NO. 17-7153

IN THE UNITED STATES SUPREME COURT

RICHARD GERALD JORDAN, *Petitioner*

versus

STATE OF MISSISSIPPI, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL

MARVIN L. WHITE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CAPITAL CASE

QUESTION PRESENTED

I. Where a death sentenced petitioner has continually fought to have his death sentence vacated since it was initially imposed in 1976, which resulted in one retrial of the sentence phase and several retrials of the sentence phase, is grounds for finding that the death sentence should be vacated, when the issues which underlie this claim have all been presented, on the merits, to the State court, the lower federal courts and this Court and relief has been denied.

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

Cases *page*

Statutes *page*

Other Authorities *page*

NO. 17-7153

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD GERALD JORDAN, *Petitioner*

versus

STATE OF MISSISSIPPI, *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINIONS BELOW

The June 13, 2017, en banc order of the Mississippi Supreme Court denying this successive post-conviction petition is reported as *Jordan v. State*, 224 So.3d 1252 (Miss. 2017), *reh. denied*, (September 14, 2017). This en banc order and the unpublished order denying rehearing are attached to the petition as an Appendix A and Appendix B.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. § 1257. He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the U.S. CONST., AMEND. VIII and AMEND. XIV. He fails to do so.

STATEMENT OF THE CASE

A. Statement of Facts

The facts of this kidnaping murder have been recounted by the court below on three occasions and the federal district court twice and the Fifth Circuit once. The facts as reflected by the transcript of this case show that on January 10, 1976, Jordan left Baton Rouge, Louisiana, after obtaining a 38-caliber revolver. He traveled to Gulfport, Mississippi, and got a room the Twin Star Motel where he registered as "Jack Wilson." Putting his plan into operation, Jordan called Gulf National Bank and expressed a desire to speak to the commercial loan officer. He was referred to Mr. Marter. Jordan then looked in the local telephone directory and found only one listing of the name "Marter." After obtaining the Marter address from the directory, Jordan drove by the Marter residence noticing several cars parked in the driveway. After all but one of the cars was driven away, Jordan dialed the Marter residence telephone number and Mrs. Marter answered.

Then, dressed in a sport coat, tie and knit pants, and carrying a manila folder, Jordan went to the Marter residence. He rang the doorbell and was greeted by Mrs. Marter whom he told that his electrical company had received information of defective circuit breakers in the area which he was investigating. Mrs. Marter admitted him inside, whereupon he

kidnaped Mrs. Marter at gunpoint and took her away, leaving her three-year-old son asleep in the house. At his command, she drove him into a remote wooded area of the DeSoto National Forest. He ordered her out of the car. Jordan told Mrs. Marter she would be released when he obtained some money from her husband. Jordan then shot her in the back of the head, killing her. Jordan then went to a telephone and called Mr. Marter at the bank, told him that "[w]e have your wife . . .", demanded $25,000, for her return and gave instructions where to deliver the money. Marter was to drop the money on the side of Highway 49 where he saw a coat lying beside the road. Marter quickly obtained the money, but was unable to deliver the money because Jordan, fearing Marter was being followed, did not place a coat by the roadside, which was to be the signal where to leave the money.

Before arranging a second delivery, Jordan threw the murder weapon into the Big Biloxi River. Mr. Marter contacted the authorities, FBI agents recorded the serial numbers of the cash and made microfilm copies. Jordan again contacted Mr. Marter by telephone about 9:00 a.m. on January 13, 1976. Jordan assured Marter that his wife was all right, and demanded that Marter drop the money on Interstate Highway 10. Marter proceeded as Jordan directed; this time he found the coat and dropped the money on it. Two officers, Deputy Sheriff Larkin Smith and FBI Agent Shepherd, having been made aware of the new delivery point, positioned themselves near the scene of the drop and saw Jordan place a coat there. Soon they saw him pick up the money, after which they gave chase at high speed. During the chase, Jordan rammed his car into the officers car, forcing them off the road. The

