CAPITAL CASE EXECUTION SCHEDULED – JANUARY 12, 2021

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LISA MONTGOMERY, *APPLICANT*,
V.

WARDEN OF USP TERRE HAUTE, UNITED STATES OF AMERICA, *RESPONDENTS*.

APPLICATION FOR STAY OF EXECUTION

TO THE HONORABLE AMY CONEY BARRETT, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

Lisa Montgomery is scheduled to be executed on January 12, 2020, at 6:00 p.m. Eastern. Mrs. Montgomery respectfully requests a stay of her execution pending this Court's disposition of her petition for a writ of certiorari.

MOTION FOR STAY OF EXECUTION

The district court properly entered a stay in this case, and the circuit should not have vacated it. The circuit court made two errors in it's Order vacating the stay, discussed *infra*. Because the circuit was silent on almost all of the district courts's order, Mrs. Montgomery will focus primarily on the district court stay which also ordered an evidentiary hearing.

Appellate courts' power to vacate a stay entered by a lower court should be reserved only for exceptional circumstances. *See, e.g., Kemp v. Smith*, 463 U.S. 1321, 77 L. Ed. 2d 1424 (1983) (Powell, J., Circuit Justice); *O'Connor v. Board of Education*, 449 U.S. 1301 (1980) (Stevens, J., Circuit Justice). A lower court's decision is "deserving of great weight." *Commodity Futures Trading Commission v. British American Commodity Options Corp*., 434 U.S. 1316, 1319, 12 (1977) (Marshall, J., Circuit Justice).

Where the lower court offered no reason for its decision to grant the stay application ," and "no plausible reason appeared from the record," *Wainwright v. Booker*, 473 U.S. 935 (1985), then vacating a stay may be appropriate. *See also Dugger v. Johnson*, 485 U.S. 945 (1988)(O'Connor, joined by Rehnquist, C.J., dissenting)("Because neither the District Court nor the Court of Appeals has articulated an adequate legal basis for entering a stay in this case, I would grant

the State's application to vacate.").

The lower court decision was reasoned, applied the applicable, controlling law, and, after calling balls and strikes, the district court judge reasonably granted a stay of execution and an evidentiary hearing on Mrs. Montgomery's claims under *Ford v. Wainwright*, 477 U.S. 399 (1986). *Ford* claims are not cognizable until "execution is imminent," *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007), meaning "about to happen," not when it is convenient for the parties or the courts. The district court's decision reflected an adequate, indeed a compelling, legal basis for entering a stay and providing for an evidentiary hearing; that decision ought to be afforded great weight, as the district court did precisely what is expected from district court judges.[1]

> The Court finds [Petitioner's] experts' declarations satisfy the required preliminary showing that Ms. Montgomery's current mental state would bar her execution. *Ford* did not set a precise standard for competency, *Panetti*, 551 U.S. at 957, and the concept of "rational

[1]In deciding whether to stay an execution, the Court must consider: "(1) whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). "The first two factors . . . are the most critical." *Id.* Before entering a stay, the Court must also consider "the extent to which the inmate has delayed unnecessarily in bringing the claim. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). The government's reliance on *Bucklew v. Precythe*, 139 S.Ct 1112 (2019).

understanding" is hard to define. *Id.* at 959. While there similarly are no set criteria describing what constitutes a "substantial threshold showing," the record before the Court contains ample evidence that Ms. Montgomery's current mental state is so divorced from reality that she cannot rationally understand the governments rationale for her execution. Dkt. 16-1, at 2, ¶ 17 (Dr. Kempke); dkt. 11-2 at 4, ¶ 6 (Dr. Porterfield); *id.* at 41 (Dr. Woods). *See Panetti*, 551 U.S. at 950 (finding that petitioner had made substantial threshold showing); *see id.* at 970 (Thomas, J., dissenting) (noting that the majority found the "threshold showing" satisfied with one unsworn, one- page letter from a doctor and another one-page declaration from a law professor, both relying on the petitioner's past medical history).[2]

Having reasonably applied the law to the facts, the lower court did not abuse its discretion.

