

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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December 13, 2017

APPENDIX A:

Opinion Denying Successive Petition for
Post-conviction Relief:

Jordan v. State, 224 So. 3d 1252 (Miss. 2017)

APPENDIX B:

Decision Letter on Denial of Rehearing, September 14, 2017

APPENDIX A:

Opinion Denying Successive Petition for
Post-conviction Relief:

Jordan v. State, 224 So. 3d 1252 (Miss. 2017)

Richard Gerald JORDAN

v.

STATE of Mississippi

No. 2016–DR–00960–SCT

Supreme Court of Mississippi.

SO ORDERED, this the 13th
day of June, 2017.

Rehearing Denied September 14, 2017

Background: Capital defendant filed a successive petition for post-conviction relief.

Holdings: The Supreme Court, en banc, Jess H. Dickinson, P.J., held that:

- (1) defendant’s claim that statute precluded State from using midazolam to execute him was moot, and
- (2) executing defendant more than 40 years after he was originally sentenced was not cruel or unusual punishment.

Petition dismissed in part and denied in part.

Kitchens, J., objected with written statement in which Waller, C.J., and King, J., joined.

1. Criminal Law ⇌1443

Defendant’s postconviction claim that statute precluded State from using midazolam to execute him was moot, where statute was amended to no longer require ultra short-acting barbiturate or other similar drug to be used in execution. Miss. Code Ann. § 99-19-51(1).

2. Sentencing and Punishment ⇌1795

Executing defendant more than 40 years after he was originally sentenced to death did not amount to cruel or unusual punishment; even though circumstances surrounding defendant’s pre-execution incarceration were unusual, death sentence was not itself unusual, and defendant was subject to same punishment as every other

inmate who had been executed. U.S. Const. Amend. 8; Miss. Const. art. 3, § 28.

EN BANC ORDER

JESS H. DICKINSON, PRESIDING
JUSTICE FOR THE COURT

This matter comes before the En Banc Court on Richard Gerald Jordan’s Successive Petition for Post-Conviction Relief. Jordan claims the State’s intent to use midazolam in its lethal injection protocol violates Mississippi Code Section 99–19–51. He also claims executing an inmate more than forty years after he was first sentenced to death would violate the United States and Mississippi Constitutions.

Claim I

[1] When Jordan filed his petition, Mississippi Code Section 99–19–51(1) provided that “[t]he manner of inflicting the punishment of death shall be by continuous intravenous administration of a lethal quantity of an ultra short-acting barbiturate or other similar drug in combination with a chemical paralytic agent” Jordan claimed the State could not use midazolam because it was not an “ultra short-acting barbiturate or other similar drug.” But on April 5, 2017, Mississippi Code Section 99–19–51(1) was amended to state “[t]he manner of inflicting the punishment of death shall be by the sequential intravenous administration of a lethal quantity of the following combination of substances: (a) an appropriate anesthetic or sedative; (b) a chemical paralytic agent; and (c) potassium chloride, or other similarly effective substance. . . .”

Ordinarily, this Court will not dispose of a case on grounds which the parties have not been afforded an opportunity to brief. Here we do so because Jordan claims that the use of midazolam violates a provision of Section 99–19–51 that now has been amended. Because we find Jordan’s claim

to be moot, we decline to address whether midazolam is or is not a permissible drug under the current statute.

Claim II

[2] Jordan also argues that both the United States and Mississippi Constitutions prohibit the State from executing an inmate more than forty years after he was originally sentenced to death. Jordan has been on death row for over forty years—longer than any other Mississippi inmate. He argues that after this length of time, execution will amount to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, and cruel or unusual punishment under Article 3, Section 28 of the Mississippi Constitution.

Courts regularly have rejected similar claims.¹ The United States Supreme Court recently rejected a petition for certiorari review of “whether execution of a condemned individual more than three-and-one-half decades after the imposition of a death sentence violates the Eighth Amendment’s prohibition against cruel and unusual punishment.”² We are provided no compelling argument to depart from these holdings, so we must conclude that Jordan’s Eighth Amendment claim lacks merit.

Jordan also lodges his claim under Article 3, Section 28 of the Mississippi Constitution, which prohibits cruel *or* unusual. Jordan argues that the forty-year delay has resulted from his sentence being reversed three times due to the State’s inappropriate conduct at trial, and that even if not cruel, the extensive delay renders his punishment unusual because no Mississippi

prisoner has waited so long for the imposition of a death sentence.

While we agree that the circumstances surrounding Jordan’s pre-execution incarceration are unusual, the Mississippi Constitution prohibits unusual punishment, and the punishment Jordan asks this Court to vacate—his death sentence—is not itself unusual. Regardless of the delay, Jordan will be subjected to the same punishment as every other inmate who has been executed. So we find no merit to Jordan’s claim that his punishment violates Article 3, Section 28 of the Mississippi Constitution.