officers shot at Jordan as he fled in his car. Jordan's car was damaged in the ramming episode the damage to his car caused the bent fender of his car to come into contact with the tire. Because the car could not be steered, Jordan abandoned his vehicle at a shopping center, hid the money in some nearby woods, and then went to another shopping center. There he purchased a red jump-suit which he donned before leaving the store. He got a taxi at the shopping center and instructed the driver to take him to the Twin Star Motel. Not knowing that Jordan was the man for whom a large search was under way, the taxi driver told Jordan that roadblocks were up and that the officers were looking for someone. On the way to the motel, the taxi was stopped and an officer identified Jordan from a picture obtained by the FBI. The officer arrested Jordan and turned him over to the FBI. On that same afternoon, January 13, 1976, Mrs. Marter's body was found a remote wooded area of Harrison County. The next day a diver from the Gulfport Fire Department retrieved the murder weapon from the river. During questioning, Jordan confessed to the kidnaping and murder of Edwina Marter. *See Jordan v. State*, 786 So.2d 987, ¶¶ 1-7 (Miss. 2001). Additional factual recitations are found in *Jordan v. State*, 365 So.2d 1198, 1199-1200 (Miss. 1978); *Jordan v. State*, 464 So.2d 475, 477-78 (Miss. 1985); and *Jordan v. Watkins*, 681 F.2d 1067, 1069 (5th Cir. 1982); *Jordan v. Epps*, 740 F.Supp.2d 802, 808-09 (S.D.Miss. 2010); and *Jordan v. Epps*, 756 F.3d 395, 399 (5th Cir. 2014).

B. Procedural History

Jordan was originally convicted and automatically sentenced to death in a single

proceeding for the January 13, 1976, kidnaping and murder of Edwina Marter in the Circuit Court of Jackson County, Mississippi on July, 1976.[1] Within the time for the granting of a motion for a new trial, the Mississippi Supreme Court, decided *Jackson v. State*, 337 So.2d 1242 (Miss. 1976), holding that Mississippi's statute requiring automatic imposition of the death penalty on a finding a defendant guilty of capital murder was unconstitutional. The Court further judicially construed the Mississippi statute as constitutional by creating a bifurcated procedure requiring that issue of sentence be determined separately from the issue of guilt. *Id.* Following the dictates of *Jackson*, the trial court granted petitioner's motion for a new trial. Jordan was again put to trial under the judicially bifurcated trial procedures. The jury again convicted Jordan of capital murder and sentenced him to death in a separate proceeding on March 2, 1977. The Mississippi Supreme Court affirmed the conviction and sentence on direct appeal and rehearing was denied. *Jordan v. State*, 365 So.2d 1198 (Miss. 1979), *cert. denied, Jordan v. Mississippi*, 444 U.S. 885 (1979).

Jordan then filed his first federal habeas corpus petition on January 3, 1980, with the United States District for the Southern District of Mississippi. Those proceedings were stayed pending exhaustion of all claims in the state court. After receiving a stay, Jordan filed a motion for post-conviction relief with the court below. This application for leave to file a petition for writ of error coram nobis was denied. *In re Jordan*, 390 So.2d 584 (Miss.

[1]On motion of the defendant, venue had been changed to Jackson County, Mississippi from Harrison County, Mississippi.

1980).

After the denial of state post-conviction relief, the federal district court proceeded with the consideration of Jordan's first habeas petition. This first habeas petition was denied on March 19, 1981, by the district court in an unpublished opinion. *Jordan v. Watkins*, No. S80-0234©. On appeal, the Fifth Circuit affirmed in part, reversed in part, and in doing so it affirmed the conviction of capital murder and vacated the sentence of death, and granted the writ as to the sentence phase of the trial. *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir.), *reh. and reh. en banc denied sub nom*, *Jordan v. Thigpen*, 688 F.2d 396 (5th 1982).

Thereafter, a new sentencing hearing was conducted in state court and a sentence of death again imposed by the jury on April 29, 1983. Jordan took his automatic appeal of the sentence to the Mississippi Supreme Court which once again affirmed the sentence of death imposed by the jury. *Jordan v. State*, 464 So.2d 475 (Miss. 1985).

Jordan filed a petition for writ of certiorari challenging this decision affirming the reimposition of the sentence of death. This Court granted the petition for writ of certiorari on May 5, 1986, vacated the death sentence and remanded the case to the Mississippi Supreme Court for reconsideration in light of *Skipper v. South Carolina*, 476 U.S. 1 (1986). *See Jordan v. Mississippi*, 476 U.S. 1101 (1986).