I. JURISDICTION

This Court's authority to enter a stay is based upon 28 U.S.C. § 1651, in aid of the Court's jurisdiction.

II. EVIDENCE IN SUPPORT OF A THRESHOLD SHOWING UNDER FORD

Dr. Kempke, and two other mental health experts, submitted declarations to the district court. With respect to Dr. Kempke

1. I am a Board Certified psychiatrist, currently retired.

2. I served as a psychiatrist at the Carswell Medical Center (Federal Bureau of Prisons) from February 2008 through September 2010.

---

[2]The government argues the ultimate meritsof the *Ford* claim and conflates that with the need for an evidentiary hearing

3. During the course of my employment, I was the treating psychiatrist for Lisa Montgomery. Initially I saw her on the M-3 (mental health segregation) unit and later I treated her after she was housed in the admin unit.

4. When Mrs. Montgomery arrived at Carswell, she carried a bipolar diagnosis. She was medicated with Depakote but was not doing well psychiatrically.

5. She presented as disheveled and unclean. I had a hard time getting her to answer my questions or to come to the door to talk to me.

6. I initially thought that Mrs. Montgomery's presentation was due to depression over her conviction and death sentence, but I later learned that was not the case. After we began appropriately medicating her with antipsychotics, her affect, demeanor, and presentation changed dramatically. The information I later learned about Mrs. Montgomery's social history reinforced my revised assessment: Mrs. Montgomery's presentation was not simply depression, but psychotic depression.

7. I witnessed Mrs. Montgomery in an acute dissociative psychotic state at least two times.

8. When I treated her, her psychosis primarily manifested as crying, withdrawal, not responding to social cues, difficulty with concentration and deliberation, poor understanding of what she read, and hearing voices talking to her from the radio.

9. Mrs. Montgomery's counsel have informed me that she has been moved to death watch following the setting of her execution date.

10. They have described to me Mrs. Montgomery's current conditions of confinement, which are consistent with what I know to be the suicide precautions used at Carswell.

11. Though BOP is currently ensuring that Mrs. Montgomery showers three times a week, it is my understanding that she does so as quickly as possible—generally in under the 2 minute timer in the inmate shower—to avoid a prolonged re-experiencing of the sensation of observation and vulnerability into which showering recapitulates her. According to her lawyers, Mrs. Montgomery endorses that showers always cause her to re-experience her childhood violation. She reports crying in the shower, not because it is a safe place to cry, but rather because the experience in the shower itself is so scary that she cannot withstand it. This is consistent with my observations when she exhibited extreme aversion to showering.

12. Mrs. Montgomery's counsel have described Mrs. Montgomery's current functioning, including that Mrs. Montgomery hears her dead mother's voice and is having nightmares. She cannot describe either the instructions of the auditory hallucinations or the nightmares, because they are too terrifying.

13. Counsel has related that since October 16, 2020, Mrs. Montgomery has experienced lapses of time, including more than one that was commented upon by a guard who observed Mrs. Montgomery sitting staring blankly for a prolonged period. Mrs. Montgomery had not been aware of doing so. Mrs. Montgomery has described other lapses, including reading several pages of a book and realizing she could not remember any of what she read, and writing a letter and then not being able to remember doing it. Mrs. Montgomery reports being unsure of what is real—saying that without access to her most trusted friend, she is unsure of what is happening to her, so she cannot assess whether her perceptions are skewed or not.

14. Per counsel, Mrs. Montgomery reports feeling outside herself—as if watching from a distance, and the sensation of existing in a house in her mind as she did when she was raped as a child. The fact that Mrs. Montgomery is re-experiencing the mental detachment that previously allowed her to survive chronic abuse and gang rape is clinically significant and reflects decompensation and a detachment from reality.

15. Counsel have described that Mrs. Montgomery believes she has received messages from God in a dot-to-dot drawing that she was provided by the BOP. Mrs. Montgomery's counsel have described Mrs. Montgomery finding messages in a feather, a sensation of clouds parting and warmth from the sun, and in seeing the moon in a location she found uncanny. Without more information, it is impossible to know whether these were true hallucinations or delusions of reference. In either case, these indicate that Mrs. Montgomery is psychotic.

