

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD GERALD JORDAN, *Petitioner*,

v.

STATE OF MISSISSIPPI, *Respondent*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

Richard Jordan was first convicted and sentenced to death for capital murder in 1976. He has thus spent over 41 years incarcerated for the same crime. The initial judgment against him was vacated because Mississippi followed the type of unitary proceeding held invalid in *Woodson v. North Carolina*. He was convicted and sentenced to death again in 1977. The Fifth Circuit vacated his sentence due to improper instructions on aggravating circumstances. He was sentenced to death again in 1983, but once again the State prevented him from having a constitutional proceeding because it refused to permit him to present evidence of his adaptability to prison. In 1991, a Special Prosecutor agreed that Richard Jordan should receive a sentence of life without possibility of parole, citing Jordan's exemplary prison behavior, military service, expressions of remorse, and efforts to contribute to society despite his incarceration. The Mississippi Supreme Court subsequently determined that such sentence agreements were void ab initio because life without parole was not an available sentencing option under then-existing law. Jordan sought to modify his sentence to one with parole, but the Mississippi Supreme Court simply vacated the sentence and returned Jordan to his pre-agreement status, thus freeing the State to seek the death penalty again. Jordan was again sentenced to death in 1998.

These circumstances raise the following questions:

1. Whether incarcerating a prisoner over four decades awaiting execution, even after the State found at one point that a life without parole sentence was appropriate, violates the Eighth Amendment because it fails to serve any legitimate penological purpose?
2. Whether incarcerating a prisoner over four decades awaiting execution, with over half that time attributable to repeated constitutional violations in a succession of sentencing hearings, violates the Eighth Amendment because it fails to serve any legitimate penological purpose?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Gerald Jordan, a state capital inmate, respectfully requests that the Court grant a writ of certiorari to review the decision of the Mississippi Supreme Court.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court denying a successive petition for post-conviction relief, *Jordan v. State*, 224 So. 3d 1252 (Miss. 2017), is attached as Appendix A. The order denying a motion for rehearing is unpublished and is attached as Appendix B.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Mississippi Supreme Court on the basis of 28 U.S.C. Section 1257. The decision of the Mississippi Supreme Court denying relief was entered June 13, 2017, and Petitioner's motion for rehearing was denied on September 14, 2017.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional provisions:

The Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment (relevant 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 OF THE CASE

Richard Jordan has been incarcerated for a crime that occurred in January 1976. For most of that time, he has been on death row. He was sentenced to death three times, and each time, his sentence was reversed because the State violated his constitutional rights. After the third time his sentence was vacated, a Special Prosecutor representing the State agreed to a sentence of life without possibility of parole. Finding such plea bargains to a life without parole *void ab initio* under then-existing state law, the Mississippi Supreme Court vacated Jordan's life sentence, thereby making him eligible for the death penalty. At a fifth sentencing, when trial counsel were disadvantaged due to the passage of time since the crime, Jordan was again sentenced to death. During the entire course of his incarceration, Jordan has been an exemplary prisoner.

Executing Jordan after requiring him to spend an extraordinary length of time under harsh conditions of death row restrictive confinement due to the State's persistent inability to provide him a constitutionally adequate sentencing, and after the Special Prosecutor had previously agreed that a sentence of life imprisonment without possibility of parole protected the public's interest, will serve no legitimate penological purpose and will thus violate the Eighth Amendment.

A. Three Unconstitutional Death Sentences (1976, 1977, 1983)

Richard Jordan was first tried and convicted on July 21, 1976, for the murder of Edwina Marter. He was sentenced to death. The trial court, however, granted a motion for a new trial based on the Mississippi Supreme Court's decision in *Jackson*

v. State, 337 So. 2d 1242 (Miss. 1976), which was decided just after Jordan was convicted, and which declared Mississippi's mandatory death sentencing scheme to be unconstitutional.

Jordan was again convicted and sentenced to death the next year. *Jordan v. State*, 365 So. 2d 1198 (Miss. 1978); see also *In re Jordan*, 390 So. 2d 584 (Miss. 1980). Jordan subsequently obtained federal habeas corpus relief because the sentencing instructions in his second trial failed to "channel the sentencer's discretion by clear and objective standards and did not provide specific and detailed guidance." *Jordan v. Watkins*, 681 F.2d 1067, 1082 (5th Cir. 1982), rehearing denied sub. nom. *Jordan v. Thigpen*, 688 F.2d 395 (5th Cir. 1982) (internal quotes omitted).