While the state court was considering the case on remand, the petitioner filed a second state post-conviction petition again challenging his original conviction on the basis that his confession had been improperly admitted in the guilt phase of the trial. The state court held

that the question was barred from relitigation. *Jordan v. State*, 518 So.2d 1186, 1189 (Miss. 1987). In addition, the Mississippi Supreme Court remanded the case for retrial of the sentence phase based on the *Skipper* error. Jordan filed another petition for writ of certiorari with this Court challenging the ruling of the Mississippi Supreme Court holding that the resolution of the confession was *res judicata*. Certiorari was denied on October 3, 1988. *Jordan v. Mississippi*, 488 U.S. 818 (1988).

On June 12, 1989, Jordan filed a successive petition for writ of habeas corpus once again challenging the admission of his confession with the United States District Court for the Southern District of Mississippi. This petition for writ of habeas corpus was denied by the district court on September 24, 1990, in an unpublished opinion. *Jordan v. Black*, No. S89-0542(G). The district court denied Jordan's motion for a certificate of probable cause to appeal on October 15, 1990. Jordan then requested that a CPC be granted by the Fifth Circuit. *See Jordan v. Black*, No. 90-1866. On March 22, 1991, the Fifth Circuit granted Jordan's motion for CPC. Briefs were filed and set for oral argument. Prior to oral argument in the Fifth Circuit, Jordan entered into a plea agreement waiving his right to seek parole or further litigate his case in exchange for the State not seeking the death penalty on resentencing. On December 2, 1991, Jordan was sentenced to life imprisonment without parole pursuant to the terms of the plea agreement. Earlier, on November 29, 1991, Jordan filed a motion in the Fifth Circuit to dismiss his appeal of the case. This voluntarily motion to dismiss the appeal was granted by the Fifth Circuit in an unpublished order on December

2, 1991.

On April 26, 1994, Jordan filed a pro se motion for post-conviction relief with the Circuit Court of Harrison County, Mississippi, challenging his life without parole sentence and asking that it be corrected or amended to a sentence of life with parole citing the state court's decision in *Lanier v. State*, 635 So.2d 813 (Miss. 1994), as authority for granting relief. The circuit court conducted a hearing on the motion and denied relief on April 5, 1995. Jordan then timely appealed the denial of relief to the Mississippi Supreme Court. On July 17, 1997, the court below reversed the circuit court and vacated the life without parole sentence imposed pursuant to the plea agreement as against public policy on the precedent found in *Patterson v. State*, 660 So.2d 966 (Miss. 1995) and *Lanier v. State*, 635 So.2d 813 (Miss. 1994). The state court then ordered a new sentencing trial be conducted in which Jordan could again face the death penalty. The resentencing hearing was conducted on April 20-24, 1998, and Jordan was again sentenced to death. On April 24, 1998, the jury returned a sentence of death in proper form. Cause No. 1998-DP-901-SCT at 338-39. Jordan again appealed the sentenced of death.

On April 26, 2001, the Mississippi Supreme Court affirmed the sentence of death in a written opinion. A timely petition for rehearing was filed and later denied on June 28, 2001. *See Jordan v. State*, 786 So.2d 987 (Miss. 2001). A petition for writ of certiorari was filed which contained three questions, which was denied on January 7, 2002. *See Jordan v. Mississippi*, 534 U.S. 1085 (2002).

Jordan then filed an application for leave to file a motion for post-conviction relief in the trial court with this Court, raising twenty-eight claims for relief challenging his sentence of death. Petitioner later amended this petition for post-conviction relief adding two additional claims. On March 10, 2005, the court below denied post-conviction relief. Petitioner filed a motion for rehearing which was later denied on June 2, 2005. *See Jordan v. State*, 912 So.2d 800 (Miss. 2005). No petition for writ of certiorari was filed with the federal Supreme Court following the denial of state post-conviction relief.

On May 24, 2005, petitioner filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Mississippi. On August 30, 2010, the district court issued a memorandum opinion denying habeas corpus relief and a separate judgment. *See Jordan v. Epps*, 740 F.Supp. 2d 802 (S.D. Miss. 2010). The district court also entered an order denying a COA on all claims. On September 27, 2010, petitioner then filed a motion to alter or amend judgment and a motion for reconsideration of the denial of COA. On September 30, 2010, the district court denied the motion to alter or amend and the motion to reconsider the denial of COA. On October 27, 2010, petitioner filed a timely notice of appeal.

