

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

No. _____

In the
Supreme Court of the United States

Richard Gerald Jordan,
Petitioner,

v.

State of Mississippi,
Respondent.

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

Petition for a Writ of Certiorari

Krissy C. Nobile
Counsel of Record
S. Beth Windham
MISSISSIPPI OFFICE OF
CAPITAL POST-CONVICTION
COUNSEL
239 North Lamar Street
Suite 404
Jackson, MS 39201
(601) 359-5733
knobile@pcc.state.ms.us
bwindham@pcc.state.ms.us

CAPITAL CASE

QUESTION PRESENTED

The State of Mississippi seeks to execute Petitioner Richard Gerald Jordan, a 79-year-old man who has been on Mississippi's death row for nearly half a century, for a crime he committed in January 1976, shortly after he returned from combat duty in Vietnam. At the time of Jordan's crime, the only constitutional penalty in Mississippi for any classification of murder was imprisonment for life because this Court's decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976) invalidated Mississippi's then-existing mandatory death penalty scheme. The Mississippi Legislature did not enact a constitutionally permissible capital sentencing scheme until after Jordan's retrial. Jordan thus filed an *ex post facto* challenge to his death sentence in 1978. The Mississippi Supreme Court rejected Jordan's claim, holding that the change in state statute affected only a matter of "procedure."

Forty-five years then passed. In twin decisions, the Mississippi Supreme Court reversed course on decades-old state precedent, holding that all laws passed by the Mississippi Legislature are, by definition, matters of substantive law, and that the Judiciary lacks authority to enact substantive law. Consistent with the State's Post-Conviction Act, Jordan relied on these intervening decisions to renew his *ex post facto* challenge, since his challenge should now be considered a question of substantive law. Even though its intervening decisions opened the door to consideration of the substance of the federal *ex post facto* challenge, the Mississippi Supreme Court arbitrarily refused to address the merits and held the claim statutorily barred. The question presented is:

Whether the State of Mississippi has run afoul of due process by arbitrarily denying an available state court forum to adjudicate a federal constitutional claim—here, whether Jordan's death sentence violates the *Ex Post Facto* Clause?

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Jordan v. State, No. 24-959 Supreme Court of the United States. Distributed for Conference of June 18, 2025.

Jordan v. State, No 24A1143, Supreme Court of the United States. Application for a stay of execution of sentence of death.

Jordan v. State, No. 2024-DR-01272-SCT, Mississippi Supreme Court. Judgment entered on May 1, 2025. Rehearing denied on June 12, 2025.

Jordan v. State, No 2022-DR-012430-SCT, Mississippi Supreme Court. Judgment entered on October 1, 2024. Rehearing denied on December 5, 2024.

Jordan v. State, No. 2017-DR-00989-SCT, Mississippi Supreme Court. Judgment entered on December 6, 2018. Rehearing denied on March 21, 2019.

Jordan v. State, No. 2016-DR-00960-SCT, Mississippi Supreme Court. Judgment entered on June 13, 2017. Rehearing denied on September 14, 2017. This Court denied a petition for a writ of certiorari, No. 17-7153, on June 28, 2018. *See* 585 U.S. 1039 (2018) (Breyer, J., dissenting from the denial of certiorari).

Jordan v. Epps, No. 10-70030, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on June 25, 2014. This Court denied a petition for a writ of certiorari, No. 14-8035 on June 29, 2015. *See* 576 U.S. 1071 (2015) (Sotomayor, J., dissenting from the denial of certiorari).

Jordan v. Epps, No. 05-cv-260-KS, U.S. District Court for the Southern District of Mississippi. Judgment entered on August 30, 2010.

Jordan v. State, No. 2002-DR-00896-SCT, Mississippi Supreme Court. Judgment entered on March 10, 2005. Rehearing denied on June 2, 2005.

Jordan v. State, No. 1998-DP-00901-SCT, Mississippi Supreme Court. Judgment entered on April 26, 2001. Rehearing denied on June 28, 2001. This Court denied a petition for a writ of certiorari, No. 01-6421, on January 7, 2002. *See* 534 U.S. 1085 (2002).

Jordan v. State, Nos. 15,909 & 18,807, Circuit Court of Harrison County, First Judicial District. Judgment entered on April 24, 1998.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Mississippi Supreme Court's decision denying rehearing on Petitioner's petition for post-conviction relief is not reported and is reprinted in the Appendix to the Petition. Pet. App. 3a. The Mississippi Supreme Court's May 1, 2025 decision denying Petitioner's petition for post-conviction relief is not reported and is reprinted in the Appendix to the Petition. Pet. App. 1a-2a. Petitioner's Petition for Post-Conviction Relief is reprinted in the Appendix to the Petition. Pet. App. 4a-50a. The Mississippi Supreme Court's decision affirming Petitioner's conviction and sentence on direct review is reported at *Jordan v. State*, 786 So. 2d 987 (Miss. 2001). The Mississippi Supreme Court's decision previously rejecting Jordan's *ex post facto* challenge is reported at *Jordan v. State*, 365 So. 2d 1198 (Miss. 1978).

