

**TO THE HONORABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES:**

**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS
OF LISA MONTGOMERY BY THE UNITED STATES OF AMERICA**

AND

URGENT REQUEST FOR PRECAUTIONARY MEASURES

MRS. MONTGOMERY IS SCHEDULED FOR EXECUTION ON DECEMBER 8, 2020

**By the undersigned, appearing as counsel for the Petitioner under the provisions of Article
23 of the Commission's Regulations, on behalf of Lisa Montgomery**

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INTRODUCTION

Lisa Marie Montgomery—a survivor of multiple rapes, child abuse, torture, and domestic violence—currently faces execution by the federal government of the United States on December 8, 2020. Mrs. Montgomery petitions this Honorable Commission for relief from ongoing violations of her human rights and the imposition of a death sentence in contravention of binding treaty obligations and customary international law. She further seeks precautionary measures from this Commission to prevent her execution.

Years of torture at the hands of caregivers, documented brain damage, and untreated severe mental illness have made it impossible for Mrs. Montgomery to function in the world. Even today, she requires a complex cocktail of psychotropic medications to maintain contact with reality. Despite her mental illness and a trial that fell far short of minimum standards of fairness in violation of international law, the U.S. Government decided, on October 16, 2020, to schedule her execution without notice to her attorneys.

This petition raises five claims. First, Mrs. Montgomery’s debilitating mental illness precludes her execution under international law, and the United States’ plan to execute her therefore violates her rights under Articles I, XVIII and XXVI of the American Declaration on the Rights and Duties of Man (ADRDM).

Second, the United States provided Mrs. Montgomery with incompetent lawyers who failed to present powerful mitigating evidence at her trial in violation of Articles XVIII and XXVI.

Third, the United States violated Articles I, II, V, and VII when it failed to act with due diligence to protect Mrs. Montgomery from severe child abuse and sexual violence, despite the awareness of state actors that she was at imminent risk of violence.

Fourth, the degrading conditions of confinement in which Mrs. Montgomery is currently

held violate her right to humane treatment.

Finally, by scheduling Mrs. Montgomery's execution in the midst of a global pandemic, the United States has violated her right of access to the courts and to a fair clemency process. The public health crisis—and the risks it poses to Mrs. Montgomery, her lawyers, and the experts necessary to evaluate her mental health—prevent her from obtaining and presenting evidence of her incompetency to be executed. The pandemic likewise prevents her from fully participating in the clemency process. In its haste to execute her notwithstanding the pandemic, the Government has violated her rights to petition the authorities and to due process under Articles XXIV and XXVI of the American Declaration.

I. ADMISSIBILITY

In the interests of expediting the Commission's review of her claims, Mrs. Montgomery respectfully requests that the Commission join its review of the admissibility of the petition with its evaluation of the merits of her claims. Mrs. Montgomery further requests expedited review of this petition.

I. COMPETENCE OF THE COMMISSION

Petitioner asserts that the United States has violated her rights under Article I (right to not be arbitrarily deprived of life), Article II (right to equality under the law), Article V (right to privacy and protection of family life); VII (right of the child to special protection); Article XVIII (right to a fair trial), Article XXIV (right of petition), Article XXV (right to humane treatment in custody), and Article XXVI (right to due process and right not to receive cruel, unusual, or infamous punishment) of the ADRDM. The Commission has competence over a claim where the alleged victim is a natural person “whose rights are protected under the American Declaration, the

provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission’s Statute and Article 49 of the Commission’s Rules of Procedure.”¹ Petitioner is a natural person. The events raised in Petitioner’s claim occurred while the alleged victim was within United States territory and jurisdiction and subsequent to its ratification of the OAS Charter. Counsel for the Petitioner is authorized under Article 23 of the Commission’s Rules of Procedure to represent her before the Commission. Therefore, the Commission is competent to hear this claim.

II. EXHAUSTION OF DOMESTIC REMEDIES

Two of the legal claims Mrs. Montgomery raises in this petition have been fully exhausted: (1) that she was provided incompetent legal representation at trial; and (2) that her severe mental illness and brain damage preclude her execution. Mrs. Montgomery’s remaining claims have not been fully exhausted—but for the reasons outlined below, her failure to exhaust those claims is justifiable and presents no bar to admissibility.

A. The Federal Courts Reviewed Mrs. Montgomery’s Ineffective Assistance of Counsel and Mental Illness Claims and Denied Relief.

In a petition for writ of habeas corpus filed in the Federal District Court for the Western District of Missouri, Mrs. Montgomery argued that her trial lawyers were grossly ineffective. The District Court held a hearing on Mrs. Montgomery’s claim and denied relief. With respect to Mrs. Montgomery’s claim that her severe, ongoing mental illness precludes her execution under the U.S. Constitution, the District Court denied relief without a hearing and refused to grant a Certificate of Appealability, effectively foreclosing her ability to appeal the issue to a higher court.

¹ Inter-Am. Comm. H.R., Report No 39/03, Petition 136/02 (Admissibility), *Abdur’Rahman v. United States*, ¶ 22.

The United States Court of Appeals for the Eighth Circuit refused to review the District Court's judgment, and the U.S. Supreme Court denied certiorari on May 26, 2020.

B. Due Diligence, Conditions of Confinement and Right to Petition Claims

Exhaustion is not required for consideration of the merits of Mrs. Montgomery's due diligence, conditions of confinement and right to petition claims. Rule 31 of this Commission's Rules of Procedure expressly provides that exhaustion is not required where:

- a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Specifically, this Commission has previously determined that where a petitioner's presentation of legal claims to domestic courts would have "no reasonable prospect of success," domestic remedies are not "effective" under international law.² As outlined below, the unexhausted claims in this petition have no prospect of success, and should therefore be deemed admissible under Article 31 of the Commission's Regulations.³

1. Due Diligence Claim

Mrs. Montgomery is not required to exhaust her due diligence claim because her claim would have "no reasonable prospect of success" under the U.S. Supreme Court's established jurisprudence. In *Castle Rock v. Gonzales*,⁴ the petitioner, Jessica Gonzales, had sought a remedy

² Report No. 51/00, Case 11.193, *Gary T. Graham v. United States*, ¶¶ 60–61 (June 15, 2000); Report No. 108/00, Case 11.753, *Ramón Martínez Villareal v. United States*, ¶ 70 (Dec. 4, 2000).

³ See *Graham*, ¶ 61; *Ramón Martínez Villareal*, ¶ 70.

⁴ 545 U.S. 748 (2005).

for the government’s failure to enforce a protective order against her abusive ex-husband, who ultimately kidnapped and killed her daughters. The Court rejected her claim, holding that an individual has no protected right to have “someone else arrested for a crime.”⁵ Similarly, in *DeShaney v. Winnebago County Dept. of Social Servs.*,⁶ the Court held that the due process clause of the U.S. Constitution did not “requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors.”⁷ Under these binding precedents, it would be an exercise in futility to seek to exhaust Mrs. Montgomery’s due diligence claim in national courts.

2. Conditions of Confinement and Right to Petition Claims

The facts giving rise to these claims occurred on October 16, 2020, when the United States scheduled an execution date for Mrs. Montgomery without providing notice to her attorneys. Under these circumstances, Mrs. Montgomery is effectively prevented from exhausting her remedies, as to do so would delay her filing before this Commission until the eve of her scheduled execution, when it would be too late for the Commission to weigh the facts in deciding whether to issue precautionary measures.

C. Even if Mrs. Montgomery Attempted to Present her Due Diligence Claim in Federal Court, It Would Be Procedurally Defaulted.

Finally, Mrs. Montgomery is barred from presenting her due diligence claim by federal legislation imposing draconian limitations on the presentation of “successive” post-conviction petitions. Under 28 U.S.C. §2255 (h), Mrs. Montgomery is barred from litigating her claim unless she can demonstrate that her petition rests on (1) newly discovered evidence of innocence; *or* (2)

⁵ *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005).

⁶ 489 U.S. 189 (1989).

⁷ *Id.* at 195.

a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable. But Mrs. Montgomery's claim does not rest on newly discovered evidence of innocence, nor has the United States Supreme Court issued an opinion affirming the rights Mrs. Montgomery seeks to vindicate.

This Commission has previously held that where a death row inmate was precluded from exhausting his domestic remedies by virtue of the draconian limits on post-conviction appeals imposed by state and federal legislation, his petition was admissible under Article 31 of the Commission's Regulations.⁸ This holding reflects the established principle that domestic remedies must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.⁹

III. DUPLICATION

A petition raising the claims presented herein has never been submitted to any other international organization, nor is the subject matter of the petition "pending settlement before an international governmental organization," nor does it duplicate a petition "pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member." The petition therefore complies with Article 33 of the Commission's Rules of Procedure.

⁸ Report No. 51/00, Case 11.193, *Gary T. Graham v. United States*, ¶ 59.

⁹ See Inter-Am. Court H.R., *Velásquez Rodríguez Case*, Merits, Judgment, (ser. C) No. 4, ¶¶ 64-66 (July 29, 1988). It is well established that when domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused. See Inter-Am. Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights, Advisory Opinion OC-11/90, (ser. A) No. 11, ¶ 17 (August 10, 1990). See also Organization of American States, American Convention on Human Rights art. 46.2, 1144 U.N.T.S. 123 (exhaustion is not required where (1) the legislation of the State concerned fails to afford due process for the protection of the right allegedly violated; and (2) the party alleging the violation has been hindered in his or her access to domestic remedies).

IV. TIMELINESS OF THE PETITION

This petition also meets the terms of Article 32(2) of the Rules of Procedure: “In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. . . [considering] the date on which the alleged violation of rights occurred and the circumstances of each case.” As noted above, Mrs. Montgomery’s appeals have all been denied. The U.S. Supreme Court denied certiorari on May 26, 2020.

STATEMENT OF FACTS¹⁰

The story of Lisa Montgomery’s childhood reads like the script of a horror movie. The severe trauma, abuse, and neglect that Mrs. Montgomery endured, combined with her mental illness and brain damage, have left her permanently disabled. The effects of the torture she endured while in the captivity of her parents are akin to the psychological damage experienced by child soldiers. The only difference is that the violence Mrs. Montgomery endured took place not on a battlefield, but in an isolated trailer in the rural Midwest of the United States.

Lisa endures childhood sexual abuse, forced prostitution, and other forms of torture.

Lisa’s mother Judy was an alcoholic whose drinking caused Lisa to be born with permanent brain damage. Hr’g Tr. Vol. 7, p. 1813, Dr. George Washington Woods, Jr. Testimony, Exhibit A.

¹⁰ The following sources are cited throughout this application: (1) the criminal trial transcript [hereinafter Trial Tr.] conducted in 2007 in the U.S. District Court for the Western District of Missouri; (2) the evidentiary hearing transcript [hereinafter Hr’g Tr.] from the evidentiary hearing conducted during post-conviction proceedings in the U.S. District Court for the Western District of Missouri from October 31, 2016 through November 10, 2016; and (3) exhibits submitted at the evidentiary hearing. References to the record will be as follows: Vol. #, p. #, Witness Name or Exhibit Name. Citations to the record are in text. Citations to authorities are in footnotes.

Parenting for Judy was an exercise in cruelty. When Lisa did not finish her meal on her highchair table, Judy would leave her there for hours, strapped into the chair, crying. Declaration of John Joseph Hedberg Patterson, p. 6, Exhibit B. When Lisa wet the bed, she was forced to take cold showers as punishment. When Judy grew angry with Lisa, she would beat her with belts, cords, hangers, and hairbrushes. Lisa was not allowed to speak or make any noise—even the noise of a fork on a plate would trigger her mother’s rage. Often Judy duct taped Lisa’s mouth shut to force her into silence. Lisa recounts how she learned not to cry when the duct tape was on her mouth, because her nose would become stuffed up and she feared she would suffocate. Hr’g Tr. Vol. 7, p. 1646, Dr. Katherine Porterfield Testimony, Exhibit C.

Lisa’s father abandoned his family when Lisa was three years old. Declaration of Jan Vogelsang, p. 49, Exhibit G. Judy remarried Jack Kleiner, a “mean drunk” who beat his wife and children mercilessly. According to one of his children, “[w]hen Jack came into a room, the atmosphere changed.” Declaration of Wendy Triebs, p. 3, Exhibit D. He punched, kicked, and choked his children, including Lisa. He broke his wife Judy’s jaw and knocked out her teeth. Hr’g Tr. Vol. 6, p. 1503, Janet Vogelsang Testimony, Exhibit E.

Lisa’s older sister Diane tried to protect her, but Diane was a child herself—and she was also a victim of severe abuse. Hr’g Tr. Vol. 6, pp. 1549–52, Diane Mattingly Testimony, Exhibit F. When Diane was around eight years old, one of Judy’s male friends began regularly molesting and raping her, entering her room at night while she lay next to four-year-old Lisa in beds close enough that the girls could reach out and touch each other’s hands. Hr’g Tr. Vol. 6, pp. 1550–51, Diane Mattingly Testimony, Exhibit F. When Diane was removed from the home by social services, the government agency failed to remove Lisa from the home or make any inquiries into her well-being.

Jack's abuse of Lisa and her younger sister, Patty, took on sexual overtones starting when Lisa was still a small child. He would make Lisa and her younger sister Patty go into the bathroom, take their pants down and bend over the tub. They were forced to stay that way until Jack began to beat them. Hr'g Tr. Vol. 6, p. 1504, Janet Vogelsang Testimony, Exhibit E. Even at that age, Lisa recognized that Jack didn't ask the boys to strip naked before they were disciplined. Declaration of Janet Vogelsang, pp. 70–71, Exhibit G. By the time she turned 13, Jack started raping her. He threatened to rape her little sister if she resisted, and told her he would kill her entire family if she told anyone.

During these years, the family moved repeatedly. In the first fourteen years of her life, Lisa moved seventeen times. Jack eventually moved the family to an isolated, run-down trailer at the end of a dead-end road. There was no running water. Jack built Lisa a small room onto the side of the trailer with its own entrance, making it easy for him to rape her out of earshot of others. She began to drink the wine stored in the room as a means to cope. Hr'g Tr. Vol. 6, p. 1511, Janet Vogelsang Testimony, Exhibit E. She lived in constant terror and constant anticipation of rape. He raped her two to three times a week for three years. Declaration of Janet Vogelsang, p. 81, Exhibit G; *Kleiner v. Kleiner* Divorce Tr., p. 96, Exhibit H.