16. The difficulties in reality testing described above are similar to those Mrs. Montgomery exhibited before I prescribed Risperdal; this means the beneficial effect of the Risperdal is insufficient to control her symptoms.

17. It is my professional opinion to a reasonable degree of medical certainty that, based on my knowledge of Mrs. Montgomery's history of psychosis and the psychotic symptoms reported by counsel, she is currently unable to rationally understand the government's rationale for her execution.

App. ___, Reply to Government Response,dkt.number ___/[3]

A. Mrs. Montgomery's Childhood

The district court determined that while "Ms. Montgomery's current mental state is the issue in this case, her past trauma and diagnoses are relevant because

[3]Paragraphs 9-17 of this declaration describe Mrs. Montgomery's **current mental functioning**, as do affidavits fro Dr. George Wood's and Dr. Katherine Porterfield's declaration. Based upon these conditions and their fact to face knowledge of her, each formed current expert opinions about Mrs. Montgomery. The circuit was thus in error to write that these evaluations depend upon "extremely outdated evaluations" and "stale observations that cannot support a claim abut her current mental state." Order at 3. There is nothing stale about the information relied upon by these experts.

her clinical history informs the experts' opinions regarding her current mental state. Ms. Montgomery's childhood trauma was extreme and "consistent with torture." Dkt. 11-12 (Woods Decl. 2020). Her mother and stepfather were physically and emotionally abusive. Dkt. 11-5 at 42–43 (Porterfield Decl. 2016). Her mother found humor in the fact that Ms. Montgomery's first words as a toddler were, "[d]on't spank me." *Id.* Her stepfather sexually assaulted her on a weekly basis for years. *Id.* at 43; *see also Montgomery*, 635 F.3d at 1080. Her mother's emotional abuse included sadistic acts such as taping Ms. Montgomery's mouth shut with duct tape for speaking and beating the family dog to death in front of Ms. Montgomery and her siblings. *Id.* at 43–44. Order at 5-6

B. Diagnosis and treatment in prison.

> The prison psychiatrist who treated Ms. Montgomery in the three years preceding her trial diagnosed her with depression, bipolar disorder, and PTSD. Dkt. 11-10 at 2, 14–15.[4] At trial, medical experts from both sides agreed that Ms. Montgomery suffered from depression, borderline personality disorder, and PTSD. *United States v. Montgomery* , 635 F.3d, 1074, 1082 (2011)(direct appeal). One of Ms. Montgomery's experts, Dr. Logan, characterized Ms. Montgomery's illness as depressive disorder which "at times included psychotic features such as hallucinations." Dkt. 11-6 at 80 (Logan

[4][footnote not in order] Dr. McCandless visited with Mrs. Montgomery 62 times in 2005 and a total of 105 times over three years. She ultimately concluded Mrs. Montgomery's "symptoms reflected a diagnosis...[o]f psychosis." TT. 2144. *See also* Order at 38, App. A (Dr. McCandless diagnosed "bipolar disorder and psychosis.")(App.A)

Report).

After her trial, Ms. Montgomery was placed at the Federal Medical Center, Carswell ("FMC Carswell"), a federal prison in Texas for female inmates with special mental health needs. Dr. Camille Kempke, Ms. Montgomery's treating psychiatrist at FMC Carswell between 2008 and 2010, witnessed Ms. Montgomery in "an acute dissociative psychotic state" at least twice. Dkt. 16-1 at ¶ 2–3. Id.

