

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD GERALD JORDAN, *Petitioner*,

v.

STATE OF MISSISSIPPI, *Respondent*

APPENDIX

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APPENDIX A

Serial: 257022

IN THE SUPREME COURT OF MISSISSIPPI

No. 2024-DR-01272-SCT

RICHARD GERALD JORDAN**FILED*****Petitioner***

v.

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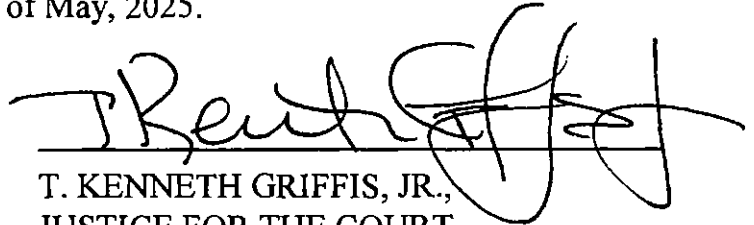
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SUPREME COURT
COURT OF APPEALS***Respondent*****EN BANC ORDER**

Before the Court, *en banc*, is Richard Gerald Jordan's Motion for Leave to File Petition for Post-Conviction Relief and/or Motion to Vacate Death Sentence in Light of the Intervening Decisions in *Howell v. State* and *Ronk v. State*. Jordan claims his death sentence violates the *ex post facto* protections of the Constitution of the United States and the Constitution of the State of Mississippi.

Jordan's motion is time- and successive-writ barred. Miss. Code Ann. §§ 99-39-5(5) and -27(9) (Rev. 2020). And, we find Jordan's *ex post facto* claim is barred by *res judicata*. To overcome these bars, Jordan must meet an exception. Jordan claims he meets the intervening-decision exception through two recent opinions: *Howell v. State*, 358 So. 3d 613 (Miss. 2023); and *Ronk v. State*, 391 So. 3d 785 (Miss. 2024). We disagree. Therefore, after due consideration, we find Jordan's motion should be denied.

IT IS, THEREFORE, ORDERED that Richard Gerald Jordan's Motion for Leave to File Petition for Post-Conviction Relief and/or Motion to Vacate Death Sentence in Light of the Intervening Decisions in *Howell v. State* and *Ronk v. State* is hereby denied.

SO ORDERED, this the 1st day of May, 2025.



T. KENNETH GRIFFIS, JR.,
JUSTICE FOR THE COURT

AGREE: RANDOLPH, C.J., COLEMAN, P.J., MAXWELL, CHAMBERLIN, ISHEE,
GRIFFIS, SULLIVAN AND BRANNING, JJ.

DISAGREE: KING, P.J.

APPENDIX B

3a
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June 12, 2025

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 12th day of June, 2025.

Supreme Court Case # 2024-DR-01272-SCT
Trial Court Case # 18807

Richard Gerald Jordan v. State of Mississippi

The motion for rehearing filed by the petitioner is denied. King, P.J., would grant.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: <https://courts.ms.gov>, and selecting the appropriate date the opinion was rendered under the category "Decisions."

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2024-DR-01272-SCT

RICHARD GERALD JORDAN

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

FILED

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**MOTION FOR LEAVE TO FILE
PETITION FOR POST-CONVICTION RELIEF AND/OR
MOTION TO VACATE DEATH SENTENCE IN LIGHT OF
THE INTERVENING DECISIONS IN *HOWELL v. STATE*
AND *RONK v. STATE***

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2024

3801

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PETITION FOR POST-CONVICTION RELIEF AND/OR MOTION TO VACATE DEATH SENTENCE

INTRODUCTION

This Petition raises claims under the *Ex Post Facto* and Due Process Clauses. The claims in this Petition were triggered by recent, intervening case law in *Howell v. State* and *Ronk v. State*.¹ The decisions in *Howell* and *Ronk* upset 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”). As the State recently put it, *Howell* and *Ronk* constitute a “significant change in [Mississippi] state law.”²

The rationale invoked by the Court in *Howell* and *Ronk* was in many ways revolutionary. This is so not only because of the decades of precedent the

¹ *Howell v. State*, 358 So. 3d 613 (Miss. 2023); *Ronk v. State*, 391 So. 3d 785 (Miss. 2024). Jordan’s counsel has a legal and ethical duty to bring such legal issues to this Court’s attention. *See* Miss. R. of Prof. Conduct 1.3 and cmt. (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyers, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1 (C) (Rev. Feb. 2003) (“Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules.”).

