No. 20A124

IN THE SUPREME COURT OF THE UNITED STATES

LISA MONTGOMERY, APPLICANT

v.

T.J. WATSON, WARDEN, ET AL.

(CAPITAL CASE)

RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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PARTIES TO THE PROCEEDING

Applicant (petitioner-appellee below) is Lisa Montgomery.

Respondents (respondents-appellants below) are T.J. Watson, in his official capacity as Warden of United States Penitentiary – Terre Haute; Michael Carvajal, in his official capacity as Director of the Bureau of Prisons; and Jeffrey A. Rosen, in his official capacities as Deputy Attorney General and Acting Attorney General.

III

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Ind.):

Montgomery v. Warden, No. 21-cv-20 (Jan. 11, 2021)

United States Court of Appeals (7th Cir.):

Montgomery v. Watson, No. 21-1052 (Jan. 12, 2021)

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The Acting Solicitor General, on behalf of respondents T.J. Watson, et al., respectfully submits this response in opposition to applicant's application for a stay of her execution, which is scheduled for today.

Applicant filed her underlying petition for a writ of habeas corpus on the evening of Friday, January 8 -- less than four days before her scheduled execution -- contending that she is not competent to be executed under this Court's decision in Ford v. Wainwright, 477 U.S. 399 (1986). At about 10:30 p.m. last night, the district court issued a stay of execution. App., infra, 1a-21a. This afternoon, a panel of the United States Court of Appeals for the Seventh Circuit unanimously vacated that stay on two separate grounds. Id. at 81a-83a. First, it concluded that she has failed to make a strong showing of a likelihood of success on the merits of her underlying Ford claim. Id. at 82a. Second, it concluded that she has not overcome the "strong equitable

presumption that no stay should be granted where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of stay." Ibid. (quoting Bucklew v. Precythe, 139 S. Ct. 112, 1134 n.5 (2019) (internal quotation marks and citation omitted)).

This Court has repeatedly explained that "last-minute" stays of execution "'should be the extreme exception, not the norm.'" Barr v. Lee, 140 S. Ct. 2590, 2591 (2020) (citation omitted). It should deny applicant's request so that her execution can "proceed as planned." Id. at 2592.

Applicant was convicted and sentenced to death 13 years ago for strangling a pregnant woman to death and kidnapping her baby by cutting it out of her body while the woman was still alive. She is scheduled to be executed today. In preparation for the execution, she was transferred yesterday evening from a federal women's prison in Texas to the federal execution facility in Indiana. Multiple members of the murdered woman's family are currently in Indiana to witness the execution.

Applicant's execution date was first announced on October 16, 2020. Within 12 days, applicant had indicated she would challenge her competency to be executed under this Court's decision in Ford v. Wainwright, 477 U.S. 399 (1986). But -- tacitly conceding the weakness of her claim -- she did not file a petition for a writ of habeas corpus asserting her Ford claim until the evening of Friday,

January 8, 2021. She thereby sandbagged the government and the courts, by undermining the government's ability to comprehensively demonstrate, at the eleventh hour, that the hundreds of pages of materials she proffered with her petition do not make any threshold showing of her incompetence under Ford.

The district court rewarded her egregious ploy to evade her lawful death sentence, enjoining the government from carrying out the execution until the court holds a competency hearing, which the court stated it would schedule "in due course." App., infra, 21a. As the court of appeals correctly concluded, the district court's "last-minute" stay of execution is fundamentally flawed in two independent respects. Lee, 140 S. Ct. at 2591.

First, applicant cannot establish a likelihood of success on her Ford claim. App., infra, 82a. Her asserted lack of competence is based largely on evidence about her mental history developed during previous proceedings that did not address the relevant question now: whether she is currently "unable to rationally understand the reasons for [her] sentence." Madison v. Alabama, 139 S. Ct. 718, 727 (2019). And although she offers three "expert" opinions about her current condition, none of those experts has actually examined applicant in years, not even by videoconference. They are relying on her counsel's statements about her supposedly deteriorating condition. Those statements not only fail to connect any currently reported symptoms to the constitutional standard,

but are contradicted by unbiased evidence of her current condition. Applicant has made multiple statements during telephone calls with family members in recent weeks and months demonstrating that she understands her situation quite well and is hoping that one of her pending challenges will simply postpone her execution date until at least January 20.

Second, the balance of equities weighs overwhelmingly against halting applicant's execution, and in favor of vacating the stay entered by the district court. Applicant was sentenced to death 13 years ago for a crime of staggering brutality. She has exhaustively litigated challenges to her conviction and sentence, all of which have failed. She had signaled her intention to challenge her competency under Ford for months. Yet she waited until Friday to bring her claim. The only purpose served by that delay was to prevent the government from subjecting applicant's last-minute claim of incompetency to scrutiny it would not survive.