Two psychological experts hired by Ms. Montgomery's team in support of her § 2255 proceedings recounted the key role dissociation plays in Ms. Montgomery's mental functioning and provided declarations in support of the motion to stay in this action. Dr. Katherine Porterfield, who examined Ms. Montgomery in 2016, is a clinical psychologist who has worked with survivors of torture and trauma for more than two decades. Dkt. 11-12 at 2 (Porterfield Decl. 2020); dkt. 11-5 at 39 (Porterfield Decl. 2016). In her opinion, Ms. Montgomery suffers from complex post-traumatic stress disorder[5] (CPTSD), complex partial seizures and brain impairment, depression, and bipolar disorder. Dkt. 11-12 at 2. Ms. Montgomery's "CPTSD is characterized by severe dissociative symptoms." *Id.* As Dr. Porterfield explained, "[d]issociation is a process of the human nervous system in which neurochemical reactions to excessive stress lead to alterations in consciousness and perceptions of senses, the environment, and the self. Dissociation represents a lowering of consciousness, *sometimes to the point of actual rupture of consciousness and awareness*." *Id.* at 2–3 (emphasis added).

Dr. Porterfield described the dissociative symptoms prevalent in Ms. Montgomery's functioning as follows: (1) confused thought

[5]CPTSD is not a condition that is recognized by the Diagnostic and Statistical Manual of Mental Disorders. According to Dr. Porterfield, it is a "diagnostic category proposed for inclusion in the World Health Organization International Classification of Diseases, 11th version, and arrived at by consensus among a panel of international trauma experts." Dkt. 11-5 at 48. Because dissociative symptoms are included in the criteria for PTSD—which experts on both sides agree Ms. Montgomery has—the Court pays more attention to the symptoms described by Ms. Montgomery's experts rather than the diagnostic label of CPTSD or PTSD.

> process— “frequently confused thinking that indicated questions about the reality of certain events and perceptions in her past”; (2) disengagement—feeling “out of it” or as if she was in her own world and would forget what day it was or how she got places; (3) depersonalization—feeling detached from her own body or like she does not belong in her body; (4) derealization—feeling her surroundings are not familiar in some cases, not real; (5) identity dissociation—feeling like she has different people inside herself or like there are people inside who are talking to her; (6) memory disturbance—experiencing blank spells or loss of time; and (7) emotional constriction—having restricted or limited emotional experience.

Dkt. 11-5 at 48–54; Order at

> Dr. George Woods, a physician with a specialty in neuropsychiatric consultations, conducted clinical evaluations of Ms. Montgomery, which included interviews and assessments of Ms. Montgomery's neurological status, in January and February 2013 and July and August 2016. Dkt. 11-6 at 1; dkt. 11-12 at 34. He observed that Ms. Montgomery has cerebellar[6] dysfunction and other brain impairments. Dkt. 11-6at 5. Ms. Montgomery's symptoms consistent with impairment of the cerebellum include "distractibility, hyperactivity, impulsiveness, disinhibition, anxiety, irritability, ruminative and obsessive behaviors, dysphoria, and depression, tactile defensiveness d sensory overload, apathy, and childlike behavior." *Id.* Dr. Woods also diagnosed Ms. Montgomery with Bipolar I Disorder, Most Recent Episode Depressed, Severe with Psychotic Features." *Id.* at 19. Ms. Montgomery's brain impairments, exposure to extreme trauma, mood disorder, and psychosis "interact synergistically" preventing her from being able to act "rationally and logically." *Id.* at 24.
>
> According to Dr. Woods, prior to the announcement of her execution date, the symptoms of Ms. Montgomery's illnesses had largely been controlled at FMC Carswell, due to three interactive factors: "1) a highly structured

---

[6][footnote 2 in Order] As Dr. Woods explained, "The cerebellum is a region of the brain that plays an important role in motor control and some cognitive functions such as attention and language and in regulating fear and pleasure." *Id.*

> and predictable environment; 2) a stable community wherein she is largely surrounded by supportive female companions and where her exposure to the threat of sexual violence is greatly reduced; and 3) careful titration and monitoring of her regime of antipsychotic medications." Dkt. 11-12 at 35. The impact of her medication, in particular Risperdal, [footnote omitted] an antipsychotic medication, when combined with a supportive community allowed her to function more successfully but did not resolve her underlying conditions. *Id.* at 40.

Order at 6-8.

