CAPITAL CASE
EXECUTION SCHEDULED – JANUARY 12, 2021

No. 20A125

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Applicant,
v.

LISA MARIE MONTGOMERY.

OPPOSITION TO APPLICATION TO VACATE STAY OF EXECUTION PENDING APPEAL

The Government seeks to execute Lisa Montgomery **today, January 12, 2021**. This afternoon, a panel of the Eighth Circuit issued a stay of Mrs. Montgomery's execution to permit consideration of her claim that the express terms of the district court's final judgment render her execution today unlawful. The Eighth Circuit's entry of a stay to consider the legal violation raised by Mrs. Montgomery was unquestionably correct. The Executive Branch cannot put her to death in violation of the criminal judgment that permits that sentence in the first place.

The judgment in Mrs. Montgomery's case includes a stay that has not been lifted. The judgment further states when the sentence of death must be executed. It is undisputed that *either* the stay remains in place, precluding Mrs. Montgomery's execution until the stay is lifted; *or* that the stay was lifted three years ago, making Mrs. Montgomery's execution today untimely. Mrs.

Montgomery's appeal to the Eighth Circuit raises the simple question whether the Government may execute a person in violation of the plain terms of the criminal judgment entered against them.

The answer is obviously no, and the Government all but concedes the point. The Eighth Circuit has already determined the district court's order refusing to comply with the judgment will likely be reversed on appeal, that Mrs. Montgomery will suffer irreparable harm absent a stay, and that the balance of the equities and public interest weigh heavily against allowing the Government to prematurely execute Mrs. Montgomery in violation of the law. The plain text of the sentencing court's judgment makes the unlawfulness of an execution today undisputable. The Government's extraordinary request to vacate the stay and execute Mrs. Montgomery tonight is a shocking invitation to lawlessness.

Mrs. Montgomery is likely to succeed on the merits of her claim because the Government has designated her date of execution in violation of the express terms of the district court's criminal judgment. Mrs. Montgomery was sentenced to death in April 2008. *United States v. Montgomery*, 635 F.3d 1074, 1079 (8th Cir. 2011). The district court entered judgment on April 4, 2008 (the "Judgment"), ordering that "[i]f an appeal is taken from the conviction or sentence, execution of the judgment *shall be stayed pending further order* of th[e] [district court] upon receipt of the Mandate of the Court of Appeal," and that the execution "shall not be sooner than 60 days nor later than 90 days after the date of th[e] judgment." Appendix

("App") 4a (emphasis added).[1] All agree that the Government has never sought an order lifting the district court's stay, nor has the district court ever purported to issue such a stay-lifting order. As a result, the court's stay remains in effect. Indeed, for this very reason, in a case concerning a separate challenge to the Government's order designating the January 12 execution date, Judge Randolph Moss on the United States District Court for the District of Columbia expressed serious doubt about the lawfulness of allowing Mrs. Montgomery's execution to go forward today under the plain terms of the district court's final judgment.

The other stay factors likewise weigh in Mrs. Montgomery's favor. The Government primarily argues that their unlawful designation may be disregarded because Mrs. Montgomery supposedly delayed in bringing this claim. But it was the Government's obligation to comply with the law in implementing Mrs. Montgomery's sentence of death. And the claim Mrs. Montgomery asserts now—that the Government must comply with the district court's Judgment, in the face of evidence that it intends to violate that Judgment—did not ripen until after the Government scheduled her execution, at a time when another stay was pending, which precluded that designation on other grounds. At any time, the Government could have sought, but failed to obtain, an order lifting the stay that makes Mrs. Montgomery's execution today unlawful. Fundamental principles of finality and the rule of law demand that the Government honor the terms of a sentence of death.

[1] "Dkt." refers to the district court's docket in *United States v. Montgomery*, 5:05-cr-06002-GAF-1 (W.D. Mo.).