The State obtained a third unconstitutional death sentence in 1983 by improperly limiting Jordan's right to present mitigating evidence. Although the state supreme court initially affirmed the sentence, this Court granted certiorari and vacated his death sentence in light of its decision in *Skipper v. South Carolina*, 476 U.S. 1101 (1986), which held that the Eighth Amendment required a defendant facing a death sentence to be allowed to present evidence of his adaptability to prison. On remand, the Mississippi Supreme Court applied *Skipper* and found the third death sentence to be unconstitutional. *Jordan v. State*, 518 So. 2d 1186 (Miss. 1987).

B. Fourth Sentencing: the Attempted LWOP Agreement

In 1991, Jordan and the State of Mississippi¹ agreed to resolve the case with the imposition of a sentence of life imprisonment without the possibility of parole, even though no such sentence was authorized at that time under Mississippi law. Prosecutors in Mississippi entered similar agreements with at least three other capital defendants. *See Lanier v. State*, 635 So. 2d 813 (Miss. 1994); *Stevenson v. State*, 674 So. 2d 501 (Miss. 1996); *Patterson v. State*, 660 So. 2d 966 (Miss. 1995). In agreeing to the life without parole sentence, the Special Prosecutor stipulated to a number of powerful mitigating circumstances:

1. That Richard Gerald Jordan has expressed sorrow for this crime in previous court testimony.

* * *

5. That Richard Gerald Jordan has not had a discipline record problem in the jail/prison system for the past 15 years, 11 months.

6. That while in prison Richard Gerald Jordan has been creative and attempted to make significant contributions to society through his ideas for inventions to benefit businesses and society.

7. That while in prison Richard Gerald Jordan has assisted bank and bank security personnel in devising methods and approaches to prevent crimes against banking personnel and their families.

8. That members of the religious community have previously testified and are prepared to again testify to the remorse of Richard Gerald Jordan for his crime and to his commitment to personal improvement.

9. That while in prison Richard Gerald Jordan has been a positive force and assisted other prisoners.

¹ The State was represented in 1991 by Special Prosecutor Joe Sam Owen. Owen served as an Assistant District Attorney for the 1976 and 1977 trials. By 1983, he entered private practice but was appointed as a Special Prosecutor at the request of the victim's family. T. 26; State Trial Exhibit 1.

PCR Ex. 34; R. 1094-95.

The Special Prosecutor also recognized Jordan’s record of “eight (8) years of honorable service in the United States Army, from which he was honorably discharged and discharged partially disabled from injuries received in combat in Vietnam.” *Id.* ¶ 2.

Not long after Jordan was sentenced to life without parole, the Mississippi Supreme Court held that LWOP plea agreements in capital cases were “void and unenforceable on public policy grounds.” *Lanier v. State*, 635 So. 2d 813, 815 (Miss. 1994); *see also Patterson v. State*, 660 So. 2d 966 (Miss. 1995).

As a result, Jordan asked the Harrison County Circuit Court to strike the prohibition against seeking parole. The Circuit Court denied relief. On appeal, the state supreme court applied *Lanier* and found the 1991 agreement “void as against public policy” and restored the parties to their “pre-bargain positions” in which Jordan had the right to a jury sentencing and the State had the right to seek the death penalty. *Jordan v. State*, No. 95-KP-00113-SCT at 4 (Miss. July 17, 1997).²

The Mississippi Supreme Court explained:

an agreement between a defendant who knowingly and voluntarily enters into a plea agreement to life imprisonment without the possibility of parole, during a time when the sentencing statute did not offer such option, to avoid a possible death sentence is void *ab initio* on the ground that it violates public policy.

² This opinion was not reported.

The Mississippi Supreme Court added: “the circuit court had no authority to issue such a sentence.” *Id.* at 4.³ As explained in *Lanier*, “both parties are placed back in the positions which they occupied prior to entering into the agreement.” *Lanier*, 635 So. 2d at 817. The State once again had provided Jordan with a defective sentencing proceeding.