C. Current medical condition

The circuit court completed ignored this:

> On October 16, 2020, the warden read Ms. Montgomery her execution warrant and she was removed from her community and activities and placed in a suicide cell. Dkt. 11-12 at 40–41. Dr. Woods believes that this disruption to her routine and the stress of learning of her impending execution have resulted in a resurgence of her symptoms. *Id.* at 35, 39.
>
> Ms. Montgomery's attorneys have reported the following symptoms or behaviors:
>
> auditory hallucinations with self-attacking content (hearing her abusive mother's voice);
>
> sleep disturbances and nightmares of past sexual violence that are so disturbing she is unable to recount them;
>
> disruption in bodily functions related to elimination due to her perception of male guards' observation of her;
> distorted sense of reality (uncertainty about whether the infant she
>
> kidnapped is really her child; being unsure of what is real without access to her most trusted friend to confirm reality);
>
> religious delusions/hallucinations (believing God spoke with her

through connect-the-dot puzzles, finding messages in a feather, seeing the moon in a location she found uncanny);

gaps in consciousness of time passing due to periods of dissociating (staring blankly for prolonged periods without awareness, writing letters and then forgetting doing so);
alterations in perception of the external world (feeling outside of herself as if she is "existing in a house in her mind");
inappropriate affect, irritability, and emotional description; and

distorted perceptions of reality evincing paranoia (believing a male psychologist stated to her, "Don't you just want to say 'fuck the government and kill yourself?'").
Dkt. 11-2 at 3–4; dkt. 16-1.

Dr. Porterfield, Dr. Woods, and Dr. Kempke all testify that these behaviors indicate current psychosis. 11-12 at 3–4 (Dr. Porterfield: "manifestations of dissociation, disturbed thinking and likely psychosis"); *id.* at 39 (Dr. Woods: "a reemergence of psychotic symptomology" indicating that Ms. Montgomery has "lost contact with reality"); Dkt. 16-1 (Dr. Kempke: observations "indicate that Mrs. Montgomery is psychotic")." Order at 19

Finally, "[b]ased on reported observations, review of past materials, review of BOP medical records, and, in Dr. Kempke's case, her past observation of Ms. Montgomery experiencing psychosis, all three experts opine that Ms. Montgomery is presently unable to rationally understand the government' rationale for her execution as required by *Ford*. Dkt. 11-12 at 4 (Dr. Porterfield),

41 (Dr. Woods); dkt. 16-1 at ¶ 17 (Dr. Kempke).

D. Current condition satisfies threshold showing

The respondent argues that none of Ms. Montgomery's experts' conclusions are reliable because they have not interviewed Ms. Montgomery in her current condition. But experts may rely on the statements of laypeople in forming opinions about Ms. Montgomery's mental state. *See*, *e.g.*, *United States v. Brownlee*, 744 F.3d 479, 481–82 (7th Cir. 2014) ("[A]n expert witness is permitted to rely on any evidence, whether it would be admissible or inadmissible if offered by a lay witness, that experts in the witness's area of expertise customarily rely on."). Indeed, each expert acknowledged that a direct interview would be useful for diagnosis, but that the descriptions of Ms. Montgomery'scurrent behavior, when coupled with their past treatment or evaluations, was sufficient to allow them to reach an opinion to a reasonable degree of scientific (or medical) certainty. Dkt. 11-12 at 4, ¶ 6; *id.* at 41; dkt. 16-1 at 2, ¶ 17.

The Court finds these experts' declarations satisfy the required preliminary showing that Ms. Montgomery's current mental state would bar her execution. *Ford* did not set a precise standard for competency, *Panetti*, 551 U.S. at 957, and the concept of "rational understanding" is hard to define. *Id.* at 959. While there similarly are no set criteria describing what constitutes a "substantial threshold showing," the record before the Court contains ample evidence that Ms. Montgomery's current mental state is so divorced from reality that she cannot rationally understand the government's rationale for her execution. Dkt. 16-1, at 2, ¶

THERE HAS BEEN NO UNDUE DELAY

Ford claims cannot be brought before an execution is imminent. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). And an individual could decompensate into *Ford* incompetence at any time before a scheduled execution. The circuit

court's reliance on *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019) is thus misplaced. Bucklew's claim could have beenbrought much earlier, but Mrs. Montgomery's could not.

