THIS IS A CAPITAL CASE – EXECUTION SET FOR JUNE 25, 2025

No. 24-7474

In the

Supreme Court of the United States

Richard Gerald Jordan,

***Petitioner*,**

v.

State of Mississippi,

Respondent.

On Petition for a Writ of Certiorari from the Supreme Court of Mississippi

Reply Brief for Petitioner

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Nothing in the State's brief in opposition blunts Petitioner Richard Jordan's case for plenary review. The State goes out of its way to cast the Mississippi Supreme Court's decision as one resting only on state law grounds. But the problem is that the lower court's decision, much like the State's brief here, manipulates state devices to dodge federal review of federal law. The Court's review is warranted.

I. This Court Has Jurisdiction, and It Has Roundly Condemned State Courts for Manipulating State Law to Avoid Providing a Forum for Federal Law Claims.

1. The State's primary argument for why the Court should not hear this claim is that the state court "considered and rejected" the *ex post facto* claim previously. Opp. 9. That contention proves too much. The state court did previously consider the issue—but now it has reversed course on the very law it previously used to deny Jordan's claim. *See Howell v. State,* 358 So. 3d 613, 620 (Miss. 2023) (Kitchens, P.J., dissenting and joined by P.J. King and J. Ishee) (discussing the Court's "harsh and unjustified departure from our precedent"). The state court's decisions in *Howell v. State,* 358 So. 3d 613 (Miss. 2023) and *Ronk v. State*, 391 So. 3d 785 (Miss. 2024) radically altered the fundamentals of Mississippi law. As the State concedes, *Howell* and *Ronk* constitute a "significant change in [Mississippi] state law."[1]

The State also agrees that Mississippi's analysis for *ex post facto* claims turns on the procedural or substantive nature of the law at issue. *Howell*, 358 So. 3d at 619 (Kitchens, P.J., dissenting) ("This Court has held consistently that statutes that are procedural and ameliorative do not violate ex post facto prohibitions."). Because Mississippi has modified its test for

[1] *See* State Response Brief in *Batiste v. Cain*, U.S. District Court for the Northern District of Mississippi, Case No. 1:22-cv-00108, [Doc. 71], p. 4.

determining what is a matter of substance, it consequently changes the court's prior treatment of Jordan's *ex post facto* claim. Under the state-law exception for intervening decisions, the Mississippi Supreme Court was obligated to address anew the federal *ex post facto* claim. Instead, it arbitrarily denied review. That is precisely what gives way to a due process violation and federal review.

2. The state court's bars are also anything but "firmly established and regularly followed." Opp. 11. As to the time bar, there is no time bar in cases that meet the intervening law exception to statutory bars. This is best illustrated in *Bell v. State*, 66 So. 3d 90 (Miss. 2011), where the Court granted post-conviction relief on the basis that *Atkins v. Virginia*, 536 U.S. 304 (2002) was intervening law. The state court granted that relief *eight years* after *Atkins* was decided. The Court in *Bell* held that "[n]oticeably absent from this statute is a time limitation in which to file a second or successive application if such application meets one of the statutory exceptions." *Id.* at 93; *Fluker v. State*, 170 So. 3d 471, 476 (Miss. 2015) ("It is true that, because the UPCCRA excepts certain claims from this three-year statute of limitations, those claims have no statutory limitations period.").

It is also important that the cases cited by the State on pages 11-12 were decided before the decisions in *Howell v. State* and *Ronk v. State.* The rationale invoked by the Court in *Howell* and *Ronk* was in many ways revolutionary. This is so not only because of the decades of precedent the cases overturned, but also because of the many areas of law impacted. The three dissenting Justices in *Howell* forecasted the reverberations of the Court's holding. *Howell,* 358 So. 3d at 619 (Kitchens, P.J., dissenting) ("'Today's holding that the Legislature is capable of enacting nothing but substantive laws can impact many areas of state law."). This Court has reiterated that "unforeseeable and unsupported state-court decision[s]," like the one here, "do[ ] not constitute

an adequate ground to preclude this Court's review of a federal question." *Cruz v. Arizona*, 598 U.S. 17, 26 (2023)

3. The State's attempted merits analysis also falls short. The State begins by focusing on the law at the time of Jordan's crime. Opp. 16. And the State admits there was only one available sentence for capital murder in January 1976—and that was a mandatory death penalty. What the State never grapples with, though, is that the only available sentence was unconstitutional. Rather than address this point, the State pivots and just says that it is "unclear how [Jordan] could be sentenced at all." Opp. 19. But Mississippi already answered that question. *Ivy v. State*, 731 So. 2d 601, 603-04 (Miss. 1999) ("Following its decision in *Furman* [ ], the U.S. Supreme Court found that Mississippi's statutory scheme for imposing the death penalty was unconstitutional."); *id.* (explaining that Ivy committed murder in 1973 and, "[s]ince the U.S. Supreme Court had declared the death penalty portion of § 2217 unconstitutional, the only viable sentence at the time Ivy committed the murder was life in prison").

