AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Punishments

**Jordan v. Mississippi, \_\_\_ U.S. \_\_\_** (2018)

*Richard Jordan was sentenced to death four times for the abduction and murder of Edwina Marter. The first three death sentences were reversed because of constitutional error. By the time Jordan’s fourth conviction became final, he had been on death row for more than four decades. Jordan then claimed that executing a person more than forty years after the original conviction violated the cruel and unusual punishment clause of the Eighth Amendment and the due process clause of the Fourteenth Amendment. He also claimed that his death sentence was unconstitutionally arbitrary because he lived in one of the few counties in Mississippi and the United States that still imposed death sentences. The Supreme Court of Mississippi rejected both claims. Jordan appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States refused to grant certiorari. Justice Stephen Breyer’s dissent from that denial maintained that Jordan’s case was a good vehicle for the court to reassess whether capital punishment is constitutional. Breyer gives several reasons for thinking the death penalty arbitrary and unreliable. Which of those reasons are distinctive to Jordan? Which, in any, infect the entire capital sentencing process? Is there a constitutional limit on the number of times a state may try a person for the same crime? Is there a constitutional limit on the number of times a state may try a person for a capital crime?*

JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I791e82647ad711e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), dissenting from the denial of certiorari.

. . . .

The petitioner in the first case, Richard Gerald Jordan, was sentenced to death nearly 42 years ago. He argues that his execution after such a lengthy delay violates the Eighth Amendment's prohibition on “cruel and unusual punishments.” . . . More than a century ago, the Court described a prisoner's 4–*week* wait prior to execution as “one of the most horrible feelings to which [a person] can be subjected.” What explains the more than 4–*decade* wait in this case? Between 1976 and 1986, each of Jordan's first three death sentences was vacated on constitutional grounds, including by this Court. . . . Jordan has lived more than half of his life on death row. He has been under a death sentence “longer than any other Mississippi inmate.” The petition states that since 1977, Jordan has been incarcerated in the Mississippi State Penitentiary and spent “most of that time on death row living in isolated, squalid conditions.” This Court has repeated that such conditions bear “‘a further terror and peculiar mark of infamy’ [that is] added to the punishment of death.” Such “additional punishment,” the Court has said, is “of the most important and painful character.” In my view, the conditions in which Jordan appears to have been confined over the past four decades reinforce the Eighth Amendment concern raised in his petition.

Jordan, now 72 years old, is one among an aging population of death row inmates who remain on death row for ever longer periods of time. . . . Meanwhile, the average period of imprisonment between death sentence and execution has risen from a little over 6 years in 1988 to more than 11 years in 2008 to more than 19 years over the past year.

In addition, both Richard Jordan's case and that of Timothy Nelson Evans, the second petitioner here, illustrate the problem of arbitrariness. To begin with, both were sentenced to death in the Second Circuit Court District of Mississippi. Evans says that district accounts for “the largest number of death sentences” of any of the State's 22 districts since 1976. This geographic concentration reflects a nationwide trend. Death sentences, while declining in number, have become increasingly concentrated in an ever-smaller number of counties. In the mid–1990's, more than 300 people were sentenced to death in roughly 200 counties each year. By comparison, these numbers have declined dramatically over the past three years. A recent study finds, for example, that in 2015, *all* of those who were sentenced to death nationwide (51 people in total) were sentenced in 38 of this Nation's more than 3,000 counties; in 2016, *all* death sentences (31 in total) were imposed in just 28 counties nationwide (fewer than 1% of counties).

This geographic arbitrariness is aggravated by the fact that definitions of death eligibility vary depending on the State. This Court has repeated that “[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes,” But the statutory criteria States enact to distinguish a non-death-eligible murder from a particularly heinous death-eligible murder and thus attempt to use to identify the “worst of the worst” murderers are far from uniform. For instance, as Evans argues, Mississippi is one of a small number of States in which defendants may be (and, in Mississippi's Second Circuit Court District, routinely are) sentenced to death for, among other things, felony robbery murder without any finding or proof of intent to kill*.* And the Court recently considered a petition presenting “unrebutted” evidence that “about 98% of first-degree murder defendants in Arizona were eligible for the death penalty” under Arizona's death penalty statute, which allows for imposition of the death penalty for “felony murder based on 22 possible predicate felony offenses ... including, for example, transporting marijuana for sale.”

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Finally, I note that in the past three years, further evidence has accumulated suggesting that the death penalty as it is applied today lacks “requisite reliability.” Four hours before Willie Manning was slated to die by lethal injection, the Mississippi Supreme Court stayed his execution and on April 21, 2015, he became the fourth person on Mississippi's death row to be exonerated. Since January 2017, six death row inmates have been exonerated. Among them are Rodricus Crawford, Rickey Dale Newman, Gabriel Solache, and Vicente Benavides Figueroa, whose exonerations were based upon evidence of actual innocence.

In my view, many of the capital cases that come before this Court, often in the form of petitions for certiorari, involve, like the cases of Richard Jordan and Timothy Evans, special problems of cruelty or arbitrariness. Hence, I remain of the view that the Court should grant the petitions now before us to consider whether the death penalty as currently administered violates the Constitution’s Eighth Amendment.