JURISDICTION

The Mississippi Supreme Court entered judgment against Petitioner on May 1, 2025. Petitioner timely moved for rehearing, which was denied on June 12, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Ex Post Facto* Clause, U.S. Const. Art. I § 10, cl. 1, provides in relevant part: "No State shall . . . pass any . . . ex post facto Law[.]"

The Fourteenth Amendment, U.S. Const. amend. XIV, §1 provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

This death penalty case arises from a crime occurring in January 1976. At the time of Richard Jordan's crime, the only constitutional penalty for any classification of "murder" was imprisonment for life. Even so, Mississippi rejected an *ex post facto* challenge to Jordan's sentence in 1978 because the changes to Mississippi law to provide for a constitutional death penalty scheme "affect[ed] procedure and not substance." *Irving v. State*, 361 So. 2d 1360 (Miss. 1978) (relied on in *Jordan v. State*, 365 So. 2d 1198, 1204 (Miss. 1978)).

Forty-five years passed. In 2023 and 2024, the Mississippi Supreme Court markedly reversed course on the basics of what it considers as substantive law as opposed to matters of procedure. These intervening decisions recast Jordan's *ex post facto* challenge as one of substantive law, rather than a question of procedure. Based on these changes in how the Mississippi Supreme Court considers and applies the law, Jordan re-urged his federal *ex post facto* challenge under the new precedent. Despite plain authority of the Mississippi Post-Conviction Act authorizing successive state court petitions based on intervening decisions of law, the Mississippi Supreme Court arbitrarily refused to hear the merits of his federal claim.

A. Jordan's Conviction and Prior Trials

Richard Jordan was charged with capital murder in the course of a kidnapping. The kidnapping and murder happened on January 12, 1976. Jordan was convicted of capital murder and sentenced to death in the circuit court of Harrison County in July 1976 under a mandatory death penalty statute. He was re-tried in 1977. He has also had two additional sentencing trials, one in 1983 and one in 1998, the latter being the one he is now serving.

Jordan's 1976 Trial (*Jordan I*). At his first trial, Jordan was tried under the existing 1974 statute—the operative one in effect at the time of the crime. *Johnston v. State*, 618 So. 2d 90, 94 (Miss. 1993) (“One convicted should be sentenced pursuant to the statute existing on the date of his offense to avoid an *ex post facto* problem.”). The penalty for capital murder in 1976 was found in Miss. Code Ann. § 97-3-21, which read as follows:

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the state penitentiary.

Every person who shall be convicted of capital murder shall be sentenced by the court to death.

See id.; *see also* Laws, 1974, ch. 576, § 7.

Shortly after Jordan's initial trial, this Court invalidated such mandatory capital sentencing schemes in *Woodson v. North Carolina*, 428 U.S. 280 (1976). Jordan subsequently moved for a new trial and, while that motion was pending, the Mississippi Supreme Court issued its opinion in *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976). In *Jackson*, the appellant attacked the constitutionality of § 97-3-21. *Jackson* found that the current death penalty statute should be interpreted to mean,

That every person convicted of capital murder shall be sentenced by the court to death if that be the verdict of the jury after the defendant has been accorded a trial governed by procedures and guidelines designed to prevent the risk that the death penalty would be inflicted in an arbitrary and capricious or freakish manner.

Id. at 1251. The Mississippi Supreme Court also mandated bifurcated sentencing proceedings and provided for the consideration of aggravating and mitigating circumstances.

Based on *Jackson*, the *Jordan I* Court granted Jordan's motion for a new trial.

Jordan's 1977 Trial (*Jordan II*). Jordan's second trial was conducted in accordance with the Mississippi Supreme Court's decision in *Jackson*, which required the jury to analyze both

aggravating and mitigating factors before handing down a sentence. Jordan was essentially convicted on the same evidence as *Jordan I*, the only difference this time was that the prosecution introduced new evidence indicating Jordan killed the victim “execution style” which was used as an aggravating factor during the sentencing phase.

After an hour of deliberation, the jury came back and reported they were deadlocked. After being sent back for further deliberation, just forty-five minutes later the jury came back announcing the decision that Jordan should be sentenced to the death penalty. Although the Mississippi Supreme Court affirmed the judgment of the trial court, the Fifth Circuit granted penalty phase relief. *Jordan v. Watkins*, 681 F.2d 1067, 1083 (5th Cir. 1982).

Jordan’s 1983 Trial (*Jordan III*): Jordan’s next sentencing-phase trial was in 1983. While he was resentenced to death, the sentence was unconstitutional. The death sentence was invalidated because the court prohibited Jordan from presenting certain mitigating evidence. *Jordan v. Mississippi*, 476 U.S. 1101 (1986); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

Jordan’s 1998 Trial (*Jordan IV*): Jordan’s last trial was in 1998. The constitutional errors in that trial became the subject of a Petition for Post-Conviction Relief filed on December 13, 2022 in the Mississippi Supreme Court. *See Jordan v. State*, 2022-DR-1243. Jordan’s 2022 Petition was based on violations of *Ake v. Oklahoma*, 470 U.S. 68 (1985), *McWilliams v. Dunn*, 582 U.S. 183 (2017), and *Cruz v. Arizona*, 598 U.S. 17 (2023). Jordan filed a Petition for Writ of Certiorari in this Court on May 3, 2025. *See Jordan v. State*, No. 24-959. It was distributed for conference of July 18, 2025.

