

November 12, 2020

President Donald J. Trump  
The White House  
1600 Pennsylvania Ave., NW  
Washington, DC 20500

**Re: Federal Executions Scheduled for November and December 2020**

Dear President Trump:

As President of the American Bar Association, I write to express our urgent concern over the government's plan to carry out three federal executions between now and December 10, in spite of an alarming surge in COVID-19 cases nationwide and the consequences of the pandemic on due process, lawyers' ability to advocate zealously for their clients, and lawyers' individual health and safety.

- **Orlando Hall** is scheduled to be executed on **November 19**. Due to the pandemic, counsel for Mr. Hall have been unable to visit their client since his execution date was set, nor have they been able to conduct the investigation necessary to prepare a current and complete clemency petition on his behalf. As a result, Mr. Hall is currently scheduled for execution with no clemency petition pending.

- **Lisa Montgomery** is scheduled to be executed on **December 8**. Counsel for Ms. Montgomery conducted in-person visits with their client after her execution date was announced, as Ms. Montgomery is severely mentally ill and her competency to be executed must be regularly monitored. Counsel for Ms. Montgomery last visited the medical prison in Fort Worth, Texas, where Ms. Montgomery is incarcerated, on November 3; as of November 7, both attorneys for Ms. Montgomery began displaying symptoms of COVID-19, and as of November 11, both have tested positive for the virus. Neither attorney is currently able to continue work on the case, meaning that without your intervention, Ms. Montgomery will also proceed to execution with no clemency petition pending before the President.

- **Brandon Bernard** is scheduled to be executed on **December 10**. In large part due to investigative work that was completed before pandemic restrictions took hold in March 2020, counsel for Mr. Bernard are the only attorneys representing a federal prisoner currently scheduled for execution who have been able to submit a clemency petition by the statutory deadline. Mr. Bernard, only 18 years old at the time of the crime, has a compelling case for mercy that is nevertheless at risk of being overshadowed by the rush to execute all three prisoners in coming weeks amid the startling surge in COVID-19 cases.

In light of these extraordinary circumstances, outlined in greater detail below, and out of respect for basic principles of fairness, justice, and compassion, **we urge you to immediately reprieve these three scheduled executions until such time as counsel can safely resume effective representation.**<sup>1</sup>

### **Attorney Obligations and the COVID-19 Crisis**

While the American Bar Association does not take a position on the morality or legality of the death penalty itself, we are committed to ensuring that no death sentence is carried out without due process of law and zealous representation by counsel throughout every stage of the legal proceedings, including in applications for executive clemency.<sup>2</sup> In death-penalty cases, effective representation requires that attorneys visit with their clients regularly<sup>3</sup> and undertake an intensive investigation at every stage of the case.<sup>4</sup> Counsel's responsibilities become especially weighty when an execution date is set. This event triggers counsel's professional and ethical duty to seek a stay in "all available fora,"<sup>5</sup> including via executive clemency, and is necessarily the most pivotal period in a death penalty case. At this critical time, counsel must also redouble efforts to "keep the client whole," as the imminence of execution can cause mental deterioration rendering the execution unconstitutional.<sup>6</sup> This obligation is especially significant in cases where the defendant has a serious mental illness. Effective advocacy during this time can literally mean the difference between life and death.

Although every federally death-sentenced prisoner has a right to seek and present evidence in support of executive clemency,<sup>7</sup> as well as the right to effective representation in connection with those efforts,<sup>8</sup> circumstances due to the COVID-19 pandemic are presently making a nullity of those rights. The United States remains in the grip of a global pandemic that has killed more than 240,000 Americans and sickened millions more.<sup>9</sup> The federal prison system in which all federal death row prisoners facing execution are incarcerated has itself seen a

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<sup>1</sup> The President has complete authority under U.S. Const. Art. II. to issue a reprieve in all three cases. The Bureau of Prisons ("BOP") via the Department of Justice has authority to withdraw or reset the scheduled execution dates pursuant to the authority to issue the execution dates in the first instance. 28 C.F.R. § 26.3(a)(1) (2020) (stating that the Director of the Federal Bureau of Prisons shall set execution dates, and reset the date for any execution in which a defendant was granted a stay of execution after the stay expires).