Again, the district court was correct:

> The government's primary equitable argument is that counsel should have filed this claim and motion for stay sooner. Indeed, "last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course." *Panetti*, 551 U.S. at 946. But counsel's filing is not frivolous. As discussed elsewhere in this order, Ms. Montgomery has been diagnosed with physical brain impairments and multiple mental illnesses, and three experts are of the opinion that, based on conduct and symptoms reported to them by counsel, Ms. Montgomery's perception of reality is currently distorted and impaired.
>
> Additionally, the timing is not unreasonable given Ms. Montgomery's deterioration, this case's procedural history and what's at stake. Ms. Montgomery's condition began to devolve when the government first announced her execution date. But within a month, the execution was stayed. Counsel believed, and the District of Columbia District Court agreed, that the January 12 execution date was unlawful. Not until January 1, 2021, was the January 12 execution date relatively set in stone, and counsel filed this petition one week later. It is also worth noting that a brief stay of execution was initially granted to provide counsel time to recover from debilitating COVID-19 symptoms that included extreme fatigue, impaired thinking and judgment, and inability to concentrate. *See Montgomery v. Barr*, No. 20-3261 (D.D.C. Nov. 19, 2020), 2020 WL 6799140 at *7.
>
> While the Court is mindful about the possibility of strategic litigation, neither that possibility or the delay outweigh the need for the stay when counsel has made a threshold showing that Ms. Montgomery is presently incompetent to be executed. *Madison,* 139 S. Ct. at 727 ("Similarly, *Ford* and *Panetti* stated that it 'offends humanity' to execute a person so

> wracked by mental illness that he cannot comprehend the 'meaning and purpose of the punishment.'").

Order at 24.

MRS. MONTGOMERY'S DUE PROCESS RIGHTS ARE VIOLATED WHEN COUNSEL AND EXPERT HAVE DONE ALL THEY CAN DO UNDER PANDEMIC CONDITIONS

> The circuit court did not address this
>
> This Court insists
>
> upon *unfettered presentation of relevant information*, before the final fact antecedent to execution has been found....[C]onsistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that *any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate*.

Ford, 477 U.S. at 414 (plurality decision)(citation omitted)(emphasis added). The right to counsel and to experts to assist in gathering and presenting material relevant to incompetence to be executed claims is indisputable. When developing evidence about a federal constitutional violation, particularly when the evidence would at least temporarily stop a person from being executed, cannot turn on arbitrary considerations. Unlike other federal constitutional

challenges,[7] a *Ford* claim is not cognizable until "execution is imminent," *Panetti*, 551 U.S. at 949, meaning "about to happen."[8] When an execution becomes "immediate," individuals can be at risk of deteriorations in their mental states. *Cf. Panetti*, 551 U.S. at 943. Thus, now is when mental health experts would need to conduct the most meaningful evaluations of Mrs. Montgomery.

Appointed counsel and their experts are unable to evaluate Mr. Montgomery face-to-face--without risking their lives.[9] Enforcement of the Constitution

---

[7]For example, ineffective assistance of counsel (*Strickland v. Washington*, 466 U.S. 668 (1984)) and government suppression of material exculpatory evidence (*Brady v. Maryland*, 373 U.S. 88 (1963)) claims must be brought in a first 2255 proceeding.

[8]*See* Black's Law Dictionary, Ninth Ed., 2009, Garner, B., ed., p. 450 ("imminent danger. (16c) 1. An immediate, real threat to one's safety that justifies the use of force in self-defense.").