For the foregoing reasons we dismiss Jordan’s petition as moot as to claim one and deny Jordan’s petition as to claim two.

SO ORDERED, this the 13th day of June, 2017.

TO AGREE: DICKINSON AND
RANDOLPH, P.JJ., COLEMAN,
MAXWELL, BEAM AND
CHAMBERLIN, JJ.

KITCHENS, J., OBJECTS WITH
SEPARATE WRITTEN STATEMENT
JOINED BY WALLER, C.J., AND
KING, J.

KITCHENS, JUSTICE, OBJECTING
TO THE ORDER WITH SEPARATE
WRITTEN STATEMENT:

¶1. In view of the statutory change, I would order supplemental briefing to allow the parties the opportunity to present arguments under the new statute. I also would order supplemental briefing to allow the parties to address whether executing an inmate more than forty years after he

1. See *Reed v. Quarterman*, 504 F.3d 465, 488 (5th Cir. 2007) (quoting *White v. Johnson*, 79 F.3d 432, 436–40 (5th Cir. 1996)) (“[n]o other circuit has found that inordinate delay in carrying out an execution violates the con-

demned prisoner’s eighth amendment rights.’”).

2. Petition for Writ of Certiorari, *Moore v. Texas*, — U.S. —, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017) (No. 15–797).

was sentenced to death violates the prohibition on “[c]ruel *or* unusual punishment” found in Article 3, Section 28, of the Mississippi Constitution. Miss. Const. art. 3, § 28 (emphasis added).

WALLER, C.J., AND KING, J., JOIN THIS SEPARATE WRITTEN STATEMENT.



Marlon K. JACKSON a/k/a Marlon Jackson a/k/a Marlon Kevin Jackson Jr., Appellant

v.

STATE of Mississippi, Appellee
NO. 2016–CP–00381–COA

Court of Appeals of Mississippi.

08/01/2017

Background: Defendant, who had previous convictions or burglary of a dwelling and sexual battery, and who pleaded guilty to possession of more than one precursor chemical, filed for post-conviction relief. The Circuit Court, Hancock County, Christopher Louis Schmidt, J., denied the motion, and defendant appealed.

Holdings: The Court of Appeals, Greenlee, J., held that:

- (1) defendant did not receive ineffective assistance for counsel allegedly failing to inform him of coming changes in the law;
- (2) court was permitted to sentence defendant as a habitual offender; and
- (3) defendant was not entitled to post-conviction for his sexual-battery conviction and requirement that he register as a sex-offender.

Affirmed.

Barnes, J., concurred in part and in the result.

1. Criminal Law ⇌1156.11, 1158.36

The Court of Appeals reviews the denial of post-conviction relief for clear error and abuse of discretion.

2. Criminal Law ⇌1957

Defendant did not receive ineffective assistance for counsel allegedly failing to inform him of coming changes in the law, that defendant claimed would have had him delay his proceedings to obtain a less-harsh sentence for his possession-of-precursor-chemicals conviction, where defendant’s sentence was within the statutory requirements at the time of sentencing, and had defendant’s sentence been made under the amended sentencing structure, he still would have been sentenced to less than the maximum allowable term. U.S. Const. Amend. 6; Miss. Code. Ann. § 41-29-313.

3. Sentencing and Punishment ⇌15

The sentencing statute in effect at the time of sentencing controls.

4. Sentencing and Punishment ⇌17(3)

When a sentencing statute is amended providing a lesser penalty and is effective prior to sentencing, the trial court must sentence according to the statute as amended.

5. Sentencing and Punishment ⇌1306

Trial court was permitted to sentence defendant, who was convicted of possession of more than one precursor chemical, as a habitual offender, where defendant had five prior felony convictions for burglary of a dwelling and one prior felony conviction for sexual battery, was sentenced to a year or more for each of his prior convictions, the only prior conviction defendant took issue with on appeal was his sexual-battery conviction, and notwithstanding his prior sexual-battery conviction, defendant had more than one other prior felony conviction for which he re-

APPENDIX B:

Decision Letter on Denial of Rehearing, September 14, 2017

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
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September 14, 2017

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 14th day of September, 2017.

Supreme Court Case # 2016-DR-00960-SCT
Trial Court Case # 18807

Richard Gerald Jordan v. State of Mississippi

The Motion for Rehearing and for Leave to Supplement Petition filed by Appellant is denied. Kitchens and King, JJ., would grant. Dickinson, P.J., not participating.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

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Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found at www.courts.ms.gov under the Quick Links/Supreme Court/Decision for the date of the decision or the Quick Links/Court of Appeals/Decision for the date of the decision.