<sup>2</sup> See Guideline 1.1(B), ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter "ABA Guidelines" or "Guidelines"), 31 Hofstra L. Rev. 913 (2003), available at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/2003guidelines.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf).

<sup>3</sup> ABA Guideline 4.1, note 98 ("Effective representation requires ongoing interactive contact with the client— [including] in person, by mail, on the telephone, and in other ways... To the extent that jurisdictions impede such contact [...] they jeopardize the provision of high quality legal representation in accordance with these Guidelines.").

<sup>4</sup> See ABA Guideline 10.15.1, Duties of Post-Conviction Counsel; ABA Guideline 10.15.2, Duties of Clemency Counsel.

<sup>5</sup> See ABA Guideline 10.15.1 (B). See also Guideline 10.15.1, note 335, at 1081 ("When a capital case enters a phase of being 'under warrant' – i.e., when a death warrant has been signed—time commitments for counsel increase 'due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.'").

<sup>6</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>7</sup> 28 C.F.R. § 1.10.

<sup>8</sup> 18 U.S.C. § 3599(e); see also *Harbison v. Bell*, 556 U.S. 180 (2009).

<sup>9</sup> *Covid in the U.S.: Latest Map and Case Count*, N.Y. Times (last updated Nov. 11, 2020), available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

significant degree of COVID-19 transmission and infection. According to public data, 2,455 federal prisoners and 981 BOP staff currently have active COVID-19 infections, and 17,067 inmates and 1,543 staff have recovered from the disease.<sup>10</sup> 135 federal prisoners have died from COVID-19 thus far, as have two BOP staff.<sup>11</sup> At United States Penitentiary (“USP”) Terre Haute, in Terre Haute, Indiana, which houses federal death row inmates, there are currently three active COVID-19 cases among prisoners.<sup>12</sup> Two federal prisoners at USP Terre Haute have died of COVID-19, and 91 prisoners who were infected have recovered, together with four BOP staff.<sup>13</sup> All three federal prisoners scheduled to be executed in the next month are scheduled to be executed at this facility.<sup>14</sup>

Nearly seven months ago, in recognition of the pandemic’s likely consequences for capital cases, ABA Death Penalty Representation Project Director and Chief Counsel Emily Olson-Gault executed a Declaration detailing ways in which the pandemic is likely to prevent attorneys from fulfilling their constitutional and ethical obligations in capital representation when an execution date has been set.<sup>15</sup> Of note, Ms. Olson-Gault’s declaration advises that “[t]he Guidelines also make clear that in-person interviews with the client, witnesses, and family members are at the core of any adequate investigation,”<sup>16</sup> and that “[r]emote technology options such as video conferencing and phone calls do not provide an adequate alternative for capital defenders, mitigation specialists, experts, or investigators.”<sup>17</sup> While some of the work that a capital defender does can be done remotely for a period of time, the Guidelines make clear that when an execution date has been set, the investigation required to develop the facts relevant to clemency as well as attorneys’ grave duty to “keep clients whole” in this traumatic period require attorneys’ ability to meet with clients and witnesses in person.

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<sup>10</sup> See *COVID-19 Coronavirus*, Federal Bureau of Prisons, <https://www.bop.gov/coronavirus/> (last visited November 10, 2020).

<sup>11</sup> *Id.*

<sup>12</sup> *Facility-Level BOP COVID-19 Trends*, Office of the Inspector General, U.S. Department of Justice, <https://www.arcgis.com/apps/MapSeries/index.html?appid=a3e98be1aab94eadaeaa96ed176f418> (last visited November 10, 2020). Data derived from searching “Terre Haute USP” in “Select a Facility at a Complex” dropdown menu and reviewing active cases.