B. Legal Background: Evolution of Mississippi Law on Capital Murder

1. On June 29, 1972, this Court decided *Furman v. Georgia*, 408 U.S. 238 (1972), finding that the death penalty as then administered constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. After *Furman*, many states rushed to create capital sentencing schemes that would satisfy a constitutional standard. By 1976, the laws enacted in response to *Furman* made their way back to this Court.

On July 2, 1976, the Court upheld the guided discretion statutes, but held the mandatory statutes violated the Eighth Amendment. The Court granted certiorari in five cases. On one hand, *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), all involved guided discretion statutes of various types. On the other hand, *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976) involved mandatory statutes.

Gregg v. Georgia was the lead case. There, the Court concluded the death penalty was not per se violative of the Eighth Amendment. Next, the Court held that Georgia's guided discretion statute passed constitutional muster even though "some jury discretion still exists" because "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." *Id.* at 198 (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

Unlike the guided discretion statutes, the mandatory statutes did not fare so well. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court reasoned that mandatory death penalty statutes were out of step with "contemporary" standards of decency because they eliminated the jury's essential role in maintaining a "link" between "community values" and the capital punishment system. *Id.* at 295. The Court also believed that the mandatory statutes only "papered

over” the problem of unguided and unchecked jury discretion because juries would refuse to convict many defendants of murder if forced with such a Draconian choice. *Id.* at 302. The Court also stated that, due to the uniqueness of the death penalty, the Constitution requires that the sentencer not be precluded from considering the “character and record of the individual offender and the circumstances of the particular offense.” *Id.* at 304.

2. Prior to *Furman*, the punishment for murder under Mississippi law was found in Mississippi Code 1942 Section 2217:

Murder is punishable under Mississippi Code 1942 Annotated section 2217 (1956), which is as follows:

Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment as provided by section 1293 (Code of 1930; s 2536, Code of 1942) in which case the court shall fix the punishment at imprisonment for life.

Capler v. State, 268 So. 2d 338, 339 (Miss. 1972).

This version of Mississippi’s death penalty was unconstitutional under *Furman*. *See, e.g., Ivy v. State*, 731 So. 2d 601, 603-04 (Miss. 1999) (“Following its decision in *Furman* [], the U.S. Supreme Court found that Mississippi’s statutory scheme for imposing the death penalty was unconstitutional.”); *id.* (explaining that Ivy committed murder in 1973 and, “[s]ince the U.S. Supreme Court had declared the death penalty portion of § 2217 unconstitutional, the only viable sentence at the time Ivy committed the murder was life in prison”).

3. The Mississippi Legislature responded to *Furman* in 1974 by enacting Mississippi Code Section 97-3-21. As discussed above, the 1974 statute set forth a mandatory sentencing scheme in Mississippi: “Every person who shall be convicted of capital murder shall be sentenced by the court to death.”

That state law was and is unconstitutional under *Woodson* and its progeny. In an attempt to make the law constitutional, the Mississippi Supreme handed down *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976) on October 5, 1976. Then, in 1977, the Legislature amended § 97-3-21. The amended statute provided for a sentence of either death or life imprisonment as the penalty for capital murder. Miss. Code Ann. § 97-3-21 (Supp. 1977). At the same time, the Legislature enacted § 99-19-101 (Supp. 1977), which replaced the *Jackson* guidelines for bifurcation and created statutory aggravating and mitigating circumstances at sentencing.¹

Richard Jordan was tried in 1977 in accordance with *Jackson*—even though his crime was committed before both *Jackson* and the 1977 amendments to Sections 97-3-21 and 99-19-101. When Jordan’s crime was committed, there was no constitutional provision for the death penalty in Mississippi. But based on other constitutional deficiencies, Jordan’s 1977 sentence was reversed. Jordan then faced additional sentencing trials in 1983 and 1998 under Section 99-19-101 with death as a retroactively available punishment in each trial.

C. Mississippi’s Abrupt Departure From Decades-Old Precedent

The current method for channeling post-conviction petitions in Mississippi is set out in state statute enacted in 1984. Miss. Code Ann. § 99-39-1, *et seq.* Both before and after the current iteration of Mississippi’s Post-Conviction Act (PCR Act), the Mississippi Supreme Court has treated post-conviction statutes as matters of “procedure” for the Judiciary. *See Grubb v. State*, 584 So. 2d 786, 788 (Miss. 1991) (noting the Court’s “acceptance of” the PCR Act); *McClendon v. State*, 539 So. 2d 1375, 1377 n.2 (Miss. 1989) (The provisions of the PCR Act “enjoy enforceability, not because of any legal validity conferred upon them by the legislature but because we have

¹ Section 99-19-101 went into effect on April 13, 1977.

adopted them in prior proceedings[.]”). In addition, the Legislature declares in the statute that the PCR Act’s purpose is “to provide the courts of this state with an exclusive and uniform *procedure* for the collateral review of convictions and sentences.” MISS. CODE ANN. § 99-39-3 (emphasis added).