Lisa's mother Judy was also an active participant in her daughter's sexual exploitation. When Lisa was around fifteen years old, Judy began selling her for sex in exchange for utilities and services. She would ask the other children to leave the trailer so that the plumber, the electrician, and the man who delivered propane gas could rape Lisa. Judy told Lisa she had to "pay" for her own room by submitting to the men. Around this same time, Jack was inviting his friends to the home to have sex with Lisa. Lisa was anally, orally, and vaginally raped by several men, "one after the other," for several hours at a time. When they finished, they "urinated on her

like she was trash.” Declaration of David Kidwell, p. 4, Exhibit I; Hr’g Tr. Vol. 6, p. 1513, Janet Vogelsang Testimony, Exhibit E. One of the men who raped her was named “Shorty” and would leave money on the dresser of the trailer, worried that Judy was not sharing the proceeds. Hr’g Tr. Vol. 6, p. 1515, Janet Vogelsang Testimony, Exhibit E. To survive these attacks, Lisa would go somewhere else mentally, attempting to escape from her hellish reality. Much later, experts agreed that this was the beginning of Lisa’s dissociative disorder, a mental illness that severs Lisa’s connection with reality. Hr’g Tr. Vol. 6, pp. 1688–89, Dr. Katherine Porterfield Testimony, Exhibit C. She also developed complex post-traumatic stress disorder. She withdrew and became more quiet, trying to make herself invisible. Declaration of Janet Vogelsang, p. 88, Exhibit G.

State authorities fail to protect Lisa, despite their knowledge of abuse.

“Whenever I told, nobody did anything.”¹¹

The state consistently failed to take steps to investigate Lisa’s abuse and protect her from future violence. Although her sister Diane was removed from the home by social services when Lisa was a small child, the government agency failed to remove Lisa from the home or make any inquiries into her well-being. Had the state taken measures to protect Lisa (and her younger sister, Patty), the state could have prevented years of sexual exploitation, torture, and physical abuse. When Lisa was an adolescent, the police also had reason to know of her rapes. Lisa confided in her cousin David Kidwell, who was a police officer, but he failed to report the crimes. Mr. Kidwell stated in an affidavit that Lisa was crying and shaking as she revealed her assaults. Declaration of David Kidwell, p. 5, Exhibit I; Hr’g Tr. Vol. 6, p. 1513, Janet Vogelsang Testimony, Exhibit E. Social Services investigated abuse in the Kleiner household once, but they announced their visit

¹¹ Hr’g Tr. Vol. 7, p. 1697–98, Dr. Katherine Porterfield Testimony (quoting Lisa Montgomery), Exhibit C.

in advance. Jack prepared Lisa and Patty to be on their best behavior, threatening to beat them if they told the truth. Declaration of Janet Vogelsang, p. 86, Exhibit G. No further investigations occurred.

School administrators also had reason to suspect that Lisa was suffering at home. Lisa's sexual, physical and psychological torture inevitably derailed her education. Her grades declined, and she was eventually placed in special needs classes. Declaration of Janet Vogelsang, p. 64, Exhibit G. She came to school dirty, in clothing that was torn and full of holes. At a minimum, school administrators had reason to know that Lisa's needs were not being met at home, but like all other state agencies, failed to take steps to investigate further. Declaration of Janet Vogelsang, p. 85, Exhibit G; Declaration of Nita Milburn Montgomery, pp. 2-3, Exhibit J.

Judy reported that she brought Lisa to see a local physician after she discovered Jack raping Lisa. Report to the District Attorney, p. 2, Exhibit DDD. Years later, the doctor still recalled the visit, and how infuriated he became once he learned more about the circumstances for the visit. He performed a gynecological exam and administered a pregnancy test, which came out negative. But the doctor never talked to Lisa alone. He also never called the police, even though he was a mandatory reporter under Oklahoma law.¹² Declaration of Janet Vogelsang, p. 86, Exhibit G; Declaration of Lisa Rickert, p. 67, Exhibit K.

Judy waited nine months, from February to November, 1984 before reporting the rape to the Child Welfare Office. Despite this long delay, the social worker at the Child Welfare Office decided against pursuing the matter further in juvenile court. She trusted Judy's representations that she would protect her daughter. The agency noted that Judy had filed for divorce. But critically, the agency failed to appreciate how Judy was implicated in her daughter's sexual abuse

¹² 10A OK Stat § 10A-1-2-101 (2014).

and thus, not in a position to protect her. Report to the District Attorney, p. 2, Exhibit DDD. Although the Child Welfare Office seemed to have referred the case to the district attorney's office, prosecutors took no action. Lisa and Judy eventually started counseling at Central Family and Children's Services in Tulsa, Oklahoma in December 1984.

When Judy eventually divorced Jack in 1985, she testified in her divorce proceedings that she saw him having sex with Lisa: "He was in her. He was pumping her." Hr'g Tr. Vol. 6, p. 1516, Janet Vogelsang Testimony, Exhibit E. The judge presiding over the divorce proceedings scolded Judy for failing to report the abuse to authorities, calling the behavior "inexcusable." Hr'g Tr. Vol. 6, p. 1519, Janet Vogelsang Testimony, Exhibit E. Yet the judge failed to make any inquiries about whether Judy could continue to ensure Lisa's safety.

In family counseling, the counselor caught glimpses of the dysfunction in Lisa's home. Records from counseling describe Judy's "lack of empathy for her daughter" and Lisa's inability to express her feelings. The notes detailed an incident where Jack broke a broom while beating Lisa on March 6, 1985. Hr'g Tr. Vol. 6, p. 1518, Janet Vogelsang Testimony, Exhibit E. The counselors, however, never reported the violence to authorities, even though they are required to do so under Oklahoma law.¹³ Hr'g Tr. Vol. 6, p. 1519, Janet Vogelsang Testimony, Exhibit E. Lisa's treatment was short-lived. As soon as Judy gained custody of Lisa at the close of the divorce proceedings, she pulled Lisa from counseling after sixteen sessions. Hr'g Tr. Vol. 6, pp. 1518–20, Janet Vogelsang Testimony, Exhibit E. Lisa received no further treatment.

¹³ 10A OK Stat § 10A-1-2-101 (2014).

Lisa tries to escape.

Lisa adapted by retreating into her own world in her mind. Occasionally, she would enjoy her violin or play with her childhood dog. But these simple joys were soon taken from her, too: Judy during one incident took Lisa's violin away and sold it. And to punish Lisa's brother Teddy, Judy killed the family dog, brutally smashing its head with a shovel until its brains came out. Declaration of Teddy Kleiner, p. 8, Exhibit L.

Despite the impossible odds, in the 10th grade, Lisa was accepted to the Upward Bound Program at Rogers State Community College in Claremore, Oklahoma. The program was designed to help prepare first-generation students for college. Lisa saw for a brief moment what life could be like out of her captivity. Hr'g Tr. Vol. 6, pp. 1518–20, Janet Vogelsang Testimony, Exhibit E. Although she soon realized that she could not afford college, she made other plans. She was determined to escape. She signed up for the Air Force and prepared to enlist immediately after she graduated from high school. Hr'g Tr. Vol. 6, p. 1524, Janet Vogelsang Testimony, Exhibit E.

But her mother had other plans. While Lisa was still in high school, Judy divorced Jack and started a relationship with Richard Boman. (Judy eventually married six times, and had multiple partners throughout Lisa's childhood.) Vogelsang Biopsychosocial History PowerPoint, p. 22, Exhibit M. Judy was keen to spend as much time as she could with her new romantic partner. She delegated domestic chores to Lisa, who cared for her younger siblings, cooked and cleaned. The burdens only increased when Richard's twenty-four year old son, Carl, came home from the Army. Judy and Richard pushed Carl and Lisa together to care for their children. They encouraged their romantic relationship, even though Lisa was a minor and Carl was much older and effectively her stepbrother. At her mother's instigation, Lisa became engaged to her stepbrother at age seventeen, around the time she became pregnant for the first time. Her pregnancy disqualified her

from military service. Her chance at freedom was thwarted. Declaration of Janet Vogelsang, pp. 89–90, Exhibit G.

By the eve of her 18th birthday, Lisa had experienced nine out of ten “adverse childhood experiences” that can lead to trauma, an “astonishing” amount of trauma for a single person to absorb. Hr’g Tr. Vol. 6, p. 1657, Dr. Katherine Porterfield Testimony, Exhibit C. The trauma impaired her functioning in every sphere of her existence. Things that humans learn in the context of a nurturing environment were impossible for Lisa to acquire in the home where she was raised. Regulating her feelings, planning, thinking through her actions, and controlling her impulses were difficult for her. Hr’g Tr. Vol. 6, p. 1653, Dr. Katherine Porterfield Testimony, Exhibit C. Doctors noted decades later that the damage was visually apparent, encoded in her anatomy. Scans revealed an absence of brain matter, reflecting that her brain had either deteriorated after an injury or never formed properly. Hr’g Tr. Vol. 8, p. 2073, Dr. Ruben Gur Testimony, Exhibit N. She also suffers from epilepsy, frontal lobe syndrome, as well as parietal lobe and temporal lobe dysfunction. Each of these neurological impairments have profound practical impacts. In lay terms, for example, the parietal lobe synthesizes information and stimuli and helps a person decipher what is good or bad for her, among other things. Hr’g Tr. Vol. 7, p. 1727, Dr. Siddhartha Nadkarni Testimony, Exhibit O. Those are the very kinds of decisions that Lisa would forever struggle to make. Hr’g Tr. Vol. 7, p. 1727, Dr. Siddhartha Nadkarni Testimony, Exhibit O.

Lisa’s husbands continue the cycle of physical and sexual violence.

Abuse followed Mrs. Montgomery in all her relationships. Carl, her first husband, brutalized her. In one notable incident before marriage, Carl shoved Lisa, who was naked and getting out of a shower, against a wall heater that burned her flesh while he forced her to have sex.

Declaration of Janet Vogelsang, pp. 94–95, Exhibit G. Carl’s behavior became gradually more violent during their marriage. He beat her, tied her in stress positions, poured hot wax on her, forcibly inserted glass bottles in her anus and vagina, held a knife to her throat, and sexually assaulted her. Lisa was ashamed, humiliated, and fearful. “She grew to expect the violence and lived in sickening anticipation of its reoccurrence.” Declaration of Janet Vogelsang, p. 95, Exhibit G. As she had learned to do before, during the sexual abuse, Lisa would go “off to rooms she created in her mind.” Supplemental Declaration of Janet Vogelsang, p. 3, Exhibit P. Years later, Lisa’s brother Teddy accidentally discovered a home video showing Carl beating her and raping her. Teddy described it “like a scene out of a horror video. My sister was crying and in pain.” Declaration of Teddy Kleiner, p. 14, Exhibit L.

Carl, like Judy, controlled everything in Mrs. Montgomery’s life, down to the grocery list. In quick succession, Mrs. Montgomery gave birth to four children in four years. After her fourth child was born, Mrs. Montgomery was sterilized under pressure from Judy and Carl. Declaration of Janet Vogelsang, p. 104, Exhibit G.

After the birth of her children, her mental health deteriorated even further. Her psychotic symptoms bloomed. She descended into a near constant state of dissociation and depersonalization. She describes feeling like “I’m not in my body. I’m not real.” “[T]he world feel[s] like a movie or a fog or a dream.” Hr’g Tr. Vol. 7, pp. 1659–60, Dr. Katherine Porterfield Testimony, Exhibit C. She also experienced the full onset of bipolar disorder after the birth of her four children. Her moods became more erratic. She experienced rapidly shifting feelings of irritability, agitation, and depression, sometimes all at the same time. Hr’g Tr. Vol. 7, pp. 1767–68, Dr. George Washington Woods, Jr. Testimony, Exhibit A. Her post-traumatic stress disorder exacerbated her symptoms. Hr’g Tr. Vol. 7, p. 1768, Dr. George Washington Woods, Jr.

Testimony, Exhibit A. The complex layered impairments made it difficult for her to concentrate and left her feeling confused by the world around her. Hr’g Tr. Vol. 7, p. 1770, Dr. George Washington Woods, Jr. Testimony, Exhibit A.

Mrs. Montgomery also lived in dire poverty. Like her mother before her, Mrs. Montgomery was constantly on the move. Between 1984 and 2000, she moved 43 times, across Oklahoma, Texas, California, Washington and Colorado. Declaration of Janet Vogelsang, p. 127, Exhibit G. She continually uprooted her family in the chaotic pattern learned from her mother. She started to drink more heavily. (She had started drinking as a young girl to cope with Jack’s repeated rapes.) By the time she was in her twenties, she was always drunk. She stopped taking care of her personal appearance and hygiene, to such an extreme that people could not stand to be around her. She had lice for 5 years, seemingly unaware or indifferent. Hr’g Tr. Vol. 6, pp. 1527–28, Janet Vogelsang Testimony, Exhibit E.

Lisa was not able to keep up with the day-to-day tasks of parenting. The children went to the neighbors for food and baths. Lisa had spiraled so far down into her mental illness that she could only be brought back to reality if the children called her “Martha.” Declaration of Janet Vogelsang, p. 136, Exhibit G. Removing lice from her children’s hair so overwhelmed her that instead of addressing it, she pulled them out of school. Hr’g Tr. Vol. 7, pp. 1764–65, Dr. George Washington Woods, Jr. Testimony, Exhibit A.

When her relationship with Carl ended, Lisa married Kevin Montgomery. Although the relationships changed, the abuse persisted. Kevin “bruised [Lisa], used a horse whip on her, and tied her in forced stress positions.” Declaration of Teddy Kleiner, p. 4, Exhibit L. She was not surprised that Kevin wanted to hurt her during sex because she had come to expect nothing less; she thought it was part of maintaining a relationship with a man. She felt relieved that the violence

was less severe than it was with Carl. Even her children knew about the sexual violence Kevin inflicted on her. Declaration of Janet Vogelsang, p. 128, Exhibit G.

Lisa's mental illness takes over.

When trauma experts finally examined Mrs. Montgomery closely, they noted that her upbringing had stripped her of any autonomous sense of self. She had been raised in captivity, deprived of any control over her body and mind, and at the mercy of people who administered various forms of torture. She learned that to survive, she had to do whatever her captors wanted. Her captivity induced enduring personality changes as an adaptation to catastrophic levels of stress. Hr'g Tr. Vol. 7, pp. 1658–63, 1666–68, Dr. Katherine Porterfield Testimony, Exhibit C. She developed complex Post-Traumatic Stress Disorder, a disease caused by pervasive, long-standing traumatic events. She would continue to re-experience her torture as if it was actually reoccurring. Her senses were overwhelmed by the feeling of always living under threat. As trauma expert Dr. Katherine Porterfield observed, “[t]here [was] no ground for her to stand on.” Hr'g Tr. Vol. 7, p. 1692, Dr. Katherine Porterfield Testimony, Exhibit C.