At the least, applicant has offered no reason for her tardiness that would remotely justify postponing her execution. "[W]here a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," there is a "strong equitable presumption that no stay should be granted." Bucklew, 139 S. Ct. at 1134 n.5 (citation and internal quotation marks omitted). Because applicant provides no legitimate basis for waiting until less than four days before her

execution to file her petition, she cannot overcome that presumption. The victim's family, her community, and the Nation "deserve better." Id. at 1134. This Court should allow applicant's execution to "proceed as planned." Lee, 140 S. Ct. at 2592.

STATEMENT

1. In April 2004, applicant and Bobbie Jo Stinnett met at a dog show. Stinnett maintained a website to promote her dog-breeding business, which she ran out of her home. In the spring of 2004, Stinnett became pregnant and shared that news with her online community, including applicant. United States v. Montgomery, 635 F.3d 1074, 1079 (8th Cir. 2011).

Around that time, applicant, who was herself unable to become pregnant because she had been sterilized years earlier, falsely began telling people that she was pregnant. Applicant said that she had tested positive for pregnancy, and she began wearing maternity clothes and behaving as if she were pregnant. Applicant's second husband and her children were unaware of her sterilization and believed that she was pregnant. Montgomery, 635 F.3d at 1079-1080.

On December 15, 2004, when Stinnett was eight months pregnant, applicant contacted Stinnett via instant message using an alias and expressed interest in purchasing a puppy from her. The women arranged to meet the following day. The following day, applicant

drove from her home in Melvern, Kansas, to Stinnett's home in Skidmore, Missouri, carrying a white cord and sharp kitchen knife in her jacket. Montgomery, 635 F.3d at 1079.

When applicant arrived, she and Stinnett initially played with the puppies. But sometime after 2:30 p.m., applicant attacked Stinnett, using the cord to strangle her until she was unconscious. Applicant then cut into Stinnett's abdomen with the knife, which caused Stinnett to regain consciousness. A struggle ensued, and applicant again strangled Stinnett with the cord, this time killing her. Applicant then extracted the baby from Stinnett's body, cut the umbilical cord, and left with the child. Stinnett's mother arrived at Stinnett's home shortly thereafter, found her daughter's body covered in blood, and called 911. Stinnett's mother said the scene looked as if Stinnett's "stomach had exploded." Montgomery, 635 F.3d at 1079-1080.

The next day, December 17, 2004, state law-enforcement officers arrived at applicant's home, where applicant was sitting on the couch, holding the baby. An officer explained that they were investigating Stinnett's murder and asked about the baby. Applicant initially claimed that she had given birth at a clinic in Topeka, but later admitted to that lie and told another one. She claimed that, unbeknownst to her husband, she had given birth at home with the help of two friends because the family was having financial problems. When asked for her friends' names, applicant

said that they had not been physically present but had been available by phone if difficulties arose. Applicant asserted that she had given birth in the kitchen and discarded the placenta in a creek. Montgomery, 635 F.3d at 1080.

At some point, applicant requested that the questioning continue at the sheriff's office. Once there, applicant confessed that she had killed Stinnett, removed the baby from her womb, and abducted the child. The baby was returned to her father. Montgomery, 635 F.3d at 1080.

2. On December 17, 2004, the government filed a criminal complaint charging applicant with kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (2000). Compl., United States v. Montgomery, No. 05-cr-6002 (W.D. Mo.) (Dec. 17, 2004). Shortly thereafter, in January 2005, a federal grand jury indicted applicant on one count of kidnapping resulting in death. Indictment 1, Montgomery, No. 05-cr-6002 (W.D. Mo.) (Jan. 12, 2005). The indictment included special findings (id. at 1-4) required under the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq., for charges as to which a capital sentence is sought. See also Superseding Indictment 1-3, Montgomery, No. 05-cr-6002 (W.D. Mo.) (Mar. 13, 2007).

After trial, the jury unanimously found applicant guilty of kidnapping resulting in death and recommended a capital sentence. Montgomery, 635 F.3d at 1085. The district court sentenced

applicant in accord with that recommendation. Ibid. The court of appeals affirmed, 635 F.3d 1074, and this Court denied certiorari, Montgomery v. United States, 565 U.S. 1263 (2012) (No. 11-7377).

In 2012, applicant sought post-conviction relief under 28 U.S.C. 2255. After holding an evidentiary hearing, the district court denied relief and further denied a certificate of appealability (COA). See Order, Montgomery v. United States, No. 12-8001 (W.D. Mo. Mar. 3, 2017); Order, Montgomery, No. 12-8001 (Dec. 21, 2015). The court of appeals similarly denied a COA and dismissed applicant's appeal. Judgment, Montgomery v. United States, No. 17-1716 (8th Cir. Jan. 25, 2019). This Court denied certiorari. Montgomery v. United States, 140 S. Ct. 2820 (No. 19-5921) (May 26, 2020).