If the stay of execution is lifted now, moreover, Mrs. Montgomery will suffer irreparable harm—she will be executed in clear violation of the Judgment against her, before its terms can be given their only plain meaning, and she will be deprived of the time to which she is entitled to seek clemency and prepare for death. Further, the balance of the equities and public interest weigh heavily against allowing the Government to prematurely execute Mrs. Montgomery in violation of law. Mrs. Montgomery does not contend that the district court's Judgment forever prevents her execution. Rather, following an appropriate motion by the Government, the district court may lift its stay, and then—subject to the notice requirements of the Judgment, the Federal Death Penalty Act, and the relevant federal regulations—Mrs. Montgomery's execution may be scheduled. Mrs. Montgomery's execution can proceed with minimal delay and little prejudice to the Government—but it cannot proceed in violation of the Judgment against her.

The Government asks the Court for permission to avoid ordinary appellate review. The Government's only justification for doing so is that it would like to execute Mrs. Montgomery on the arbitrary date it has selected before her various legal claims—which nearly a dozen federal judges have now concluded are so substantial as to warrant a stay of execution—can be fully adjudicated in the ordinary course. But while the Government assuredly has a "strong interest in enforcing its criminal judgments," *Hill v. McDonough*, 547 U.S. 573, 584 (2006), it has no interest at all in rewriting them—much less in circumventing the normal appellate process to do so. The Government comes nowhere close to meeting the

high bar for this extraordinary relief to permit its rush to execution. The rule of law is of paramount importance in implementing a final judgment of death, and the Government's request should be denied.

BACKGROUND

Mrs. Montgomery was sentenced to death in April 2008. *See Montgomery*, 635 F.3d at 1079. The district court entered judgment on April 4, 2008, ordering that the "time, place and manner of execution are to be determined by the Attorney General, provided that the time shall *not be sooner than 60 days nor later than 90 days after the date of this judgment*." App. 4a (emphasis added). The court further ordered that "[i]f an appeal is taken from the conviction or sentence, execution of the judgment shall be stayed pending further order of this Court upon receipt of the Mandate of the Court of Appeal." *Id.* Mrs. Montgomery appealed the next day, Dkt. 403, automatically staying execution of the Judgment. On April 5, 2011, the Eighth Circuit affirmed, Dkt. 426, and the court of appeals' mandate issued on June 22, 2011, Dkt. 427. It is undisputed that, since the district court's Judgment was entered, the Government has never sought an order lifting the district court's stay, and the district court has never entered an order stating that the stay was lifted. *See* Dkt. 446, at 1-2.

In a different proceeding concerning the separate question whether the Government's decision to designate the January 12, 2021 execution date was proper under the Administrative Procedure Act, Judge Moss of the United States District Court for the District of Columbia recently observed that the district court's

Judgment evidently precluded the Government from carrying out the execution as scheduled. *See* Mem. Op. & Order at 14 n.3, *Montgomery v. Rosen*, No. 20-03261 (D.D.C. Dec. 24, 2020), ECF No. 47; Mem. Op. at 32 n.6, *Montgomery v. Rosen*, No. 20-03261 (D.D.C. Jan. 8, 2021), ECF No. 61. The D.C. district court explained that "it is unclear how the current execution date complies with the sentencing court's order" because the Judgment stayed Mrs. Montgomery's execution "pending further order of [the] Court," and there was not "any evidence that the stay was ever formally lifted." Mem. Op. at 32 n.6, *Montgomery v. Rosen*, No. 20-03261 (D.D.C. Jan. 8, 2021), ECF No. 61. Moreover, even if the stay "did expire automatically upon conclusion of Montgomery's appeal," the court explained, the January 12 execution date would still seem to contravene the Judgment, because more than 90 days will have passed both between (1) the court's Judgment on April 4, 2008, and the current execution date; and (2) "the time Plaintiff's collateral challenges were finally resolved" and the current date. *Id.*

On January 9, 2021, more than nine years after the court of appeals' mandate issued and three days before Mrs. Montgomery's execution is scheduled, the Government returned to the district court in this matter. The Government filed a purported "Notice Regarding Supplemental Authority," informing the court of the D.C. district court's concern. *See* Dkt. 446. In the Government's view, that concern was misplaced because the district court's stay supposedly expired automatically, *sub silentio*, when the court denied Mrs. Montgomery's § 2255 motion on March 3, 2017. *See id.* at 2. The Government invited the district court to "enter an order

confirming that its order denying Section 2255 relief terminated the stay of execution imposed in the judgment." *Id.* at 3.