[9]Mrs. Montgomery's attorneys Harwell and Henry contracted Covid precisely because they traveled to and met with Lisa Montgomery. And Dr. Woods is

> 73 years of age and am considered at high risk of COVID-19 infection and at a much-heightened risk of complications from infection. I also have several underlying conditions in addition to my age which require me to be extra vigilant including that I am currently in treatment for prostate cancer which necessitates on-going immunosuppressant therapy. My doctor has ordered me not to travel due to my health concerns (regardless of the pandemic) for at least 4 months, depending upon potential effects of hormonal, antiandrogen, and immunotherapy.

cannot be suspended because of a deadly virus.[10] Habeas corpus "protects the tights of the detained by affirming the duty of the Judiciary to call the jailer to account...*The Laws and Constitution* ***are designed to survive, and remain in force, in extraordinary times.***" *Boumediene V. Bush*, 533 S.Ct. 723, 739-40, 743, 754, 798(2008)(emphases added).

Terre Haute USP, where Mrs. Montgomery is scheduled for execution, recently became the most COVID-19 infected institution in the federal prison system, with 281 active inmate cases.[11] That number has risen to 344 active inmate cases.[12] The numbers are likely higher than what the BOP is reporting, as a result of an ineffective testing campaign by the BOP.[13] In the entire Terre Haute campus, the BOP lists 357 inmates and 21 staff members who are

---

App. F. Dr. Porterfield also cannot travel. App. F.

[10]On January 7, 2021, almost 4,100 people died in the United States from Covid. NYT, 1/8/21, at 1.

[11] Lisa Trigg, "COVID-19 soars at Terre Haute federal prison complex; death row inmates infected" Terre Haute, Ind. Tribune-Star, Dec. 22, 2020 (last accessed Dec. 29, 2020).

[12] https://www.bop.gov/coronavirus/index.jsp (last accessed Jan. 2, 2021).

[13] *See* Trigg, supra, at fn. 13; *See also* CDC, *Mass Testing for SARS-CoV-2 in 16 Prisons and Jails — Six Jurisdictions, United States, April–May 2020*, *available at* https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm (accessed Sep. 2, 2020).

currently positive for COVID-19, with a total of 736 inmates having recovered from COVID-19, across the campus.[14] At Terre Haute FCI, 13 inmates and 18 staff members currently are infected with COVID-19.[15] Nationwide, there are 7,220 federal inmates and 1,714 BOP staff who have confirmed positive test results for COVID-19, with 179 federal inmate deaths and 2 BOP staff member death attributed to COVID-19.[16]

While the BOP has attempted to reduce the spread of the virus, it continues to ravage the federal prison system and the rate of infection is far higher within the BOP compared to the community at large. In addition, while a seemingly low percentage of inmates have contracted COVID-19 in comparison to the total population of inmates, the virus is highly contagious and once an infection occurs in a prison, it is extremely hard to contain.[17]

---

[14] https://www.bop.gov/coronavirus/index.jsp (last accessed Jan. 2, 2021).

[15] *Id*. The BOP reported numbers, located on the BOP's COVID-19 historic dashboard, shows a massive spike in cases at Carswell at the beginning of July and then in late July, and 35 current cases. Counsel has reason to believe the numbers are much higher. The Carswell testing data shows no meaningful numbers of testing after the late July spike in cases.

[16] *Id*.

[17] See https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-andsecond-waves-of-coronavirus (accessed October 26, 2020)

The federal prison are unable to protect visitors to inmates. Under these extraordinary circumstances, it would violate Due Process to execute Mrs. Montgomery.

Respectfully submitted,

Kelley J. Henry

Supervisory Asst. Fed. Public Defender

Amy D. Harwell

Asst. Chief, Capital Habeas Unit

Office of the Federal Public Defender

Middle District of Tennessee

810 Broadway, Suite 200

Nashville, Tennessee 37203

Phone: (615) 736-5047

Lisa G. Nouri

2526 Holmes Street

Kansas City, Missouri 64108

Phone: (816) 471-1000

lisanouri_atty@hotmail.com

BY:/s/ Kelley J. Henry

Counsel for Lisa Montgomery

CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that a true and correct copy of the foregoing was served via the court's CM/ECF filing system which served all registered filers by email.

/s/ Kelley J. Henry

Counsel for Lisa Marie Montgomery