C. Fifth Sentencing Proceeding

In 1994, before Jordan’s fifth sentencing proceeding, the Mississippi legislature amended the capital murder sentencing statute to allow for a punishment of life without possibility of parole. Miss. Code Ann. § 97-3-21. The Mississippi Supreme Court then held that a defendant whose crime occurred prior to the effective date of the amendment to the statute could validly waive his ex post facto rights and receive a life without parole sentence. *See, e.g., West v. State*, 725 So. 2d 872 (Miss. 1998). Thus, the exact type of agreement resulting in Jordan’s 1991 life-without-parole sentence had become legal. Indeed, if these statutory and case-law developments had occurred just three years earlier (that is, prior to Jordan’s 1991 plea agreement), the state courts would have enforced the agreement as originally written.

In light of these changes in the law, Jordan informed the State that he was willing to waive his ex post facto rights concerning the application of the recent amendments to Miss. Code Ann. §§ 97-3-21 and 99-19-101 and again be sentenced to

³ Under Mississippi law, an agreement that is void *ab initio* “is null from the beginning if it seriously offends law or public policy.” *Hood ex rel State Tobacco Litigation*, 958 So. 2d 790, 815 (Miss. 2007). Such a contract has “no force or effect.” *Richardson v. Canton Farm Equip., Inc.*, 608 So. 2d 1240, 1254 (Miss. 1992).

life imprisonment without the possibility of parole. Despite finding a life without parole sentence acceptable given Jordan's mitigating evidence, the Special Prosecutor refused this offer only because Jordan challenged the *ultra vires* agreement. As the Mississippi Supreme Court found:

Owen declined Jordan's offer and indicated that he would not make a plea agreement with Jordan since Jordan had previously violated his agreement with the State that he would not appeal his plea and sentence of life imprisonment without the possibility of parole.

Jordan v. State, 786 So. 2d 987, 1000 (¶ 19) (Miss. 2001).

Although the State refused to agree to accept a life without parole sentence in Jordan's case, prosecutors in similarly situated cases agreed to the terms of the now-legal agreement. These other inmates committed crimes at least as serious as the crime for which Jordan was convicted. For example, Lanier assaulted, kidnapped, and murdered a Meridian police officer. *Lanier v. State*, 635 So. 2d 813, 815 (Miss. 1994). Stevenson attacked and stabbed to death a deputy at a jail and escaped. *Stevenson*, 674 So. 2d 501, 502 (Miss. 1996). And Patterson was convicted of kidnapping and capital murder. *Patterson v. State*, 660 So. 2d 966, 967 (Miss. 1995).

In 1998, well over twenty years after the crime, and after the State failed on four occasions either to provide a lawful sentencing proceeding or offer him a lawful plea bargain, Jordan had to confront a jury that would, because of the deaths of family members in the intervening years, never hear his full mitigation testimony and would never experience the emotional force of testimony of those who loved him dearly. As trial counsel explained, the emotional impact of the testimony of a penalty phase witness is often as important if not more so than the substance of the testimony itself.

PCR Exhibit 25 (affidavit of Tom Sumrall). Here, because so many of Jordan's strongest witnesses were deceased, trial counsel could do little but read the prior testimony into the record. Nothing the trial attorneys did could possibly convey the emotion or evoke the jury's sympathy in a way that a parent could.

Even the prosecutors recognized the emotional force of the testimony of Jordan's parents when they were able to testify in person at an earlier trial. As the District Attorneys stated to the jury at the 1983 trial: "I don't criticize those two lovely old people [Jordan's parents] because their son has committed a very heinous crime, and I knew that they were going to come down and pour their hearts out to you in behalf of their son" PCR Exhibit 45, p. 2818 (emphasis added).

In short, Jordan was denied the very type of evidence that routinely spells the difference between life and death in capital trials in Mississippi, and the State of Mississippi managed to reap the benefit of its prior inability to provide Jordan with a constitutionally-sound sentencing proceeding.

The Mississippi Supreme Court affirmed Jordan's fourth death sentence. *Jordan v. State*, 786 So. 2d 987 (Miss. 2001). It later denied a petition for post-conviction relief, even though it found that trial counsel had been deficient in preparing for aspects of the resentencing. *Jordan v. State*, 912 So. 2d 800, 812 (¶ 27) (Miss. 2005). In federal habeas proceedings, a divided panel of the Fifth Circuit denied a certificate of appealability. *Jordan v. Epps*, 756 F.3d 395 (5th Cir. 2014). Over the strenuous dissent of three justices, this Court denied a petition for a writ of certiorari. *Jordan v. Fisher*, 135 S. Ct. 2727 (2015).