The next day, Mrs. Montgomery filed a motion to enforce the judgment, requesting that the district court enter an order confirming that its final Judgment precludes the Government from carrying out the execution as scheduled. Dkt. 448. Mrs. Montgomery explained that the January 12, 2021 execution date is irreconcilable with the plain text of the court's 2008 Judgment: The court directed the Government to execute the sentence within 60 to 90 days of when the court's stay was lifted, and the stay has never been lifted. *Id.* at 1-2.

Mrs. Montgomery also responded to the Government's argument that the court's stay somehow expired *sub silentio* when the court denied her § 2255 motion in March of 2017. That order, she explained, never purported to lift the stay—nor could it have, because that would amount to authorizing the Government to execute Mrs. Montgomery while she was actively litigating her § 2255 motion on appeal. Moreover, Mrs. Montgomery noted that even if the Government were correct that the stay automatically expired on March 3, 2017, the January 12, 2021 execution date would then be years beyond the 90-day outer limit set by the Judgment, and therefore improper anyway. There is no conceivable construction of the district court's Judgment that would permit a January 12, 2021 date of execution.

On January 10, 2021, the district court denied Mrs. Montgomery's motion, holding that "in the Court's view, the stay lifted when [the court] denied [Mrs. Montgomery's §] 2255 motion" on March 3, 2017, and that "[t]he Court had no

intention to limit execution of the judgment beyond exhaustion of appeals." Dkt. 451, at 1. The district court also held that, insofar as Mrs. Montgomery's motion sought a stay of execution in the alternative, that request for a stay was denied. *See id.* at 1 n.1.

On January 11, 2021, Mrs. Montgomery appealed and moved for a stay in the Eighth Circuit. Today, the court of appeals granted a stay of execution pending resolution of Mrs. Montgomery's appeal. App. 1a.[2] The Government now asks this Court to vacate that stay so that it can execute Mrs. Montgomery tonight.

ARGUMENT

The standard of review on an application to vacate a stay of execution is highly deferential. A stay of execution is an equitable remedy that lies within a court's discretion. *See Kemp v. Smith*, 463 U.S. 1321 (1983) (Powell, J., in chambers). Where, as here, a court of appeals has granted a stay of execution, "this Court generally places considerable weight on the decision reached by the court[] of

[2] The Government relies (at 3) on *Dunn v. McNabb*, 138 S. Ct. 369, 369 (2017) to argue that the court of appeals' order was not adequately reasoned. But *Dunn* is inapposite. There, the district court expressly concluded that the merits were in "equipoise," such that "a traditional stay of execution" was unwarranted, yet nonetheless granted an All Writs Act Injunction against the execution. *Grayson v. Dunn*, 2017 WL 4638594, at *4 (M.D. Al. Oct. 16, 2017). The court of appeals here did no such thing. Rather, Mrs. Montgomery's motion in the court of appeals invoked only the traditional stay standard, *see Nken v. Holder*, 556 U.S. 418, 426 (2009), so in granting the motion, the court of appeals necessarily found that standard satisfied. Mrs. Montgomery's motion also raised only one legal issue relating the district court's judgment, so the legal basis for the court of appeals' stay is obvious. The merits of that sole legal issue, moreover, are inarguable—as demonstrated by the fact that the Government barely addresses the merits in its application to this Court.

appeals." *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). "Only when the lower courts have clearly abused their discretion in granting a stay should [this Court] take the extraordinary step of overturning such a decision." *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting); *see also Doe v. Gonzales*, 546 U.S. 1301, 1307, 1309 (2005) (Ginsburg, J., in chambers) (denying application to vacate stay entered by court of appeals because "the applicants have not shown cause so extraordinary as to justify this Court's intervention in advance of the expeditious determination of the merits toward which the Second Circuit is swiftly proceeding" (internal quotation marks omitted)).