Everything changed in 2023 in *Howell v. State*, 358 So. 3d 613 (Miss. 2023) and in 2024 in *Ronk v. State*, 391 So. 3d 785 (Miss. 2024). Together, *Howell* and *Ronk* upset over forty years of settled precedent, overturned more than fifteen hundred cases, and transformed the way the Court understands concepts of separation of powers and substantive law. *See Howell v. State*, 358 So. 3d 613, 620 (Miss. 2023) (Kitchens, P.J., dissenting and joined by P.J. King and J. Ishee) (discussing the Court’s “harsh and unjustified departure from our precedent”).

At issue in *Howell* was an illegal sentence. The post-conviction petition was filed after the standard three-year limitation period in the State’s PCR Act. That said, an illegal sentence always has been considered “void” and thus not subject to any post-conviction time limitations. *Ex parte Burden*, 92 Miss. 14, 45 So. 1, 1-3 (1907). Despite this, the court used the *Howell* decision to discard any ability of state courts to rectify claims that are subject to and fall outside of Mississippi’s statutory bars in its post-conviction scheme. To accomplish this feat, the state court revolutionized the fabric of state law by labeling *all* statutory law as “substantive” law. *Howell*, 358 So. 3d at 619 (Kitchens, P.J., dissenting) (“Today’s holding that the Legislature is capable of enacting nothing but substantive laws can impact many areas of state law.”). Because all statutes are now substantive law, the Judiciary has no authority enforce exceptions to any statute, even if constitutional rights are violated.

In *Ronk*, the Mississippi Supreme Court doubled down on *Howell*. The Court held that all statutory bars in the PCR Act (e.g., the successive writ bar) are substantive law, and the Court can create no exceptions whatsoever to substantive law enacted by the Legislature. The holding in *Ronk* resulted in the dismantling of Mississippi's state statutory and constitutional right to effective assistance of capital post-conviction counsel. *Ronk*, 391 So. 3d at 794 (explaining that "no right without a remedy" is just a "maxim" and "not an ironclad rule").

Thus, now in Mississippi, everything that was procedural is now substantive law. In other words, everything up is now down. And matters that had been denied because they had been treated as procedural should now be considered substantive. Because that distinction had a direct bearing on the state court's treatment of Jordan's federal *ex post facto* claim, the state court should have addressed the merits of that claim as required by the statutory exception to the successive-petition bar due to an intervening decision of the state supreme court.

REASONS FOR GRANTING THE PETITION

This Court has observed that federal courts have a "duty to scrutinize the application of state rules that bar [their] review of federal claims." *Cone v. Bell*, 556 U.S. 449, 468 (2009). Here, the Mississippi Supreme Court previously rejected Jordan's *ex post facto* claim because the changes in Mississippi law to provide for a constitutional death penalty scheme "affect[ed] procedure and not substance." *Irving v. State*, 361 So. 2d 1360 (Miss. 1978) (relied on in *Jordan v. State*, 365 So. 2d 1198, 1204 (Miss. 1978)). But now the Mississippi Supreme Court has abruptly changed course, and all statutory law is now considered to be substantive.

Mississippi's analysis for *ex post facto* claims turns on the procedural or substantive nature of the law at issue. *Howell*, 358 So. 3d at 619 (Kitchens, P.J., dissenting) ("This Court has held

consistently that statutes that are procedural and ameliorative do not violate *ex post facto* prohibitions.”). Because Mississippi has modified its test for determining what is a matter of substance, it consequently changes the court’s prior treatment of Jordan’s *ex post facto* claim. Under the exception for intervening decisions, the Mississippi Supreme Court was obligated to address anew the federal *ex post facto* claim. Instead, it arbitrarily denied review. This Court has roundly condemned state courts for manipulating state law to avoid providing a forum for federal law claims. Just as the trespassers in *Bowie v. City of Columbia*, 378 U.S. 347 (1964) had formed certain expectations on the basis of long-established legal principles, which the state could not evade consistently with due process, so here the state should not have been permitted to interpose a new state device and deprive Jordan of procedural fairness in evaluating his claim.

I. Once a State Creates a Forum to Hear Certain Federal Claims, It May Not Then Manipulate Its Rules to Avoid Hearing That Claim.