On February 3, 2011, petitioner filed a motion asking the Fifth Circuit to grant COA on three issues and the respondent filed its response on April 15, 2011. On June 25, 2014, the Fifth Circuit entered an opinion denying the requested COA with a written opinion. *See Jordan v. Epps*, 756 F.3d 395 (5th Cir 2014). Petitioner filed a petition for rehearing and a

petition for rehearing en banc. These petitions were denied on October 20, 2014.

Jordan then filed a petition for writ of certiorari with this Court. This petition for writ of certiorari was denied on June 29, 2015. *See Jordan v. Fisher*, ___ U.S. ___, 135 S.Ct. 2647 (2015). Once certiorari was denied, the State moved this Court to reset the execution date in this case on July 28, 2015. That motion remains pending before the Mississippi Supreme Court.[2]

Petitioner on July 6, 2016, filed a second successive petition for post-conviction relief with the court below challenging the lethal injection protocol and claiming that the length of his incarceration entitled him to have his death sentence vacated. On June 15, 2017, the court

---

[2]The reason that this motion remains pending is the pendency of a 42 U.S.C. § 1983 suit challenging the method of execution. Prior to the denial of certiorari on April 16, 2015, Jordan filed a Complaint for Preliminary and Permanent Injunctive Relief pursuant to 42 U.S.C. §1983 in the United States District Court for the Southern District of Mississippi. The civil action challenged the State's lethal injection protocol. Specifically, the complaint challenged the State's use of compounded phenobarbital, challenged the State's "failure to use an ultra short-acting barbiturate or other similar drug as directed by Mississippi statute," raised an Eight Amendment claim regarding the use of a chemical paralytic agent and potassium chloride in the three-drug protocol, and asserted Due Process violations in failing to notice plaintiffs of the precise method of execution and identities of the manufacturer of the drug(s) at issue. While the suit was pending, the State revised its lethal injection protocol to provide for the use of midazolam if Pentothal or phenobarbital could not be obtained. The district court granted a "sweeping preliminary injunction" preventing the State from using compounded phenobarbital or midazolam in its lethal injection protocol and further required the State to submit any other proposed method of execution to the district court for its approval. The Fifth Circuit Court of Appeals reversed in *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016), as revised (June 27, 2016). The Fifth Circuit found that "Mississippi's sovereign immunity prevents a federal court from enjoining state officials to follow state law, and because Plaintiffs have not shown they are likely to succeed in establishing a violation of either their procedural or substantive due process rights." *Id*. The case was remanded for further proceedings which are still pending.

below entered an En Banc Order denying relief on both claims presented in this latest petition. On September 14, 2017, the petition for rehearing was denied. *See Jordan v. State*, 224 So.3d 1252 (Miss. 2017).

Petitioner now brings a petition for writ of certiorari presenting two questions, both of which address the claim regarding the length of his incarceration.

REASONS FOR DENYING THE WRIT

Petitioner presents no cognizable claim under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

Petitioner contends that he is entitled to the vacation of his death sentence because he has successfully delayed his execution for the kidnaping and murder of Edwina Marter committed in 1976. His contention basically contends that the State's constitutional errors in the various sentencing trials have caused this delay. However, in almost all those instances the reversals were required by decisions from this Court handed down long after the trial of the case which modified the law as it regarded various sentencing issues. All the substantive issues underlying the delays have been decided on the merits in previous litigation both in State and Federal court.

Petitioner has presented no precedent of this Court which is controlling on this issue, instead relying on dissents from the denial of certiorari mainly by a single justice. Petitioner has presented no claim on which certiorari should be granted, therefore certiorari should be denied.

ARGUMENT

WHERE A DEATH SENTENCED PETITIONER HAS CONTINUALLY FOUGHT TO HAVE HIS DEATH SENTENCE VACATED SINCE IT WAS INITIALLY IMPOSED IN 1976, WHICH RESULTED IN ONE RETRIAL OF THE SENTENCE PHASE AND SEVERAL RETRIALS OF THE SENTENCE PHASE, IS GROUNDS FOR FINDING THAT THE DEATH SENTENCE SHOULD BE VACATED, WHEN THE ISSUES WHICH UNDERLIE THIS CLAIM HAVE ALL BEEN PRESENTED, ON THE MERITS, TO THE STATE COURT, THE LOWER FEDERAL COURTS AND THIS COURT AND RELIEF HAS BEEN DENIED.