² *See* State Response Brief in *Batiste v. Cain*, U.S. District Court for the Northern District of Mississippi, Case No. 1:22-cv-00108, [Doc. 71], p. 4.

cases overturned, but also because of the many areas of law impacted. The three dissenting Justices in *Howell* forecasted the reverberations of the Court's holding. *Howell*, 358 So. 3d at 619 (Kitchens, P.J., dissenting) ("Today's holding that the Legislature is capable of enacting nothing but substantive laws can impact many areas of state law."). 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."). As foretold by the dissent in *Howell* and *Ronk*, Richard Jordan's death sentence violates *ex post facto* and due process proscriptions under federal and state law.

Because this Petition is based on the intervening decisions in *Howell* in 2023 and *Ronk* in August 2024, the claims asserted are statutorily alive. The death penalty was not a constitutionally viable punishment at the time of Jordan's offense in January 1976; the only constitutional penalty for any classification of "murder" was imprisonment for life. Jordan's death sentence thus should be vacated, and he should be sentenced to imprisonment for life.

SUMMARY OF THE ARGUMENT

Howell v. State and *Ronk v. State* upset the fabric of how the Court understands "the fundamental constitutional concept of the separation of powers." *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975). Prior to *Howell* and

Ronk, the Mississippi Supreme Court turned to *Newell v. State* to delineate between judicial power to make procedural rules and legislative power to make substantive law. Under *Newell*, even though matters of procedure are for the Judiciary, the Legislature may enact procedural rules, and the Court may (or may not) accept those rules. *Newell*, 308 So. 2d at 76-78; *see also, e.g., Hall v. State*, 539 So. 2d 1338, 1346 n.20 (Miss. 1989).

Newell requires the Court to correct legislative rules only when the rules are “determined to be an impediment to justice or an impingement upon the constitution.” *Newell*, 308 So. 2d at 78. Otherwise, the Court may defer to legislative expressions, not out of obligation or accession to authority, but out of comity. *Id.*; *McCarty v. State*, 554 So. 2d 909, 914 (Miss. 1989). *Howell* and *Ronk* transformed this framework.

Under *Howell* and *Ronk*, the Legislature “only can enact substantive law.” *Howell*, 358 So. 3d at 615; *Ronk v. State*, 391 So. 3d 785, 795 (Miss. 2024). So, for example, even though Mississippi’s post-conviction statutes were enacted “to provide the courts of this state with an exclusive and uniform *procedure* for the collateral review,”³ the statutes are nonetheless substantive law. As *Howell* and *Ronk* explain, the post-conviction statutes are substantive

³ Miss. Code Ann. § 99-39-3 (emphasis added).

law because the “Legislature only can enact substantive law.” *Ronk*, 391 So. 3d at 795.

Under *Howell* and *Ronk*, Richard Jordan’s death sentence violates *ex post facto* and due process proscriptions. 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 sentence of that 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 (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 only provision providing for a death sentence *was void*.

Jordan moved for a new trial after his 1976 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.

After *Jackson*, the Court granted Jordan’s motion for a new trial. Yet in light of *Jackson*, the amended version of § 97-3-21, and *Jackson*’s codification in § 99-19-101, the death penalty was placed back on the table as a viable punishment. Death as a sentencing option should not have been an available sentencing provision. The only valid, constitutional punishment for any classification of “murder” at the time of Jordan’s offense was the first portion of Section 97-3-21: “Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the state penitentiary.”

It is true that Jordan previously raised an *ex post facto* challenge to his

death sentence. Before *Howell* and *Ronk*, the Court rejected that claim, concluding that the changes in the law were procedural, and on the whole ameliorative. *Jordan v. State*, 365 So. 2d 1198, 1204 (Miss. 1978) (citing *Bell v. State*, 353 So. 2d 1141, 1143 (Miss. 1977)). Even still, based on other constitutional deficiencies, Jordan's 1977 sentence was reversed.

Jordan then faced additional sentencing trials in 1983 and 1998 under § 97-3-21 and § 99-19-101. That death was a viable sentencing option in Jordan's 1977, 1983, and 1998 trials—*when it was not as of the date of Jordan's offense*—creates *ex post facto* and due process problems. Cf. Miss. Code Ann. § 99-19-1 ("No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment....").

The dissent in *Howell* foreshadowed this result and thus also this Petition. Under *Howell* and *Ronk*, the 1977 amendment to § 97-3-21 and the law codified in § 99-19-101 are not matters of procedure. The enacted law is also not ameliorative. At the time of Jordan's offense in January 1976, Mississippi's provision for the death penalty was unconstitutional and thus void. The only constitutional option for murder was life imprisonment. The following chart outlines the *ex post facto* inquiry:

JANUARY 1976: Imprisonment for life	APRIL 1977: Death or imprisonment for life
Section 97-3-21 as of January 1976: Every person who shall be convicted of murder shall be sentenced by the court <i>to imprisonment for life</i> in the state penitentiary. Every person who shall be convicted of capital murder shall be sentenced by the court to death.⁴	Section 97-3-21 as of April 1977: Every person who shall be convicted of capital murder shall be sentenced <i>to death or to imprisonment for life</i> in the state penitentiary.

