

Serial: 143144

IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-DR-01759-SCT

EARL WESLEY BERRY

FILED

Petitioner

v.

OCT 11 2007

STATE OF MISSISSIPPI

SUPREME COURT CLERK

Respondent

ORDER

This matter is before the Court sitting en banc on the Motion for Leave to File Successor Petition for Post-Conviction Relief filed by Earl Wesley Berry, the Response filed by the State of Mississippi and the Reply to Response filed by Berry. The Court notes that Berry previously requested post-conviction relief in this Court and did not at that time allege that the lethal injection method of execution was unconstitutional. This Court considered and denied Berry's application for post-conviction relief. *See Berry v. State*, 882 So.2d 157 (Miss. 2004), *cert. denied*, 544 U.S. 950 (2005). The State argues that Berry's Motion for Leave to File Successor Petition for Post-Conviction Relief is barred as a successive application and is untimely filed. Berry now raises two issues, which the Court considers and decides as follows.

Berry first alleges that his execution by lethal injection, under the current protocol employed by the State of Mississippi, would violate the First and Eighth Amendments to the United States Constitution, along with the Mississippi Constitution and statutory law. More specifically, Berry argues that the protocol violates Miss. Code Ann. § 99-19-51 (2007), in that one of the drugs in the protocol is not authorized by § 99-19-51; that use of this protocol

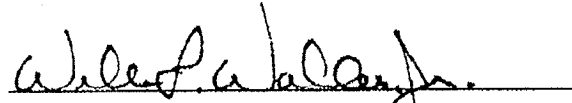


poses an unreasonable risk of subjecting Berry to excessive pain and suffering; and that because Berry would be paralyzed and unable to speak during the process, his rights under the First Amendment to the United States Constitution would be violated. After due consideration this Court finds that Berry has failed to provide sworn proof, required by Miss. Code Ann. § 99-39-9(1)(e) (2007), which legitimately questions the lethal injection protocol employed by the State of Mississippi. *Jordan v. State*, 918 So.2d 636, 662 (Miss. 2005). This issue is procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) & -27(9) (2007), and none of the statutory exceptions are applicable. The United States Supreme Court's grant of certiorari in *Baze v. Rees*, 2007 U.S. LEXIS 9066, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007), is not an intervening decision under § 99-39-27(9).

Berry next argues that competent defense counsel should have objected to the constitutionality of the State of Mississippi's lethal injection procedure at Berry's trial in 1989, and failure to do so subjected Berry to ineffective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668 (1984). This Court has determined that the State of Mississippi's lethal injection procedure does not amount to cruel and unusual punishment. *Jordan*, 918 So.2d at 662. There is no reason to believe that this Court would have determined any differently had Berry's counsel raised the issue at trial. Failure to raise the issue at Berry's trial does not amount to deficient conduct by Berry's trial counsel. This issue is procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) & -27(9) (2007), and none of the statutory exceptions are applicable. For these reasons, the Motion for Leave to File Successor Petition for Post-Conviction Relief should be dismissed.

IT IS THEREFORE ORDERED that the Motion for Leave to File Successor Petition for Post-Conviction Relief filed by Earl Wesley Berry is dismissed.

SO ORDERED, this the 11th day of October, 2007.


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

DIAZ, P.J., WOULD GRANT.
WRITTEN OBJECTION TO FOLLOW.

GRAVES, J., NOT PARTICIPATING.