In evaluating whether to grant a stay of execution, courts consider four factors: "(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, 426 (2009). The Eighth Circuit did not abuse its discretion in holding that these factors weighed in favor of a stay. Mrs. Montgomery has made a strong showing that she is likely to succeed on the merits of her appeal, and the remaining stay factors are also satisfied.

I. The Eighth Circuit Correctly Concluded That Mrs. Montgomery Is Likely To Succeed On The Merits

As the Eighth Circuit necessarily recognized, Mrs. Montgomery is likely to succeed in establishing that the January 12 execution date violates the district

court's Judgment. Mrs. Montgomery's position is compelled by the plain text of the Judgment, as well as the bedrock principle that a final judgment cannot ordinarily be modified, except in limited circumstances that inarguably are inapplicable here. The Government now halfheartedly attempts to pervert these principles under the pressures of a rush to execution—precisely when the rule of law matters the most. That attempt should be rejected.

A. The January 12 Execution Date Is Unlawful

The plain terms of the district court's Judgment make clear that executing Mrs. Montgomery today would be unlawful.

1. The Judgment unambiguously describes in what circumstances Mrs. Montgomery's judgment—in this case, her execution—will be stayed and for how long. It provides that "[i]f an appeal is taken from the conviction or sentence, execution of the judgment *shall be stayed pending further order* of th[e] [district] [c]ourt upon receipt of the Mandate of the Court of Appeal." App. 4a (emphasis added). The Government does not dispute that a stay here was triggered when Mrs. Montgomery took an appeal on April 5, 2008. Nor could it: the Judgment uses the mandatory term "shall," making clear that the stay of her judgment is automatically triggered if, and when, an appeal is taken from the conviction or sentence. The only question then is whether that stay remains in effect to this day.

The answer to that question is plainly yes. In addition to describing the conditions under which a stay is triggered, the Judgment sets out two preconditions that must be met for the stay to lift: the district court must (i) issue a "further

order" and (ii) do so "after receipt of the Mandate of the Court of Appeal." *Id.* No order of the district court satisfies those conditions here. The court of appeals' mandate issued on June 22, 2011. Dkt. 427. Since then, the district court has issued no order stating that the stay of execution has been lifted. *See* Mem. Op. at 32 n.6, *Montgomery v. Rosen*, No. 20-03261 (D.D.C. Jan. 8, 2021), ECF No. 61 (D.C. district court observing that "[t]he sentencing court … stayed execution of its judgment 'pending further order of [the] Court upon receipt of the Mandate of the Court of Appeal[s],' and the parties have not produced any evidence that the stay was ever formally lifted" (citation omitted)).

2. The Government endeavors (at 19-20) to construe the district court's March 3, 2017 order denying Mrs. Montgomery's § 2255 motion in her collateral review proceeding as the qualifying order. That effort founders for at least two reasons.

First, the district court's order denying Mrs. Montgomery's § 2255 motion necessarily *preceded* receipt of this Court's mandate on that motion. Although the district court denied Mrs. Montgomery's § 2255 motion on March 3, 2017, *see* Order, *Montgomery v. United States*, 12-cv-08001-GAF (Mar. 3, 2017), Dkt. 212, Mrs. Montgomery's § 2255 appeal did not become final until the Supreme Court denied rehearing on August 3, 2020, *see Montgomery v. United States*, 141 S. Ct. 199 (2020). The Government appears to argue (at 19-20) that the only relevant mandate was the one concerning Mrs. Montgomery's direct appeal. But Mrs. Montgomery's § 2255 motion was plainly an attack on her "sentence" within the

meaning of the Judgment; after all, the entire purpose of § 2255 is to challenge a "sentence [as] imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255.