<sup>13</sup> *Id.* Data derived from scrolling between “active cases,” “recovered,” and “deaths.”

<sup>14</sup> Lisa Montgomery is currently incarcerated at the Federal Medical Center in Fort Worth, Texas. To execute her, the BOP will need to transport her from there to Terre Haute, Indiana, an endeavor that will necessarily involve a significant number of BOP personnel and require extensive logistical coordination. Of note, transporting inmates between facilities was responsible for the deadly COVID-19 outbreak at San Quentin Prison earlier this year, which has killed 28 prisoners thus far. See 79<sup>th</sup> *California prison inmate dies of COVID-19 complications*, Tri County Sentry (Nov. 5, 2020) available at <https://tricontysentry.com/Article/Index/07efa494-b994-4fad-95b2-a50c1c65f3be>; see also *Tracking the coronavirus in California state prisons*, L.A. Times, <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/state-prisons/> (last updated Nov. 9, 2020).

<sup>15</sup> Declaration of Emily Olson-Gault, April 3, 2020, available at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/statements\\_testimony/aba-habeas-level-covid-declaration.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-habeas-level-covid-declaration.pdf).

<sup>16</sup> *Id.* at 25. See also Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, Supplementary Guideline 10.11(C) 36 HOFSTRA L. REV. 679 (2008) (“Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.”)

<sup>17</sup> Declaration of Emily Olson-Gault, *supra* note 15, at ¶ 25.

### **Orlando Hall**

Orlando Hall is the first of the three federal prisoners next scheduled for execution. His execution date of November 19 was announced on September 30, giving his two attorneys only 50 days' notice to advocate on his behalf. Since his execution date was announced, however, Mr. Hall's attorneys have been unable to conduct even a semblance of the investigation they would have otherwise undertaken to develop his case for clemency. Mr. Hall's crime took place in Texas, and important witnesses, including several codefendants who could shed critical light on the events surrounding the crime and Mr. Hall's personal culpability, are located around the country. Mr. Hall's attorneys—who live in Illinois and Georgia—have been unable to travel to Indiana to visit Mr. Hall since mid-March. According to recent legal filings,<sup>18</sup> personal circumstances place both attorneys for Mr. Hall and their families at higher risk for complications should they become infected with or exposed to COVID-19.<sup>19</sup> Due to their inability to perform any investigative work on Mr. Hall's behalf, counsel for Mr. Hall have been prevented from filing a “current and complete” clemency petition, as the federal rules governing executive clemency petitions in death penalty cases and counsel's professional and ethical obligations require.<sup>20</sup>

Mr. Hall's case also presents serious substantive issues for consideration in clemency that counsel are currently unable to develop. For example, Mr. Hall's counsel discovered after the conclusion of post-conviction proceedings that as a child, Mr. Hall had been sexually abused by a neighbor. Although this information represents significant mitigating evidence that neither the jury nor any court has ever heard, counsel's inability to travel or engage experts to evaluate Mr. Hall has prevented them from developing further evidence of this abuse or addressing its likely implications for their client's development, mental health, and moral culpability.<sup>21</sup> Also worthy of close review is that prosecutors struck four of the five Black jurors on Mr. Hall's trial venire panel, leaving only one Black juror whose pro-death penalty views forced defense counsel to remove her via peremptory challenge. Mr. Hall, a Black man, thus was ultimately convicted and sentenced to death by an all-White jury.<sup>22</sup> But while evidence of possible racial bias among

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<sup>18</sup> On November 3, Mr. Hall filed suit in federal court in Washington, D.C., alleging, *inter alia*, that the government's attempt to move forward with the November 19 execution deprives him of his right to due process in clemency proceedings under the Fifth Amendment to the U.S. Constitution and to the effective assistance of counsel under 18 U.S.C. §3599. *Hall v. Barr*, No. 1:20-cv-3184 (D.D.C.) [hereinafter “*Hall Complaint*”]. This lawsuit is pending.