A. State courts cannot interpret state law in an arbitrary manner to subvert federal constitutional guarantees.

While the protections accorded by the Fourteenth Amendment have usually been applied in cases involving state legislative action, they also apply to the actions of state judiciaries. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). State courts are not free to act arbitrarily when interpreting state law, since lawfulness itself requires at a minimum that a state must treat individuals in a fundamentally fair, or nonarbitrary, way. *See District of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008) (“‘[R]ational basis’ is not just the standard of scrutiny, but the very substance of the constitutional guarantee [of due process].”). This Court has repeatedly held that state courts cannot use their autonomous authority to interpret state law as an opportunity to violate individual rights or to subvert federal constitutional guarantees of due process under the guise of interpretation.

For example, in *Bouie*, 378 U.S. 347, several civil rights protestors engaging in a sit-in remained at a lunch counter after being ordered to leave. The state's law against trespassing only barred entry onto property after being warned not to enter; it did not prohibit a person who lawfully entered from remaining in a place after being told to leave. Nevertheless, the South Carolina Supreme Court interpreted the law to prohibit staying on land after being ordered off, and upheld the criminal convictions of the demonstrators. This Court reversed, because "by applying such a construction of the statute ... the State has punished them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* at 350. The Court took pains to note that *Bouie* was not a "void for vagueness" case. *Id.* at 351. On the contrary, "the language of [the trespass law] was admirably narrow and precise; the statute applied only to 'entry upon the lands of another ... after notice ... prohibiting such entry.' " *id.* at 351-52. But the state court's decision "unforeseeably and retroactively expanded [the statute] by judicial construction." *Id.* at 352. This arbitrary inconsistency with prior law violated the basic principles of fairness in the Due Process Clause.

Slightly more complicated was *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in which the state demanded that the NAACP hand over its membership list. The Association refused, and was held in contempt. *Id.* at 451. This Court granted certiorari, but the state argued that it lacked jurisdiction, because the NAACP had not adequately sought review by the appropriate writ to the state supreme court. *Id.* at 454-55. This error, the state continued, justified the Alabama Supreme Court in denying review, and because that denial was a state law procedural matter, this

Court was barred from examining the underlying merits. *Id.* at 455. But this Court rejected this argument:

We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment [Citing several Alabama state decisions.] ... [W]e can discover nothing in the prior state cases which suggests that mandamus is the exclusive remedy Nor, so far as we can find, do any of these prior decisions indicate that the validity of [contempt] orders can be drawn in question by way of certiorari only in instances where a defendant had no opportunity to apply for mandamus.

Id. at 456-57.

The Court then held that states may not abuse their judicial autonomy to evade review by the United States Supreme Court: “Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.” *Id.* at 457-58. *Patterson* makes clear that this Court retains power to inquire into state law to ensure that state judiciaries do not abuse their authority to avoid enforcement of federal constitutional guarantees. This Court has followed that rule in many other cases. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Douglas v. Alabama*, 380 U.S. 415, 421-22 (1965); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923). *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715-717 (2010) (judicial alteration of state property law rules may effect a taking in violation of the Fifth Amendment).

Because the legitimacy of a state’s interest in the enforcement of its procedural rules is greatly diminished where those rules are applied irregularly or arbitrarily, the prudential considerations weigh even less heavily in favor of enforcing the procedural bar in such circumstances. As then-Judge Alito explained:

If inconsistently applied procedural rules sufficed as “adequate” grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called “rules” - directions of general applicability - rather than by whim or prejudice against a claim or claimant.

Bronshtein v. Horn, 404 F.3d 700, 708 (3d Cir. 2005) (Alito, J.); *see id.* (acknowledging that the “pertinent statutory provision ... appears on its face to impose a one-year deadline” but finding such rule inadequate because “strict enforcement of [it] did not begin immediately”).

B. Mississippi has opened its post-conviction forum to reviewing all federal claims satisfying exceptions to its successive petition bar, and the State cannot arbitrarily shut the door on Jordan’s federal *ex post facto* claim.

1. Arbitrary denial of an available state court forum to adjudicate a federal constitutional claim violates due process. “A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of ‘valid excuse.’” *Howlett v. Rose*, 496 U.S. 356, 369 (1990) (quoting *Douglas v. New York, N. H. & H. R. Co.*, 279 U.S. 377, 387-388 (1929) (Holmes, J.)). “Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) (“Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.”).

Even if state procedures are facially “evenhanded,” they still “cannot be used as a device to undermine federal law.” *Haywood v. Drown*, 556 U.S. 729, 739 (2009). In other words, lower courts may not insulate their decisions from certiorari review by relying on “inadequate” state-law

grounds—i.e., state-law grounds that are either irregular or hostile to the underlying right the state has empowered its courts to enforce. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262–263 (1982); *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (“[A]n unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court’s review of a federal question”) (internal quotation marks omitted).

Here, Mississippi has opened its post-conviction forum up to claims “in violation of the Constitution of the United States or the Constitution or laws of Mississippi.” Miss. Code Ann. § 99-39-5(1)(a). It also allows claims based on “intervening decision of the Supreme Court of either the State of Mississippi or the United States.” Miss. Code Ann. § 99-39-5(2)(a)(i). The State has created a forum to hear federal claims such as *ex post facto* violations, and the State cannot manipulate its rules to avoid hearing Jordan’s claim.