Second, on the Government's reading, the Court's Judgment would have allowed the Government to execute Mrs. Montgomery while she was actively litigating her § 2255 motion on appeal. Indeed, on this implausible view, the Judgment arguably *required* the Government to execute Mrs. Montgomery while her appeal was pending, as the Judgment stated that the Government "shall" not execute Mrs. Montgomery "later than 90 days after the date of th[e] judgment." App. 4a. The Government does not (and cannot) contest that federal law plainly prohibits the execution of a federal prisoner while a first collateral attack on the sentence remains pending. But if that is true, then the district court's order denying Mrs. Montgomery's § 2255 could not have started the 60-to-90 day clock for execution of the sentence. *See* 18 U.S.C. § 3596(a) (sentence of death not implemented until after "exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence").[3] Rather, that window was stayed, by

[3] The only case the Government discusses as supposed support for the proposition that the district court's order denying Mrs. Montgomery's § 2255 motion lifted the stay actually cuts against the position it advances here. Stay App. 23. The assertion that the court in *United States v. Vialva*, 6:99-cr-00070-ADA (W.D. Tex. Sept. 11, 2020), construed a "judgment containing language similar to what Montgomery puts at issue here," Stay App. 23, is simply incorrect. The court in *Vialva* based its conclusion on language not present here—in *Vialva*, "the first paragraph of the judgment indicat[ed] that the Government *will* implement Vialva's sentence upon the exhaustion of his appeals." *See* Order on Motion for Injunctive Relief at 6, *United States v. Vialva*, 6:99-cr-070-ADA (W.D. Tex. Sept. 11, 2020),

effect of the Court's Judgment, through exhaustion of Mrs. Montgomery's direct and collateral appeals. And all that is required for that stay to be lifted is an order by the district court that the Government never sought nor obtained.

3. Notably, even if the Government *were correct*—and the district court's March 3, 2017 order denying Mrs. Montgomery's § 2255 motion *was* a "further order" lifting the stay—it *still* would be unlawful to execute Mrs. Montgomery today under the terms of the Judgment. The Judgment is equally clear in setting out the requirements for the execution date itself: "that time shall not be sooner than 60 days nor later than 90 days" after the stay is listed. App. 4a. It has been three years since the district court denied Mrs. Montgomery's § 2255 motion. *See* Order, *Montgomery v. United States*, 12-cv-08001-GAF (Mar. 3, 2017), ECF No. 212. The January 12 execution date is thus years beyond the 90-day outer limit set by the Judgment, even assuming that Judgment was stayed until March 3, 2017. In fact, under the view that the stay lifted in March 2017, the Government would now be forever barred from executing Mrs. Montgomery pursuant to the plain terms of its Judgment.

The Government offers no explanation for how its plan to execute Mrs.

Dkt. 690. That language, the court reasoned, made clear that there were no "limitations placed on the Attorney General's authority to set an execution date … after Vialva had exhausted his appeals." *Id.* The Judgment here contains no such language mandating that the Government "will implement" Mrs. Montgomery's sentence upon the exhaustion of her appeals. To the contrary, the Judgment states unambiguously that "execution of the judgment shall be stayed pending further order of [the district court] upon receipt of the Mandate of the Court of Appeal." App. 4a.

Montgomery three years after the 2017 order accords with the Judgment's command that the execution occur "not … sooner than 60 days nor later than 90 days after the date of th[e] judgment." App. 4a. Instead, the Government urges this Court to simply ignore that time limitation for three reasons, none of which is persuasive.

First, the Government cites the district court's apparent private, subjective intention that in specifying a time limit for execution of its Judgment, the district court "had no intention to limit execution of the judgment" outside that time window. Stay App. 22 (quoting App. 2a). But as this Court has explained, the "subjective intent of the sentence judge … provide[s] a questionable basis for testing the validity of his judgment" and here the terms of the Judgment are pellucid and irreconcilable with the district court's apparent intention. *United States v. Addonizio*, 442 U.S. 178, 187 (1979). Sentences have objective legal meaning. It cannot seriously be disputed that the rule of law constrains the Government to mete out punishment in compliance with the plain terms of the judgment duly entered by a federal court. Absent an enumerated exception to this Court's general command concerning the finality of sentences, judgments cannot be rewritten out of convenience.