D. Successive State Court Petition

Jordan filed a successive petition for post-conviction relief arguing that his prolonged incarceration, mostly under horrific conditions on death row, denied him his rights guaranteed by the Eighth Amendment. The Mississippi Supreme Court denied relief on the merits. *Jordan v. State*, 224 So. 3d 1252, 1253 (Miss. 2017).

REASONS FOR GRANTING THE WRIT

Richard Jordan has perhaps spent more time in prison prior to being executed than anyone in the United States. He was first convicted and sentenced to death for capital murder in July 1976. *Jordan v. State*, 365 So. 2d 1198 (Miss. 1978). He has spent approximately 34 years of this time on death row and was also in general population serving a life sentence for approximately seven years. Altogether, about 497 months have elapsed since he was first convicted and sentenced for this offense.⁴ At all times, he has been an exemplary inmate. During his time in general population, he was made a trustee and received excellent evaluations. He has not been charged with a violation of any prison rule or regulation in over thirty (30) years.

The course of Richard Jordan's legal challenges has also been extraordinary. On three occasions, the State of Mississippi denied Jordan a fair and constitutionally-sound trial. After the third reversal of his death sentence, even the Special Prosecutor agreed that a sentence of life without possibility of parole was the appropriate sentence. However, the Mississippi Supreme Court once again set aside his sentence, this time finding that the agreement that the State had entered into was deficient. Only after litigation involving the legality of the non-statutory life without parole bargain did Jordan face a death sentence for the fourth time. The fourth re-sentencing came more than twenty years after his first trial. By this time, he was prejudiced in his ability to present a compelling case in mitigation.

⁴ Based on data compiled from websites maintained by the Mississippi Department of Corrections and the Office of the State Public Defender, Jordan calculates that the average length of time between capital sentencing and execution in Mississippi is approximately 14 years and 9 months (or 177 months). A chart detailing this data appears below in subsection D.

A. Despite having to endure miserable conditions for over forty years, Jordan has remained an exemplary prisoner.

Jordan has been incarcerated for over forty years, most of that time on death row living in isolated, squalid conditions. Those living conditions were so horrific that the Fifth Circuit found that they amounted to cruel and unusual punishment. *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004). Despite having to endure the extremely miserable conditions, Jordan strived to be an excellent prisoner. He has scrupulously obeyed all rules, and when he was not on death row, worked to achieve trusty status. At his 1998 retrial, numerous employees of the Department of Corrections attested to his good conduct in prison, and since that time, he has not committed any rules infractions.

B. The Federal Constitution prohibits excessive punishment.

The Eighth Amendment prohibits the imposition of cruel and unusual punishments. U.S. Const., amend. VIII. *See also Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“The Eighth Amendment succinctly prohibits ‘excessive’ sanctions.”). The Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality)). As this Court explained, because the Eighth Amendment “necessarily embodies a moral judgment,” “its applicability must change as the basic mores of society change.” *Id.* *See also Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (plurality) (“this Court takes into account objective evidence of contemporary values before determining whether a particular

punishment comports with the fundamental human dignity that the Amendment protects.”).

Capital punishment becomes “excessive” if it is either “grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.” *Kennedy*, 554 U.S. at 441 (citing *Gregg v. Georgia*, 428 U.S. 153, 173, 183, 187 (1976) (plurality). “[W]hen the death penalty ‘ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.’” *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (Stevens, J., dissenting from denial of certiorari) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., opinion concurring in judgment)).

This Court has also consistently emphasized the demand for a heightened standard of reliability in determining whether capital punishment is appropriate in a particular case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality); *see also Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (“This Court has repeatedly said that under the Eighth Amendment ‘the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination’) (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality) (“In capital

proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.”).

C. This Court should grant certiorari to consider whether the exceptional length of time since Jordan’s initial death sentence and other extraordinary circumstances violate the Eighth Amendment.

In light of the principles and facts reviewed above, Jordan’s death sentence should not stand. He has endured forty years of brutal punishment while the State repeatedly failed to provide a constitutionally-sound sentencing proceeding until the passage of time made it impossible for Jordan to prepare an adequate defense. Although he was sentenced to death, he has also had to endure what amounts to a life sentence while awaiting the executioner.