3. On October 16, 2020, the Director of BOP designated December 8, 2020, as the date for applicant's execution. D. Ct. Doc. 444, United States v. Montgomery, No. 05-cr-6002 (W.D. Mo.). At the time of her designation and through the time that she filed her habeas petition, applicant was confined at FMC Carswell, in Fort Worth, Texas. Montgomery v. Barr, No. 4:20-CV-01281-P, 2020 WL 7353711, at *1 (N.D. Tex. Dec. 15, 2020). She has since been transferred to FCC Terre Haute, in preparation for her execution.

On October 28, 2020, 12 days after her impending execution was announced, applicant told the District Court for the District

of Columbia that she intended to challenge her competency to be executed:

> Whether [applicant] is psychiatrically competent to be executed is not at issue in this suit, but will be addressed in an appropriate forum pursuant to Madison v. Alabama, 139 S. Ct. 718 (2019).

Proposed Complaint, In re Fed. Bureau of Prisons Execution Protocol Litig. (Protocol Cases), 1:19-mc-145 (D.D.C. Oct. 28, 2020), D. Ct. Doc. 303-1. The suggestion prompted the United States Attorney for the Western District of Missouri to write applicant's current counsel, on November 13, 2020, to coordinate a fair and expeditious adjudication of any competency claim:

> On October 28, 2020, you filed a proposed complaint in the United States District Court for District of Columbia stating that, "Whether [applicant] is psychiatrically competent to be executed is not at issue in this suit, but will be addressed in an appropriate forum pursuant to Madison v. Alabama, 139 S. Ct. 718 (2019)." As we are currently fewer than four weeks from her execution date, could you please advise whether a suit raising such a claim will be filed, and if so, in which judicial district the suit will be filed? My office will assist with the Government's [response] to such a claim, and this information will greatly aid with ensuring a prompt and orderly adjudication.

D. Ct. Doc. 13-7, at 2. Applicant's counsel never responded.

Applicant subsequently filed two more suits in the District of Columbia, presenting additional arguments for delaying her execution, one of which resulted in a preliminary injunction to afford her counsel, who were suffering from COVID at the time, additional time to prepare a clemency petition. Under the injunction, the government was precluded from carrying out

applicant's execution before December 31, 2020. Montgomery v. Barr, 20-cv-3261, 2020 WL 6799140, at *11 (D.D.C. Nov. 19, 2020). On November 23, 2020, in compliance with that injunction, the BOP Director designated January 12, 2021, as applicant's new execution date. D. Ct. Doc. 445, Montgomery, 5:05-cr-6002 (W.D. Mo.).

Applicant has used the intervening weeks to raise various regulatory and constitutional claims about the scheduling of her execution and her planned transfer to Terre Haute, in the Southern District of Indiana. See, e.g., Montgomery v. Barr, No. 4:20-cv-1281, 2020 WL 7353711 (N.D. Tex. Dec. 15, 2020); Montgomery v. Rosen, No. 20-cv-3261, 2020 WL 7695994 (D.D.C. Dec. 24, 2020), summarily reversed, No. 20-5379, 2021 WL 22316 (D.C. Cir. Jan 1, 2021), reh'g en banc denied, No. 20-5379 (D.C. Cir. Jan. 5, 2021), petition for writ of certiorari filed, No. 20-922 (U.S. Jan. 9, 2021); Montgomery v. Rosen, No. 20-cv-3261, 2021 WL 75754 (D.D.C. Jan. 8, 2021), stay granted, No. 21-5001 (D.C. Cir. Jan. 11, 2021) (en banc), motion for stay or vacatur pending, No. 20A122 (U.S. filed Jan. 12, 2021); United States v. Montgomery, No. 05-cr-6002 (W.D. Mo. Jan. 10, 2021), D. Ct. Doc. 451, stay , No. 21-1074 (8th Cir. filed Jan. 11, 2021).

On January 7, 2021, applicant's counsel wrote government officials to request a delay of applicant's execution, asserting that they "have a legal and ethical obligation to evaluate [applicant's] current mental state to determine the existence of

any potential Eighth Amendment claims." D. Ct. Doc. 13-10, at 2. The officials declined to delay the execution, explaining:

> We informed you almost two months ago when you first requested a delay of [applicant's] execution date that the Bureau of Prisons would facilitate remote communication to assist counsel and others (such as medical experts) with whatever access you desire. However, you have not made any requests for such access during this time. We will continue to accommodate requests moving forward.