The crime for which Lisa was convicted and sentenced to death reflects the depth of her mental illness and despair. The facts are grim. Two days before the crime, Carl, her abusive former husband and stepbrother filed for custody of two of her children. At the time, she had told her new husband she was pregnant—which her former husband knew was untrue because she had been sterilized against her will. Carl threatened to expose her, and said he would use the imagined pregnancy in court to obtain custody of her children. The threat of losing her children combined with years of trauma and severe mental illness pushed Lisa past the brink. She went to the home of Bobbie Jo Stinnett, who was twenty-three and eight months pregnant. Lisa killed her, cut the

baby girl from her mother's abdomen, took the baby home, cared for her, and pretended she was her own child.

All experts—even those called by the prosecution at trial—agree that Mrs. Montgomery was suffering from severe mental illness at the time of the crime.¹⁴ Her grip on reality is so fragile that even today she requires a complex cocktail of psychotropic medications to control her psychosis. Yet at the time of the crime, and throughout the worst years of her torture, she received no treatment at all. By her mid-twenties, she was emotionally, physically and psychologically broken. Her migraines were so overwhelming they brought her to tears. Declaration of Janet Vogelsang, p. 125, Exhibit G. The years of constant abuse, combined with her genetic predisposition to mental illness, deprived Mrs. Montgomery of the most basic conditions required for normal human functioning. She could not—and cannot—tell what is real. Her own perceptions of her body slip away from her. Hr'g Tr. Vol. 7, pp. 1690–91, Dr. Katherine Porterfield Testimony, Exhibit C. Dr. Katherine Porterfield, retained many years later by Mrs. Montgomery's post-conviction lawyers, testified that Lisa's dissociative disorder was one of the most severe cases she has ever seen. *Id.*

¹⁴ Trial Tr. Vol. 11, p. 2405, Dr. William Logan Testimony (Exhibit R); Hr'g Tr. Vol. 4, p. 950, Dr. William Logan Testimony (Exhibit R) ("I gave several diagnoses . . . one was posttraumatic stress disorder, chronic, that began back in her adolescence with sexual abuse and physical abuse by her step father. I think what now carries the name in some circles of complex PTSD."); Trial Tr. Vol. 14, p. 3027, Dr. Ruth Kuncel Testimony (Exhibit S); Trial Tr. Vol. 11, pp. 2461–62, 2469, Dr. Dan Martell Testimony (Exhibit T) (testifying that Mrs. Montgomery "endorsed the symptoms consistent with post-traumatic stress disorder," agreeing to defense's stipulation that Mrs. Montgomery had been physically and sexually abused, and agreeing that Mrs. Montgomery's depression was connected to her childhood physical and sexual abuse); Trial Tr. Vol. 12, pp. 2566-67, Dr. Park Dietz Testimony (Exhibit U) ("[W]hat the defendant says and the way she behaves in all of the exams I think is consistent with her actually having post traumatic stress disorder. . . . She was physically and sexually abused by her stepfather, Jack Kleiner, and she witnessed violence in the home. And any of those arguably could cause a post-traumatic stress disorder. Certainly the physical and sexual abuse can cause post-traumatic stress disorder.").

Lisa's Attorneys Fail to Present Evidence of the Scope and Impact of her Sexual Torture

In any capital case, the most important factor that determines whether the defendant will live or die is the quality of the defense team. In Lisa's case, the defense team was controlled by David Owen, a lawyer who had never before defended a person facing the death penalty, nor anyone with a mental illness, let alone a woman with a history of sexual violence and trauma. Hr'g Tr. Vol. 8, p. 2137, David Owen Testimony, Exhibit V; Hr'g Tr. Vol. 2, p. 397, Susan Hunt Testimony, Exhibit W. Concerned about his inexperience, national experts recommended the appointment of Judy Clarke to the defense team. Hr'g Tr. Vol. 3, pp. 548–49, Dick Burr Testimony, Exhibit X. Judy Clarke is renowned for her work with mentally ill clients and those who are victims of abuse and trauma. She agreed to join the defense team, and quickly built a relationship of trust with Lisa. But Owen, who was known for his disparaging views of women, could not tolerate being told what to do by a female lawyer. According to female lawyers working in the same office with Owen, he chafed at Ms. Clarke's leadership role on the team and was not "particularly good at working with women," especially "[women] on equal footing." The chief investigator on Lisa's case, who was also male, repeatedly made clear that he was "not going to take any orders from any damn woman." Hr'g Tr. Vol. 2, pp. 406–07, Susan Hunt Testimony, Exhibit W.

Clarke's advice, however, was standard, taken directly from the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Clarke had organized the defense team and developed a work plan for each member to execute. The defense started a deep investigation into Mrs. Montgomery's past. This entailed exhaustive record collection, carefully planned in-depth interviews with anyone who knew Mrs. Montgomery, and, perhaps most critically, forging a relationship of trust with Mrs. Montgomery.

In these initial phases, the team had proposed a working hypothesis to explain Mrs. Montgomery's crime: they believed her acts were the product of her psychotic disorder, bipolar disorder, and severe sexually-based trauma. Hr'g Tr. Vol. 3, pp. 667-669, Judy Clarke Testimony, Exhibit ZZ. Clarke's process was meticulous and methodical. Hr'g Tr. Vol. 3, pp. 565-68, Dick Burr Testimony, Exhibit X (describing Clarke's involvement); Hr'g Tr. Vol. 3, pp. 736-37, Debra Garvey Testimony, Exhibit Y (explaining development of theories regarding bipolar, trauma, PTSD, and possibly temporal lobe epilepsy).

David Owen, however, continued to reject Ms. Clarke's leadership on the case. Without informing Clarke, Owen and his boss asked the male federal judge, Gary Fenner, to remove her from the case. Deposition of Ray Conrad, Exhibit Z, pp. 16-17; Declaration of David Owen, p. 8, Exhibit AA. The Judge ordered that all communication between Lisa and Ms. Clarke be cut off, and on April 20, 2006, when Ms. Clarke attempted to visit Lisa in jail, she was refused entry. Declaration of Judy Clarke, p. 8, Exhibit BB. Mrs. Montgomery did not see Ms. Clarke again until after Lisa was sent to federal death row. "Removing Judy from my team has been a devastating blow to me," Mrs. Montgomery explained to the court, after Ms. Clarke's termination. Lisa Montgomery Letter, p. 3, Exhibit CC. For Mrs. Montgomery, Clarke was the first attorney she had grown to trust. As a survivor of sexual trauma, trusting the male attorneys was difficult for her. Ms. Clarke's removal sent her in a "state of shock." Lisa Montgomery Letter, p. 3, Exhibit CC. She had difficulty sleeping or thinking. *Id.* After Mrs. Montgomery expressed appreciation for the remaining female attorney on her team in open court, the last remaining female was also swiftly asked to withdraw from the case by Judge Fenner. Hr'g Tr. Vol. 3, p. 715, Holly Jackson Testimony, Exhibit DD (describing Lisa's trusting relationship with Clarke and her devastation upon Clarke's removal); Hr'g Tr. Vol. 2, pp. 418-19, Susan Hunt Testimony, Exhibit X

(describing Lisa’s positive relationship with Clarke and Hunt and Judge Fenner’s removal of Hunt); Declaration of Judy Clarke, p. 9, Exhibit BB.

With Clarke no longer on the team, the comprehensive mitigation investigations came to a halt. One of the key team members confessed that he simply didn’t believe in mitigation. Hr’g Tr. Vol. 2, p. 395, Susan Hunt Testimony, Exhibit X. The mitigation specialist who was on the team was ignored, and her role truncated. Three men were left in charge of the case: lawyers David Owen and Frederick Duchardt, and investigator Ron Ninemire. Each let their personal views and bias interfere with Mrs. Montgomery’s representation.

Duchardt is known throughout the United States for his poor record in representing individuals accused of capital crimes. “One reason why Missouri’s federal courts crank out so many death sentences is that they repeatedly appoint a lawyer—Duchardt—who has rejected [ABA] standards.” David Rose, [*Death Row: The Lawyer Who Keeps Losing*](#), The Guardian (Nov. 24, 2016), Exhibit EE. Duchardt later himself admitted, “I was gender-challenged in my dealings with Lisa.” Hr’g Tr. Vol. 8, p. 2195, Frederick Duchardt Testimony, Exhibit FF. As nationally renowned mitigation specialist explained, the team lacked cultural competence in navigating a relationship with someone as traumatized by sexual violence as Mrs. Montgomery. Hr’g Tr. Vol. 1, pp. 110–11, Russell Stetler Testimony, Exhibit GG.

Mrs. Montgomery’s trial attorneys bungled her defense and failed to present the full extent and impact of her childhood torture and sexual abuse. There are too many failures to discuss each in depth here; Mrs. Montgomery’s post-conviction lawyers in federal post-conviction proceedings catalogued the oversights, mistakes, misrepresentations, and inattention in five hundred pages. What follows is a condensed account.

The team ignored that which they considered “bad” information about Mrs. Montgomery—failing to recognize that the “bad” information was symptomatic of Mrs. Montgomery’s inability to function appropriately. Instead, they pursued a set of conflicting defenses based on their opinion that Mrs. Montgomery was innocent, despite the overwhelming proof of her guilt. The defense team prepared to argue that Mrs. Montgomery’s brother, Tommy, committed the crime *and* that Mrs. Montgomery was not guilty by reason of insanity, because of an exotic mental disorder known as pseudocyesis. There were two fatal problems, however, that were apparent to the attorneys as soon as they concocted the defenses.

First, Tommy had an alibi—his probation officer. When the lawyers decided to abandon the alibi defense, the damage had already been done because Mr. Duchardt had already allowed Mrs. Montgomery to be interviewed on videotape placing her brother at the scene of the crime. Trial Tr. Vol. 12, p. 2552, Dr. Park Dietz Testimony, Exhibit U. At trial, the defense proffered an insanity defense based on Mrs. Montgomery’s alleged pseudocyesis—a disorder in which women believe they are pregnant when they are not. But the pseudocyesis defense only addressed the question of whether Mrs. Montgomery knew that she was not pregnant when she claimed to be. It did not explain her state of mind during the commission of the crime. Moreover, Mrs. Montgomery had told the FBI that she knew the baby was not hers but Bobbie Jo’s. Trial Tr. Vol. 7, p. 1646, Randy Strong Testimony, Exhibit SS. Not a single defense witness testified that Mrs. Montgomery believed the baby to be hers. The defense painted a false picture of Lisa Montgomery, and the government exploited its errors.

The team also never commissioned a social history, an essential part of any capital defense case. Declaration of Dr. William Logan, pp. 2–3, Exhibit HH. Though the team possessed information from several sources that as a young girl Lisa behaved in ways consistent with

dissociation, the team did not develop that information, leaving their experts without the available historical support for their finding that Mrs. Montgomery dissociated at the time of the crime. They failed to elicit evidence documenting the full scope and severity of her sexual torture, including the gang rapes. Hr’g Tr. Vol. 6, p. 1569, Danielle Waller Testimony, Exhibit II; Trial Tr. Vol. 8, pp. 1824–26, David Kidwell Testimony, Exhibit JJ. Despite calling Diane Mattingly, Mrs. Montgomery’ older sister, as a witness, the team failed to elicit that when Lisa was only four years old, she lay in a bed next to eight-year-old Diane as Diane was repeatedly raped. *Compare* Trial Tr. Vol. 8, pp. 2955–59, Diane Mattingly Testimony, Exhibit KK *with* Hr’g Tr. Vol. 6, pp. 1550–51, Diane Mattingly Testimony, Exhibit F; see also, Declaration of Diane Mattingly, pp. 11–12, Exhibit LL. They also failed to elicit evidence that Judy prostituted Lisa as a child. Hr’g Tr. Vol. 6, p. 1570, Danielle Waller Testimony, Exhibit II.

The team naively presented Mrs. Montgomery as a good mother because they did not investigate her functioning before the crime. The prosecutor exploited that error by eliciting testimony from Mrs. Montgomery’s own children that she abused and neglected them. Trial Tr. Vol. 9, pp. 1941–51, Desireé Boman Testimony, Exhibit MM; Trial Tr. Vol. 14, pp. 2948–50, Chelsea Boman Testimony, Exhibit NN; Trial Tr. Vol. 14, pp. 2941–44, Desireé Boman Testimony, Exhibit MM.

Mrs. Montgomery was convicted and sentenced to death on October 26, 2007. In closing arguments, federal prosecutors dismissed the evidence of her sexual abuse that was presented, trivializing it as the “abuse excuse.” Trial Tr. Vol. 13, pp. 2851–52, Gov’t Closing Argument, Exhibit OO. They faulted Mrs. Montgomery as a mother, telling the jury that she didn’t go to her children’s events, and that “[s]he didn’t cook, and [s]he didn’t clean.” Trial Tr. Vol. 15, p. 3156, Gov’t Closing Argument, Exhibit PP. They told the jury that she lived in a “filthy home.” Trial Tr.

Vol. 15, p. 3187, Gov't Closing Argument, Exhibit PP. The jury returned a death verdict in five hours. On October 22, 2007, the court sentenced her to death in accordance with the jury's recommendation.

The Eighth Circuit Court of Appeals upheld Mrs. Montgomery's conviction and sentence.¹⁵ The United States Supreme Court denied certiorari review on March 19, 2012. *See Montgomery v. United States*, 565 U.S. 1263 (2012). Her current lawyers filed a petition for writ of habeas corpus seeking to overturn Mrs. Montgomery's death sentence, but the district court denied relief, finding that her conviction and sentence did not violate the U.S. Constitution. That decision was affirmed by the Eighth Circuit Court of Appeals.¹⁶ The United States Supreme Court again denied certiorari review on May 26, 2020. On October 16, 2020, without providing notice to her legal team, the Department of Justice moved to set an execution date in Mrs. Montgomery's case. If the execution goes forward, she will be the first woman in almost 70 years to be killed by the federal government of the United States.

