

CAPITAL CASE EXECUTION SCHEDULED – JANUARY 12, 2021

No. 20A24

IN THE SUPREME COURT OF THE UNITED STATES

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LISA MONTGOMERY, *APPLICANT*,

v.

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

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SUPPLEMENT TO APPLICATION FOR STAY OF EXECUTION
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The district court noted that the definition for “substantial showing” of inopmptence was not defined. It should be the same standard as required under the AEDPA to appeal from the denial of a 2254 petition, the standard for graning a certificate of appealability (COA).

The standard for granting COA under AEDPA is “materially identical” to that under pre-AEDPA law. *Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997). Prior to AEDPA, the petitioner was required to make “a substantial showing of the denial of [a] federal right.” *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (quoting *Steward v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971)). The *Barefoot* standard does not require that the petitioner show he should prevail on the merits. *Barefoot*, 463 U.S. at 893 n.4. Rather, it has long been understood as a formulation of the nonfrivolity standard. Under that standard, a petitioner was entitled to issuance of a certificate of probable cause where “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further,’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), or when a claim is not “squarely foreclosed by statute, rule or authoritative court decision.” *Barefoot* at 893 n.4 (emphasis added). “In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause . . .” *Id.* at 893.

Under this standard, Mrs. Montgomery made a substantial showing of *Ford* incompetence. Her claims clearly are not frivolous and “deserved encouragement to proceed further.” The lower circuit court applied too high a stanbard for “substantial showing,” and the district court got it right.

Respectfully submitted,

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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