Second, the Government argues (at 22) that it may violate the clear time window in the Judgment based on the novel argument that "[n]othing in the judgment purported to prohibit the Government from ever executing the judgment if it did not comply with the initial 90-day deadline." But the Government cites

nothing to support its absurd contention that the terms of a final criminal judgment do not have effect unless a court specifies separate consequences that will flow from noncompliance. The import and meaning of a final judgment is clear on its face: its words must be followed. Indeed, the Government's authority to execute Mrs. Montgomery flows entirely from the sentencing court's judgment.[4]

Third, the Government contends (at 22) that the Court must read the 90-day deadline in view of the "automatic stay imposed by the judgment itself." But that is precisely Mrs. Montgomery's point. The only sensible way to read the deadline in the Judgment is that the 60-to-90 day window begins to run when the Judgment becomes effective, but is tolled during the pendency of the district court's stay. Once the stay is lifted—which will merely require a "further order" of the sentencing court expressly lifting the stay—the Government will be able to move forward with the execution within 60 to 90 days. But the stay has not been lifted. Indeed, the bizarre upshot of the Government's argument that the stay lifted in 2017 is that it will never be able to comply with the express terms of the Judgment

The Government's objections to following the 90-day window in the Judgment are all resolved by giving the Judgment its natural meaning: that the district court directed the Government to execute the sentence within 60 to 90 days of when the

[4] As Mrs. Montgomery has explained, *Dolan v. United States*, 560 U.S. 605 (2010), is plainly inapposite. *Contra* Stay App. 22-23. *Dolan* involved a statute failing to specify the consequences of noncompliance with a timing provision. 560 U.S. at 611. This case, in contrast, involves a criminal judgment that governs and constrains the Government's implementation of a criminal sentence and provides a simple avenue

stay was lifted. All the Government has to do is seek an order from the district court lifting the stay, at which point it will have 60 to 90 days to execute Mrs. Montgomery. The Government has never sought or obtained such an order.

4. However the Government attempts to reconceive the district court's orders in this case, the upshot is the same: executing Mrs. Montgomery today would violate the unambiguous terms of a final criminal judgment. The only path around the Judgment itself would be to amend it, but that path too would violate the law. Criminal sentences are final. As this Court has emphasized, a "'judgment of conviction … constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon v. United States*, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. § 3582(b)). Federal law provides specific, "rare exception[s] to the finality of criminal judgments." *United States v. Koons*, 850 F.3d 973, 976 (8th Cir. 2017), *aff'd*, 138 S. Ct. 1783 (2018). Neither the Government nor the district court cited any such exception, however, and none applies here. *See* 18 U.S.C. § 3582(c) (permitting sentence reductions for "extraordinary and compelling reasons," for certain elderly prisoners, as "otherwise expressly permitted by statute," or pursuant to sentencing-range reductions); Fed. R. Crim. P. 35(a) (permitting sentence corrections for "arithmetic, technical, or other clear error" or sentence reductions for substantial assistance to the Government).

Permitting the district court to nonetheless carry out a *de facto* amendment

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for the Government to move forward: obtain from the district court an order lifting the stay.

of its final judgment would also conflict with recent judicial authority addressing precisely this question, and—consistent with the bedrock principle of finality—holding that courts lack authority to amend their judgments to accommodate the Government's preferences for implementing a sentence of death.

In *United States v. Higgs*, No. CR PJM 98-520, 2020 WL 7707165 (D. Md. Dec. 29, 2020), the sentencing court's original judgment and order, entered in 2001, specified that the defendant's federal execution was to be carried out in accordance with Maryland law. *Id.* at *1. After Maryland abolished the death penalty in 2013, the Government initially asked the court to amend its 2001 judgment to direct that the defendant's execution be carried out in Indiana, pursuant to Indiana law. *See id.* When the defendant noted that the court lacked jurisdiction to do so—there, as here, none of the limited exceptions to the finality of the judgment applied—the Government "conced[ed] … that the Court indeed lacked the authority to amend the judgment." *Id.* at *3. The Government then "abruptly changed its stance" and asked that the sentencing court instead "'supplement' its judgment to the same effect." *Id.* at *4. Simply restating that argument evinces why it failed: a "supplemental order … would constitute an amendment of the original judgment in all but name," which, again, the Government conceded the court had no authority to do. *Id.* at *5. Recognizing the importance of the "novel legal issues presented" in the case, the Fourth Circuit is taking up this question to give it due consideration on an expedited schedule. *United States v. Higgs*, 20-18, — F. App'x —, 2021 WL 81779, at *1 (4th Cir. Jan. 8, 2021) (mem.). And the Government just today

petitioned for a writ of certiorari before judgment, recognizing that this question is exceptionally important and worthy of this Court's review. *United States v. Higgs*, No. 20-927 (U.S. Jan. 12, 2021) (petition for certiorari before judgment docketed); *see* Sup. Ct. R. 11 (certiorari before judgment appropriate "only upon a showing that the case is of … imperative public importance").