Petitioner contends that his death sentence should be vacated because of the length of time he has spent on death row. Since both of the questions presented are virtually the same, they will be addressed as one. While the questions he presents this Court seem to be based on claims that there were errors requiring retrial of the sentence phase and "the State found at one point that a life without parole sentence was appropriate." The substance of his argument in his petition is that he has been a good prisoner, that he has followed the rules while in prison and the length of time it has taken to arrive at this point in the litigation. However, the substantive claims alluded to as the reasons for retrial and the life sentence question have been fully litigated, on the merits, both in state court and in federal court and relief has been denied. The authority cited in support of his claims are basically dissents from the denial of certiorari in this Court by Justice Breyer and former Justice Stevens. Petitioner also relies on international authority which has been rejected by this Court as authority for vacating death sentences. The authority cited is not persuasive authority that certiorari should be granted. Petitioner has taken every opportunity to delay his execution

date through the legal process and now wants to be rewarded for delaying his execution for this long. As was so appropriately stated in 1983 by Judge Gee in of the Fifth Circuit in *Bass v. Estelle*, 696 F.2d 1154 (5th Cir. 1983):

> Understandably, most convicted defendants sentenced to death covet delay, if nothing better can be had; . . .
>
> 696 F.2d at 1159.

Petitioner has fought his sentence tooth and nail for these many years and now seeks to be rewarded for succeeding in this delay.

Jordan's first conviction and sentence of death resulted from a unitary trial and mandatory sentence of death on July 21, 1976, under the state statute enacted after *Furman v. Georgia*, 408 U.S. 238 (1972). After the decisions in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976), which held that a bifurcated trial with guilt and sentence being decided separately was required, the Mississippi Supreme Court decided *Jackson v. State*, 337 So.2d 1242 (Miss. 1976). *Jackson* held that the mandatory death sentence statute was unconstitutional and created a bifurcated procedure for the imposition of the death sentence. Jordan's 1976 trial and sentence had taken place just prior to the *Jackson* decision. Based on *Jackson,* the trial court vacated the conviction and sentence. Jordan was tried again under the bifurcated procedure contained in *Jackson*. He was convicted of capital murder and the jury imposed a sentence of death. The conviction and sentence was affirmed by the Mississippi Supreme

Court and certiorari denied by this Court. *See Jordan v. State*, 365 So.2d 1198 (Miss. 1978), *cert denied*, 444 U.S. 885 (1979). State post-conviction relief was later denied on November 19, 1980. *See In re Jordan*, 390 So.2d 584 (1980).

Jordan's first habeas petition was filed and denied by the United States District Court for the Southern District of Mississippi. On appeal the Fifth Circuit found the instruction on aggravating circumstances given by the trial court to violate the 1980 decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), which came some three years after Jordan's trial. The Fifth Circuit affirmed the denial of relief as to the guilt phase and vacated the sentence of death. *See Jordan v. Watkins*, 681 F.2d 1067, 1080–83 (5th Cir.), *rehearing denied sub nom*, *Jordan v. Thigpen*, 688 F.2d 395 (5th Cir. 1982).

The state then proceeded with a new sentencing trial under the newly enacted capital sentencing statute that had been enacted by the legislature in 1977. Jordan was again sentenced to death on April 29, 1983. On appeal the Mississippi Supreme Court again affirmed the sentence of death imposed under the statutory procedure. *Jordan v. State*, 464 So.2d 475 (Miss. 1985). On certiorari review by this Court, the Court initially denied certiorari. The Court then granted certiorari, vacated the sentence of death and remanded the case to the Mississippi Supreme Court for reconsideration under the 1986 decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986), because testimony about an invention that supposedly created an alternate method for generation of electricity was ruled inadmissable by the trial court in 1983, some three years prior to the decision. The Mississippi

During the preparation for yet another sentencing trial petitioner entered into an agreement with the prosecution that the state would accept a sentence of life without parole and that he would not further challenge his conviction or sentence in any manner. Petitioner was then sentenced to life without parole.[3]