Yet Mrs. Montgomery continues to suffer from a reality-distorting mental illness. Dr. Katherine Porterfield, the foremost expert on torture and trauma, testified that the impact of Lisa's sexual abuse was "massive," and that her dissociative disorder was one of the most severe cases she has ever seen. Hr'g Tr. Vol. 7, p. 1692, Dr. Katherine Porterfield Testimony, Exhibit C. It is woven into her personality. To this day, when she is forced to talk about her sexual abuse, she has a physical reaction and starts to gag. Hr'g Tr. Vol. 7, p. 1705, Dr. Katherine Porterfield Testimony, Exhibit C. Mrs. Montgomery currently takes a cocktail of drugs to prevent her from being overtaken by psychosis, dissociation and depression. She relies on a daily pill to sedate herself. Hr'g Tr. Vol. 7, pp. 1770–71, Dr. Katherine Porterfield Testimony, Exhibit C. While these

¹⁵ *United States v. Montgomery*, 635 F.3d 1074 (8th Cir. 2011).

¹⁶ *Montgomery v. United States*, No. 17-1716 (8th Cir. 2019).

medications have helped Mrs. Montgomery in her day-to-day life, she is fragile. The mixture of disorders she carries with her cannot be cured or erased.

The setting of Mrs. Montgomery's execution during a global pandemic and in the midst of a presidential election obstructs her ability to fully access the clemency process and the courts. Although she is not currently competent to be executed, the mental health experts retained by the defense cannot evaluate her because of the risk of contracting COVID-19. Her defense lawyers risk their own health by visiting her. The federal court's ability to hear witness testimony and to directly observe Mrs. Montgomery's behavior is also severely constrained by the pandemic. Under these circumstances, Mrs. Montgomery faces execution without full access to the courts and to a fair and reasoned clemency determination.

LEGAL ARGUMENT

I. THE UNITED STATES VIOLATED ARTICLES I, XVIII AND XXVI OF THE AMERICAN DECLARATION, AS WELL AS CUSTOMARY INTERNATIONAL LAW, BY SENTENCING MRS. MONTGOMERY TO DEATH DESPITE HER SEVERE, DEBILITATING MENTAL ILLNESS.

Lisa Montgomery suffers from multiple, debilitating mental disorders that distort reality and prevent her from engaging in rational thought. The severity of her mental illness, and its impact on her daily functioning, precludes her execution under international law. As noted below, international law categorically prohibits the execution of persons with mental disabilities. The imposition of her death sentence, and her potential execution, constitute cruel, infamous, and unusual punishment under Article XXVI of the American Declaration. Should the United States carry out her execution, it would also violate her right to life under Article I of the American Declaration.

Early in her life, Mrs. Montgomery was deprived of any opportunity to develop a healthy, well-functioning brain and mind. She was born with brain damage, and her development was built on the foundations of coercion, violence, humiliation, and exploitation. All of this was an “astonishing amount of abuse” for a child to absorb. Hr’g Tr. Vol. 7, pp. 1670-71, Dr. Katherine Porterfield Testimony, Exhibit C. Her adulthood was no better. The prolonged suffering she faced led to a complex combination of mental disorders and neurological impairments from which she can never recover. These are described in brief below.

First, Mrs. Montgomery has Complex Post-Traumatic Stress Disorder, a condition often found in war survivors, children growing up in war zones, and survivors of kidnappings. Hr’g Tr. Vol. 7, p. 1664, Dr. Katherine Porterfield Testimony, Exhibit C. As a result of this disorder, Mrs. Montgomery re-experiences traumatic events in her past as if they were real. She also lives with an overwhelming feeling of constantly being under threat of attack. She has an “almost insurmountable fear of disclosing information which is painful, deeply buried and humiliating.” Declaration of Janet Vogelsang, p. 49, Exhibit G. Her memory is fragmented and she has difficulty sequencing events. She also has exaggerated startle responses to mild triggers, such a slamming door. Hr’g Tr. Vol. 7, p. 1663, Dr. Katherine Porterfield Testimony, Exhibit C.

Second, she has Severe Dissociation as a result of “tremendous overwhelming trauma.” Hr’g Tr. Vol. 7, p. 1815, Dr. George Washington Woods, Jr. Testimony, Exhibit A. Mrs. Montgomery “lives in a dissociated state much of the time,” which means that at times she literally cannot tell if she is real, and cannot sense her own body. Hr’g Tr. Vol. 7, p. 1692, Dr. Katherine Porterfield Testimony, Exhibit C.

Third, Mrs. Montgomery suffers from Psychosis, the symptoms of which include hallucinations, delusions, withdrawal, isolation, and lack of motivation. Hr’g Tr. Vol. 7, pp. 1684–

87, Dr. Katherine Porterfield Testimony, Exhibit C; Hr’g Tr. Vol. 7, p. 1747, Dr. Siddhartha Nadkarni Testimony, Exhibit O. Mrs. Montgomery experiences hallucinations, grossly disorganized behavior, and flattened affect. Hr’g Tr. Vol. 7, p. 1835, Dr. George Washington Woods, Jr. Testimony, Exhibit A. Her delusions further impair her ability to separate reality from imagination.

Fourth, she has Rapid Cycling Bipolar Disorder, which for Mrs. Montgomery manifests as rapid shifts in her mood. Hr’g Tr. Vol. 7, p. 1755, and 1767–69, Dr. George Washington Woods Jr. Testimony, Exhibit A. She will experience irritability, agitation, and depression, possibly all at the same time. *Id.* When combined with post-traumatic stress disorder, her symptoms are more severe. *Id.* at 1768. She is described as “confused” and as unable to focus or concentrate. *Id.* at 1770.

Fifth, she has diminished mental capacity, as manifested in her inability to complete simple tasks; for example, it took her a month to learn how to properly make her bed in prison, and she is unable to finish projects. *Id.* at 1764–1765. There is an extreme difference between Mrs. Montgomery’s verbal capacity and performance capacity in her IQ test. *Id.* at 1766. This is likely the result of reduced connectivity between left and right parts of their brain, which is how people put perceptions into words. Hr’g Tr. Vol. 7, p. 1650, Dr. Katherine Porterfield Testimony, Exhibit A.

Sixth, she has multifocal brain impairment, particularly in the cerebellum, the right parietal lobe, the right temporal lobe, and the frontal lobe. Hr’g Tr. Vol. 7, pp. 1762–64, Dr. George Washington Woods, Jr. Testimony, Exhibit A. She also has an impaired limbic system, particularly in the amygdala and hippocampus. Hr’g Tr. Vol. 7, pp. 1659–1660, Dr. Katherine Porterfield Testimony, Exhibit C. Mrs. Montgomery’s impaired limbic system causes her to

reexperience memories of fear as fear itself; her body becomes physically overwhelmed by reexperiencing trauma. *Id.*

This Commission has repeatedly observed that states may neither sentence individuals to death nor execute them if they suffer from mental disabilities. Such actions amount to an arbitrary deprivation of life and cruel, infamous and unusual punishment.¹⁷ The Commission's jurisprudence reflects a broad consensus under international law. The Human Rights Committee (HRC) has ordered states to refrain from imposing death sentences on individuals with "serious psycho-social and intellectual disabilities."¹⁸ Further, the HRC made clear in *Sahadath v. Trinidad and Tobago* that the issuance of an execution warrant in the case of a mentally ill prisoner violated Article 7 of the ICCPR.¹⁹ Similarly, the UN Human Rights Commission has repeatedly called upon states that retain the death penalty "[n]ot to impose the death penalty on a person suffering from any form of mental disorder."²⁰ And the UN General Assembly has repeatedly urged states not to impose capital punishment on individuals suffering from "mental or intellectual disabilities."²¹

Considering the severity of her numerous mental disorders, Mrs. Montgomery's execution would constitute a flagrant violation of her rights and clearly established principles in international law that protect the right to life. Mrs. Montgomery's mental functioning is on par with, and in fact far worse than, many of the petitioners whose death sentences were found to violate the ADRDM.

¹⁷ *Id.* ¶ 220.

¹⁸ General Comment No. 36 (2018) on Art. 6 of the International Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc. CCPR/C/G/36, ¶ 49 (Human Rights Committee, Oct. 30, 2018).

¹⁹ *Sahadath v. Trinidad and Tobago*, Communication No. 684/1996, U.N. Doc. CCPR/C/74/D/684/1996 ¶ 7.2 (Human Rights Committee, Apr. 15, 2002).

²⁰ UN Commission on Human Rights Res. 1999/61, Question of the Death Penalty (28 Apr. 1999), available at: <https://www.refworld.org/docid/3b00f03e40.html>); UN Commission on Human Rights Res. 2000/65, Question of the Death Penalty (27 Apr., 2000) (emphasis added) available at <https://www.refworld.org/publisher,UNCHR,RESOLUTION,,3b00f29a14,0.html>.

²¹ See, e.g., G.A. Res. 69/186, (Dec. 18, 2014).

In *Lackey v. United States*, three of the sixteen petitioners had serious mental illnesses. James Brown had suffered abuse and neglect as a child, and had paranoid schizophrenia, psychotic episodes, and hallucinations.²² Troy Albert Kunkle suffered from severe childhood abuse and developed schizophrenia, as well as drug addictions.²³ Angel Maturino Resendiz had schizophrenia, and suffered from self-harm and hallucinations.²⁴ The Commission concluded that, by sentencing them to death, the United States violated Articles I and XXVI of the American Declaration in each of the petitioners' cases.

Significantly, Mr. Resendiz had been previously determined “legally competent” for execution. Nevertheless, the Commission found that his Article I and XXVI rights had been violated. Citing international principles, *Sahadath v. Trinidad and Tobago*, and *Atkins v. United States*, the Commission reinforced the heightened scrutiny required in death penalty cases.²⁵ The Commission rejected the narrow definitions of “incompetence” adapted in domestic U.S. courts as inadequate to protect the right to life. One may be competent to stand trial, as Mr. Resendiz was, and yet incompetent to be executed, on account of severe mental illness.

Lisa Montgomery's mental disorders rival if not exceed those of Brown, Kunkle, and Resendiz. She was severely abused and neglected throughout her childhood like Brown and Kunkle, and has mental disorders that induce psychosis like Brown, Kunkle, and Resendiz. Additionally, however, Mrs. Montgomery also suffers from severe dissociation, rapid-cycling bipolar disorder, multifocal brain impairment, and complex post-traumatic stress disorder, making

²² *Lackey v. United States*, No. 52/13, Case 11.575, 12.333 and 12.341 (IACmHR, Jul. 15, 2013), ¶ 28.

²³ *Id.* ¶ 45.

²⁴ *Id.* ¶ 63.

²⁵ *Id.* ¶¶ 212-15.

her condition far more severe than that of any of the *Lackey* petitioners.²⁶ As described above, she would lapse into psychosis if her delusions were not controlled by psychotropic medications, and even with the medications, she continues to dissociate. The cognitive impairments she accumulated because of her traumatic childhood prevent her from executing tasks that are essential for independent human existence.

Mental competence must not be judged merely at the point of conviction. The Human Rights Committee has stressed that issuing a death warrant against a “mentally incompetent person,” even if that person had been competent at the time of his or her conviction, is a violation of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.²⁷ All petitioners are entitled to “exhaustive and impartial investigations into all allegations of violation of the right to life,” and this includes all claims of mental illness.²⁸

Mental disability must be viewed through a broad, comprehensive lens. The United Nations Human Rights Committee has encouraged States that retain the death penalty to ensure that “persons suffering from severe forms of mental illness not amounting to mental retardation are . . . protected.”²⁹ Mrs. Montgomery deserves such protection. The Respondent State has already

²⁶ See also, *Thompson v. United States*, Report No. 132/11, Petition 194-04 (IACmHR, Oct.19, 2011) (declaring admissible and not manifestly groundless, given the heightened scrutiny test applied to death penalty cases, the case of a man diagnosed with bipolar affective disorder, schizo-affective disorder, and schizophrenia, and medicated with antipsychotics and mood stabilizers).

²⁷ *Sahadath v. Trinidad and Tobago*, Communication No. 684/1996, CCPR/C/74/D/684/1996, ¶ 7.2 (Human Rights Committee, April 2, 2002).

²⁸ Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (Dec. 14, 1994), ¶ 378.

²⁹ United Nations, Human Rights Committee, CCPR/C/USA/CO/3, September 15, 2006, ¶ 7, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>.

violated Mrs. Montgomery's Article I and XXVI rights by sentencing her to death in the first place. By executing Mrs. Montgomery, the State would compound its violations of her rights.

Although Mrs. Montgomery is not currently competent to be executed, due to the risk of contracting COVID-19, the mental health experts retained by the defense cannot perform up-to-date evaluations on her. The federal court cannot hear witness testimony or directly observe Mrs. Montgomery's behavior as they would otherwise. As a result, Mrs. Montgomery faces execution without full access to the courts or to a fair and reasoned clemency determination, as noted in Section V, below.

II. THE UNITED STATES VIOLATED ARTICLES XVIII AND XXVI OF THE AMERICAN DECLARATION BY PROVIDING INCOMPETENT DEFENSE COUNSEL IN A CAPITAL CASE, MATERIALLY PREJUDICING MRS. MONTGOMERY.

Mrs. Montgomery's legal representation fell far below international standards. Her lawyers neither investigated nor presented troves of readily available mitigating evidence to help provide context for an aggravated capital crime. They failed to comprehend the profound and permanent impact of Mrs. Montgomery's years of torture and trauma, first as a child at the hands of her mother and stepfather, and later as an adult at the hands of her two husbands. Instead, they cut corners and offered a defense unsupported by the evidence. They squandered the opportunity to humanize their client and spare her life. The deficiencies in their representation began to appear well before Mrs. Montgomery's trial, when two male lawyers approached Judge Fenner to ask that he remove the experienced female attorney, Judy Clarke, from the case. From that point forward, the defense disregarded professional standards of care. Again and again, Respondent State's courts have tolerated this outcome, which violates Mrs. Montgomery's rights to fair trial and due process.

The United States has an obligation to provide competent defense counsel to indigent prisoners facing capital murder trials. This obligation is inherent in the guarantee of a fair trial, as

set forth in Article XXVI of the American Declaration. International law requires that courts apply a heightened standard when considering violations of fair trial guarantees in capital cases. "Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."³⁰ In capital trials, any violation of fair trial rights, like the right to receive competent representation will *ipso facto* constitute violation of the right to life.³¹ The State may also only impose the death penalty after a defendant, through his attorney, has the opportunity to present mitigating evidence.³²

The Commission has held that the defense's prompt investigation and presentation of mitigating evidence is critical to a fair trial in capital cases. *See, e.g., Rocha* ¶ 73; *Medellín* ¶ 134. When determining the adequacy of legal representation, the Commission has considered whether a reasonable investigation would have revealed potentially relevant mitigating evidence. Failure to investigate and present such evidence "[deprives the petitioner] of the benefit of the jury's consideration of potentially significant information in determining his punishment." *Moreno* ¶ 54. Thus, the Commission has routinely found that the failure to present such mitigating evidence amounts to a violation of Articles XVIII and XXVI of the American Declaration. *Rocha* ¶ 78; *Tamayo* ¶ 151 (finding defense counsel "failed to develop and present potentially mitigating evidence"); *Medellín* ¶ 142. The Commission has found that defense counsel's failure to present

³⁰ I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, ¶ 136.