D. Ct. Doc. 13-11, at 2.

4. On the following evening of Friday, January 8, 2021, applicant filed a petition for a writ of habeas corpus under 28 U.S.C. 2241. D. Ct. Doc. 1. The district court ordered the government to respond by 11:59 p.m. on Sunday, January 10, 2021. D. Ct. Doc. 6. At 3:40 p.m. on Saturday, applicant filed a "corrected" petition for a writ of habeas corpus, including several appendices which had been omitted from the initial petition, followed by a motion to stay. D. Ct. Doc. 11, 12.

Applicant's habeas petition asserts two related claims. First, she claims that carrying out her scheduled execution would violate the Eighth Amendment under Ford v. Wainwright, 477 U.S. 399 (1986), because as a result of mental illness, she lacks a rational understanding of the government's rationale for executing her. Second, she argues that it would violate due process to carry out the execution without permitting her attorneys and mental health experts to evaluate her competency face-to-face, which she claims they have been unable to do during the pandemic.

Late last night, the district court granted applicant's motion for a stay of execution, concluding that three affidavits submitted by applicant established the "substantial threshold showing of insanity" to warrant a competency hearing under Ford. App., infra, 15a, 21a. The court acknowledged that none of applicant's experts had observed or spoken to applicant in years and relied on applicant's counsel for reports of her current condition. But it reasoned that experts "may rely on the statements of laypeople" if other experts in their area of expertise would "customarily rely on" such statements. Id. at 17a. The court excused applicant's delay in raising her Ford claim, reasoning that "the timing is not unreasonable" given applicant's current state, the history of this litigation, and "what's at stake." Id. at 20a. The court thus granted the motion and announced it would "set a time and date for the hearing * * in due course." Id. at 21a; see also id. at 77a (separate order entered this morning, "staying the execution" and "enjoin[ing]" respondents from executing applicant "until further order of th[e] Court") (capitalization altered).

5. This afternoon, as explained above, the court of appeals unanimously vacated the district court's stay on two separate grounds. App., infra, 81a-83a.

ARGUMENT

In evaluating applicant's request for a stay, the Court must determine whether applicant is likely to succeed on the merits and which side the equities support. See Nken v. Holder, 556 U.S. 418, 434 (2009); San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). Here, those considerations squarely support the court of appeals' decision to vacate the district court's stay, given applicant's failure to establish a likelihood of success on the merits, her egregious delay in bringing her claim, and the profound public interest in implementing applicant's lawfully imposed sentence without further delay. Particularly given the extensive preparations that have taken place, and the fact that the victim's family members are currently in Terre Haute to witness justice for applicant's victim, this Court should vacate the district court's unsupportable "last-minute" injunction and allow the execution to "proceed as planned." Barr v. Lee, 140 S. Ct. 2590, 2591-2592 (2020).

I. APPLICANT HAS NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

Applicant principally contends (at 1-2) that the court of appeals should not have vacated the district court's reasoned decision. But, to justify a stay of execution, a prisoner must make a "strong showing" that she is likely to succeed on the merits. Nken, 556 U.S. at 434.

A. The court of appeals correctly concluded that applicant cannot establish a likelihood of success on the merits on her Ford claim.

Because a prisoner "must have been judged competent to stand trial" "in order to have been convicted and sentenced," the government "may properly presume that [a prisoner] remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process." Ford v. Wainwright, 477 U.S. 399, 425-426 (1986) (Powell, J., concurring). Before applicant is entitled to a hearing, she therefore must first make a substantial threshold showing that she is unable to "reach a rational understanding of the reason for his execution," Madison v. Alabama, 139 S. Ct. 718, 723 (2019) (internal quotation marks omitted). See Panetti v. Quarterman, 551 U.S. 930, 949 (2007). Contrary to the district court's reasoning, applicant's proffered declarations by experts who have not observed or interacted with applicant for at least four years cannot make that showing. Each of those declarations should have been rejected for three reasons.

First, the opinions do not comport with the applicable professional standards for assessing competency. As the district court recognized, the experts rely "on a combination of the relevant scientific literature, past direct observations of [applicant], and descriptions of [her] current behavior relayed by

her counsel." App., infra, 15a. In other words, although each purports to opine on applicant's current competency, none has had any recent direct observation or communication with applicant. Indeed, neither Dr. Porterfield nor Dr. Wood has observed applicant since 2016. Id. at 22a, 27a-28a. And Dr. Kempke, whose opinion the court found "especially probative," id. at 17a, last treated applicant more than a decade ago in 2010, and does not even claim to have received her medical records, id. at 65a.