On March 31,1994, the Mississippi Supreme Court decided the case of *Lanier v. State*, 635 So.2d 813 (Miss. 1994). *Lanier* held that agreed sentences of life without parole for capital murder such as that entered into by petitioner were void and against public policy. On April 26, 1994, relying on the decision in *Lanier* and ignoring his plea agreement, Jordan filed a pro se motion for post-conviction relief with the trial court challenging his life without parole sentence and asking that it be corrected or amended to a sentence of life with parole. The circuit court conducted a hearing on the motion and denied relief on April 5, 1995. Jordan appealed the denial of relief to the Mississippi Supreme Court. On July 17, 1997, the court below reversed the circuit court and vacated the life without parole sentence imposed pursuant to the plea agreement as against public policy on the precedent found in *Patterson v. State*, 660 So.2d 966 (Miss. 1995) and *Lanier v. State*, 635 So.2d 813 (Miss. 1994). The state court then ordered a new sentencing trial be conducted in which Jordan could again face the death penalty. The resentencing hearing was conducted on April 20-24, 1998, and Jordan was again sentenced to death. Jordan again appealed the sentenced of death. The court

[3]At the time of this plea agreement, the Mississippi capital sentencing statute did not provide life without parole as a sentence option. The sentence options were life with the possibility of parole and death.

below again affirmed and denied rehearing. *See Jordan v. State*, 786 So.2d 987 (Miss. 2001), *cert. denied*, 534 U.S. 1085 (2002). State post-conviction relief was sought and denied. *See Jordan v. State*, 912 So.2d 800 (Miss. 2005).

On May 24, 2005, petitioner filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Mississippi. On August 30, 2010, the district court issued a memorandum opinion denying habeas corpus relief and denying a certificate of appealability. *See Jordan v. Epps*, 740 F.Supp. 2d 802 (S.D. Miss. 2010). On October 27, 2010, petitioner filed a timely notice of appeal. On February 3, 2011, petitioner filed a motion asking the Fifth Circuit to grant COA on three issues and the respondent filed its response on April 15, 2011. On June 25, 2014, the Fifth Circuit entered an opinion denying the requested COA with a written opinion. *See Jordan v. Epps*, 756 F.3d 395 (5th Cir 2014). Petitioner filed a petition for rehearing and a petition for rehearing en banc. These petitions were denied on October 20, 2014.[4]

Jordan's petition for writ of certiorari filed with this Court from the Fifth Circuit decision was denied on June 29, 2015. *See Jordan v. Fisher*, ___ U.S. ___, 135 S.Ct. 2647 (2015). Once certiorari was denied, the State moved to reset the execution date in this case on July 28, 2015. That motion remains pending before the Mississippi Supreme Court.[5]

---

[4]The respondent would note that this case was before the federal district court and the Fifth Circuit for nearly nine years before resolution. Five years in the district court and 3 ½ years in the Fifth Circuit after briefs were filed.

[5]The reason that this motion remains pending is the pendency of a 42 U.S.C. § 1983 suit challenging the method of execution. Prior to the denial of certiorari on April 16, 2015,

Petitioner on July 6, 2016, filed a second successive petition for post-conviction relief with the court below challenging the lethal injection protocol and claiming that the length of his incarceration entitled him to have his death sentence vacated. On June 15, 2017, the court below entered an En Banc Order denying relief on both claims presented in this latest petition. On September 14, 2017, the petition for rehearing was denied. *See Jordan v. State*, 224 So.3d 1252 (Miss. 2017).

This detailed account of the litigation is given to show that there has been no undue delay by the State in pressing this case. The sentence reversals were based on decisions made by this Court, in most instances long after the trial of the case, that modified the law in force at the time of the trial.

Jordan filed a Complaint for Preliminary and Permanent Injunctive Relief pursuant to 42 U.S.C. §1983 in the United States District Court for the Southern District of Mississippi. The civil action challenged the State's lethal injection protocol. Specifically, the complaint challenged the State's use of compounded pentobarbital, challenged the State's "failure to use an ultra short-acting barbiturate or other similar drug as directed by Mississippi statute," raised an Eight Amendment claim regarding the use of a chemical paralytic agent and potassium chloride in the three-drug protocol, and asserted Due Process violations in failing to notice plaintiffs of the precise method of execution and identities of the manufacturer of the drug(s) at issue. While the suit was pending, the State revised its lethal injection protocol to provide for the use of midazolam if pentothal or pentobarbital could not be obtained. The district court granted a "sweeping preliminary injunction" preventing the State from using compounded pentobarbital or midazolam in its lethal injection protocol and further required the State to submit any other proposed method of execution to the district court for its approval. The Fifth Circuit Court of Appeals reversed in *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016), as revised (June 27, 2016). The Fifth Circuit found that "Mississippi's sovereign immunity prevents a federal court from enjoining state officials to follow state law, and because Plaintiffs have not shown they are likely to succeed in establishing a violation of either their procedural or substantive due process rights." *Id*. The case was remanded for further proceedings which are still pending.