Mississippi previously rejected Jordan’s *ex post facto* claim on the merits because it determined that its changes to state statute affected only matters of “procedure.” But now Mississippi has entirely reversed course. Under *Howell* and *Ronk*, all legislation is now considered “substantive.” That abrupt change in the law impacts the Mississippi court’s prior treatment of Jordan’s *ex post facto* claim. Indeed, the three dissenting Justices in *Howell* forecasted the reverberations of the court’s holding. *Howell*, 358 So. 3d at 619 (Kitchens, P.J., dissenting) (“Today’s holding that the Legislature is capable of enacting nothing but substantive laws can impact many areas of state law.”). One area of law impacted by *Howell* and *Ronk* is how the court evaluates *ex post facto* prohibitions. *Howell*, 358 So. 3d at 619 (Kitchens, P.J., dissenting) (“This

Court has held consistently that statutes that are procedural and ameliorative do not violate *ex post facto* prohibitions.”).

The state court should not be able to scuttle review of Jordan’s *ex post facto* claim by haphazardly altering state devices to dodge the merits of the claim.

2. Jordan’s *ex post facto* claim also has substantive merit. The seminal case defining the *Ex Post Facto* Clause articulated the history and purpose of that term. *See Calder v. Bull*, 3 U.S. 386 (1798). It also outlined the four categories of law that may give rise to *ex post facto* issues: laws that (1) make previously innocent behavior criminal; (2) aggravate a crime; (3) change the punishment and give greater punishment for the crime; and (4) alter the rules of evidence, requiring less or different testimony to convict. *Carmell v. Texas*, 529 U.S. 513, 543 (2000); *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798); *Bell v. State*, 726 So. 2d 93, 94 (Miss. 1998). This case concerns *Calder*’s third category of *ex post facto* laws—those that “chang[e] the punishment, and inflic[t] a greater punishment, than the law annexed to the crime, when committed.” *Peugh v. U. S.*, 569 U.S. 530, 530-531 (2013).

The date of Jordan’s offense was January 12, 1976. That date matters because a person “convicted should be sentenced pursuant to the statute existing on the date of his offense to avoid an *ex post facto* problem.” *Johnston v. State*, 618 So. 2d 90, 94 (Miss. 1993). Jordan was tried and sentenced under the 1974 version of Mississippi Code § 97-3-21, which read as follows:

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the state penitentiary.

Every person who shall be convicted of capital murder shall be sentenced by the court to death.

Laws, 1974, ch. 576, § 7. The second clause of that state statute was and is unconstitutional under *Woodson v. North Carolina*, 428 U.S. 280 (1976) and its progeny.

“An unconstitutional law is void, and is as no law.” *Tatro v. State*, 372 So. 2d 283, 285 (Miss. 1979); *E.g., Bd. of Liquidation v. McComb*, 92 U.S. 531, 541, 23 L. Ed. 623 (1875) (“An unconstitutional law will be treated by the courts as null and void.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“[A]n act of the legislature, repugnant to the constitution, is void.”); *id.* (“[A] legislative act contrary to the constitution is not law.”). Thus, as of the date of Jordan’s offense, the provision providing for a death sentence *was void*. *Montgomery v. Louisiana*, 577 U.S. 190, 204 (2016) (“A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner’s sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids.”).

3. Modern *ex post facto* jurisprudence centers on concerns of fundamental fairness and justice. *See Carmell v. Texas*, 529 U.S. 513, 523 (2000) (recognizing that “[t]here is plainly a fundamental fairness interest [in prohibiting *ex post facto* laws], even apart from any claim of reliance or notice”); *Peugh v. U. S.*, 569 U.S. 530, 545-46 (2013) (“[T]he *Ex Post Facto* Clause does not merely protect reliance interests. It also reflects principles of “fundamental justice.”); *id.* at 550 (“[O]ne of the principal interests that the *Ex Post Facto* Clause was designed to serve [is] fundamental justice.”). In analyzing the third category in *Calder* (also at issue here), the Supreme Court in *Peugh* utilized a “significant risk” analysis, explaining the touchstone of a proper *ex post facto* inquiry is whether the retroactive application of the change in the law created a “‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’” *Peugh*, 569 U.S. at 539 (quoting *Garner v. Jones*, 529 U.S. 244, 250 (2000)).

This was a question never asked in earlier cases, including *Dobbert v. Florida*, 432 U.S. 282 (1977), which also concerned a death sentence analyzed under the *Ex Post Facto* Clause. The issue in *Dobbert* concerned a “change in the role of the judge and jury in the imposition of the death sentence.” *Id.* at 292. At the time of the petitioner’s offense, a judge did not review a jury’s recommendation of a death or life sentence. *Id.* at 288. The law applied retroactively to the petitioner. At the time of his trial, the law provided for an advisory decision by the jury and a separate binding decision made by a judge. *Id.* at 290-91. The petitioner argued that the change in the law harmed him “because the jury’s recommendation of life imprisonment would not have been subject to review by the prior law.” *Id.* at 294.