The district court concluded that those opinions were nevertheless reliable on the ground that experts may "rely on any evidence" that other experts in their field "customarily rely on." App., infra, 17a (citation omitted). But as Dr. Pietz explained (and applicant has not denied), while "it is appropriate and consistent with the specialty guidelines for forensic psychology for an evaluator to discuss with attorneys their concerns regarding their client's competency, no professional evaluating competency should rely solely on that information and historical clinical evaluations in making a determination as to current competency." Id. at 38a-39a (emphasis added). Consequently, as Dr. Pietz further explained, Dr. Porterfield's and Dr. Woods's opinions concerning applicant's current competency "do not appear to have been based on sufficient, current facts or data to conform to any known professional standards for evaluating competency." Id. at 39a. And although applicant submitted Dr. Kempke's declaration

only after the government's district-court submission, id. at 11a n.4, it suffers from the same flaws. The failure of applicant's proffered experts to reliably apply generally accepted principles and methods is sufficient ground to disregard their opinions entirely. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).[1]

Second, the doctors' decision to rely primarily on second-hand reports for information about applicant's current symptoms is only made worse when one considers the likely veracity of their sources: statements made by a condemned prisoner with a history of exceptional deception funneled through her own attorneys. This is double hearsay of the most unreliable form.

Applicant's history of manipulation and deception is well established. After undergoing a sterilization procedure in 1990, applicant falsely claimed to have had four more pregnancies. Montgomery, 635 F.3d at 1081. In carrying out the gruesome murder

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[1] The district court noted that Dr. Porterfield and Dr. Woods claim to have been prevented from conducting a current in-person evaluation of applicant due to the COVID-19 pandemic. App., infra, 11a. But as Dr. Pietz explains, competency evaluations can and are being conducted remotely via videoconference, consistent with professional standards. Id. at 37a. Indeed, one of applicant's own experts (who the district court does not mention) acknowledged that during the pandemic, he has "conduct[ed] telemedicine interviews for the purpose of evaluating competence." Id. at 75a. Even if applicant's other experts reasonably could not travel, they cannot possibly justify their decision to rely almost exclusively on hearsay, rather than interact directly with applicant via videoconference, the next-best option to an in-person meeting.

of Bobbie Jo Stinnett, applicant used an alias to contact Stinnett online and feign interest in purchasing a puppy. Id. at 1079. After the murder, applicant told her husband "that she had gone into labor while Christmas shopping and that she had given birth at a women's clinic in Topeka." Id. at 1080. After announcing the birth of "their daughter" to friends and family, she lied to the police by claiming to have given birth in her kitchen at home and "disposed of the placenta in a nearby creek." Ibid.

For their part, applicant's counsel have previously been "admonished" "for their improper and unprofessional conduct" in applicant's Section 2255 proceedings. Order at 127-128, Montgomery v. United States, 12-cv-8001 (W.D. Mo. Mar. 3, 2017), D. Ct. Doc. 212. Among other things, Judge Fenner pointed to "the inappropriate and false description of trial counsel's performance during voir dire," "the false accusation that [one of the government's experts] committed perjury," "the twisted interpretation of the record to accuse trial counsel of discrimination," and "the accusation that [two experts] presented false testimony without any support for that claim." Id. at 122-123. He concluded that "[h]abeas counsel in the instances cited acted with disregard for the personal and professional reputation of individuals involved in the handling of this case," and found "no excuse to ignore professional decorum and conduct one's self

without regard for anything other than one's cause." Id. at 127-128 (emphasis added).

Opinions based on such facially unreliable information cannot support a substantial threshold showing of incompetency. See, e.g., Dallas & Mavis Forwarding Co., Inc. v. Stegal, 659 F.2d 721, 722 (6th Cir. 1981); see also Montgomery v. Barr, No. 20-cv-3214, 2020 WL 6939808, at *7 (D.D.C. Nov. 25, 2020) (McFadden, J.) (expressing skepticism that "a declaration filled with hearsay statements from applicant -- a condemned prisoner with a history of dishonesty -- through an attorney who has been admonished by another federal court for unprofessional conduct" "could justify the relief [applicant] seeks").

Third, the opinions of applicant's experts are conclusory about the relevant question and offer no insight into applicant's ability to understand the reasons for her execution. They opine that applicant is mentally ill, and recite that applicant's lawyers have said she is exhibiting symptoms of mental illness. What matters, however, is not the kind of mental impairment that a prisoner may have, but its "downstream consequence." Madison, 139 S. Ct. at 729. Thus, a prisoner may have delusions or dementia that do not "interfere with the understanding that the Eighth Amendment requires." Id. at 729.

Even assuming that applicant has had dissociative episodes manifesting in things such as "auditory hallucination," "lapses of

time," and uncertainty about "what is real," App., infra, 16a,[2] that does not mean that she is, as the district court erroneously credited her experts with establishing, "so divorced from reality that she cannot rationally understand the government's rationale for her execution," id. at 18a. Applicant's recent medical records do not suggest that she is presently suffering from any symptoms of mental illness that would impair her ability to comprehend her legal situation or interact with her attorneys. Id. at 38a. Rather, applicant "understands her current legal situation, legal options, that she is going be executed, and that execution means death." Ibid.