³¹ General Comment No. 36 (2018) on Art. 6 of the International Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc. CCPR/C/G/36, ¶ 49 (Human Rights Committee, Oct. 30, 2018).

³² *See Medellín, Ramírez Cárdenas and Leal García v. United States*, Case 12.644, Inter-Am. Comm'n H.R., Report No. 90/09, OEA/Ser.L/V/II.135, doc. 37 ¶ 134 (2009); *Abu-Ali Abdur'Rahman v. United States*, Case 12.422, Inter-Am. Comm'n H.R., Report No. 13/14, OEA/Ser.L/V/II.150, doc. 17 (2014) at ¶ 56. *Lezmond C. Mitchell v. United States*, Case 13.570, Inter-Am. Comm'n H.R., Report No. 211/20, OEA/Ser.L/V/II, doc. 225 (2020), ¶ 112.

testimony about the defendant’s “upbringing and social history,” such as childhood trauma, is especially prejudicial. *See, e.g., Rocha* ¶¶ 21–27, 71; *Tamayo* ¶¶ 97–102, 145. Failure to produce available and relevant testimony about the defendant’s character and history also constitutes a deprivation of the petitioner’s right to present mitigating evidence. *Tamayo* ¶ 145.

The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases outlines practical guidelines for defense attorneys and courts to follow when assessing lawyers’ performance. Specifically, with regard to mitigation, Guideline 10.7 provides that defense teams must conduct exhaustive and unprecedented investigation into personal and family history in preparation for the penalty phase of a capital case.³³ Mrs. Montgomery’s trial lawyers failed to comply with these standards.

A. Mrs. Montgomery’s Trial Lawyers Conducted a Superficial Investigation into Her Life History, Overlooking Critical Mitigating Evidence.

Mrs. Montgomery’s trial lawyers failed to pursue a number of leads that would have yielded mitigating evidence, including Mrs. Montgomery’s extensive abuse, trauma, and mental illness.

First, Mrs. Montgomery’s defense team failed to adequately interview and examine at trial key witnesses to draw out powerful, contemporaneous accounts of Mrs. Montgomery’s abuse and its impact on her. As a result, the jury never learned that Lisa was gang raped by a series of men. David Kidwell, Mrs. Montgomery’s cousin, could have testified regarding his knowledge that Lisa had been gang raped by Jack Kleiner, his friends, and other men. Declaration of David Kidwell, pp. 4–5, Exhibit I. Kidwell worked in law enforcement when Lisa told him about the rapes. He

³³ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.7 (rev. ed. 2003).

recalled that Lisa told him that the rapes happened frequently, and that Lisa was afraid that Jack Kleiner would kill her if she told anyone about the abuse. *Id.* Kidwell could also have testified to his observations of her demeanor changing over time, in response to the trauma. But when Kidwell testified at trial, Duchardt only asked him about Jack Kleiner's sexual abuse. Trial Tr. Vol. 8, p. 1825, David Kidwell Testimony, Exhibit JJ. Duchardt did not solicit any other information from Kidwell. The jury did not learn about the gang rapes. *Id.*

The jury also never learned about Judy's prostitution of Lisa. David Owen, Duchardt's co-counsel, later conceded that the first he had ever heard that Judy prostituted Lisa was at the evidentiary hearing in post-conviction proceedings. Hr'g Tr. Vol. 8, p. 2184–85, Testimony of David Owen, Exhibit V. Owen also admitted that he had not known that multiple men were allowed to rape and urinate on Lisa. *Id.* Had counsel investigated further, they could have also presented evidence that Judy sold Lisa into prostitution for goods and services. Hr'g Tr. Vol. 7, p. 1671, Dr. Katherine Porterfield Testimony, Exhibit C. But none of this information made it to the jury.

The trial attorneys also failed to discover or present evidence that Lisa witnessed her older sister, Diane Mattingly, being raped in the bed next to her when she was four years old. Mr. Duchardt spoke with Diane only once before she testified at trial. In front of the jury, she was only asked to speak to having taken care of Lisa in their childhood and that living with Judy was like "walking on eggshells." Trial Tr. Vol. 14, pp. 2956–58, Diane Mattingly Testimony, Exhibit KK. Had the defense team probed, they would have discovered Diane was willing to testify in vivid detail to the horrendous abuse they both endured at the hands of Judy and the men that she allowed into their children's bedroom. She could have testified that Judy frequently and randomly threatened to send Diane away, and would lock her out of the house for extended periods of time

with no clothes on.³⁴ Diane could have testified that when she was eight, she was raped repeatedly while Lisa lay in the bed next to hers—so close that the sisters could have reached their hands out and touched each other. Hr’g Tr. Vol. 6, pp. 1550–51, Diane Mattingly Testimony, Exhibit F; Declaration of Diane Mattingly, p. 4, Exhibit LL.

Second, defense counsel failed to pursue key investigative leads that would have provided insight into Mrs. Montgomery’s mental disabilities. The lawyers never conducted an extensive social history, despite such investigation being standard practice for representation in capital cases. Hr’g Tr. Vol. 5, p. 1274, Dr. Ruth Kuncel Testimony, Exhibit S. Had they done so, the full extent of Mrs. Montgomery’s trauma would have been apparent. The jury never heard about Mrs. Montgomery’s full range of cognitive dysfunctions and mental illnesses, and how these interacted with each other.

Lisa’s family members noticed signs of mental disability from an early age, but counsel never solicited their testimony. For example, Teddy, her younger brother, could have testified that Lisa often “spac[ed] out” and lived in her own little world. Declaration of Teddy Kleiner, p. 22, Exhibit L. Her children could have shown that her impairments continued into adulthood. For example, Mrs. Montgomery repeatedly treated her children for lice but did not treat herself, thereby reinfesting the family; she was unable to complete projects—often because she repeatedly took things apart and started over; she could not help her children with their homework; she could not plan a menu or buy groceries within a budget. Declaration of Janet Vogelsang, Exhibit G.

Third, and perhaps most importantly, defense counsel failed to develop a relationship with Mrs. Montgomery herself. As a result, Lisa never felt comfortable communicating her history of

³⁴ At the evidentiary hearing, Mrs. Mattingly described the random and violent abuse that Judy inflicted on both Diane and Lisa: “If [Judy] was in a foul mood, whoever was in front of her got it, either hit or thrown outside with no clothes on.” Hr’g Tr. Vol. 6, p. 1549, Diane Mattingly Testimony, Exhibit F.

trauma to her male attorneys, including information about being prostituted. Predictably, given Lisa's history of trauma, several of Mr. Duchardt's interviews with Lisa ended with Lisa curled into the fetal position. Duchardt Memo to Team 03/07/2007, p. 3, Exhibit QQ. Further, as a result of their inability to form a relationship with Lisa, defense counsel had only a superficial understanding of her cognitive impairments and psychological distress.

B. Mrs. Montgomery's Lawyers Pursued Defense Theories Unsupported by Facts or Psychological Expertise.

Instead of mining their client's history for an explanation of the crime and relying on interdisciplinary expertise, as is expected in capital cases, Mrs. Montgomery's trial lawyers pursued two contradictory defenses: "the Tommy defense" and the theory that Mrs. Montgomery was not guilty by reason of insanity on account of pseudocyesis. The facts supported neither defense, however. Their colossal misjudgment deprived Mrs. Montgomery of a fair trial.

Initially, the defense team pursued "the Tommy defense"—their theory that Lisa's brother, Tommy, who had previously had trouble with law enforcement, was with Lisa at the time of the crime and committed the murder. The team continued to pursue this theory even in the face of clear evidence to the contrary: Both Tommy and his probation officer confirmed they were with each other at the time of the murder. Hr'g Tr. Vol. 4, p. 902, Erin Garman Testimony, Exhibit RR. Duchardt and Owen eventually abandoned this defense, but only after they had caused irreparable damage to Mrs. Montgomery's credibility. After badgering her for months to say that her brother was with her at the time of the crime, Mrs. Montgomery told one of the prosecution's doctors that her brother was responsible for what happened—a statement that was captured on videotape.

At trial, Mrs. Montgomery's trial counsel asserted that their client was not guilty by reason of insanity. The defense asserted that Mrs. Montgomery suffered from pseudocyesis, a condition

in which a woman incorrectly believes that she is pregnant and experiences symptoms of pregnancy. Mrs. Montgomery, however, made statements to the FBI demonstrating that she knew that the baby did not belong to her. Trial Tr. Vol. 7, p. 1646, Randy Strong Testimony, Exhibit SS. Defense counsel was so determined to proffer the pseudocyesis defense that Mr. Duchardt hired Dr. V.S. Ramachandran, a neurologist, to testify as an “expert” on pseudocyesis. Dr. Ramachandran’s “expertise” consisted of writing five pages on pseudocyesis and evaluating two with the condition outside of the United States. Dr. Ramachandran later disclaimed being an expert on the diagnosis. Trial Tr. Vol. 1, p. 52, Dr. V.S. Ramachandran Testimony, Exhibit TT; Deposition of Dr. V.S. Ramachandran, pp. 14–15, Exhibit UU.

The pseudocyesis defense was a distraction from the torture Mrs. Montgomery suffered, which offered a more truthful and convincing account for the crime. The pseudocyesis defense was not based on any reasonable trial strategy, and was bound to fail because it was based on incomplete information on Lisa’s past trauma and resulting mental illnesses and brain dysfunction. As noted above, no witness could corroborate that Mrs. Montgomery thought she was actually pregnant. No expert claimed that she committed the crime under the misunderstanding that the baby was hers. The diagnosis of pseudocyesis did not fit her symptoms. Furthermore, as a diagnosis, it does not prevent someone from discerning the wrongfulness of their actions. It was bound to fail.

Had the jury been given a window into the true extent of the abuse that Lisa suffered and the trauma that resulted, there is a reasonable probability that at least one juror would have been convinced that Lisa deserved a life sentence. Instead, the jury heard an unfounded, exotic and partial explanation for her actions that failed to offset the lurid details of the crime.

C. The Prosecution Successfully Exploited Defense Counsel’s Incompetence.

By the end of her trial, Mrs. Montgomery’s lawyers had managed to undermine their own pseudocycyis defense. Thus, instead, in penalty phase closing arguments, her lawyer leaned heavily on the evidence that Lisa had been sexually abused by her stepfather, in a last-ditch effort to solicit sympathy from the jury. The prosecutor, in turn, characterized Mrs. Montgomery’s defense as “the abuse excuse.” Trial Tr. Vol. 13, pp. 2851–52, Gov’t Closing Argument, Exhibit OO. The prosecutor trivialized the abuse, in part because defense counsel neither presented its full extent nor its devastating impact. The defense team never connected the dots between Lisa’s abuse, her mental illness and the crime. Russ Stetler explained the team’s cardinal failure: the trial team never “put together all the pieces in some sort of framework that would help the jury understand what had happened in Mrs. Montgomery’s life.” Hr’g Tr. Vol. 1, p. 128, Russell Stetler Testimony, Exhibit GG.

D. The Defense Team’s Failure to Present Mitigating Evidence was Rooted in Misogyny.

As noted above, District Judge Gary Fenner removed Judy Clarke from the legal team at the insistence of David Owen, over Mrs. Montgomery’s clear objection. Judy Clarke’s removal was part of a wider pattern: The male defense team members chafed at their female colleagues’ leadership. A number of competent female mitigation specialists and attorneys were removed or sidelined in the team.³⁵ Their exclusion was consistent with a culture of misogyny in the offices in which they practiced. From the federal district court up to the U.S. Supreme Court, Respondent

³⁵ Attorney Anita Burns withdrew from the case because David Owen, despite his lack of expertise, was attempting to take charge of the case and refused to allow her to make decisions. Hr’g Tr. Vol. 2, p. 326, Anita Burns Testimony, Exhibit VV. Mitigation specialist Lisa Rickert left the case when she learned that Owen had been publicly speculating that she was having an affair with Ron Ninemire. Hr’g Tr. Vol. 2, p. 446, Lisa Rickert Testimony, Exhibit WW. Judge Fenner also removed Attorney Susan Hunt after Judy Clarke’s removal, despite Mrs. Montgomery having expressed appreciation for Hunt to the court. Hr’g Tr. Vol. 2, p. 419, Susan Hunt Testimony, Exhibit W.

State sanctioned this gender discrimination, which had serious consequences for the quality of the representation Mrs. Montgomery received.

Owen's problems with women were well known. One of Owen's colleagues, who is now the chief federal public defender for the Western District of Missouri, testified that "[Owen] was very hard to work with. He was belligerent. He was misogynistic. He was a bully in every sense of the word." Hr'g Tr. Vol. 3, pp. 689–90, Laine Cardarella Testimony, Exhibit BBB. Owen repeatedly asked the female attorneys assigned to the case, "You're not one of those militant female lawyer types, are you?" Hr'g Tr. Vol. 3, p. 690, Laine Cardarella Testimony, Exhibit BBB. Owen told Duchardt that he objected to Clarke's presence on the team because he found her "emasculating." Declaration of Chris Armstrong, p. 2, Exhibit CCC. Owen's personal animosity had lethal consequences for his client, Mrs. Montgomery. An investigator on the team, who had no previous experience in a capital case, was resentful of another female team member's role, and stated, "I am not going to take any orders from any damn woman." Hr'g Tr. Vol. 2, pp. 406–07, Susan Hunt Testimony, Exhibit W.

Mrs. Montgomery was devastated by Mrs. Clarke's removal because Mrs. Clarke was the only lawyer that Lisa trusted. Mrs. Montgomery wrote a letter to the court expressing her dismay after Mrs. Clarke's termination: "Of all the lawyers I have had to date, I have felt the most comfortable with Judy. . . . [When Judy was removed, I felt] that I had lost all hope. With Judy gone, it's difficult to have any confidence in the future of my case. . . . Removing Judy from my team has been a devastating blow to me." Lisa Montgomery Letter, p. 3, Exhibit CC. Mrs. Montgomery explained to the court that, as a result of the trauma that she had experienced, she had "struggled greatly with being able to trust [attorneys]," particularly male attorneys. *Id.* at 1. She ended her letter praising the last remaining female attorney on the team: "Susan [Hunt] has

shown a genuine concern for how I was feeling about [Ms. Clarke's removal] and I appreciate her effort to do so." *Id. at 3*. Judge Fenner promptly removed the remaining female attorney from the case. Hr'g Tr. Vol. 2, p. 419, Susan Hunt Testimony, Exhibit W.