<sup>19</sup> Importantly, both Mr. Hall's attorneys represent him in their individual capacities and thus do not have access to institutional resources such as an unrestricted pool of funding or legal support staff that would be available if Mr. Hall were represented by a federal defender office. This means that funding for work done on Mr. Hall's behalf has to be approved first by the appointing federal court, and there are no staff investigators or paralegals available to assist in Mr. Hall's representation unless the court authorizes payment for them in advance. On October 29, 2020, Mr. Hall's counsel were able to secure support from a pro bono law firm to assist in bringing the above-referenced suit in the D.C. federal court.

<sup>20</sup> See *Hall Complaint*, *supra* note 18, at 37-39. Under the federal rules governing clemency petitions in capital cases and based on Mr. Hall's November 19 execution date, Mr. Hall's “current and complete” clemency petition was due to the Office of the Pardon Attorney on October 30, 2020.

<sup>21</sup> *Id.* at 41.

<sup>22</sup> *Id.* at 12.

jurors can be critical in support of clemency and even in reopening legal proceedings,<sup>23</sup> such evidence cannot be reliably investigated remotely or over the phone. To effectively investigate and present information in support of clemency, Mr. Hall's attorneys need to be able to meet with potential witnesses in person and for extended periods of time,<sup>24</sup> something that is presently foreclosed by the pandemic.

### **Lisa Montgomery**

Lisa Montgomery is the only woman on federal death row and suffers from a host of serious mental illnesses that should render her exempt from execution.<sup>25</sup> Ms. Montgomery's background is horrific: as a preteen she was raped repeatedly by her stepfather.<sup>26</sup> In her teens, her mother began prostituting her to male friends in exchange for "money and services."<sup>27</sup> This extensive and prolonged sexual abuse caused Ms. Montgomery to develop "Complex Post-Traumatic Stress Disorder" and periods of disassociation from reality in order to cope with the trauma she was experiencing.<sup>28</sup> This shocking abuse continued throughout her childhood, adolescence, and teen years, causing neurological damage to her developing brain and irreparably damaging her relationship to reality.<sup>29</sup> As a result, Ms. Montgomery is incarcerated at a prison medical facility where she receives a complex cocktail of psychotropic medications to stave off recurrent psychosis.

Given Ms. Montgomery's fragile mental state and counsel's obligation to monitor clients for competency when an execution date has been set, attorneys for Ms. Montgomery resumed in-person visitation with their client after October 16, when her December 8 execution date was noticed. Counsel for Ms. Montgomery live in Nashville, Tennessee, and traveled by plane to visit Ms. Montgomery at the Federal Medical Facility in Fort Worth, Texas. Attorneys for Ms. Montgomery returned from their last visit to Texas on November 3. On November 5, one attorney for Ms. Montgomery began feeling ill and both received COVID-19 tests. As of

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<sup>23</sup> Issuing a reprieve of execution in light of concerns over racial bias is not unprecedented in the federal death penalty system. In 2000, President Clinton issued Juan Raul Garza a six-month reprieve of execution in order to allow for a study of the extent to which racism affects the federal death penalty. See *Clinton Stays Execution for Racial Study*, L.A. Times (Dec. 8, 2000), <https://www.latimes.com/archives/la-xpm-2000-dec-08-mn-62953-story.html>. In addition, judicial stays in recent cases on the eve of execution have also underscored the importance of evaluating the impact that racism may have had on a death sentence. See *Buck v. Davis*, 137 S. Ct. 759, 777, (2017) (regarding racism, "[s]ome toxins can be deadly in small doses.").

<sup>24</sup> See *Hall* Complaint, *supra* note 18, at 34-35 (citing numerous declarations of persons with extensive experience in capital defense).

<sup>25</sup> In 2006 the ABA adopted the Mental Illness Resolution, which states that a defendant who had a severe mental illness at the time of the offense should not be executed or sentenced to death if that impairment limited intellectual functioning, preventing a person from (1) appreciating the consequences or wrongfulness of their actions, (2) exercising rational judgment, or (3) conforming their conduct to the requirements of the law. ABA Resolution 2006M112A, at 1-2, available at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/dp-policy/2006\\_am\\_122a.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/dp-policy/2006_am_122a.pdf).