The addition of a provision allowing for the death penalty, *even a discretionary death penalty*,⁵ is certainly a worse and more onerous punishment than life imprisonment.⁶ Thus, retroactively applying a substantive law with death as an option runs headlong into *ex post facto* and due process prohibitions. *See, e.g., Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798) (explaining there are four categories of law that may give rise to *ex post facto* issues, including laws that change the punishment and give greater punishment for the crime); *Ivy v. State*, 731 So. 2d 601, 603-04 (Miss. 1999) (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

⁴ The strikethrough reflects the portion of the law deemed unconstitutional. As a point of clarity, the strikethrough does not mean courts are the ones to actually expunge a law from the books.

⁵ “[T]he fact that the sentencing authority exercises some measure of discretion will also not defeat an *ex post facto* claim.” *Peugh v. United States*, 569 U.S. 530, 539 (2013).

⁶ What is more is that, even if the Court defaulted back to the law before the 1974 statute, that law also was unconstitutional under *Furman v. Georgia*, 408 U.S. 238 (1972). Thus, the prior law authorizing a death sentence also was void.

only viable sentence at the time Ivy committed the murder was life in prison") (emphasis added).

In the modern era of *ex post facto* decisions, the U.S. Supreme Court has stressed that "fundamental justice" is "[o]ne of the principal interests that the *Ex Post Facto* Clause was designed to serve." *Carmell v. Texas*, 529 U.S. 513, 531 (2000); *Peugh v. United States*, 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.'" (quoting *Carmell*)). In the Court's modern jurisprudence, "[t]he touchstone of th[e] [*ex post facto*] ... inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh* 569 U.S. at 539.

Here, the new law increased the measure of the punishment that constitutionally could be attached to murder. Additionally, 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. *Cf. Stogner v. California*, 539 U.S. 607, 615 (2003) (explaining the fundamental concern over "punishment that courts lacked the power to impose at the time the legislature acted."); *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.”).

Indeed, it would be highly perverse to impose an *unconstitutional* state law on Jordan as a means of subverting his separate *constitutional* rights under the *Ex Post Facto* Clause. It would also not correspond to contemporary *ex post facto* analysis. For example, in *Peugh*, the federal statute at issue provided a statutory range that *did not change at all* between the offense and the time of sentencing. *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 ... and applies to regulations governing the conditions of imprisonment as well as to the length of sentences.”).

At the time of Jordan’s crime, *Furman v. Georgia* had been decided halting the death penalty nationwide, and the provision in Mississippi responding to *Furman* and imposing a mandatory death sentence was unconstitutional. *Jackson*, 337 So. 2d at 1250 (“[I]t is clear that we misinterpreted *Furman*[.]”). All in all, the fact remains that the only constitutional sentence for any classification of “murder” at the time of

Jordan's offense was imprisonment for life in the state penitentiary. Jordan's death sentence should thus be vacated.

STATEMENT OF THE CASE

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 in the circuit court of Harrison County. To date, he has had two trials on guilt and sentencing, one in 1976 and one in 1977. He has also had two additional sentencing trials, one in 1983 and one in 1998, the latter being the one he is currently 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.

After being convicted, Jordan 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.

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

Jordan's 1977 Trial (Jordan II). During Jordan's second guilt and sentencing trial, the law changed. The new law 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.

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 are the subject of Jordan's petition for post-conviction relief filed on December 13, 2022. *See Jordan v. State*, 2022-DR-1243. Jordan's rehearing on his claim under *Ake v. Oklahoma* and *McWilliams v. Dunn* is pending before this Court. *See id.*

B. Evolution of Mississippi Law on Capital Murder

1. On June 29, 1972, the U.S. Supreme Court decided *Furman v. Georgia*, 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. *See, e.g., Jackson v. State*, 337 So. 2d 1242, 1250 (Miss. 1976) (discussing the state reaction to *Furman*).

By 1976, the laws enacted in response to *Furman* made their way back to the U.S. Supreme 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)). The Court concluded:

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id. at 195.

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 required that the sentencer could 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 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.⁷

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. Rather, the only portion of the law valid at the time of Jordan's crime on January 12, 1976 was the portion of Section 97-3-21 providing for "imprisonment for life":

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 Laws, 1974, ch. 576, § 7.4.

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. Because the death penalty was not a viable punishment at the time of Jordan's offense, his death sentence should be vacated.

⁷ Section 99-19-101 went into effect on April 13, 1977.