In his successive petition to the Mississippi Supreme Court petitioner made claims regarding the length of his sentence based on the federal and state constitutions. The court below addressed both, however only the decision on the federal question is properly before this Court. In its en banc order in the instant case the court below held:

> 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.

---

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 condemned 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).

224 So.3d at 1253.

The decision of the court below is not contrary to the decisions and precedent of this Court.

In fact, this is the second time petitioner has presented this question to the court below, the first time was in direct appeal from the last imposition of the sentence of death. *See Jordan v. State*, 786 So.2d 987 (Miss. 2001), *cert. denied*, 534 U.S. 1085 (2002). In 2001, the Mississippi Supreme Court decided the claim on the merits in petitioner's direct appeal holding:

> XXVIII. WOULD JORDAN'S EXECUTION VIOLATE THE EIGHTH AMENDMENT?
>
> ¶ 160. Jordan did not make this argument at trial and is procedurally barred from raising it for the first time on appeal.
>
> ¶ 161. Jordan argues that he has been incarcerated on death row from the time the crime was committed in this case, in 1976, until 1991, and then again in 1998, when the life sentence was vacated, until now. He claims that he has suffered psychological trauma waiting for his execution and that there is nothing gained by the State from 22 years of needless infliction of pain and suffering. He indicates that the United States Supreme Court has held that the death penalty violates the Eighth Amendment when it makes no measurable contribution to acceptable goals of punishment, *i.e.*, retribution and deterrence, and is nothing more than needless imposition of pain and suffering. *Penry v. Lynaugh*, 492 U.S. 302, 335, 109 S.Ct. 2934, 2956, 106 L.Ed.2d 256, 289 (1989). Jordan also points out that Justices Stevens and Breyer have opined that there may be a valid Eighth Amendment challenge for someone who has

> spent many years on death row. *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (memorandum of Stevens, J., respecting the denial of certiorari). However, a denial of certiorari has no precedential value. Moreover, Justice Thomas responded to Justices Stevens and Breyer when he noted that the Constitution would not protect a defendant who availed himself of the "panoply of appellate and collateral procedures" and then claimed that his execution had been too long delayed. *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) (Thomas, J., concurring in the denial of certiorari). There is no precedent which supports Jordan's contention that his Eighth Amendment right against cruel and unusual punishment has been violated. Therefore, there are no grounds for reversal on this issue.
>
> 786 So. 2d at 1028.

The court below has held the same in *Brown v. State*, 948 So.2d 405, 414 (Miss. 2006); *King v. State*, 960 So.2d 413, 432 (Miss. 2007); *Russell v. State*, 849 So. 2d 95, 144-45 (Miss. 2003); *Wilcher v. State*, 863 So.2d 776, 833-34 (Miss. 2003).

Recently, in *Glossip*, Justice Scalia addressed Justice Breyer's concerns on the length of incarceration claim in his concurring opinion. He stated:

> Justice BREYER's third reason that the death penalty is cruel is that it entails delay, thereby (1) subjecting inmates to long periods on death row and (2) undermining the penological justifications of the death penalty. The first point is nonsense. Life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty. As for the argument that delay undermines the penological rationales for the death penalty: In insisting that "the major alternative to capital punishment – namely, life in prison without possibility of parole – also incapacitates," post, at 2767, Justice BREYER apparently forgets that one of the plaintiffs in this very case was already in prison when he committed the murder that landed him on death row. Justice BREYER further asserts that "whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole," post, at 2769. My goodness. If he thinks the death penalty not much more harsh (and hence not much more

retributive), why is he so keen to get rid of it? With all due respect, whether the death penalty and life imprisonment constitute more-or-less equivalent retribution is a question far above the judiciary's pay grade. Perhaps Justice BREYER is more forgiving "or more enlightened" than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough.