<sup>26</sup> See *United States v. Montgomery*, 635 F.3d 1074, 1080-81 (8th Cir. 2011).

<sup>27</sup> See *Montgomery v. United States*, No. 4:12-cv-08001, slip op. at 120-21 (W. D. Mo. Mar. 3, 2017), ECF No. 212 (discussing evidence that Montgomery's mother traded sex with an underage Montgomery for housework such as plumbing and electrical repairs).

<sup>28</sup> *Montgomery*, *supra* note 26 at 1085; *Montgomery*, *supra* note 27 at 41 (discussing testimony by multiple doctors about Montgomery's mental illness and the impact it had on her throughout her life).

<sup>29</sup> *Montgomery*, *supra* note 27 at 35-36 (discussing Montgomery's assertion in her §2255 motion that her mental illness affected her relationship with reality).

November 11, test results were positive for COVID-19 for both attorneys. Ms. Montgomery's attorneys both report extreme fatigue, headache, loss of taste and smell, dry cough, body aches, congestion, and mental fog, making it impossible for them to continue work at this time. As a result of continuing on with their zealous representation of Ms. Montgomery in spite of the pandemic, counsel are now disabled from work and unable to submit a current or complete clemency petition on Ms. Montgomery's behalf by the statutory deadline.

### **Brandon Bernard**

Brandon Bernard was sentenced to death for his role as an accomplice in a robbery-murder that took place when he was just eighteen years old.<sup>30</sup> According to the government's own filings,<sup>31</sup> Mr. Bernard was not the ringleader of the crime, which was committed by teenage gang members. According to the government's expert, Mr. Bernard occupied the lowest rung of the gang's hierarchy relative to his codefendants.<sup>32</sup> Prior to this offense, Mr. Bernard had no record of violence;<sup>33</sup> and, according to his clemency petition, in his over twenty years on death row, he has never received a single disciplinary infraction.<sup>34</sup>

Counsel for Mr. Bernard (which, by contrast with Mr. Hall, includes a federal public defender office) assembled a clemency petition on his behalf in 2016 to present to President Obama. As a result, when Mr. Bernard's December 10, 2020 execution date was set in October of this year, counsel had already conducted interviews with jurors eliciting powerful statements in support of clemency. Mr. Bernard's attorneys were therefore able to reach back out to those jurors to request that they supplement their earlier statements in support of clemency for Mr. Bernard.<sup>35</sup> This, together with the fact that Mr. Bernard has had significantly greater resources for his defense as a result of having an institutional defender office on his case since 2002, has allowed his attorneys to submit a substantial clemency petition on his behalf.

Nevertheless, there is no question that Mr. Bernard's attorneys have been prevented from conducting the full range of fact-development they would otherwise have pursued, were it not for the pandemic.<sup>36</sup> Nor is there any question that meaningful consideration of these cases will be

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<sup>30</sup> As a result of the substantial body of scientific research establishing that the juvenile brain is not yet fully developed at age eighteen, on February 8, 2018, the ABA adopted the Late-Adolescent Death Penalty Resolution urging that executions not be carried out of any individuals whose crimes were committed prior to the age of 21. On this basis alone, Mr. Bernard's sentence should be commuted. *See* ABA Resolution 2018 MY 111 available at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/2018\\_my\\_111.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2018_my_111.pdf).

<sup>31</sup> Mr. Bernard's codefendant, Christopher Vialva, was executed for his involvement in this same crime on September 24, 2020. Mr. Vialva shot both the victims and then ordered Mr. Bernard to set fire to their car. In filings in support of Mr. Vialva's execution, the government repeatedly emphasized Mr. Vialva's "ringleader" status, highlighting his greater culpability in the offense relative to his codefendants, including Mr. Bernard. *See Return to Order to Show Cause* at 29 (S.D. Ind. Aug. 25, 2020) (ECF No. 11) (Government arguing that, in light of the "overwhelming" evidence that Mr. Vialva was the "ringleader of the [capital crime] operation," Mr. Vialva had not been prejudiced by trial counsel's failure to seek funding).