In any event, the opinions of applicant's experts are contradicted by recent evidence reflecting applicant's ability to understand reality and her impending punishment. As the district

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[2] To be clear, applicant's detailed, contemporaneous psychology records provide ample reason to doubt those assertions. Applicant has been under constant observation since October 16 and, every day, a licensed psychologist evaluates her and reviews staff reports of her behavior. App., infra, 46a. These psychologists note that applicant's thought process have been organized and her thought content has been without abnormality or overt delusional content. Id. at 43a. "Providers have consistently noted that there were no signs of psychosis or symptoms of severe mental illness observed." Ibid. The only providers actually "familiar with [applicant's] clinical presentation" since 2016 note that there are no signs that applicant has delusions or hallucinations. Id. at 38a. Applicant's current mental health diagnoses are "unspecified personality disorder, unspecified mood [affective] disorder, and posttraumatic stress disorder." Id. at 43a. She takes one antipsychotic drug, but only "for mood," not psychosis. Id. at 45a.

court acknowledged, the government presented "relevant contrary evidence," including that applicant "understands that she is supposed to be executed soon." App., infra, 18a. The court sought to minimize that evidence by suggesting it does not indicate "that she rationally understands the meaning and purpose of the punishment." Ibid. (internal quotation marks omitted). But her recent telephone conversations with family members squarely refute the district court's principal inference that she is fundamentally "divorced from reality" -- much less from matters reflecting on the rationale for her punishment. Id. at 15a.

Applicant is acutely aware of various legal challenges she has brought, discussing in recent weeks such things as her approval of representation by additional counsel who are "doing it for free" (Dec. 14), legal claims of hers that were still outstanding (Jan. 2), and her petition for clemency or a reprieve (Jan. 2). App., infra, 59a, 61a, 62a-64a. She is following political developments that could affect her case, telling her sister that she is keeping track of the days remaining until January 20 (Dec. 14). Id. at 60a; see id. at 49a (Aug. 6) ("[I]f Biden becomes president he said * * * he'll abolish the death penalty"). She is aware that she would be a rare example of a woman executed by the federal government (Sept. 1). Id. at 54a. And she is aware that her execution will mean that she will have final calls with some members of her family and that others will be witnesses (Jan. 2),

and further that she will need to be cremated, which she found "really helpful" to discuss with the prison chaplain (Dec. 14). Id. at 60a, 63a.

Moreover, applicant's telephone calls specifically indicate that she understands that she is being punished for her crime. She understands that she has a criminal "sentence" for "[o]ne big" charge (Aug. 13) and is subject to "the death penalty" (Aug. 6). App., infra, 49a, 50a. She acknowledged it is "true" that she "went off the path for a minute" (Dec. 17). Id. at 61a. She marked the recent anniversaries of her crime and her arrest (Dec. 14, 17). Id. at 60a, 61a. She took comfort from Psalm 107:14, because it says God will burst the bonds of those in "the shadow of death" (Nov. 2). Id. at 55a. And she is aware of the connections between crime and punishment, as she noted that her ex-husband would be "going down for a long time" because of the evidence against him in a new criminal case (Nov. 10). Id. at 56a. Although she further suggested to her daughter that she is less culpable than her ex-husband because she "did not know what [she] was doing" when she committed her crime (Nov. 26), id. at 58a, that defense was discredited at trial. Montgomery, 635 F.3d at 1083-1085.

If anything, the government's evidence about applicant's understanding speaks more directly to the material question under Ford -- whether she understands the rationale for her punishment

-- than does her generic and conclusory evidence about potential dissociative episodes. She clearly does not misunderstand what a death sentence means, nor does she believe that the government is punishing her for a reason unrelated to her crime. And of course, applicant prevented the government (and her own experts) from gathering even more specific evidence about this question by waiting until the last minute to file her claim. Simply put, applicant cannot make a substantial threshold showing of incompetency -- let alone on the eve of a scheduled execution -- merely because her lawyers have relayed to her doctors that she claims such things as to be hearing voices.

B. Applicant also asserts (at 14-18) a derivative claim that she has been deprived of due process because her expert witnesses were unable to travel during the COVID-19 pandemic to conduct in-person examinations of her. Having found that applicant is entitled to a hearing, the district court did not address that claim, but it lacks merit.