The all-male trial team was unprofessional in their dealings not only with female colleagues, but also lacked the skills to build rapport with their client. In post-conviction proceedings, trial counsel admitted that they lacked cultural competence in counseling and representing a woman like Mrs. Montgomery, a survivor of gender-based torture. Duchardt conceded that he was "gender-challenged" in his dealings with Lisa. Hr'g Tr. Vol. 8, p. 2195, Frederick Duchardt Testimony, Exhibit FF.

Further, members of the defense team stated outright that they did not understand the purpose of mitigation and did not intend to pursue it, certainly not in the way that Judy Clarke had outlined. In other words, they refused to comply with professional norms. The high turnover rate of team members also made an effective mitigation investigation impossible. The female mitigation specialists on the team operated with little autonomy or support. Owen controlled the purse strings of the team and micromanaged mitigation specialists' tasks. Declaration of Susan Hunt, p. 7, Exhibit XX; Hr'g Tr. Vol. 3, pp. 699–700, Holly Jackson Testimony, Exhibit DD. This level of control was particularly problematic because the male members of the team did not "believe in" mitigation. Hr'g Tr. Vol. 2, pp. 345–46, Stephanie Elliott Testimony, Exhibit YY; Hr'g Tr. Vol. 6, p. 1558, Danielle Waller Testimony, Exhibit II. The team used, at different points, four different mitigation investigators, creating "witness fatigue" when the same witnesses were asked the same questions repeatedly by different investigators. Hr'g Tr. Vol. 1, pp. 106–07, Russell Stetler Testimony, Exhibit GG. The high turnover rate of lawyers also undermined the strength of the attorney client relationship. In addition, the defense team did not adequately prepare witnesses,

meeting with many of them, including Diane Mattingly, only once on the night before they were scheduled to testify. Hr’g Tr. Vol. 6, pp. 1550–51, Diane Mattingly Testimony, Exhibit F; Declaration of Diane Mattingly p. 13, Exhibit LL.

Gender bias also animated the team’s chosen defense. Outside observers noted that Mrs. Montgomery’s attorneys viewed her as a “sweet” and weak woman who could not possibly have committed the crime on her own. Hr’g Tr. Vol. 8, p. 2192, Frederick Duchardt Testimony, Exhibit FF, *but see* Hr’g Tr. Vol. 3, p. 670, Judy Clarke Testimony, Exhibit ZZ (forensic pathologist determined that only one person could have committed the crime). As a result, the lawyers pursued defenses predicated upon her innocence. They disregarded her sincere expressions of remorse. It is here where the damage wrought by Ms. Clarke’s removal is most apparent. Unlike Duchardt and Owen, Ms. Clarke had previously defended women charged with murdering children—as well as others accused of multiple aggravated murders—and had obtained life sentences for them. Hr’g Tr. Vol. 1, p. 213, Marc Bookman Testimony, Exhibit AAA. Despite the gravity of Mrs. Montgomery’s offense, a death sentence was far from a foregone conclusion: at least a dozen other women who have committed similar crimes around the country have received life sentences.³⁶ Indeed, Mrs. Montgomery is the only woman on death row in the entire country for such a crime.

³⁶ Brooke Crews was sentenced to life in prison for killing a pregnant woman and stealing the baby, and her co-defendant, William Hoehn, received a life sentence that the court later overturned as too severe. “North Dakota Court Overturns Life Term in Cut from Womb Case,” Associated Press (Aug. 22, 2019), <https://www.newscenter1.tv/north-dakota-court-overturns-life-term-in-cut-from-womb-case/>. Julie A. Corey also received a life sentence for killing a pregnant woman, retrieving the baby, and attempting to pass the baby off as her own. Brian Lee, “Family of Darlene Haynes, Killed 10 Years Ago for Her Unborn Child, Creates Memorial at the Site,” Telegram (Jul. 26, 2019), <https://www.telegram.com/news/20190726/family-of-darlene-haynes-killed-10-years-ago-for-her-unborn-child-creates-memorial-at-site>. Similarly, Andrea Curry-Demus, who was initially found incompetent to stand trial, also received a life sentence for the same crime, even though Curry-Demus had previously served eight years in prison for stabbing another pregnant woman in an attempt to steal her baby and stealing a baby from the hospital. Edecio Martinez, “Andrea Curry-Demus Gets Life for Cutting Baby from 18-Year-Old’s Womb,” CBS News (May 18, 2010), <https://www.cbsnews.com/news/andrea-curry-demus-gets-life-for-cutting-baby-from-18-year-olds-womb/>.

Had Ms. Clarke remained on the case, Mrs. Montgomery would likely be serving a life sentence today.

Trial counsel's failure to adequately investigate and present evidence of Lisa's sexual and physical trauma and her resulting mental illness ultimately perpetuated the cycle of gender-based discrimination she had suffered her entire life.

III. THE UNITED STATES VIOLATED ARTICLES I, II, V, AND VII OF THE AMERICAN DECLARATION BY FAILING TO PROTECT MRS. MONTGOMERY FROM CHRONIC SEXUAL AND DOMESTIC ABUSE AS A YOUNG GIRL.

The United States, under its own domestic and international obligations, was bound to ensure that Mrs. Montgomery enjoyed a safe childhood; instead, she was a victim of repeated sexual violence and terror at the hands of her caretakers. Local authorities could have prevented the torture she endured, but they never intervened, despite their obligation to do so under international law and despite numerous opportunities to do so. She currently suffers from a debilitating combination of mental disabilities that have been exacerbated at every turn by the United States' failure to investigate her abuse, protect her from further harm and provide her with ongoing treatment and rehabilitation.

A. The United States had a Heightened Due Diligence Obligation to Prevent, Investigate, and Remedy Gender-Based Violence Inflicted on Mrs. Montgomery as a Girl-Child Raised in Rural Poverty.

International law recognizes the specific obligations States owe to young girls within their jurisdiction. Their vulnerability to violence, and to sexual violence in particular, demands proactive and aggressive governmental responses to prevent, investigate, and remedy gender-

based violence, including within the home.³⁷ Their gender and age make girl children more susceptible to human rights violations.³⁸ The IACHR, in recognizing that girls are “the main victims of sexual violence” and that aggressors are typically males with some family relationship or kinship with the victim, has labelled violence against women and girls as “one of the clearest manifestations of a patriarchal culture in which a woman’s body and her sexuality are not hers to control,”³⁹ perpetuating generations of discrimination against woman.⁴⁰ A “State’s failure to act with due diligence to protect women from violence is a form of discrimination and a denial of their right to equal protection of the law and of the duty to guarantee access to justice.”⁴¹

States’ elevated obligations to girl-children reflect a widespread concern over the devastating impact of childhood abuse. The Commission has urged States to recognize the grave physical and psychological consequences of rape, noting that child-victims face heightened

³⁷ IACHR, Report No. 80/11, Case 12,626, Merits, *Jessica Lenahan (Gonzales) et al. (United States)*, July 21, 2011, ¶¶ 122, 123, 125.

³⁸ *Id.* ¶¶ 124, 129; *See also* IACHR, *Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean*, ¶ 11, OEA/Ser.L/V/II., Doc. 233, November 14, 2019 (“On this score, it must be noted that pre-teenage and teenage girls continue to be invisible inasmuch as the specific issues and vulnerabilities faced by them and their special protection needs are not recognized. Their rights and the particular challenges faced by them go unnoticed under the ageless category of “women,” which does not take into consideration their special needs of protection due to their condition of growth and development; or they remain invisible under the categories of “children,” “adolescents” and “young people,” which do not take gender and the issues they face into account, precisely because of their condition as female and structural situations of violence and discrimination against women.”).

³⁹ IACHR, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, ¶ 21, OEA/Ser.L/V/II., Doc. 63, 9 December 2011, <https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf>.

⁴⁰ *Id.* ¶ 17 (“Sexual violence is not an isolated phenomenon ... It is instead a multidimensional problem that affects every country in the Americas. It is a product of a social environment in which violence is tolerated and is compounded in the case of women, as they are victims of generations of discrimination and inferior treatment owing to their sex.”); *See also* United Nations, Committee on the Elimination of Discrimination against Women, General Recommendation 24, Women and Health, 20th session (02/02/1999), ¶ 29 (underscoring that States Parties should promote women’s health throughout their lifespan, which includes interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women).

⁴¹ IACHR, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, ¶ 40, OEA/Ser.L/V/II., Doc. 63, 9 December 2011, <https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf>.

trauma, particularly where an offender “maintains a bond of trust and authority” with the child.⁴² U.N. bodies have also noted that “*exposure of victims to domestic violence generally continues for many years and often lasts an entire lifetime.*”⁴³ The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has compared domestic violence to war, explaining that it is a “veritable ‘scourge’ of inhumanity, traumatizing countless children, women and men on a daily basis, and brutalizing human society for generations to come.”⁴⁴ Where experiences of domestic and other gender-based violence amount to torture, States have even greater obligations to prevent, investigate, and remedy the acts.⁴⁵

States’ obligations to guarantee equal protection and non-discrimination to girl-children requires that all government agencies and bodies work towards “the prevention and eradication of violence against women.”⁴⁶ The judicial system, legislatures and their enactments, and public policies, as well as “those entrusted with safeguarding the security of the State”—such as police officers—must each individually and in coordination diligently protect girl-children from

⁴² IACHR, *Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean*, ¶¶ 247, 263, OEA/Ser.L/V/II., Doc. 233, November 14, 2019.

⁴³ United Nations Human Rights Office of the High Commissioner, Thematic Consultations of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/DomesticViolenceProhibitionTorture.aspx> (emphasis added).

⁴⁴ *Id.*

⁴⁵ States bear responsibility for private conduct where the State “fail[s] to exercise due diligence to stop, sanction and provide remedies to victim of torture,” particularly in the context of “gender-based violence, such as rape, domestic violence, . . . and trafficking.” See General Comment 2, UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

⁴⁶ IACHR, Report No. 80/11, Case 12,626, Merits, *Jessica Lenahan (Gonzales) et al. (United States)*, July 21, 2011, ¶¶ 101–170. See also CEDAW Comm., General Recommendation No. 19, Violence Against Women, U.N. Doc. A/47/38 (1992) (explaining that discrimination against women involves gender-based violence, violence that disproportionately affects woman or violence directed against a woman because she is one) [hereinafter CEDAW, General Recommendation 19].

discrimination and violence.⁴⁷ When government actors become aware of any sexual or gender-based violence, they “must conduct the investigation with a sense of resolve and in an effective manner, taking into account society’s obligation to reject violence against women and the States’ obligations to eliminate it and to give victims confidence in the State agencies charged with protecting them.”⁴⁸ States must also offer a remedy, not simply in the form of judicial accountability but by facilitating access to health, education, and other services in order to make victims whole. Critical to the safety of girl children is their access to adequate standard of living for themselves and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.⁴⁹ Where the State cannot restore the victim to her prior situation because of irreversible harms to her physical, sexual, or psychological integrity, it should consider compensation, rehabilitation, guarantees of non-repetition, and a measure of satisfaction.⁵⁰

The United States claims to recognize and embrace its obligation to protect girl children from sexual exploitation. The preamble of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (“Optional Protocol”), ratified by the United States on June 18, 2002, observes that “girl children . . . are at greater risk of sexual exploitation and that girl children are disproportionately represented among

⁴⁷ IACHR, Report No. 80/11, Case 12,626, Merits, *Jessica Lenahan (Gonzales) et al. (United States)*, July 21, 2011, ¶¶ 123, 125, 128.

⁴⁸ IACHR, Access to Justice for Women Victims of Sexual Violence in Mesoamerica, ¶ 16, OEA/Ser.L/V/II., Doc. 63, December 9, 2011, <https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf>; See IA Court of H.R., *Fernández Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 30, 2010, Series C No. 215; IA Court of H.R., *Rosendo Cantú et al. v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 31, 2010, Series C No. 216.

⁴⁹ IA Court of H.R., “*Street Children*” (*Villagrán Morales et al.*) v. *Guatemala*, Judgment of November 19, 1999, Series C No. 63.

⁵⁰IACHR, Access to Justice for Women Victims of Sexual Violence in Mesoamerica, ¶ 108, OEA/Ser.L/V/II., Doc. 63, 9 December 2011, <https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf>.

the sexually exploited.” The Optional Protocol further requires states parties to “adopt appropriate measures to protect the rights and interests of child victims . . . at all stages of the criminal justice process,” “adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol,” and “take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offenses, including their full social reintegration and full physical and psychological recovery.”⁵¹

B. Despite Clear Evidence that Lisa Was Being Abused, State Authorities Repeatedly Failed to Investigate and Prevent her Sexual, Physical and Psychological Abuse.

Various State actors, including social service workers, a police officer, a state judge, a school teacher and an administrator, knew or had reason to know that Lisa faced an imminent risk of physical and sexual violence. But they failed to “conduct [an] investigation with a sense of resolve and in an effective manner,” and consequently failed to protect Lisa from harm, contrary to this Commission’s mandate.

In determining whether a State has failed to meet its due diligence obligations, the Inter-American Commission considers: “(i) whether the state authorities at issue should have known that the victims were in a situation of imminent risk of domestic violence; and (ii) whether the authorities undertook reasonable measures to protect them from these acts.”⁵² Knowledge is imputed to the State where authorities “had already recognized a risk of harm to the victim and/or her family members, but had failed to act diligently to protect them.”⁵³ The Commission has

⁵¹ Optional Protocol No. 2 to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted at New York, May 25, 2000, signed on July 5, 2000, art. 8, 9.

⁵² IACHR, Report No. 80/11, Case 12,626, Merits, *Jessica Lenahan (Gonzales) et al. (United States)*, July 21, 2011, ¶ 137.