<sup>32</sup> *See In Re: Brandon Bernard, Petition for Clemency Seeking Commutation of Death Sentence* (Nov. 10, 2020) at 9, available at <https://drive.google.com/file/d/1qakeAfk10q9YbrQxDU3e-PEeZCVEyEpl/view> [hereinafter "Bernard Clemency Petition"].

<sup>33</sup> Bernard Clemency Petition, *supra* note 32, at 21.

<sup>34</sup> *Id.* at 31.

<sup>35</sup> One juror signed an affidavit in 2016 stating that "[w]hile the evidence proved that there is no doubt that Mr. Bernard is guilty, I also believe Mr. Bernard's trial attorneys, failed to even adequately represent him." *Id.*

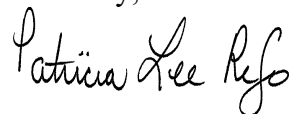
<sup>36</sup> "While this petition contains powerful arguments showing why President Trump should spare Brandon's life, counsel was unable to marshal all evidence and arguments on Brandon's behalf because the on-going pandemic,

negatively impacted by the ongoing public health catastrophe. Together with the fact that the ABA categorically opposes the execution of any person who was under the age of twenty-one at the time the crime was committed, we urge you to reprieve or commute Mr. Bernard's death sentence.

### **Conclusion**

In continuing to press forward with executions amid the rising COVID-19 crisis, the federal government is an outlier. While two executions have been carried out by the individual states since March 2020,<sup>37</sup> more than a dozen state-level executions have been stayed on account of the pandemic.<sup>38</sup> Since July 2020, however, the federal government has executed an unprecedented seven prisoners. With COVID-19 cases again steeply on the rise, moving forward with yet more executions creates further risk of COVID-19 infection and transmission, including among prison staff whose ordinary job duties will place them in greater peril.<sup>39</sup> In weighing your decision whether to issue a reprieve or to proceed with the three federal executions currently scheduled in 2020, we urge you to consider the health and safety of these other individuals as well. At a time of national crisis such as this, the public interest is not served by rushing forward with executions at the expense of due process, fundamental fairness, and individual health and safety.

Sincerely,



Patricia Lee Refo

Copies to:

William Barr, Attorney General, U.S. Department of Justice  
Pat Cipollone, Counsel to the President, The White House

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coupled with the short time-frame between the announcement of the scheduled execution and the execution date, prevented the completion of necessary work." *Id.* at 1 n. 1.

<sup>37</sup> Walter Barton was executed on May 17 in Missouri, and Billy Wardlow was executed on July 8 in Texas. See *Executions Database*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=2020> (last visited Nov. 8, 2020).

<sup>38</sup> See *Stays of Execution in 2020*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/executions/upcoming-executions#stays2020> (last visited Nov. 9, 2020).

<sup>39</sup> Executions involve scores of people, including BOP staff; media witnesses; prisoners' family; victim family members; counsel for the condemned prisoners and representative for the state, among others. During the federal executions carried out this summer, the considerable risk of COVID-19 infection forced various victim family members, attorneys, and others who under other circumstances would have traveled to attend and witness the execution instead to remain home. And indeed, data suggests that COVID-19 cases spiked after both the execution of Walter Barton in Missouri in May, and the spate of federal executions carried out in Terre Haute in July and August. See *Federal Executions During Covid-19 Put Innocent Lives at Risk*, Wired (Sept. 24, 2020), <https://www.wired.com/story/federal-executions-covid-19/>; see also *Prison outbreak leads to virus surge in St. Francois County*, Associated Press (July 3, 2020), <https://apnews.com/article/559e30b82814a78404f0480206f8838e> (noting a June COVID-19 outbreak at the Missouri prison where Walter Barton was executed in May).