

Serial: 143240

IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-DR-01759-SCT

*EARL WESLEY BERRY*

**FILED**

*Petitioner*

v.

OCT 18 2007

*STATE OF MISSISSIPPI*

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

*Respondent*

ORDER

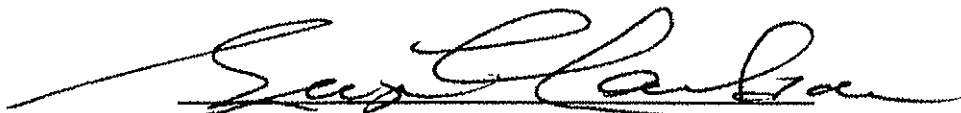
This matter is before the Court en banc on the Motion for Rehearing Based Largely on Respondent's Factual Stipulations and the Response filed by the State of Mississippi. By order dated October 11, 2007, this Court dismissed Berry's Motion for Leave to File Successor Petition for Post-Conviction Relief. Berry now asks for reconsideration of that decision. Berry argues that the State of Mississippi has stipulated that the lethal injection protocol used by the State is similar to the protocol used by Kentucky and at issue in *Baze v. Rees*, 2007 U.S. LEXIS 9066, 76 U.S.L.W. 3154 (Sept. 25, 2007). Berry argues that if the United States Supreme Court finds favorably for *Baze*, then that decision would also be applicable to Berry. Berry argues that this Court erroneously applied procedural bars in dismissing the Motion for Leave to File Successor Petition for Post-Conviction Relief.

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). Neither Berry's allegations, nor the United States Supreme Court's grant of certiorari in *Baze v. Rees* have altered that determination.

This Court has allowed prisoners under sentence of death to raise issues before this Court based on intervening decisions, such as *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court has allowed stays of the initial stage of capital post-conviction proceedings based on decisions of the United States Supreme Court which are anticipated but not yet handed down. Berry comes under neither of these scenarios. After due consideration the Court finds that the Motion for Rehearing Based Largely on Respondent's Factual Stipulations is not well taken and should be denied.

IT IS THEREFORE ORDERED that the Motion for Rehearing Based Largely on Respondent's Factual Stipulations filed by Earl Wesley Berry is denied.

SO ORDERED, this the 18<sup>th</sup> day of October, 2007.



GEORGE C. CARLSON, JR., JUSTICE  
FOR THE COURT

DIAZ, P.J., GRAVES AND DICKINSON, JJ., WOULD GRANT.