After more than 40 years of incarceration, there is little reason to believe that either of the constitutionally acceptable goals of capital punishment will be fulfilled by Jordan’s execution. Such an unprecedented delay between incarceration and execution will have no deterrent value. As former Justice Powell noted, “[t]he retributive value of the death penalty is diminished as imposition of sentence becomes ever farther removed from the time of the offense,” Lewis Powell, *Capital Punishment*, Commentary, 102 Harv. L. Rev. 1035, 1041 (1989) (“.

Members of the Court have questioned whether either deterrence or retribution retains any force after the passage of time. In *Lackey, supra*, Justice Stevens questioned whether the passage of seventeen years reduced the justification for a death sentence. As Justice Stevens observed, “the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row

followed by the prisoner's continued incarceration for life, on the other, seems minimal." *Lackey*, 514 U.S. at 1046. Likewise, he pointed out that "after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted." *Id.* at 1045. Of course, Jordan has spent far more than twice as long in prison as Lackey did.

Since *Lackey*, Justice Breyer has questioned the constitutionality of lengthy pre-execution incarceration, and has encouraged judicial examination of sentences in light of this aspect of the Eighth Amendment. In *Valle v. Florida*, 132 S. Ct. 1 (2011), he affirmed his position that carrying out an execution after lengthy confinement (33 years in Valle's case) amounted to cruel and unusual punishment:

I have little doubt about the cruelty of so long a period of incarceration under sentence of death. In *Lackey* and in *Knight* Justice Stevens and I referred to the legal sources, in addition to studies of attempted suicides, that buttress the commonsense conclusion that 33 years in prison under threat of execution is cruel. See *In re Medley*, 134 U. S. 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890) (describing as "horrible" the "feelings" that accompany uncertainty about whether, or when, the execution will take place); *Solesbee v. Balkcom*, 339 U. S. 9, 14, 70 S. Ct. 457, 94 L. Ed. 604 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); Strafer, *Volunteering for Execution*, 74 J. Crim. L. & C. 860, 872, n. 44 (1983) (a study of Florida inmates showed that 35% of those confined on death row attempted suicide; 42% seriously considered suicide); *id.*, at 869-871, ("Recent studies and law suits document both the barbaric conditions pervading death rows and the debilitating and life-negating effects of these conditions").

So long a confinement followed by execution would also seem unusual. The average period of time that an individual sentenced to death spends on death row is

almost 15 years. Thirty three years is more than twice as long.

Valle v. Florida, 132 S. Ct. at 1-2) (Breyer, J. dissenting from denial of stay and certiorari); *see also Smith v. Arizona*, 552 U.S. 985 (2007) (Breyer, J. dissenting from denial of certiorari) (thirty year delay due to constitutionally defective proceedings amounts to cruel and unusual punishment); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J. dissenting from denial of certiorari); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J. dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari).

The result of Jordan's most recent sentencing proceeding is unreliable due to the passage of time. Many witnesses who could have provided compelling mitigating evidence were no longer available and trial counsel had to read their prior testimony to the jury.⁵

No other prisoner sentenced to death in Mississippi, especially those sentenced when Mississippi had a mandatory death penalty, has had to face an execution, much less face one after being incarcerated for so long. Jordan's sentence is therefore "unusual." As shown in the chart below, the average length of time between imposition of a death sentence and execution in Mississippi is 14 years and 9 months.

⁵ The reliability of Jordan's death sentence is further undermined by instances of trial counsel's deficient conduct. Even though the Mississippi Supreme Court found insufficient prejudice, it found that trial counsel failed to correct a reported provided to a court-appointed psychiatrist that erroneously stated Jordan had been dishonorably discharged from the army and that trial counsel failed to prepare to challenge the State's blood spatter expert. *Jordan v. State*, 912 So. 2d 800, 812, 816 (Miss. 2005).

It has been approximately 497 months or over 41 years years since Jordan was first sentenced to death.