**RETROSPECTIVE APPLICATION OF SUBSTANTIVE, NON-
AMELIORATIVE LAW VIOLATES RICHARD JORDAN'S
CONSTITUTIONAL RIGHTS AND IMPINGES ON THE
FUNDAMENTAL JUSTICE UNDERPINNING THE *EX POST
FACTO* CLAUSE**

- A. The Federal and State Constitutions preclude the *ex post facto* application of laws and judicial decisions that violate due process.**

The United States Constitution and the Mississippi Constitution preclude *ex post facto* application of laws. The United States Constitution guarantees that “[n]o bill of attainder or ex post facto law shall be passed.” U.S. Const., Art. 1, § X. The Mississippi Constitution similarly protects citizens and prohibits after-the-fact application of the law: “[e]x post facto laws or laws impairing the obligation of contracts shall not be passed.” Miss. Const. Art. 3, § 16.

The *Ex Post Facto* Clause is a limitation upon the powers of state legislatures and does not by its own terms apply to judicial decisions. *See, e.g., Frank v. Magnum*, 237 U.S. 309, 344 (1915). That said, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the U.S. Supreme Court held that a state supreme court is barred by the due process clause from achieving by judicial construction a result which a state legislature could not obtain by statute. *See, e.g., Jordan v. Watkins*, 681 F.2d 1067, 1079 (5th Cir. 1982); *United States v. Wasserman*, 504 F.2d 1012, 1015 (5th Cir. 1974) (“[T]he policy considerations

which support a prohibition against the *ex post facto* application of a criminal statute are also applicable to judicial decisions which affect the interpretation of a criminal statute.”); *Magwood v. Warden, Alabama Dep’t of Corr.*, 664 F.3d 1340, 1348 (11th Cir. 2011) (“The *Ex Post Facto* Clause prohibits four distinct categories of legislative action ... (3) change[] the punishment, and inflict[] a greater punishment ... Magwood’s due process claim falls into the third *Calder* category.”) (internal quotation marks omitted, brackets in original); *Ricks v. Wynne*, 2012 WL 6062065, at *1 n.1 (M.D. Ala. Oct. 11, 2012), *report and recommendation adopted*, 2012 WL 6088828 (M.D. Ala. Nov. 29, 2012) (“While the *Ex Post Facto* Clause applies directly to legislative acts, the Fourteenth Amendment extends Article 1, Section 10’s prohibition on *ex post facto* laws to include judicial decisions.”).

“[T]he *Ex Post Facto* Clause does not merely protect reliance interests. It also reflects principles of ‘fundamental justice.’” *Peugh v. United States*, 569 U.S. 530, 545–46 (2013) (quoting *Carmell*, 529 U.S., at 531). The Framers considered *ex post facto* laws to be “contrary to the first principles of the social compact and to every principle of sound legislation.” The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison). The Clause “safeguards ‘a fundamental fairness interest ... in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of

his or her liberty or life.” *Peugh*, 569 U.S. at 544. (quoting *Carmell*, 529 U.S., at 533).

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, 513 (2000); *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798); *Bell v. State*, 726 So. 2d 93, 94 (Miss. 1998). Drawing substantially on Richard Wooddeson’s 18th-century commentary on the nature of *ex post facto* laws and past parliamentary abuses, the *Calder* Court divided *ex post facto* laws into categories that the Court described in two alternative ways. *Stogner v. California*, 539 U.S. 607, 611–12 (2003). The Court wrote:

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder, supra, at 390–391, 1 L.Ed. 648 (emphasis altered from original).

In his alternative description, the *Calder* Court traced these four categories back to Parliament's earlier abusive acts, as follows:

Category 1: “Sometimes they respected the crime, by declaring acts to be treason, which were not treason, when committed.”

Category 2: “[A]t other times they inflicted punishments, where the party was not, by law, liable to any punishment.”

Category 3: “[I]n other cases, they inflicted greater punishment, than the law annexed to the offence.”

Category 4: “[A]t other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit.”

Stogner, 539 U.S. at 613 (emphasis removed).

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*, 569 U.S. at 530–31.

B. Prior to *Howell v. State* and *Ronk v. State*, Jordan previously raised an *ex post facto*/due process challenge that was rejected.

“One 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); *see also* Miss. Code Ann. § 99-19-1 (“No statutory change of any law affecting a crime or its punishment or the collection of a

penalty shall affect or defeat the prosecution of any crime committed prior to its enactment...."). Jordan originally was tried in 1976 under Mississippi's 1974 death penalty statute. That law was, without question, unconstitutional under *Woodson*. Jordan was thus tried again in 1977 after *Jackson v. State*.

