

ORIGINAL

RRB

Supreme Court U.S.

FILED

JUN 19 2020

OFFICE OF THE CLERK

No. 19-5921

IN THE
Supreme Court of the United States

LISA MARIE MONTGOMERY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION TO REHEAR

LISA G. NOURI
2526 Holmes
Kansas City, MO 64108
(816) 875-0448

KELLEY J. HENRY*
CHIEF, CAPITAL HABEAS UNIT
AMY D. HARWELL
ASST. CHIEF, CAPITAL HABEAS UNIT
OFFICE OF FEDERAL PUBLIC
DEFENDER, MIDDLE
DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

* Counsel of Record

Counsel for Petitioner

June 19, 2020

In this capital habeas proceeding, Lisa Montgomery seeks relief under 18 U.S.C. §2255 for the trial court's severance of her established relationship with her preferred counsel. In her petition for writ of certiorari Mrs. Montgomery argued that the Eighth Circuit improperly denied her application for a certificate of appealability regarding the violation of her Sixth Amendment right to counsel, because decisions from courts in California, Georgia, Louisiana, and Texas inherently demonstrate the debatability of her claim. *See* Pet. For Cert. at i, 21, 26, 27 (citing *Harris v. Superior Court of Alameda Cty.*, 567 P.2d 750, 752 (Cal. 1977); *Amadeo v. State*, 384 S.E.2d 181, 183 (Ga. 1989); and *Davis v. Cain*, 662 So. 2d 453, 354 (La. 1995)). The injustice resulting from the Eighth Circuit's denial of a certificate of appealability is further evidenced by *Randolph v. Wetzel*, 1:06-cv-00901 (M.D. Pa., May 27, 2020) issued the day after this Court denied review of Mrs. Montgomery's claim. Thus, pursuant to Supreme Court Rule 44, Mrs. Montgomery requests rehearing based on the intervening circumstance of the issuance of *Randolph* after this Court's consideration of the initial petition.

Randolph demonstrates the debatability of Mrs. Montgomery's claim. *Randolph*'s holding that the state court violated the Sixth Amendment by failing to accept the last-minute substitution by Mr. Randolph's chosen counsel manifests Mrs. Montgomery's right to a certificate of appealability. Every fact upon which *Randolph* based is equally strong in *Montgomery*—or *stronger*. The basics about the cases are the same: Mr. Randolph was put to trial, convicted, and sentenced to death while represented by an attorney who was not his preferred counsel; so was Mrs.

Montgomery. Both Mr. Randolph and Mrs. Montgomery could afford their preferred counsel: Mr. Randolph had funds to hire his lawyer; Mrs. Montgomery's preferred lawyer was willing to appear for free. Where the two cases diverge, *Montgomery* presents a more blatant constitutional violation than *Randolph*. Unlike the trial court's interference with Mrs. Montgomery's relationship with her counsel, which occurred two years before the case went to trial, Mr. Randolph sought substitution of counsel on the day of jury selection. The trial court denied the substitution by Mr. Randolph's preferred counsel because that substitution would have delayed the trial, but the trial court's removal of Mrs. Montgomery's preferred counsel *caused* a delay in the trial schedule. Even though Mr. Randolph sought to change counsel to a new lawyer with whom he did not have a relationship, the federal court found the denial of his choice of counsel violated the constitution. *Randolph* at 25. Here, the trial court severed Mrs. Montgomery's existing, well-established relationship with her counsel. Indeed, every fact about Mrs. Montgomery's case is either on all-fours with *Randolph* or more strongly demonstrates a Sixth Amendment violation.

The *Randolph* court found that reasonable, fair minded jurists could not disagree that Mr. Randolph's right to his preferred counsel trumped the delay that would have been occasioned by allowing the substitution of counsel. *Randolph* at 25 (“[T]he state court’s ruling on this claim ‘was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement’”) (citing *Harrington v. Richter*, 562 U.S. at 102). Because Mrs. Montgomery's case is at least as strong as *Randolph*, the violation of her rights

is at least equally apparent. Despite that, the Eighth Circuit found that *Montgomery* did not present a substantial showing of a constitutional violation under 28 U.S.C. §2253(c)(2). Both these things cannot be true at the same time: it cannot be true that no reasonable jurist could disagree that the *Randolph* facts show a Sixth Amendment violation and simultaneously be true that stronger facts do not even debatably show a Sixth Amendment violation. While it may be true that reasonable jurists could not disagree that Mr. Randolph's rights were violated, the fact that the *Randolph* court found facts less compelling than those presented by Mrs. Montgomery to have violated the Sixth Amendment necessarily proves that Mrs. Montgomery's claim is debatable.

The Eighth Circuit's refusal to grant Mrs. Montgomery a certificate of appealability in the face of state and federal jurisprudence demonstrating the debatability of Mrs. Montgomery's claim runs afoul of this Court's admonition in *Buck v. Davis*, 580 U.S. _____, _____ (2017), that a merits determination may not supersede the determination of jurisdiction. As Justice Sotomayor recently cautioned the Eleventh Circuit, the threshold determination of a certificate of appealability is "not coextensive with a merits analysis." *St. Hubert v. United States*, 590 U.S. _____, No. 19-5267 (June 8, 2020) (Sotomayor, J., Statement respecting the denial of certiorari) (slip op., at 5 n.3) (quoting *Buck*, slip op., at 13). Accordingly, this Court should reconsider Mrs. Montgomery's petition in light of *Randolph*, grant this petition for rehearing, grant the petition for writ of certiorari, vacate the judgment of the Eighth Circuit, and issue a certificate of appealability.

Respectfully submitted,

/s/ Kelley J. Henry

LISA G. NOURI
2526 Holmes
Kansas City, MO 64108
(816) 875-0448

KELLEY J. HENRY*
CHIEF, CAPITAL HABEAS UNIT
AMY D. HARWELL
ASST. CHIEF, CAPITAL HABEAS
UNIT
OFFICE OF FEDERAL PUBLIC
DEFENDER, MIDDLE
DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
* Counsel of Record

June 19, 2020

CERTIFICATE

I certify that the foregoing petition for rehearing is restricted to grounds set forth in Rule 12.2 and is presented in good faith and not for delay

Respectfully submitted,

/s/ Kelley J. Henry

LISA G. NOURI
2526 Holmes
Kansas City, MO 64108
(816) 875-0448

KELLEY J. HENRY*
CHIEF, CAPITAL HABEAS UNIT
AMY D. HARWELL
ASST. CHIEF, CAPITAL HABEAS
UNIT
OFFICE OF FEDERAL PUBLIC
DEFENDER, MIDDLE
DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
* Counsel of Record

June 19, 2020

OFFICE OF THE
FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF TENNESSEE

HENRY A. MARTIN
FEDERAL PUBLIC DEFENDER

810 BROADWAY, SUITE 200
NASHVILLE, TENNESSEE 37203-3805
TELEPHONE: 615-736-5047
FAX: 615-736-5265

June 19, 2020

Mr. Scott S. Harris
Office of the Clerk
United States Supreme Court
1 First Street NE
Washington, DC 20543

Via Federal Express

Re: *Lisa M. Montgomery, No. 19-5921 – Petition For Rehearing*

Dear Mr. Harris:

Enclosed please find the original and ten copies of the Petition For Rehearing to be filed in the Lisa M. Montgomery case.

Also enclosed one additional copy to be file stamped and returned in the self-addressed pre-stamped envelope.

Thank you kindly for your assistance.

Sincerely,



Nona C. Muir
CHU Admin Asst. / Sr. Legal Assistant

