 2d 105 (Miss. 2004); ***Snow v. State***, 875 So. 2d 188 (Miss. 2004); ***Carr v. State***, 873 So. 2d 991 (Miss. 2004); ***Scott v. State***, 938 So. 2d 1233 (Miss. 2006); ***Thorson v. State***, __ So. 2d __, 2007 Miss. LEXIS 497

The attorney points to inadequate funding and understaffing of the Office of Capital Post-Conviction Counsel which led to his failure to adequately present post-conviction claims to this Court.[2] He admits that Berry's initial application "desperately needed [a] supplemental

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(Aug. 30, 2007). In other words, as Berry now argues, "if [his prior attorney] served as lead counsel on a case, the evidence required by ***Chase*** was never presented; on the other hand, for numerous other prisoners, having a different attorney spelled the difference between having a chance to present evidence at a hearing and having relief denied."

[2]Attached to Berry's motion is a chart listing cases appointed to the Office of Capital Post-Conviction from November 2000 to July 2003. In all but one case where Berry's prior counsel was listed as the only attorney, or the lead attorney, post-conviction relief was denied. Indeed, in many cases filed by Berry's prior counsel, this Court has specifically pointed out his failure to develop evidence in a timely way and to support the claims he has made.

For example, in ***Howard v. State***, 945 So. 2d 326, 352 n. 16 (Miss. 2006), this Court noted that "[t]he only evidence linking Howard to the crime was his alleged statement to Detective Turner that the case was 'solved' and the bite mark identification." However, despite being given the opportunity to seek DNA testing of the biological evidence, which would potentially exculpate the defendant, no effort was made to obtain any testing. ***Id.*** at 337. In addition, this Court had previously stated "concerns regarding the reliability of bite mark identification and gave counsel guidance on how to defend against such evidence, including the use of expert testimony." ***Id.*** at 352 n. 16 (citing ***Howard I***, 701 So. 2d 274, 287-88 (Miss. 1997)). Although we found that the trial counsel's "failure to call an expert witness [on bite mark evidence] was deficient performance," the Court denied relief because appellate counsel also failed to obtain an expert witness to rebut the State's testimony. ***Id.*** at 352.

In ***Simmons***, 869 So. 2d at 1003, we observed that "Simmons offers no evidence now which supports his claim that his trial counsel should have investigated more thoroughly, or in certain areas, even under the authority he cites, Simmons offers nothing in support from mental health experts who can now say what an investigation of Simmons or his family background would have shown or what such experts would now be willing to testify to." The Court also rejected a claim regarding DNA evidence because post-conviction counsel "produced nothing . . . which calls into question the accuracy of the results testified to by the State's DNA expert." ***Id.***, at 1005.

In ***Puckett***, 879 So. 2d at 936, 938, 940, 942, this Court denied the defendant's ineffectiveness claims because (1) "Puckett neither provide[d] this Court with insight as to who else should have been presented as a defense witness during the guilt phase nor [did] he assert that defense counsel was deficient in his cross-examination of the state's witnesses;" (2) other claims were based on "conclusory allegation[s]" and "undeveloped

petition[]," and that his office "had not had an adequate opportunity to investigate and present all of the claims." He also states that when he became sole counsel in the case, he "had done virtually nothing" on Berry's post-conviction application. Whatever the reasons for his prior counsel's deficient performance, it is clear that Berry was not allowed a meaningful opportunity to present his mental retardation claim to this Court. We rely on counsel to present his or her client's case in a thorough and competent manner. Otherwise, our decisions cannot be based on a proper consideration of the relevant facts and law. This is especially important in post-conviction review, which is designed to be the last opportunity for this Court to consider a defendant's case. When appointed counsel fails to provide the Court with the relevant facts, the system designed to ensure due process as well as a timely

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assertions"; and (3) although Puckett's mother provided the names of additional witnesses for mitigation evidence, he "failed to provide affidavits from those individuals."

In *Grayson*, 879 So. 2d at 1016, we pointed out that post-conviction counsel "failed to present any information regarding the extent of the investigation actually conducted by counsel, or what, if anything an 'adequate' investigation would have revealed." We also noted that he did not request DNA testing until he filed a reply brief which did not comply with the Rule 22 procedures to request testing. *Id.* at 1017 and n. 4. The Court stated that "[i]f Grayson wants the funds for such examination and testing, he should file a proper motion," but no such motion was ever filed. *Id.*

In *Bishop*, 882 So. 2d at 146, the Court agreed with the State that an ineffectiveness claim should be dismissed because he "failed to attach any affidavits in support of his petition," and that he "ha[d] not named any witnesses and ha[d] not specified any testimony which might have been offered in his favor." The opinion also stated that one claim made "absolutely no sense." *Id.* at 155.

In *Knox*, 901 So. 2d at 1264, 1266, the Court rejected an ineffectiveness claim because the petition "ha[d] not suggested any new evidence or testimony which should have been offered by trial counsel," and because it "supplied little or nothing as to what an effective attorney performing a proper investigation would or should have found in the way of mitigating testimony."

Finally, in *Walker*, 913 So. 2d 198, *Stevens*, 867 So. 2d 219, *Holland*, 878 So. 2d 1, and *Mitchell*, 886 So. 2d 704, most, if not all of the claims were recycled from the direct appeals and were rejected as procedurally barred.

end to the appellate process, ceases to function. In the end, justice fails for all of those involved.

For these reasons, I would not apply the procedural bar to Berry's *Atkins* claim and would allow him the opportunity to present evidence of his mental retardation in the trial court.