Jordan previously challenged the application of *Jackson*, the amendment in Section 97-3-21, and the enactment of Section 99-19-101 as violative of federal and state *ex post facto* and due process provisions. In 1978, in response to Jordan's claim(s), this Court held as follows:

Jordan asserts that the court erred in overruling motions to quash the indictment and grant a new trial on the grounds that retrospective application of the procedures pursuant to *Jackson v. State, supra*, would violate the constitutional prohibition of *Ex post facto* laws. Jordan committed the murder of Mrs. Marter on January 12, 1976, and he was tried in accord with our pronouncements in *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976), which we handed down October 5, 1976. On this basis, Jordan says that application of *Jackson, supra*, to his trial constitutes a violation of "state and federal prohibitions against *Ex post facto* laws." This question, however, has already been decided adversely to Jordan's position. *Bell v. State*, 353 So. 2d 1141 (Miss. 1978); *Irving v. State*, 361 So. 2d 1360 (Miss. 1978).

Jordan v. State, 365 So. 2d 1198, 1204 (Miss. 1978). In both *Bell v. State* and *Irving v. State*, the Court held that "the requirements of *Jackson* affect procedure and not substance and on the whole are ameliorative. In such case, the appellant is not subjected to an *ex post facto* violation." *Bell*, 353 So. 2d at 1143; *Irving*, 361 So. 2d at 1368 (same, quoting *Bell*).

Jordan, Bell, and Irving were not the only litigants to challenge *Jackson* and its codification. Chester Johnson also brought such a challenge. Johnson was convicted of capital murder for a murder in 1976, and he was sentenced to life imprisonment without parole. *Johnston v. State*, 618 So. 2d 90, 92 (Miss. 1993). “Johnston argue[ed] that the application of Miss. Code Ann. § 99–19–81 (Supp. 1992) was error because at the time of Edwards’ murder in 1976, the statute was not yet in effect; therefore, application of the statute constituted an *ex post facto* law[.]” *Id.* at 94. In line with prior holdings, *Johnston* held that “[t]here is no *ex post facto* problem in applying the 1977 amendment to Johnston’s 1976 offense because the changes brought about by *Jackson* are ameliorative and procedural.” *Id.* at 95.

The Court’s decision in *Jackson* and its codification in statute previously were found not violative of *ex post facto* or due process because the Court construed such laws as procedural and ameliorative. The Court’s recent decisions in *Howell v. State* and *Ronk v. State* change this Court’s prior decisions on the retroactive impact of the changes to the laws in Sections 97-3-21 and 99-19-101.

- C. In *Howell v. State* and *Ronk v. State*, this Court held that all laws enacted by the Legislature are substantive laws, and the changes to state law fall within *Calder v. Bull's ex post facto* categories.

The Mississippi Supreme Court embraced its inherent authority to promulgate procedural rules in *Newell v. State*, 308 So. 2d 71 (Miss. 1975). *Newell* delineated between the judicial power to make procedural rules and the legislative power to make substantive law—while recognizing that the Judiciary may accept procedure in a statute, unless it causes an impediment to justice. Since *Newell* in 1975, the Court has held that it must correct legislative rules when “determined to be an impediment to justice or an impingement upon the constitution.” *Newell*, 308 So. 2d at 78. Otherwise, the Court may defer to legislative expressions, not out of obligation or accession to authority, but out of comity. *Id.*; *McCarty v. State*, 554 So. 2d 909, 914 (Miss. 1989).

Howell v. State, 358 So. 3d 613 (Miss. 2023) and *Ronk v. State*, 391 So. 3d 785 (Miss. 2024) recently transfigured how this Court understands “the fundamental constitutional concept of the separation of powers.” *Newell*, 308 So. 2d at 76. Prior to *Howell* and *Ronk*, it was accepted that the post-conviction act was a procedural vehicle enacted by the Legislature and accepted by the Court. See, e.g., *Knox v. State*, 75 So. 3d 1030, 1035 (Miss. 2011) (“[M]otions for post-conviction relief [] [are] subject to the procedural rules promulgated [in the PCR Act].”); *Grubb v. State*, 584 So. 2d 786, 788 (Miss. 1991) (explaining this Court’s

“acceptance of the Post–Conviction Collateral Relief Act”); Miss. Code Ann. § 99-39-3 (Mississippi’s post-conviction statutes were enacted “to provide the courts of this state with an exclusive and uniform *procedure* for the collateral review.”) (emphasis added).⁸

In 2023 in *Howell*, this Court for the first time held that the PCR Act’s time limitation for filing initial post-conviction petitions was a matter of substantive law for the Legislature. *Howell* reasoned that the time bar *had to be substantive* because the Legislature “*only can enact substantive law.*” *Howell*, 358 So. 3d at 615 (emphasis added). *Ronk v. State* expanded on *Howell*’s rationale in 2024. *Ronk* says all the bars in the PCR Act are substantive (and have to be) because the “Legislature only can enact substantive law.” *Ronk*, 391 So. 3d at 795. This means that bars such as a “successive writ” bar and “res judicata” are substantive laws. *Id.*

To reach their outcomes, neither *Howell* nor *Ronk* turned to *Newell* or its analysis of judicial rules versus legislative law. Rather, in both cases, the laws were substantive because they were enacted by the Legislature. If collateral relief and the bars to that relief, both of which originated with the Judiciary,⁹

⁸ There are more than fifteen-hundred reported cases construing the PCR Act as a matter of procedure.

