

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

RICHARD GERALD JORDAN

17–7153

v.

MISSISSIPPI

TIMOTHY NELSON EVANS, AKA TIMOTHY N. EVANS,
AKA TIMOTHY EVANS, AKA TIM EVANS

17–7245

v.

MISSISSIPPI

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME
COURT OF MISSISSIPPI

Nos. 17–7153 and 17–7245. Decided June 28, 2018

The petitions for writs of certiorari are denied.

JUSTICE BREYER, dissenting from the denial of certiorari.

In my dissenting opinion in *Glossip v. Gross*, 576 U. S. ____ (2015), I described how the death penalty, as currently administered, suffers from unconscionably long delays, arbitrary application, and serious unreliability. *Id.*, at ____ (slip op., at 2). I write to underline the ways in which the two cases currently before us illustrate the first two of these problems and to highlight additional evidence that has accumulated over the past three years suggesting that the death penalty today lacks “requisite reliability.” *Id.*, at ____ (slip op., at 3).

I

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.” I continue to believe this question merits the Court’s attention. See *id.*, at ____–____ (slip op., at 17–33); *Boyer v. Davis*, 578 U. S. ____ (2016) (BREYER, J.,

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dissenting from denial of certiorari) (slip op., at 1) (“Richard Boyer was initially sentenced to death 32 years ago”); *Ruiz v. Texas*, 580 U. S. ___ (2017) (BREYER, J., dissenting) (slip op., at 1) (“Petitioner Rolando Ruiz has been on death row for 22 years, most of which he has spent in solitary confinement”); *Lackey v. Texas*, 514 U. S. 1045, 1046 (1995) (Stevens, J., memorandum respecting denial of certiorari) (discussing petitioner’s “17 years under a sentence of death”).

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.” *In re Medley*, 134 U. S. 160, 172 (1890). 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. See *Jordan v. Mississippi*, 476 U. S. 1101 (1986) (vacating death sentence and remanding case in light of *Skipper v. South Carolina*, 476 U. S. 1 (1986)); see also Brief in Opposition in No. 17–7153, p. 4–5 (“Jordan was originally convicted and *automatically* sentenced to death” in July 1976—the same month that this Court held mandatory death sentences unconstitutional in *Woodson v. North Carolina*, 428 U. S. 280 (1976) (emphasis added)). In 1998, Jordan was sentenced to death for the fourth time. (He had entered into a plea agreement providing for a sentence of life without parole, but the Mississippi Supreme Court invalidated that agreement and the prosecutor refused to reinstate it. See *Jordan v. Fisher*, 576 U. S. ___ (2015) (SOTOMAYOR, J., dissenting from denial of certiorari).)

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.” 224 So. 3d 1252, 1253 (Miss. 2017). The petition states that since 1977, Jordan has been incarcerated in the Mississippi State Penitentiary

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and spent “most of that time on death row living in isolated, squalid conditions.” Pet. for Cert. in No. 17–7153, p. 11; see also *ibid.* (citing *Gates v. Cook*, 376 F.3d 323, 332–335 (CA5 2004) (holding that the conditions of confinement on Mississippi State Penitentiary’s death row violate the Eighth Amendment)); Robles, *The Marshall Project, Condemned to Death—and Solitary Confinement* (July 23, 2017), (reporting based upon a nationwide survey of state corrections officials that Mississippi is 1 among 20 States that permit death row inmates “less than four hours of out-of-cell recreation time each day”), <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement> (all Internet materials as last visited June 27, 2018); cf. *Davis v. Ayala*, 576 U. S. ___, ___ (2015) (KENNEDY, J., concurring) (slip op., at 1) (noting that “the usual pattern” of solitary confinement involves “a windowless cell no larger than a typical parking spot” for up to “23 hours a day”). This Court has repeated that such conditions bear “‘a further terror and peculiar mark of infamy’ [that is] added to the punishment of death.” *In re Medley, supra*, at 170. Such “additional punishment,” the Court has said, is “of the most important and painful character.” *Id.*, at 171. 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. Over the past decade, the percentage of death row prisoners aged 60 or older has increased more than twofold from around 7% in 2008 to more than 16% of the death row population by the most recent estimate. Compare Dept. of Justice, Bureau of Justice Statistics, T. Snell, *Capital Punishment, 2008—Statistical Tables* (rev. Jan. 2010) (Table 7), with Dept. of Justice, Bureau of Justice Statistics, E. Davis & T. Snell,

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Capital Punishment, 2016, p. 7 (Apr. 2018) (Table 4) (Davis & Snell). 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. See Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2013—Statistical Tables, p. 14 (rev. Dec. 19, 2014) (Table 10); Death Penalty Information Center (DPIC), Execution List 2018, <https://deathpenaltyinfo.org/execution-list-2018>; DPIC, Execution List 2017, <https://deathpenaltyinfo.org/execution-list-2017>; see also F. Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty 161, 168, Fig. 8.1 (2018) (analyzing recent data showing that “nationally, each passing year is associated with approximately 125 additional days of delay from crime to execution”).

II

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. Pet. for Cert. in No. 17–7245, pp. 5–6; see also App. D to Pet. for Cert. (citing death sentencing data maintained by Mississippi’s Office of the State Public Defender).

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. B. Garrett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice 138–140 (2017). By comparison, these numbers have declined

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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). *Id.*, at 139–140, Fig. 6.2; see also Garrett, Jakubow, & Desai, The American Death Penalty Decline, 107 J. Crim. L. & C. 561, 564, 584 (2017); Fair Punishment Project, Too Broken To Fix: Part I: An In-Depth Look at America’s Outlier Death Penalty Counties 2 (2016) (citing data indicating there were 16 counties, or 0.5% of all counties nationwide, in which five or more death sentences were imposed from 2010 to 2015); cf. M. Radelet, The History of the Death Penalty in Colorado 168 (2017) (explaining that Colorado’s three death row inmates “[a]ll were prosecuted in the same judicial district, all the cases came from Aurora, all are young black men, and indeed all attended the same high school”); Joint State Government Commission, Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee 90 (June 2018) (“[D]ifferences among counties in death penalty outcomes . . . were the largest and most prominent differences found in the study. In a very real sense, a given defendant’s chance of having the death penalty sought, retracted, or imposed depends upon where that defendant is prosecuted and tried”) (internal quotations omitted); *Glossip*, 576 U. S., at ____ (slip op., at 12) (BREYER, J., dissenting).

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,” *Roper v. Simmons*, 543 U. S. 551, 568 (2005) (internal quotation marks omitted), since “the culpability of the average murderer is insufficient to justify the most extreme sanction available

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