⁵³ *Id.* ¶ 132 (citing European Court of Human Rights, *E. and Others v. the United Kingdom*, Application No. 33218/96; *Z and Others v. the United Kingdom* [GC], Application No. 29392/95 ECHR 2001-V).

imputed knowledge to the State in “cases where social services had already recognized a risk of harm to children who were abused in the home setting, and failed to adopt positive measures to prevent further abuse from taking place.”⁵⁴ The obligation to protect is “one of reasonable means, and not results;” States bear responsibility where they fail to “take reasonable measures that ha[ve] a real prospect of altering the outcome or mitigating the harm.”⁵⁵

The State was first put on notice of Lisa’s risk of abuse when she was only four years old. Declaration of Janet Vogelsang, p. 53, Exhibit G.⁵⁶ Diane Mattingly, her half-sister, testified that in February 1972, when Diane was eight years old, two social workers visited Lisa’s home and took Diane away. Before the Department of Human Services removed her, Diane had been raped by one of her mother’s male friends while she lay in bed next to her younger sister. Diane had also been punched, beaten, and forced to strip naked and sit outside the house as punishment. When the Department of Human Services removed Diane from the home, Diane clung to Lisa, fearing that the sexual abuse she endured would be redirected to young Lisa.

Although the Department of Human Services removed Diane from the home, it failed to take adequate measures to investigate whether her sister was being abused or neglected. Oklahoma law requires the Department of Human Services to conduct a safety investigation or assessment upon a report of abuse or neglect.⁵⁷ These investigations must include “a visit to the home of the child, an interview with and examination of the subject child,” and may include interviews with

⁵⁴ *Id.*

⁵⁵ *Id.* ¶ 134 (citing European Court of Human Rights, *Opuz v. Turkey*, Application No. 33401/02, 9 June 2009, ¶ 136; *E. and Others v. the United Kingdom*, no. 33218/96, ¶ 99.).

⁵⁶ Social services noted that “this child’s needs have been totally ignored by the adults who have charge of her and it is felt that she is in need of protection.” Declaration of Janet Vogelsang, p. 53, Exhibit G.

⁵⁷ 10A OK Stat § 10A-1-2-102 (2014); 10A OK Stat § 10A-1-2-105 (2014); Okla. Admin. Code § 340:75-3-200.

parents and a medical, psychiatric, or psychological examination of “any child in the home.”⁵⁸ Where the Department receives reports of sexual abuse or extreme physical abuse, it must, where possible, employ a multidisciplinary team to investigate the allegations and provide investigation information to law enforcement; the Department Director may also request that law enforcement directly conduct such investigations directly.⁵⁹ During these investigations, the Department should give “special consideration to the risks of any minor, including a child with a disability, who is unable to communicate effectively about abuse, neglect or other safety threat or who is in a vulnerable position due to the inability to communicate effectively.”⁶⁰ Oklahoma law further mandates the Department of Human Services to forward the results of the assessment to a district attorney’s office with proper jurisdiction.⁶¹ The Department of Human Services has the discretion to identify services in the community and “refer the family or arrange for such services” when an assessment suggests the family might benefit from them. It must also record attempts to “provide, refer, or arrange” for the services, and determine whether a recommendation should be made to remove the child if the family refuses such services.⁶²

The Department failed to execute any of these obligations in Lisa’s case. During the visit, the two social services workers failed to interview Diane, Lisa, or Judy; failed to involve law enforcement or other multidisciplinary team members; failed to consider the filth and unsuitability of the home environment; failed to investigate Diane’s emotional response to her own removal;

⁵⁸ 10A OK Stat § 10A-1-2-105 (2014).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 10A OK Stat § 10A-1-2-102 (2014).

⁶² 10A OK Stat § 10A-1-2-105 (2014).

and failed to refer or arrange for any social services for the family she left behind, ultimately violating due diligence obligations to Lisa.

At another point, social services conducted an investigation into abuse at the Kleiner house, but they announced their visit beforehand. Jack took full “advantage of the notice and threatened to beat Lisa and Patty if they told the truth.” Declaration of Janet Vogelsang, p. 86, Exhibit G. No further action was taken after that single visit.

A decade later, the State failed to meaningfully intervene when it was put on notice that Jack had raped Lisa. Judy reported that she had discovered Jack raping 16-year-old Lisa to the Child Welfare Office in November 1984. She had waited nine months to report the incident. The agency refused to recommend juvenile court action, explaining that “Lisa is on the waiting list for counseling and Mrs. Kleiner has filed for divorce from her husband.” Report to the District Attorney, Exhibit DDD. The agency opined that Lisa would be adequately protected by Judy, despite acknowledging in the same report that Judy had welcomed Jack back into home in the months after Lisa’s rape. *Id.* Although this time the Child Welfare Office filled out a form referring the matter to the district attorney’s office, prosecutors took no action. *Id.* Where a State fails to translate its legislation and state policies into “effective measures” to investigate, prosecute, and punish such acts of violence, it fails to ensure the rights of girl-children.⁶³ The district attorney’s office and the Child Welfare Office both fell short of their due diligence obligations towards Lisa.

In 1985, the State had another opportunity to intervene during Judy and Jack’s divorce proceedings. There, Judy testified in court that she saw Jack raping Lisa: “He was in her. He was pumping her.” The Court learned that Judy allowed Jack back into the trailer only two days after she discovered him raping her daughter, and waited three months to leave him. The Court found

⁶³ IACHR, Report No. 80/11, Case 12,626, Merits, Jessica Lenahan (Gonzales) et al. (United States), July 21, 2011, ¶ 410.

Judy's failure to report the abuse to authorities and immediately obtain counseling as "inexcusable." The Court noted that Judy sat emotionless during the testimony regarding Lisa's sexual abuse. *Kleiner v. Kleiner* Divorce Tr., p. 306, Exhibit H.

Yet, although the judge recognized that Lisa was at risk of harm, he failed to take reasonable steps to prevent, investigate, and remedy her abuse. Under Oklahoma law, where evidence in a court proceeding regarding child custody suggests a child is a victim of neglect or abuse, the court must remit the allegations to the Department of Human Services for an investigation and appoint an attorney for the child for that proceeding and any related ones.⁶⁴ Oklahoma law further empowers district court judges to request investigations by law enforcement agencies "where the court reasonably believes that . . . physical or sexual abuse of a child has occurred."⁶⁵ At the time Lisa testified, the statute of limitations for rape had not yet run, and Jack could have been prosecuted. Yet while the judge conveyed disapproval, there was no accountability. There is nothing to suggest the judge reported the abuse to the Department of Human Services or any law enforcement agency for investigation. Finally, Lisa did not receive legal counsel to advise and defend her rights.⁶⁶

Despite the State's knowledge of Lisa's sexual and physical abuse, it failed to take adequate steps to investigate the circumstances surrounding her abuse, to prevent further harm, and to take measures to ensure her recovery. Her abusers enjoyed complete impunity. The counselor noted Lisa's ongoing psychological and physical mistreatment, documenting Judy's "lack of empathy for her daughter," her verbal abuse of Lisa, and Lisa's inability to express her feelings. The

⁶⁴ 10A OK Stat § 10A-1-4-102 (2014).

⁶⁵ 10A OK Stat § 10A-1-2-103 (2014).

⁶⁶ Judy's private attorney eventually referred Lisa to the Department of Human Services and Central Family and Children's Services in Tulsa, Oklahoma for family counseling, ten months after one of Lisa's rapes. The attorney's referral was a private recommendation, not a State order.

counselor recorded an incident where Jack broke a broom beating Lisa. But the counselor also failed to respond. Authorities were never once called to prevent, investigate or remedy this abuse or to investigate and prosecute Jack, despite knowledge by multiple actors. When Judy gained custody of Lisa, she immediately pulled Lisa from treatment in April 1985, and the State took no further action to save Lisa.

Still, Lisa desperately continued to seek help, reporting her physical and sexual abuse to her cousin, David Kidwell, a Deputy Sheriff in Oklahoma. Declaration of Janet Vogelsang, p. 80, Exhibit G. She broke down, explaining to him that she had been raped by multiple men brought into her home; they brutally raped her orally, vaginally, and anally on numerous occasions, tying her up and urinating on her. International law requires that all law enforcement agents—including those at local level—combat domestic violence.⁶⁷ The Special Rapporteur on Violence Against Women has also identified the vital role that law enforcement plays in discharging States' due diligence obligations. Law enforcement agents need to be sensitive to and aggressive in tackling domestic violence, by, for example, implementing support services for victims.⁶⁸ David Kidwell, as a law enforcement official, had a duty as a state actor to report, prevent, and investigate this abuse. He did not. Instead, Lisa's torture continued.

In the absence of any help, Lisa kept quiet about her abuse. Lisa lamented years later to a defense expert: "Whenever I told, nobody did anything."⁶⁹ Various persons took notice of her declining condition, psychological and physical. Lisa's grades suffered. Although school officials

⁶⁷ See *X. v. Timor-Leste*, CEDAW Committee, Comm'n No. 88/2015, §§ 6.3, 6.4, U.N. Doc CEDAW/C/69/D/88/2015 (2015) (declaring local authorities, as State authorities, have a duty to prevent violence against women); General Recommendation 35, § 24(2)(b)).

⁶⁸ See Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo, U.N. Doc. A/HRC/23/49, § 71 (2013); Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Radhika Coomaraswamy, U.N. Doc. E/EN.4/1999/68, § 25 (1999).

⁶⁹ Hr'g Tr. Vol. 7, pp. 1697–98, Dr. Katherine Porterfield Testimony, Exhibit C.

had reason to know that her needs were not being met, they acted only to place her in special needs classes. Lisa persevered and attended community college through Upward Bound, a federally funded program to help “the most deprived and underprivileged in the country.” Declaration of Nita Milburn Montgomery, p. 1, Exhibit J. Again, administrators at the program noted Lisa’s disheveled appearance and improper hygiene. *Id. at 1–2*. The school officials joined the ranks of passive witnesses to Lisa’s deterioration. Oklahoma law requires teachers, doctors, and “every person having reason to believe that a child . . . is a victim of abuse or neglect” to promptly report the suspected abuse to the Department of Human Services.⁷⁰ “Any person who knowingly and willfully fails to promptly report suspected child abuse or neglect . . . may be reported to local law enforcement for criminal investigation”⁷¹ Despite these clear statutory mandates, no one took seriously their obligations to protect Lisa from gender-based violence.

Their inaction tacitly condoned Lisa’s abuse. Neither the State nor any relevant actors condemned Judy or Jack’s behavior. United States’ authorities failed to detain or even question Jack or Judy regarding their abuse, despite the court learning about Lisa’s rape during the civil divorce proceedings. The therapy that Lisa received was a pittance for the security she deserved. Despite myriad opportunities to prevent and investigate Lisa’s abuse, the State failed to intervene, violating its due diligence obligations.

⁷⁰ 10A OK Stat § 10A-1-2-101 (2014).

⁷¹ *Id.*

C. State Authorities Never Offered Any Meaningful Remedy to Mrs. Montgomery.

The United States' due diligence obligations require the State to provide remedies to victims of GBV.⁷² These remedies must include providing thorough and effective investigations of domestic violence complaints, establishing domestic violence shelters throughout the State's territory for women who are abused at home, and developing and ensuring the availability of psychosocial rehabilitation programs for women, such as therapy and community reintegration programs.⁷³ Lisa never received appropriate and effective remedies as a victim of torture, sexual abuse, and domestic violence.

Although Lisa was treated for her injuries at the hospital and received counselling services, she received no medical care for the long-term effects of domestic violence and gang rapes, whether physical, sexual, or psychological. *See* Declaration of Janet Vogelsang, Exhibit G; Supplemental Declaration of Janet Vogelsang, Exhibit P; *Kleiner v. Kleiner* Divorce Tr., p. 306, Exhibit H. She never had the opportunity to recover from the trauma of the repeated attacks. Lisa was forced to cope alone with severe depression and psychological distress without professional assistance. There were also no precautions taken to ensure her physical safety. The judicial authorities, teachers, school administrators, neighbors, medical and counseling staff, all let her return home. She remained in captivity and a slave to Judy's whims.

Lisa was also denied reparations. The State offered her no support, no way out of her increasingly desperate domestic situation. She never had the opportunity to recover from the endless cycle of abuse. The State has remained indifferent to her suffering, which has compounded Mrs. Montgomery's sense of vulnerability and has further diminished her sense of self-worth. She

⁷² IACHR, Report No. 80/11, Case 12,626, Merits, *Jessica Lenahan (Gonzales) et al. (United States)*, July 21, 2011, ¶ 130; CEDAW Article 2(e).

⁷³ CEDAW, GR 35, § 26(b); CEDAW, 2016 Concluding Obs., § 22.

endured catastrophic levels of violence on a daily basis, uninterrupted. It eventually took its toll, indelibly impairing her daily functioning and cognition. If Lisa had been removed from the home with Diane, she, like Diane, might have enjoyed a safer life. If Lisa had been removed from the home after Judy divorced Jack, she could have had the chance to recuperate, and eventually, enroll in the military and live out her dream of escaping her home for good. But State authorities missed repeated opportunities to grant her safety. As a result of their inaction, she has suffered lifelong disabilities.

Mrs. Montgomery's crime is a product of cognitive impairments and mental illness she developed as a result of the gender-based violence the State failed to prevent or remedy. The United States bears partial responsibility for Lisa's mental condition at the time of this crime; had it complied with its obligations to protect her rights as a girl-child in the first place, her act might have been avoided.

IV. MRS. MONTGOMERY'S CURRENT CONDITIONS OF CONFINEMENT VIOLATE HER RIGHT TO HUMANE TREATMENT UNDER ARTICLE XXV AND HAVE SUBJECTED HER TO CRUEL AND INFAMOUS PUNISHMENT UNDER ARTICLE XXVI.⁷⁴

Mrs. Montgomery's conditions of confinement violate her rights to humane treatment and her right to be free from cruel, infamous and degrading treatment under the American Declaration. She is currently held in solitary confinement in a freezing cell, under twenty-four hour video surveillance. She is only allowed to wear a gown. She is not allowed underwear. Although her execution date is less than two months away, this does not excuse the United States' failure to treat her humanely and to respect her dignity.

⁷⁴ The facts set forth here are drawn from Defense Counsel's letter to Mrs. Kacie Inman, Senior CLC Attorney, Federal Bureau of Prisons dated October 27, 2020, Exhibit EEE.

Since October 16, 2020, Mrs. Montgomery has been placed in single cell by herself, without access to any other prisoners. Her cell is guarded twenty-four hours a day seven days a week. She does not leave her cell, except to shower three times a week or for legal visits. She is currently held in a suicide precautions cell that includes only a cement bunk, a rubber mattress, a sink and toilet. The lights in the cell remain illuminated twenty-four hours a day. The lighting also does not vary with normal circadian rhythms—or at all. Since being placed in solitary confinement, Mrs. Montgomery has fainted twice. The first time, as she fell to the floor, she hit her head on the cement wall.