NAME	SENTENCED	EXECUTED	LENGTH OF TIME
Gary Simmons	August 1997	June 20, 2012	14 years 10 months
Jan Brawner	April 2002	June 12, 2012	10 years 2 months
Henry Jackson	September 1991	June 5, 2012	20 years 9 months
William Mitchell	July 1998	March 22, 2012	13 years 8 months
Larry Puckett	August 1996	March 20, 2012	15 years 7 months
Edwin Turner	February 1997	February 8, 2012	15 years
Rodney Gray	January 1996	May 17, 2011	15 years 4 months
Benny Stevens	December 4, 1999	May 10, 2011	11 years 5 months
Joseph Burns	September 1996	July 21, 2010	13 years 10 months
Gerald Holland	December 11, 1987	May 20, 2010	22 years 5 months
Paul Woodward	April 1987	May 19, 2010	23 years 1 month
Dale Bishop	February 4, 2000	July 23, 2008	8 years 5 months
Earl Berry	April 22, 1988	May 21, 2008	20 years 1 month
Bobby Wilcher	July 1982	October 18, 2006	24 years 3 months
John Nixon	March 26, 1986	December 14, 2005	19 years 9 months
Jessie Williams	December, 1983	December 11, 2002	19 years
Tracy Hansen	October 30, 1987	July 17, 2002	14 years 9 months
Leo Edwards	July 1981	June 21, 1989	7 years 11 months
Connie Evans	October 1981	July 8, 1987	5 years 9 months
Edward Johnson	August 1980	May 20, 1987	6 years 9 months
Jimmy Gray	December 1976	September 2, 1983	6 years 9 months
AVERAGE TIME			14 years 9 months

Besides being “unusual,” Jordan’s experience is also “cruel.” He has already served the equivalent of a life sentence, and still faces the prospect of being executed. Essentially, rather than receiving either a sentence of life imprisonment or a death sentence, he received both. *See Foster v. Florida*, 537 U.S. 990, 993 (2002) (Breyer, J.

dissenting from denial of certiorari) (execution after incarceration of 27 years cruel because prisoner “will have been punished both by death and also by more than a generation spent in death row’s twilight”). Moreover, Jordan has had to endure most of his lengthy incarceration under the harsh confinement of death row. Unlike other prisoners who are eligible to work and participate in other programs, Jordan, like other death row prisoners, is confined to a small cell.

The Eighth Amendment prohibition against cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions.” *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (quotes and citation omitted). Long-term placement in solitary confinement violates this prohibition. As Justice Kennedy observed, “[t]he human toll wrought by extended terms of isolation has been understood, and questioned, by writers and commentators.” *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring); *see also id.* at 2210 (“research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price”); *In re Medley*, 134 U.S. 160, 170 (1890) (solitary confinement carries “a further terror and peculiar mark of infamy”).⁶

Despite his excellent prison record, Jordan has had to endure a harsh punishment like no other prisoner in Mississippi, only to have the State execute him. These extraordinary circumstances make his execution excessive and disproportionate to the crime and thus in violation of the federal constitution.

⁶ Psychological studies confirm the debilitating effects of isolation. *See, e.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol’y 325, 354 (2006); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am J. Psychiatry 1450 (1983).

D. International standards support a finding that the unprecedented delay in Jordan's case renders his death sentence invalid.

International standards of decency have evolved to the point that many foreign jurisdictions that accept the lawfulness of the death penalty now hold that “lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel.” *See Knight*, 528 U.S. at 995-96 (Breyer, J., dissenting from denial of certiorari) (discussing holdings of foreign courts in Jamaica, India, Zimbabwe, Europe, and Canada). Because of the long delays between sentencing and execution, and the conditions in which the condemned are kept, execution of the death penalty in Jordan's case constitutes “cruel, inhuman or degrading treatment or punishment” in violation of Article VII of the International Covenant on Civil and Political Rights. (“ICCPR”). Article 7 of the ICCPR provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” When the U.S. Senate ratified the ICCPR, it declared that this phrase meant “the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.” What constitutes cruel and unusual punishment is informed by international norms. *See Roper v. Simmons*, 543 U.S. 551, 576-78 (2005).

The British Privy Council's decision in *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 A.C. 1, 4 All E.R. 769 (Privy Council 1993)(en banc), and the decision of the European Court on Human Rights in *Soering v. United Kingdom*, 11 Eur. H. R. Rep. 439 (1989) (European Court of Human Rights refused

to extradite a German national to face capital murder charges because of anticipated time that he would have to spend on death row if sentenced to death) exemplify the norms.