⁹ *Howell* and *Ronk* classify the PCR Act as substantive law even though collateral relief itself derived as a judicial remedy and so too did bars to that relief. *Wheat v. Thigpen*, 431 So. 2d 486, 487 (Miss. 1983) (explaining that res judicata “procedurally barred” “further consideration” of the claim); *Gilliard v. State*, 446 So. 2d 590, 592 (Miss. 1984) (same and

are substantive laws, so too are laws that govern the death penalty by setting the punishment (Section 97-3-21) and statutorily creating aggravators and mitigators (99-19-101).

Additionally, the amendment to Section 97-3-21 in 1977 and the enactment of Section 99-19-101 affect substantive matters for purposes of the *Ex Post Facto* Clause because they squarely fit within the third category of *Calder v. Bull*. The changes to laws changed the punishment and provided greater punishment (life imprisonment versus the option of death) for the Jordan's offense. *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

D. The state laws at issue changed the constitutionally available punishment from life imprisonment to death; such a change is neither procedural nor ameliorative.

The dissent in *Howell* cited *Johnston v. State* as an example of a case impacted by the majority's holding—and thus also subsequently impacted by the holding in *Ronk*. In *Johnston*, the murder was convicted in June of 1976. *Johnston v. State*, 618 So. 2d 90, 95 (Miss. 1993). In 1976, as discussed above, the penalty for capital murder in 1976 was found in Mississippi Code § 97-3-21, which read in part as follows: "Every person who shall be convicted of capital

citing *Auman v. State*, 285 So. 2d 146 (Miss. 1973)); *Gilliard v. State*, 446 So. 2d 590, 593 (Miss. 1984) (claims were "procedurally barred").

murder shall be sentenced by the court to death.” This statute was enacted in response to *Furman* but was unconstitutional under *Woodson* and its progeny.

Johnston brought an *ex post facto* challenge because he was tried and sentenced under the changes required by *Jackson* and codified in Section 99-19-101—both of which were after his 1976 crime. Specifically, he was sentenced to death under the 1977 amendments to § 97-3-21 as well as the 1977 enactment in § 99-19-101. *Johnston*, 618 So. 2d at 95. There is no question that, at the time of Johnston’s 1976 offense, Mississippi’s 1976 provision for the death penalty was unconstitutional and thus void. Nevertheless, this Court rejected Johnston’s *ex post facto* claim, holding that “[t]here is no *ex post facto* problem in applying the 1977 amendment to Johnston’s 1976 offense” because “the changes required by *Jackson* and subsequently codified at § 99-19-101 are procedural and ameliorative.” *Johnston*, 618 So. 2d at 95.

In light of *Howell* and *Ronk*, the changes in the law are not procedural. Nor are they ameliorative. The changes in the law are substantive and provide a greater punishment than available at the time of Jordan’s offense: a death versus life sentence.

Indeed, there was no constitutional provision for a sentence of death in Mississippi as of January 1976. “An unconstitutional law is void, and is as no law.” *Tatro v. State*, 372 So. 2d 283, 284 (Miss. 1979); *Lawrence v. Mississippi State Tax Comm’n*, 162 Miss. 338, 137 So. 503, 505 (1931), *aff’d sub nom.*

Lawrence v. State Tax Comm'n of Mississippi, 286 U.S. 276 (1932) (explaining that an unconstitutional and void statute is without effect). This is a basic principle of constitutional law. See *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.”); *Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886) (“An unconstitutional act is not a law; ... it is, in legal contemplation, as inoperative as though it had never been passed.”); *United States v. Davis*, 588 U.S. 445, 447 (2019) (affirming that unconstitutionally vague statute “is no law at all” and cannot support a criminal conviction); *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.”).

Below is a chart of the evolution of the law as it relates to Jordan’s case:

CHART:

1957 Mississippi death penalty law



Held unconstitutional under *Furman* in 1972.
Thus, no constitutional option for death in Mississippi.



Section 97-3-21 enacted in 1974 as a *mandatory* death penalty scheme after *Furman*.



Jordan's offense committed on Jan. 12, 1976.



Section 97-3-21 mandatory scheme held unconstitutional under *Woodson*. Thus, at the time of Jordan's offense, there was no constitutional option for a death sentence. The law was unconstitutional and thus void.