As an initial matter, applicant misapprehends the applicable due process standard by relying (at 14) on Justice Marshall's plurality opinion in Ford. As the Court later held in Panetti, the controlling opinion in Ford on the issue of procedure is Justice Powell's concurrence, not Justice Marshall's plurality opinion. See Panetti, 551 U.S. at 949 (citing Marks v. United States, 430 U.S 188, 193 (1977)). Justice Powell explained that

he "would not require the kind of full-scale 'sanity trial' that JUSTICE MARSHALL appears to find necessary." Ford, 477 U.S. at 425 (Powell, J., concurring). "Due process is a flexible concept, requiring only such procedural protections as the particular situation demands." Ibid. (internal quotation marks omitted). Under that standard, the government may presume that applicant is competent, and need provide no process until she makes a substantial threshold showing otherwise. Ford, 477 U.S. at 425-26 (Powell, J., concurring); see also Panetti, 551 U.S. at 949.

In any event, applicant's due process claim fails on its own terms. Under the controlling standard, "[o]nce a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." Ibid. She contends (at 15) that "[a]ppointed counsel and their experts [we]re unable to evaluate [her] face-to-face -- without risking their lives." But that allegation fails to show any lack of fundamental fairness in the procedures available for applicant to pursue her Ford claim. Furthermore, as noted above, competency evaluations can and are being conducted by other experts remotely via videoconference, consistent with professional standards. See p. 16 n.1, supra; App., infra, 37a. BOP would have made applicant available for either in-person or remote examinations, but her

experts never sought to conduct either (or find other experts who would). See p. 11, supra.[3]

II. THE BALANCE OF THE EQUITIES OVERWHELMINGLY FAVORS PERMITTING APPLICANT'S EXECUTION TO PROCEED

The balance of the equities weighs strongly in favor of permitting applicant's lawful execution to proceed as scheduled. First and foremost, applicant has not overcome the "strong equitable presumption" against granting a stay in response to her last-minute claim. Bucklew v. Precythe, 139 S. Ct. 1112, 1134 n.5 (2019) (internal quotation marks omitted). This Court has repeatedly emphasized that the public has a "powerful and legitimate interest in punishing the guilty," Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted), and that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a [death] sentence," Bucklew, 139 S. Ct. at 1133 (internal quotation marks omitted). "Only with an assurance of real finality can the [government] execute its moral judgment in a case," and "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out." Calderon, 523 U.S. at 556. "The proper role of courts is" thus to ensure that challenges to the execution of

[3] To the extent that applicant relies (at 16-17) on statistics about COVID-19 cases at Terre Haute, that information is irrelevant to the risks that would have been involved in meeting her at any point during the last several months, since she was not transferred to that facility until yesterday.

"lawfully issued sentences are resolved fairly and expeditiously," and to "police carefully against attempts to use such challenges as tools to interpose unjustified delay." Bucklew, 139 S. Ct. at 1134. Federal courts "can and should" reject "dilatory or speculative suits," Hill v. McDonough, 547 U.S. 573, 585 (2006), and ensure that "[l]ast-minute stays should be the extreme exception, not the norm," Bucklew, 139 S. Ct. at 1134.

Those principles apply equally to claims that may first arise as an execution nears. In Dunn v. Ray, 139 S. Ct. 661 (2019), for example, the Court vacated a stay because the death-row inmate waited until ten days before his execution date to challenge a restriction on having a spiritual advisor in the execution chamber itself, even though the date of the execution had been set nearly three months earlier. See Bucklew, 139 S. Ct. at 1134 n.5. And the Sixth Circuit has vacated a district court's stay when an inmate first raised his Ford claim eight days in advance of his execution -- four days sooner than applicant brought hers. See Bedford v. Bobby, 645 F.3d 372, 376-377 (2011).

As explained above, applicant was first notified of her impending execution date nearly three months ago. And the current execution date of January 12, 2021, was established on November 23, 2020, after the first date was delayed to permit her counsel additional time to file a clemency application on her behalf. Yet

applicant inexplicably waited until the Friday evening before her Tuesday execution to file her petition.

Applicant has advanced no reason why she could not have filed her claims several weeks ago, when she was raising various other claims in other courts. She simply asserts (at 12-13) that she could not have brought her claim "much earlier" because "an individual could decompensate into Ford incompetence at any time before a scheduled execution." But she points to no evidence indicating that her condition materially changed only in the last several days. The record shows that applicant had long planned to bring a Ford claim. On November 13, 2020, government officials offered to "aid with ensuring a prompt and orderly adjudication" of such a claim. D. Ct. Doc. 13-7, at 2. Rather than agree to an orderly resolution (or respond at all to that offer), applicant lay in wait for nearly two more months before filing her habeas petition.