In *Pratt and Morgan*, the Privy Council held that a delay of fourteen years between the time of conviction and the carrying out of a death sentence in the case of a Jamaican prisoner was “inhuman punishment.” 2 A.C. at 33. In *Soering*, the European Court found that prisoners in Virginia spend an average of six to eight years on death row prior to execution. The court determined that “[h]owever well-intentioned and even potentially beneficial is the provision of the complex post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.” 161 Eur. Ct. H.R. at 42. *See also Vatheeswaran v. State of Tamil Nadu*, 2 S.C.R. 348, 353 (India 1983)(criticizing the “dehumanizing character of the delay” in carrying out the death penalty); *Catholic Comm’n for Justice & Peace in Zimbabwe v. Attorney General*, 14 Hum. Rts. L. J. 323 (Zimb. June 24, 1993).

The Supreme Court of Canada considered evidence that death-sentenced inmates in Washington took, on average, 11.2 years to complete state and federal post-conviction review, in weighing the legality of extraditing two men to the United States to face capital charges. The Court acknowledged a “widening acceptance” that “the finality of the death penalty, combined with the determination of the criminal justice system to satisfy itself fully that the conviction is not wrongful, seems

inevitably to provide lengthy delays, and the associated psychological trauma.” *Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 March 2001)(at para. 122). Relying in part on this evidence, the court held that the Canadian Charter of Rights and Freedoms precluded the defendants’ extradition, absent assurances the United States would not seek the death penalty.

The norm against cruel, inhuman, or degrading treatment is now universally recognized as a violation of international law. The Universal Declaration of Human Rights, article 5, provides: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” Universal Declaration of Human Rights, *adopted* Dec.10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). *See also* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 16, *adopted* Dec.10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (*entered into force* June 26, 1987); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953); the American Convention on Human Rights, Art. 5, *opened for signature* Nov.22, 1969, O.A.S. T.S. No.36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (*entered into force* July 18, 1978); the International Covenant on Civil and Political Rights, Art. 7, *adopted* Dec.16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (*entered into force* Mar. 23, 1976); African Charter on Human and People’s Rights, Art. 5, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (*entered into force* Oct.21, 1986).

The prohibition against cruel, inhuman, or degrading treatment has attained binding force as customary international law. *See* Declaration of Tehran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 GAOR, U.N. Doc. A/CONF. 32/41 (1968) (noting status of Universal Declaration of Human Rights, including prohibition against cruel, inhuman or degrading treatment, as customary international law). *Accord De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (noting that the right not to be subjected to cruel, inhuman, and degrading treatment constitutes universally accepted international law).⁷ Jordan’s death sentence after such delays, not attributable to him, due to errors by the trial court violates norms of international law.

E. Conclusion.

By any standard, Richard Jordan’s case is an outlier. The State repeatedly denied him a constitutional sentencing proceeding, forcing him to defend himself time and again even though his ability to marshal a case in support of a death sentence grew weaker with the passage of time. Incredibly, there was a time when the State determined that life without parole was an appropriate sentence. During that relatively brief window when he was off death row, Jordan did everything expected

⁷ International human rights organizations have also condemned the practice of solitary confinement for extended periods of time. *See, e.g.*, U.N. Special Rapporteur of the Human Rights Council, Interim Rep. on torture and other cruel, inhuman or degrading treatment of punishment, ¶ 70, U.N. Doc. A/66/268 (Aug. 5, 2011). Similarly, international courts have found that prolonged isolation breaches violate international prohibitions against torture. *See, e.g., Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 87 (Nov. 27, 2003) (restating the finding of International American Court of Human Rights that “prolonged isolation and deprivation and communication are in themselves cruel and inhuman treatment”); *Babar Ahmad and Others v. United Kingdom*, Eur. Ct. H.R. App. Nos. 24027/07 et al., ¶ 210, 52 I.L.M. 443, 2013 WL 5785362 (Apr. 10, 2012).

of a prisoner and more. He ultimately became a trustee. Despite his excellent conduct and the State's recognition of a wealth of other compelling mitigating circumstances, Jordan was thrown back on death row for no other reason than he was swept up in the legal uncertainties surrounding life without parole arrangements in the early 1990s. But for the timing of the negotiations of that bargain, Jordan unquestionably would be serving a life without parole sentence that all felt appropriate.

Richard Jordan has now served the equivalent of a life sentence in wretched conditions while coping with the extreme stress and anxiety of living on death row awaiting his execution. Given these extraordinary circumstances, especially the 40 years that Jordan has already served, this Court should grant certiorari.

PRAYER FOR RELIEF

Wherefore, for the foregoing reasons, this Court should grant certiorari to review the decision of the Mississippi Supreme Court.

Respectfully Submitted,

/s/James W. Craig

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