Because the statute concerned only a change in the role of the judge and jury, the Court held that the law “simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.” *Id.* at 293-94; *id.* at 304 (Stevens, J., dissenting) (noting that the matter concerned the “procedure for imposing the death penalty in Florida”). It was also a speculative injury because “it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life.” *Id.* at 294.

Dobbert does not answer the *ex post facto* question raised here. Unlike in *Dobbert*, Mississippi Code Section 99-19-101 and the 1977 amendment to Section 97-3-21 are substantive laws. *See Ronk*, 391 So. 3d at 795 (explaining state statutes are substantive law because the “Legislature only can enact substantive law”). In addition, while Mississippi continues to use the substantive versus procedural nature of the law in its *ex post facto* analysis, the Supreme Court after *Dobbert* explained that “by simply labeling a law ‘procedural,’ a legislature does not thereby immunize it from scrutiny

under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones.” *Collins v. Youngblood*, 497 U.S. 37, 46 (1990) (internal citations omitted).

Thus, not only has *Howell* and *Ronk* revolutionized the distinction between substantive versus procedural laws in Mississippi, but procedural laws also may violate *ex post facto* principles in certain circumstances. For example, in *Carmell*, the state courts had held the law to be a matter of procedure. The statute at issue there had abolished an earlier provision of Texas law which declared that convictions for certain sexual offenses could not rest on the uncorroborated testimony of the victim. The Texas appellate court held that “the statute as amended does not increase the punishment nor change the elements of the offense that the State must prove. It merely ‘removes existing restrictions upon the competency of certain classes of persons as witnesses’ and is, thus, a rule of procedure.” *Carmell v. State*, 963 S.W.2d 833, 836 (Tex. App. 1998). The U.S. Supreme Court disagreed and reversed the state court. In so doing, the Court reiterated that the proper question for *ex post facto* is whether the law at issue falls within one of *Calder v. Bull*’s four categories.

The decision in *Dobbert* also centered largely on the “fair warning” principle. The Court in *Dobbert* reasoned that the statute in effect at the time of petitioner’s offense indicated Florida’s view of the degree of punishment the state legislature wished to impose for murder. Justice Stevens’ dissent in *Dobbert* criticized the majority opinion for relying too heavily on that principle, explaining that “[f]air warning cannot be the touchstone” of *ex post facto*. 432 U.S. at 307 (Stevens, J., dissenting).

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

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

As noted, the Texas statute at issue in *Carmell* abolished an earlier provision of Texas law which declared that convictions for certain sexual offenses could not rest on the uncorroborated testimony of the victim. The Supreme Court explained that the elimination of this corroboration requirement reduced the quantum of evidence needed to support a conviction under Texas law. That is, the new statute altered the legal definition of what constituted sufficient proof of these sexual offenses—and altered it in a manner that was “advantageous only to the state.” *Id.* Thus, the Supreme Court concluded, retroactive application of this Texas statute violated the *Ex Post Facto* Clause.

The dissent in *Carmell* criticized the majority opinion because the petitioner no doubt had fair warning. *See id.* at 566 (Ginsburg, J., dissenting) (“[Carmell] had ample notice that the conduct in which he engaged was illegal. He certainly cannot claim to have relied in any way on the preamendment version of [state law][.] He tendered no reason to anticipate that [the victim] would not report the assault within the outcry period, nor any cause to expect that corroborating evidence would not turn up sooner or later.”).

Over the dissent’s objection in *Carmell*, the Court moved away from “fair warning” as the primary benchmark of the *Ex Post Facto* Clause. *Id.* Thus, the evolution of modern *ex post facto* jurisprudence looks to more than just the fair warning concern in *Dobbert*.

Indeed, after *Carmell*, the Supreme Court decided *Peugh v. United States*, 569 U.S. 530 (2013). In *Peugh*, fair warning also was not the only yardstick by which to measure *ex post facto* claims. As in Jordan’s case here, *Peugh* also concerns *Calder*’s third category of *ex post facto* laws—

those that “chang[e] the punishment, and inflic[t] a greater punishment, than the law annexed to the crime, when committed.” *Peugh*, 569 U.S. at 530–31. The Court in *Peugh* noted that “[t]he touchstone of th[e] ... inquiry is whether a given change in law presents a ‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’” *Id.* at 539 (quoting *Garner v. Jones*, 529 U.S. 244, 250 (2000)). “[M]ere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the *Ex Post Facto* Clause.” *Id.*

In *Peugh*, the “sufficient risk” test was implicated where the state sentenced a defendant under the federal sentencing guidelines promulgated after he committed his criminal act. *Id.* at 539 (citing *Calder*, 3 U.S. at 390). Notably, the statutory range at the time of the petitioner’s offense was *the same* as the statutory range at the time of his sentencing. That is, *the legally prescribed statutory range did not change*. *Id.* at 546 (explaining that the “upper boundary of the sentencing court’s power to punish remained unchanged”). What changed in *Peugh* was the advisory federal sentencing guidelines that are “no[t] [] binding,” but require district courts to “consider all of the factors” in the guidelines. *Id.* at 536.