She is dressed only in what is known as a suicide prevention smock and is not permitted any undergarments. Given her history of trauma, the sensation of being without basic undergarments is deeply distressing. She is not allowed shoes or socks while in her cell. Her cell is extremely cold. Mrs. Montgomery shivers in her gown under the two blankets that the prison has allotted her. She needs to be wrapped in blankets in order to feel comfortable, which is not possible when standing at her door to converse with the assessors and psychologists, or when in an attorney visit. Mrs. Montgomery requires prescription glasses to correct her vision, but she does not have access to the glasses that were prescribed to her by the Bureau of Prisons approved eye-doctor. She does not have access to her CPAP (Continuous Positive Airways Pressure) machine to treat her sleep apnea. Without this machine, her breathing at night is irregular. Her access to basic hygiene is also strictly controlled. She only receives four squares of toilet paper at a time. Prison authorities have also restricted her access to books and media. Although the Bureau of Prisons has explained the changes in her conditions of confinement as ones necessary to protect her from suicide, they are not therapeutic but instead are precipitating a further decline in her mental health.

These conditions also violate international human rights law. First, Mrs. Montgomery's conditions meet the international definition for solitary confinement. Solitary confinement is defined as the "confinement of prisoners for 22 hours or more a day without meaningful human contact."⁷⁵ Solitary confinement becomes prolonged when in excess of 15 consecutive days.⁷⁶ This Commission has held that prolonged solitary confinement amounts to cruel, infamous or unusual punishment.⁷⁷ Solitary confinement can also rise to the level of torture. For example, the Inter-American Court in *Cantoral-Benavides* has clarified that detaining someone in a "small cell with no ventilation or natural light...for twenty-three and a half hours a day," may constitute physical and psychological torture.⁷⁸ By October 30, Mrs. Montgomery's solitary confinement will be "prolonged" under the Mandela Rules, which specify that solitary confinement should only ever be used "in exceptional cases as a last resort, for as short a time as possible...It shall not be imposed by virtue of a prisoner's sentence."⁷⁹ The State has not established why solitary confinement is necessary for Mrs. Montgomery's safety, and has failed to mitigate its devastating impacts.

The harmful effects from solitary confinement are well-established both in law and in psychology. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment noted the "severe adverse health effects" of prolonged solitary confinement.⁸⁰ Psychologists have

⁷⁵ Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), G.A. Res. 70/174 (the Nelson Mandela Rules) Rule 44 at 17/33 (Dec. 17, 2015).

⁷⁶ *Id.*

⁷⁷ Inter-American Commission on Human Rights (IACHR), *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II. Doc 64, at ¶ 413.

⁷⁸ *Cantoral-Benavides v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶¶ 63(k), 104 (Aug. 18, 2000).

⁷⁹ The Nelson Mandela Rules, G.A. Res. 70/174, Rule 55 at 17/33 (Dec. 17, 2015).

⁸⁰ U.N. Secretary-General, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at ¶ 70, U.N. Doc. A/66/28 (Aug. 5, 2011). This is

also documented the harm caused by solitary confinement: “all of the individuals will still experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli.”⁸¹ Inmates may experience hyperresponsivity to external stimuli; perceptual distortions, delusions, and hallucinations; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts about violence; overt paranoia; and problems with impulse control.⁸² Subjecting someone to solitary confinement means placing them in an environment that exposes them to these psychological harms. This risk of permanent psychological damage increases when an inmate suffers from pre-existing mental illness.⁸³ Given Mrs. Montgomery’s complex psychiatric disabilities, her extreme isolation only serves to deepen her distress.

Furthermore, current conditions are not humane, because they fail to meet her most basic needs. This Commission has affirmed that “international human rights law demands that the State guarantee the rights of the persons under their custody.”⁸⁴ States must exercise “care for the life and physical and psychological integrity of persons deprived of liberty.”⁸⁵ These principles are anchored in Article XXV of the American Declaration, which provides: “[e]very individual who

consistent with the conclusions of the Human Rights Committee, which noted in General Comment No. 20 that prolonged solitary confinement of a detainee may amount to acts prohibited by article 7. Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, at ¶ 6 (Mar. 10, 1992).

⁸¹ See, e.g. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. Univ. J.L. & Pub. Pol’y 325, 332 (2006).

⁸² *Id.* at 335-35.

⁸³ See Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 Crime & Delinquency 124, 142 (2003).

⁸⁴ Inter-American Commission on Human Rights (IACHR), *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II. Doc 64, ¶ 30.

⁸⁵ Inter-American Commission on Human Rights (IACHR), *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II. Doc 64, ¶ 20.

has been deprived of his liberty [...] has the right to humane treatment during the time he is in custody.”

The Nelson Mandela Rules provides specific guidance for states to ensure conditions of confinement meet international human rights standards. The United States has systematically failed to comport with the Mandela Rules in its treatment of Mrs. Montgomery. Rule 13 requires that conditions of confinement meet prisoners’ requirements for health. It asks states to consider the “climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.”⁸⁶ Mrs. Montgomery is constantly cold in her cell. The light is on all the time, disturbing her sleep and disorienting her. Her lawyers have sought to remedy these conditions with prison administration, but there has been so significant improvement in her conditions. Rule 16 mandates that prisoners have access to adequate bathing, but Mrs. Montgomery is only allowed to shower a few times a week rather than daily. As a result, she is uncomfortable in the stench of her own body odor. Rule 23 requires that individuals have access to exercise in the open air daily, weather permitting, yet she has not been allowed to go outside for fresh air. Rule 24 guarantees health care for prisoners that meets the same standards of the kind of care available in the community. Mrs. Montgomery, however, has been denied access to the medical equipment necessary for her sleep apnea. She is without her glasses and cannot see, only heightening her sense of isolation in solitary confinement.

In a distressing development, Mrs. Montgomery has also been forced to live without undergarments, which violates her rights under Rule 19.1. She is entitled to clothes that are suitable for the weather and that preserve her good health, including her mental health. Without underwear, she is reminded of the trauma of her sexual assaults, and of being forcibly unclothed. The State

⁸⁶ The Nelson Mandela Rules, G.A. Res. 70/174, Rule 44 at 13/33 (Dec. 17, 2015).

justifies this deprivation to prevent suicide, but it must find alternatives that do not entail Mrs. Montgomery's humiliation.

Furthermore, Mrs. Montgomery is being monitored twenty-four hours per day, including while she sleeps and uses the toilet. Mrs. Montgomery advised counsel that she overheard a male guard commenting that he could see the monitor from the guard's area. Given Mrs. Montgomery's history of repeated violent sexual trauma by men, the thought of male guards viewing her during vulnerable and exposed moments any time of day is psychologically harmful to her. Mrs. Montgomery retains a right to dignity under Rule 1, and privacy under Rule 50. State authorities have failed to respect these rights.

Under Rule 22.1, Mrs. Montgomery is entitled to potable water and food that is wholesome in quality, but the water available at the prison is foul-tasting. Mrs. Montgomery is now severely dehydrated. The prison at Carswell routinely provides a powdered drink mixture to flavor the water with daily meal trays, but those have been removed from Mrs. Montgomery's trays. Under Rule 64, prisoners are also entitled to be able to access both recreational and instructional books. Mrs. Montgomery's reading and access to media has been restricted, which heightens the symptoms of her mental illness.

Mrs. Montgomery is entitled to be treated with the respect even as someone sentenced to death. Her conditions of confinement, however, constitute cruel, infamous or unusual punishment under Article XXVI of the ADMR. They also violate her right to humane treatment while in custody under Article XXV of the ADRM.

V. BY SCHEDULING MRS. MONTGOMERY'S EXECUTION IN THE MIDST OF A GLOBAL PANDEMIC, THE UNITED STATES HAS VIOLATED HER RIGHT OF ACCESS TO THE COURTS, HER RIGHT OF PETITION, AND HER RIGHT TO A MEANINGFUL CLEMENCY PROCESS.

On October 16, 2020, the United States announced that it had scheduled Mrs. Montgomery's execution for December 8, 2020—less than eight weeks later. The announcement was made without prior notice to Mrs. Montgomery's attorneys. By scheduling Mrs. Montgomery's execution date in the midst of a global pandemic, the United States has created insurmountable impediments for her legal representatives to access the courts and participate fully in the clemency process. These circumstances give rise to a violation of Mrs. Montgomery's rights to access the courts, to petition the authorities, and to due process of law under Articles XVIII, XXIV and XXVI of the American Declaration.

As outlined above, Mrs. Montgomery is severely mentally ill, and the news of her execution date has been profoundly destabilizing for her mental health. Her attorneys have traveled to Texas to visit her at the Carswell Unit, where, as the only woman on federal death row, she has been detained since her death sentence was imposed. They have done so at considerable risk to their own health, flying from Nashville, Tennessee to Dallas-Forth Worth International Airport to make the trip to the prison.

While the attorneys have opted to put their own health at risk to satisfy their ethical obligations to their client, they cannot require any of their mental health experts to do the same. The Covid-19 pandemic is accelerating daily in the United States; on October 23, 2020, the United States recorded the highest number of Covid-19 infections in a single day since the start of the pandemic. Cases are mounting rapidly, as are deaths. One of Mrs. Montgomery's mental health experts, Dr. George Woods, is elderly and has pre-existing health conditions. He lives in Oakland, California, and is unable to travel during the pandemic for risk of exposure. Yet the assistance of

Dr. Woods and other experts is critical for Mrs. Montgomery to support her claim that she is currently incompetent to be executed under *Ford v. Wainwright*.⁸⁷

Mrs. Montgomery has multiple mental disorders that distort her ability to distinguish what is real and what is not; that cause her to dissociate; that have precipitated full-blown psychosis. The Supreme Court observed in *Panetti v. Quarterman* that “gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.”⁸⁸ Under *Ford* and *Panetti*, therefore, there is little doubt that Mrs. Montgomery can make “a substantial threshold showing of insanity”⁸⁹ that entitles her to a judicial process to determine whether she is competent to be executed. The judicial process must provide guarantees consistent with a fair process, including the opportunity for Mrs. Montgomery’s lawyers to “submit evidence and argument. . . including expert psychiatric evidence that may differ from the State’s own psychiatric examination.”⁹⁰

This Commission has held that the State also has a “special duty to protect persons with mental disabilities.”⁹¹ These combined obligations require states to take a broad view of mental illness and to “survey all records and information in their possession concerning the mental health of a person accused of a capital offense.”⁹² Yet the current pandemic prevents Mrs. Montgomery’s legal team from presenting evidence that is essential to a fair determination of her competency to

⁸⁷ 477 U.S. 399 (1986).

⁸⁸ *Panetti v. Quarterman*, 551 U.S. 930 (2007).

⁸⁹ *Id.* at 426 (Powell, J., concurring).

⁹⁰ *Id.* at 427.

⁹¹ *Lackey v. United States*, No. 52/13, Case 11.575, 12.333 and 12.341 (IACmHR, Jul. 15, 2013), ¶ 219.

⁹² *Id.*

be executed. An accurate determination of an individual’s mental functioning requires longitudinal information about the person’s functioning over time; for this reason, it is not a simple matter of finding any mental health expert who is willing to risk her health to visit Mrs. Montgomery in prison. Moreover, Mrs. Montgomery has enormous difficulty interacting with male professionals unless they have extensive experience working with traumatized women. For all of these reasons, it is imperative for the defense to obtain assessments of Mrs. Montgomery by experts who have worked with her before, who know her history, and who have seen her on several occasions in the past. But by virtue of the pandemic, a public health crisis exacerbated by the policies of the U.S. Government, those experts are unable to travel to the prison—one of the highest risk environments in the Covid-19 pandemic—to conduct the assessments.

The Inter-American Court on Human Rights has emphasized that the right to effective recourse to a competent court “constitutes one of the basic pillars. . . .of the very rule of law in a democratic society,” and *must be more than a mere formality*.⁹³ Moreover, while a country may impose reasonable limitations on the right of access to the courts, “the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”⁹⁴ There can be little doubt that by scheduling Mrs. Montgomery’s execution during the pandemic, the United States has made it impossible for her to have meaningful judicial review of her competency claims in violation of Articles XVIII, XXIV, and XXVI.

For all of these same reasons, the United States’ decision to set Mrs. Montgomery’s execution date on December 8, 2020 violates her right to meaningfully participate in the clemency

⁹³ *Rosero v. Ecuador*, Case No. 44, Inter-Am. Ct. H.R. (ser. C) (Nov. 12, 1997) (emphasis added).

⁹⁴ *Ashingdane v. United Kingdom*, 93 Eur. Ct. H.R. (ser. A), ¶57 (1985).

process. It is well established that the procedures for considering amnesty, pardon or clemency in death penalty cases must “guarantee condemned prisoners with an effective or adequate opportunity to participate in the mercy process.”⁹⁵ These minimum due process safeguards must include the right “to present, receive or challenge evidence considered” by the clemency authority and “to receive a decision from that authority within a reasonable period of time prior to his or her execution.” *Id.* at paras. 118, 121. “In other words,” the Inter-American Court has instructed, “it is not enough merely to be able to submit a petition; rather, the petition must be treated in accordance with procedural standards that make this right effective. . . . the State has a duty to implement a fair and transparent procedure by which an offender sentenced to death may make use of all favorable evidence deemed relevant to the granting of mercy.”⁹⁶

None of these requirements can be met in the current pandemic. The haste with which the United States has scheduled Mrs. Montgomery’s execution effectively precludes her from engaging and participating in the clemency process.

REQUEST FOR PRECAUTIONARY MEASURES

In light of her imminent execution date, the Petitioner respectfully requests that the Commission exercise its authority under Article 25 of its Rules of Procedure and request precautionary measures on her behalf from the United States.

⁹⁵ *Rudolph Baptiste v. Grenada*, Case 11.743, Report N° 38/00 (April 13, 2000), ANNUAL REPORT OF THE IACHR 1999, para. 120.

⁹⁶ I/A Ct. H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, (Judgment of June 21, 2002), paras. 186-188.
Rudolph Baptiste v. Grenada, Case 11.743, Report N° 38/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 721 (1999).

CONCLUSION

Mrs. Montgomery respectfully requests that this Commission issue precautionary measures calling upon the United States to preserve her life while this Commission examines the merits of her petition. She further requests that the Commission order the United States to provide an effective remedy for the violations set forth above, which includes providing Mrs. Montgomery with a new trial and sentencing hearing in accordance with her rights to equality, due process, a fair trial, and humane treatment under the ADRDM.

Respectfully submitted,



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