The State also relies almost entirely on *Dobbert v. Florida*, 432 U.S. 282 (1977). Opp. 18. But the decision in *Dobbert* centered largely on the "fair warning" principle, which is no longer the only guiding *ex post facto* principle. The Court in *Dobbert* reasoned that the statute in effect at the time of petitioner's offense indicated Florida's view of the degree of punishment the state legislature wished to impose for murder. Justice Stevens' dissent in *Dobbert* criticized the majority opinion for relying too heavily on that principle, explaining that "[f]air warning cannot be the touchstone" of *ex post facto*. 432 U.S. at 307 (Stevens, J., dissenting).

After *Dobbert*, Justice Stevens' dissenting opinion on fair warning evolved into the majority opinion in *Carmell v. Texas*, 529 U.S. 513 (2000). Justice Stevens' majority opinion in *Carmell*

expressly recognizes that "[t]here is plainly a fundamental fairness interest [in prohibiting *ex post facto* laws], even apart from any claim of reliance or notice[.]" *Carmell*, 529 U.S. at 523.

* * *

All in all, at the time of Richard Jordan's offense, there was no constitutional provision for a death sentence in Mississippi. *Furman* had halted the death penalty shortly prior to Jordan's offense, and the mandatory death penalty scheme created by Mississippi existing at the time of Jordan's offense was unconstitutional and thus void. That Mississippi had a void and unconstitutional statute providing for a mandatory death sentence in its dead-letter law at the time of Jordan's offense does not cure Jordan's *ex post facto* claim.

II. A Stay is Warranted.

The State's opposition to Jordan's emergency application for stay is similarly flawed. The State boldly states in its response that Jordan "cannot show any likely merits success" but fails to rebut Jordan's strong showing of the "presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Opp. 21.

The State doubles down on its prior claim that Jordan is unlikely to suffer irreparable harm absent a stay of his execution. Opp. 21; *See also* Opp 14. This makes no logical or legal sense, as "execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

The State attempts to argue execution does not cause harm where a petitioner's "guilt is not in question," asking this Court to ignore his *ex post facto* claim and the State's arbitrary evasion of federal review in violation of Jordan's due process rights. Opp. 21. Again, as Jordan has previously stated, his "guilt or innocence is irrelevant to the equitable considerations attending

habeas relief, if the petitioner has demonstrated prejudicial constitutional error." Thus, a requirement of actual innocence is not a prerequisite to obtaining a stay for this Court to review a meritorious constitutional claim.

The State's claims about delay have already been dealt with in Jordan's Emergency Application for Stay, and Jordan will not beleaguer those points here. *See* Application for Stay 4-5.

The State avers that "[t]hree decades of litigation have not demonstrated constitutional errors at that sentencing, in his state post-conviction proceedings or in his method of execution." Opp. 21. But Jordan is bringing his claims based on the intervening law of *Howell* and *Ronk*, which the Mississippi Supreme Court handed down in 2023 and 2024, respectively. *See Howell v. State*, 358 So. 3d 613 (Miss. 2023); *Ronk v. State*, 391 So. 3d 785 (Miss. 2024). No court had the benefit of these cases and this seismic shift in Mississippi's law before that time, and how that changes *ex post facto* law in Mississippi. Nor could the courts foresee that this change would prevent Mississippi state courts from adjudicating fundamental constitutional rights in post-conviction where there is a statutory bar contained in the Act. *Id.*

Finally, the State is incorrect in claiming the "equities clearly favor the State" because "the State is entitled to an assurance of finality." Opp. 22 (internal citations omitted). As stated in Jordan's emergency application for stay, the State has delayed this execution around fifty years because they violated his constitutional rights in three (and Jordan submits four) separate trials. *See* Application for Stay 7. The State is to blame for any delay—not Jordan.

CONCLUSION

Jordan's petition is meritorious and should result in a grant of certiorari. This Court should grant a stay so that it may fully address the important constitutional issue presented.

Dated: June 24, 2025

Respectfully submitted,

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