In *Peugh*, the Supreme Court summarized its *ex post facto* jurisprudence as follows:

On the one hand, we have never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause ... the fact that the sentencing authority exercises some measure of discretion will also not defeat an *ex post facto* claim ... On the other hand, we have made it clear that mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the *Ex Post Facto* Clause ... The touchstone of this Court’s inquiry is whether a given change in law presents a “‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’” *Garner*, 529 U.S., at 250, 120 S.Ct. 1362 (quoting *Morales*, 514 U.S., at 509, 115 S.Ct. 1597). The question when a change

in law creates such a risk is “a matter of degree”; the test cannot be reduced to a “single formula.”

Id. at 539.

Under the “significant risk” inquiry,² the Supreme Court concluded that the change in guidelines created an *ex post facto* violation *Id.* at 550; *id.* (explaining that a change in the guidelines “offended one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice”) (internal quotations omitted). Thus, the *Ex Post Facto* Clause may be violated even when “[t]he statutory range in effect at the time of the petitioner’s offence remain[s] the same” and the defendant “knows he may be sentenced anywhere within the legally prescribed range [of the statute].” *Id.* at 562-63 (Thomas, J., dissenting); *Blue v. State*, 303 So. 3d 714, 719 (Miss. 2020) (“[A] law can run afoul of the Clause even if it does not alter the statutory maximum punishment attached to a crime ... A statute may violate the *Ex post facto* Clause even if it alters punitive conditions outside the sentence ... [or where it] substantially alters the consequences attached to a crime already completed, and therefore changes the quantum of punishment.”) (cleaned up, internal citations and quotations omitted).

Here, at the time of Richard Jordan’s offense, there was no constitutional provision for a death sentence in Mississippi. *Furman* had halted the death penalty shortly prior to Jordan’s offense, and the mandatory death penalty scheme created by Mississippi existing at the time of Jordan’s offense was unconstitutional and thus void. That Mississippi had a void and unconstitutional statute providing for a mandatory death sentence in its dead-letter law at the time of Jordan’s offense does not cure Jordan’s *ex post facto* claim. Indeed, in *Peugh*, the federal statute provided a statutory range that did not change at all between the offense and the time of sentencing.

² The Court appears to treat the terms “significant risk” and “sufficient risk” interchangeably.

See Peugh, 569 U.S. at 539 (a law need not “increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause.”); *id.* at 546 (“[A] law can run afoul of the Clause even if it does not alter the statutory maximum punishment attached to the crime.”); *see also, e.g., Sash v. Zenk*, 439 F.3d 61, 65 (2d Cir. 2006) (Sotomayor, J., for the court) (“The *ex post facto* doctrine applies to any penal enactment that retrospectively disadvantages a criminal offender, whether or not it increases a criminal sentence, *see Weaver*, 450 U.S. at 29, 32 n. 17, 101 S.Ct. 960, and applies to regulations governing the conditions of imprisonment as well as to the length of sentences.”); *Stogner v. California*, 539 U.S. 607 (2003) (California’s 1993 statutory extension of the limitations period was unconstitutional to the extent that it permitted resurrection of otherwise time-barred prosecutions).

In addition, that Mississippi added discretion into its death penalty scheme to comply with *Woodson* and its progeny does not cure the *ex post facto* violation. *Peugh*, 569 U.S. at 539 (2013) (“[T]he fact that the sentencing authority exercises some measure of discretion will also not defeat an *ex post facto* claim.”). In fact, that is not even the correct inquiry. The salient point for the *ex post facto* analysis is that there was no constitutional provision for the death penalty in January 1976 when Jordan committed his offense. Perhaps if mandatory death sentences were constitutionally sound, then moving from a constitutional mandatory death sentence to a constitutional discretionary death sentence could impact the analysis. But, here, that is not the case.

Lastly, it is hard to legally credit Jordan with any kind of “fair warning” of the laws in 1976 when the State of Mississippi itself “misinterpreted *Furman*.” *Jackson v. State*, 337 So. 2d 1242, 1250 (Miss. 1976) (“[I]t is clear that we misinterpreted *Furman*[.]”). Thus, even if the only consideration were fair warning, a mere statement that the punishment for murder shall be death—

with no means or authority to enforce it—does not and cannot serve to fairly warn a defendant. Indeed, the only constitutional sentence at the time of Jordan’s offense was imprisonment for life. Jordan’s death sentence is thus unconstitutional.

CONCLUSION

The petition for certiorari should be granted.

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Respectfully submitted,

Krissy C. Nobile

Krissy C. Nobile

Counsel of Record

S. Beth Windham

Mississippi Office of Capital Post-

Conviction Counsel

239 North Lamar Street

Suite 404

Jackson, MS 39201

(601) 359-5733

knobile@pcc.state.ms.us

bwindham@pcc.state.ms.us