Jackson decided, § 97-3-21 amended, and § 99-19-101 enacted—providing a valid provision for the death penalty as a constitutional option.



Jordan retried with the death penalty as a constitutionally viable sentence in 1977, 1983, and 1998—even though there was no constitutional option for a death sentence at the time of the offense.

Applying a law with the death penalty as a viable, constitutional option when it was not a viable, constitutional option at the time of the offense raises *ex post facto* concerns.

The only constitutional option at the time of Jordan's offense was "imprisonment for life in the state penitentiary." Laws, 1974, ch. 576, § 7. See *Ivy*, 731 So. 2d 601 at 604 ("[T]he only viable sentence at the time Ivy committed

the murder was life in prison. The sentencing judge did not have the discretion to give Ivy the death penalty, nor a sentence less than life imprisonment.”); *Capler v. State*, 268 So. 2d 338, 339-40 (Miss. 1972) (“The only infirmity in section 2217 is that the harsher penalty of death may not lawfully be imposed. The remaining part of the statute is complete, and it does not follow that the remaining provision providing for imprisonment in the penitentiary for the life of the defendant must fall. We hold that because of the decision in *Furman v. Georgia* the death penalty cannot be inflicted; that the remainder of the statute is valid, and the only other punishment for murder is life imprisonment.”); see also, e.g., *State v. Lindquist*, 99 Idaho 766, 589 p.2d 101 (Iowa 1979) (death penalty statute could not be applied to person who committed crime before its enactment, especially in light of the circumstances of state law).

The 1977 changes to the State’s death penalty regime also do not expressly apply retroactively. See Miss. Code Ann. § 99-19-1 (“No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment ...unless otherwise specially provided in such statutes.”); *Wells v. State*, 202 So.3d 1230, 1234 (Miss. 2016) (“Mississippi Code Section 99–19–1 expressly provide[s] that the previous law will remain in effect for the purpose of providing punishment, unless otherwise specially provided in the new statute.”) (internal quotation marks omitted).

Lastly, even if the Court defaulted back to the law before the 1974 statute, that law also was unconstitutional under *Furman v. Georgia*, 408 U.S. 238 (1972). *Cf. Johnson v. State*, 146 Miss. 593, 111 So. 595, 596 (1927) (declaring certain laws were “unconstitutional and void” and thus the “sentence should be imposed under the statutes theretofore existing and in force prior to the date of the approval of said act”). Thus, in this case, the law at the time of Jordan’s offense was unconstitutional and so too was the prior law authorizing a death sentence. The only constitutional sentence for any classification of murder at the time of Jordan’s offense was imprisonment for life.

E. The concerns of fundamental justice underpinning the *Ex Post Facto* Clause require that Jordan’s death sentence be vacated.

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 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 for at least three primary reasons.

First, unlike in *Dobbert*, Mississippi Code Section 99-19-101 and the 1977 amendment to Section 97-3-21 are substantive laws. *Ronk*, 391 So. 3d at 795 (explaining state statutes are substantive law because the “Legislature only can enact substantive law”). In addition, while Mississippi and other states continue 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 disagree 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.

Second, the injury here is not speculative and the change in the laws impacted the “quantum of punishment.” At the time of Jordan’s offense, there was no constitutional death penalty provision in Mississippi at all. The state law in Mississippi passed after *Furman* was unconstitutional and thus void. (The state law passed in Florida after *Furman* was held to be constitutional in *Proffitt v. Florida*, 428 U.S. 242 (1976)).

Third, the decision in *Dobbert* 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. Like 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,¹⁰ 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

¹⁰ The Court appears to treat the terms “significant risk” and “sufficient risk” interchangeably.

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. *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 so as 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 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 fact remains that the only constitutional sentence at the time of Jordan’s offense was imprisonment for life. Jordan’s death sentence is thus unconstitutional.

**THE CLAIMS RAISED IN THIS PETITION ARE NOT
STATUTORILY BARRED.**

Jordan's claims are not statutorily barred for the following reasons:

1. *Howell v. State* and *Ronk v. State* are intervening Mississippi Supreme Court decisions. *Howell* was decided in 2023, and *Ronk* expanded on *Howell*'s rationale in 2024. *Ronk* was not final until less than three months ago, when the mandate issued on August 23, 2024. As the State concedes, *Howell* and *Ronk* constitute a "significant change in [Mississippi] state law."¹¹

The Mississippi Legislature has instructed counsel (and pro se inmates) when an inmate has the right to file a successor petition. That legislative mandate triggers a legal and ethical duty for counsel, especially when counsel, as here, represents an inmate "until execution...."¹² Under Mississippi's post-conviction statute, an inmate has the right to file a successor petition when there is (i) "supervening mental illness before the execution of a sentence of death," (ii) "an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected

¹¹ See State Response Brief in *Batiste v. Cain*, U.S. District Court for the Northern District of Mississippi, Case No. 1:22-cv-00108, [Doc. 71], p. 4.