And finally, Justice BREYER speculates that it does not "seem likely" that the death penalty has a "significant" deterrent effect. Post, at 2768. It seems very likely to me, and there are statistical studies that say so. *See, e.g.*, Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 166 (2004) ("[I]t is estimated that each state execution deters approximately fourteen murders per year on average"); Dezhbakhsh, Rubin, & Shepherd, *Does Capital Punishment Have a Deterrent Effect*? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003) ("[E]ach execution results, on average, in eighteen fewer murders" per year); Sunstein & Vermeule, *Is Capital Punishment Morally Required*? *Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 713 (2005) ("All in all, the recent evidence of a deterrent effect from capital punishment seems impressive, especially in light of its 'apparent power and unanimity'"). But we federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans' everyday lives. The suggestion that the incremental deterrent effect of capital punishment does not seem "significant" reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate. Of course, this delay is a problem of the Court's own making. As Justice BREYER concedes, for more than 160 years, capital sentences were carried out in an average of two years or less. Post, at 2764. But by 2014, he tells us, it took an average of 18 years to carry out a death sentence. *Id*., at 2764-2765. What happened in the intervening years? Nothing other than the proliferation of labyrinthine restrictions on capital punishment, promulgated by this Court under an interpretation of the Eighth Amendment that empowered it to divine "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) – a task for which we are eminently ill suited. Indeed, for the past two decades, Justice BREYER has been the Drum Major in this parade. His invocation of the resultant delay as grounds for abolishing the

> death penalty calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan. Amplifying the surrealism of his argument, Justice BREYER uses the fact that many States have abandoned capital punishment – have abandoned it *precisely because* of the costs those suspect decisions have imposed – to conclude that it is now "unusual." Post, at 2772- 2776. (A caution to the reader: Do not use the creative arithmetic that Justice BREYER employs in counting the number of States that use the death penalty when you prepare your next tax return; outside the world of our Eighth Amendment abolitionist-inspired jurisprudence, it will be regarded as more misrepresentation than math.) If we were to travel down the path that Justice BREYER sets out for us and once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled. That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind. Justice BREYER's dissent is the living refutation of *Trop's* assumption that this Court has the capacity to recognize "evolving standards of decency." Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have "changed radically," , and has sought to replace the judgments of the People with their own standards of decency. Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, Justice BREYER does not just reject the death penalty, he rejects the Enlightenment.
>
> 135 S. Ct. at 2749.

Respondent would Justice Scalia's concurring opinion is especially applicable to the case at bar. The respondent submits that there is simply no federal precedent that supports petitioner's contention that there is an Eighth Amendment violation because of the length of time he has been incarcerated awaiting the execution of his death sentence.

Finally, petitioner's reliance on international treaties and conventions is unavailing. These concerns were addressed in the concurring opinion in the denial of certiorari in *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999). *Knight* was cited in the court below's earlier opinions in *Jordan, supra* and *Russell, supra*. These international treaties and conventions do not apply to the domestic courts of the United States unless enabling legislation has been passed by congress. *See Medellin v. Texas*, 552 U.S. 491128 S.Ct. 1346170 L.Ed.2d 190 (2008). This portion of petitioner's claim is without merit.

This Court has never held that execution after a long tenure on death row is cruel and unusual punishment. As Justice Thomas stated in his concurring opinion in *Knight v. Florida*, 528 U.S. 990, 959 (1999), there is simply no "support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." Jordan simply cannot, with any modicum of credibility, claim that there is any clearly established precedent from this Court that would grant him relief. Therefore, certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL

MARVIN L. WHITE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL
Miss. Bar No. 7149
(Counsel of Record)

BY: s/*Marvin L. White, Jr.*

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above **Brief in Opposition** to the following, additionally I have filed a copy of this **Brief in Opposition** with the Clerk of the United States Supreme Court using the ECF system:

James W. Craig, Esquire
Emily M. Washington, Esquire
The Roderick & Solange MacArthur Justice Center
4400 South Carrollton Avenue
New Orleans, Louisiana 70119
(504) 620-2259
jim.craig@macarthurjustice.org

David P. Voisin, Esquire
P.O. Box 13984
Jackson, Mississippi 39236-3984
(601) 949-9486
david@dvoisinlaw.com

This the 22nd day of March, 2018.

s/*Marvin L. White, Jr.*