While purporting to be "mindful about the possibility of strategic litigation," App., infra, 20a, the district court manufactured a reason for applicant's delay. In her habeas petition, applicant asserts that individuals "can be at risk of deteriorations in their mental states" as an execution nears. D. Ct. Doc. 11, at 85 (emphasis added). The district court speculated that applicant's condition may actually have deteriorated when, on January 1, 2021, the D.C. Circuit reversed

another stay of execution and her January 12 execution date became "relatively set in stone." App, infra, 20a. But nothing in applicant's petition or evidence supports that speculation.

To the contrary, the overwhelming majority of the proffered evidence is from her 2008 trial and her 2012 post-conviction litigation. See, e.g., D. Ct. Doc. 11, at 15 (trial testimony); id. at 21, 24, 43, 51, 63 (post-conviction testimony). And the three recent affidavits, on which the district court relied, themselves heavily depend on the same outdated information and provide no indication that applicant has undergone any change in the last several days that might justify the eleventh-hour claim. See, e.g., App., infra, 33a (claiming that applicant's "context changed dramatically" when the execution date was initially set in October); cf. id. at 23a (noting that her attorneys have not visited applicant since November).[4]

Had applicant timely filed her Ford claim, the parties could already have developed the facts and the district court would have had the opportunity to determine applicant's competency on a full,

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[4] The district court found it "worth noting" that two of applicant's attorneys previously experienced serious COVID-19 symptoms. App., infra, 20a. But applicant is represented by many more attorneys who have continued to litigate zealously on her behalf, and "courts across the country have declined to delay executions for pandemic-related reasons." Hall v. Barr, No. 20-cv-3184-TSC, 2020 WL 6743080, at *5 (D.D.C. Nov. 16, 2020) (citing examples), aff'd, 830 Fed. Appx. 8 (D.C. Cir. Nov. 19, 2020), stay and petition for certiorari denied, Nos. 20-688 and 20A100, 2020 WL 6798776 (U.S. Nov. 19, 2020).

adversarial record and without a stay. Instead, she forced the district court, the court of appeals, and this Court either (1) to deny (or vacate) a stay, and thus effectively the claim, without the possibility of any meaningful factual development or (2) to grant (or affirm) a stay and delay the execution of a lawful sentence based solely on allegations and expert declarations that rely on unreliable hearsay that cannot be tested.

The district court chose the latter course, concluding that neither the "possibility" of strategic litigation nor delay outweighs "the need for a stay" when "counsel has made a threshold showing" of incompetence. App., infra, 20a. But there is no exception to equitable principles for last-minute Ford claims. And had applicant's counsel truly believed in the strength of their threshold showing, they would have brought this claim when there was still time for full adversarial testing. Their failure to do so speaks volumes.

On the other side of the balance, the public's "interests have been frustrated in this case." Bucklew, 139 S. Ct. at 1133. Applicant committed her crime more than 16 years ago, and has exhausted all permissible opportunities for further review of her conviction and sentence. Nevertheless, her execution has already been delayed once by a district court based on a (legally baseless) claim that two of her attorneys were temporarily unavailable to work on a clemency petition, and she now seeks still further delay

for a competency hearing that should have and could have been held, if at all, months or weeks ago.

Nor is the harm to the government and the public mitigated in a meaningful way by the fact that applicant's legal claim may only entitle her to a limited period of delay. Cf. Barr v. Hall, No. 20A102, 2020 WL 6797719, at *1 (U.S. Nov. 19, 2020) (vacating brief stay designed to permit additional findings). Even minor delays can inflict serious psychological harms on the families of victims -- including the family members in this case who are already waiting in Terre Haute to witness the execution.[5] Delay also amplifies the substantial logistical challenges that inhere in any execution, even absent last-minute injunctive relief. Matters are only made worse by the district court's vague promise to set a time for the competency hearing "in due course." App., infra, 21a.

The balance of equities does not support relief. Applicant committed one of the most horrific crimes imaginable: strangling a pregnant mother to death and cutting her premature baby out of her stomach to kidnap the child. Applicant does not challenge her conviction for the kidnapping and murder she committed "in an especially heinous or depraved manner," United States v.

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[5] See also Alan Van Zandt, "People Gather in Skidmore to Remember Bobbie Jo Stinnett," KQ2.com (Dec. 9, 2020), https://www.kq2.com/content/news/People-in-Skidmore-gather-to-remember-Bobbie-Jo-Stinnett-573340761.html (noting candlelight vigil for applicant's victim on original execution date).

Montgomery, 635 F.3d 1074, 1095-1096 (8th Cir. 2011), nor does she challenge her sentence of death or even the protocol that will be used in her execution. Applicant's eleventh-hour request to delay the execution for a competency hearing based on outdated evidence and unreliable hearsay is too little, much too late. This Court should deny applicant's motion so that her execution may "proceed as planned." Lee, 140 S. Ct. at 2592.

CONCLUSION

The application for stay of execution should be denied.

Respectfully submitted.

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Acting Solicitor General

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