¹² The Mississippi Office of Capital Post-Conviction Counsel has the legal and ethical duty to represent death-row inmates until the execution of the sentence or the vacation of the sentence. "Representation in post-conviction proceedings *shall further include* representation of the inmate from the *exhaustion of all* state and federal post-conviction litigation *until* execution of the sentence or an adjudication resulting in either a new trial or a vacation of the death sentence." Miss. Code Ann. § 99-39-107 (emphasis added).

the outcome of his conviction;” (iii) “evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence;” and (iv) a claim “that [the] sentence has expired or [the] probation, parole or conditional release has been unlawfully revoked.” *See, e.g.*, Miss. Code Ann 99-39-27(9).

Here, Jordan’s claims fall in category (ii). Jordan’s claims are not barred due to intervening law, and Jordan’s counsel has a legal and ethical duty to bring such case law to this Court’s attention. *See* Miss. R. of Prof. Conduct 1.3 and cmt. (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyers, and may take whatever lawful and ethical measures are requires to vindicate a client’s cause or endeavor.”); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1 (C) (Rev. Feb. 2003) (“Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules.”).

2. Application of the statutory bars would also be unconstitutional as applied to Jordan under the Court’s decision in *Hathorne v. State*, 376 So. 3d 1209 (Miss. 2023). Hathorne dealt with defective indictments. The Court of

Appeals denied Hathorne relief because the claim was statutorily barred under the PCR Act, as “a defective indictment is not an enumerated exception to the procedural bars of the UPCCRA.” *Id.* at 1213. Under *Howell*, the fundamental rights “exception” to the PCR Act’s statutory bars purportedly did not apply because “defective indictments” is not expressly written into the statute.

Nevertheless, the *Hathorne* Court reaffirmed that constitutional rights may and do overcome statutory bars—irrespective of whether the statutory bar is “procedural” or “substantive” law. The Court in *Hathorne* did not invoke the “fundamental rights exception.” Instead, in light of *Howell*, the Court reframed the issue as a challenge to the “constitutionality of the statutory bar[s]” “as applied to [Hathorne’s] particular case.” *Id.* at 1214. Notably, the Court in *Hathorne* also reframed the issue *sua sponte*—as Hathorne’s brief, even his supplemental brief after *Howell*, did not assert an as-applied challenge to the statutory bars. (Hathorne’s supplemental brief, even after *Howell*, presented the issues as “whether the fundamental rights exception applies to post-conviction bars that are procedural in nature” and “whether § 99-39-21 is a procedural enactment”).

Because Hathorne’s indictment was defective, and thus violated Hathorne’s constitutional rights, the PCR’s Act statutory waiver bar had to yield to the Constitution. This was so even though Hathorne’s claim, per statute, was barred because it was capable of determination at trial and/or on

direct appeal. *Id.* As this Court put it, the PCR Act’s statutory bar (even if labeled as substantive law), did not apply in *Hathorne* because:

- “[A] challenge to an indictment for failure to charge the essential elements of a criminal offense *affects a fundamental right*, and may not be waived.” *Hathorne*, 376 So. 3d at 1215 (emphasis in original; internal quotation marks removed).
- The Court’s “precedent places great emphasis on the protection of the right to challenge the sufficiency of an indictment.” *Id.*
- Hathorne’s continued imprisonment would “constitute ‘cruel or unusual punishment’ and an ‘excessive fine[],’ which is expressly prohibited under our Constitution. Miss. Const. art. 3, § 28.” *Id.*

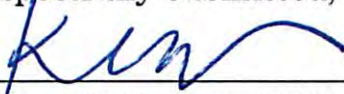
Here, because there was no constitutional provision for the death penalty at the time of Jordan’s offense, his death sentence is unconstitutional. Jordan’s constitutional claims are not statutorily barred, and any bar would be unconstitutional as applied to Jordan in this case.

CONCLUSION

For the foregoing reasons, Richard Jordan respectfully requests the Court grant him post-conviction relief. The death penalty was not a constitutionally viable punishment at the time of Jordan’s offense in January 1976; the only constitutional penalty for any classification of murder was imprisonment for life. Jordan’s death sentence thus should be vacated as it is violative of *ex post facto* and due process proscriptions. Jordan should be sentenced to imprisonment for life.

Dated: November 13, 2024.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have on this day caused the foregoing to be filed using the MEC system, which sent notice to all counsel of record, including:

Ashley Sulser
Office of the Attorney General
P.O. Box. 220
Jackson, MS 39205

Dated: November 13, 2024.

/s/ 
Krissy C. Nobile