5. Rather than argue the merits, which are incontestable, the Government primarily argues that Mrs. Montgomery unreasonably delayed in pursuing this claim. That is a tacit concession of error. And the Government is wrong.

The issue presented here did not even theoretically become ripe until the Government set Mrs. Montgomery's execution date in late 2020, and even then, the date was then stayed by the United States District Court for the District of Columbia in light of defense counsels' COVID-19 diagnoses through the end of the year. The days it then took for Mrs. Montgomery to file her motion to enforce the Judgment—all while pursuing other federal constitutional and statutory claims multiple federal courts have held meritorious—constitute no delay at all. The Government does not argue that Mrs. Montgomery has forfeited or waived this claim either. For good reason. Just as subject matter jurisdiction can never be waived because it involves a federal court's power to decide the case, a defendant's right to enforcement of the plain terms of the judgment entered against her can never be waived because it involves the power of the Government to mete out punishment consistent with our constitutional system of separation of powers.

Even more to the point, because the district court's stay has been in place

since Mrs. Montgomery initially appealed in 2008, it was incumbent on the Government, not Mrs. Montgomery, to seek an order from the district court lifting the stay and clearing the way for the Government proceed with her execution. The Government should not be excused from its obligation to comply with the plain terms of a duly entered criminal judgment before executing a woman on death row, especially where, as here, it has only itself to blame for the exigent circumstances.

II. Mrs. Montgomery Will Be Irreparably Harmed Absent A Stay

Absent a stay, the irreparable harm to Mrs. Montgomery is plain. She will be unlawfully executed; and death, as this Court has made clear, is "the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.). If the Government is permitted to execute Mrs. Montgomery in contravention of the plain terms of a federal court order, Mrs. Montgomery's life will be irrevocably cut short in derogation of law. That is quintessentially harm that cannot be undone. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (Connor, J., concurring in part and concurring in the judgment) ("A prisoner under a death sentence remains a living person and consequently has an interest in h[er] life."); *see id.* at 281 (Rehnquist, J.) (plurality op.) (a death-sentenced prisoner retains a "residual life interest").

III. The Remaining Equitable Factors Favor Granting A Stay

On the other side of the ledger, the only consequence of a stay will be that the Government will have to reschedule the execution date in conformity with the district court's Judgment. Because "[t]here is generally no public interest in the

perpetuation of unlawful agency action," neither the Government nor the public has any interest in carrying out an unlawfully-scheduled execution. *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). To the contrary, there is "a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* (quotation omitted). And that substantial interest is only heightened in capital cases—"when so much is at stake … the Government should turn square corners." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909-10 (2020) (quotation omitted).

That this litigation is occurring at all—and now so close to the scheduled execution date—is only because the Government never sought or obtained an order lifting the district court's stay, instead unlawfully scheduled Mrs. Montgomery's execution in contravention of the district court's Judgment, and then returned to the district court a mere *three days* before the unlawful execution date with a request that the court effectively amend its Judgment and retroactively bless the Government's noncompliance. This Court should not truncate its own consideration of the law that will govern the implementation of death sentences, now and forever, to license the Government's unprecedented rush to the execution chamber. The law, the public interest, and Mrs. Montgomery deserve otherwise.

CONCLUSION AND PRAYER FOR RELIEF

Ms. Montgomery respectfully requests that the Court deny the Government's application.

Respectfully submitted this 12th day of January, 2021,

Kelley J. Henry
CAPITAL HABEAS UNIT
OFFICE OF FEDERAL PUBLIC DEFENDER,
M.D. TENN.
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
kelley_henry@fd.org

Meaghan VerGow
Counsel of Record
Anna O. Mohan
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5504
mvergow@omm.com