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***State v. Cheetham*: Montana Supreme Court Refuses to Substitute Strickland Standard When Analyzing Substitution of Counsel Claims**

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CASENOTE; *State v. Cheetham*: Montana Supreme Court Refuses to Substitute *Strickland* Standard When Analyzing Substitution of Counsel Claims

Cori Losing

I. INTRODUCTION

Distinct from a criminal defendant's right to effective assistance of counsel is a defendant's right to counsel of choice.¹ In *State v. Cheetham*,² the Montana Supreme Court erroneously analyzed the defendant's substitution of counsel claim under a standard that blends substitution of counsel with ineffective assistance of counsel.³

II. FACTUAL AND PROCEDURAL BACKGROUND

In January 2014, Timothy Cheetham Sr. was charged with sexual intercourse without consent, sexual assault, and sexual abuse of children.⁴ At trial, N.S. testified that Cheetham had touched her inappropriately on her chest and her vagina, had forced her to watch child pornography, and had forced her to have intercourse with Cheetham once.⁵ Cheetham was found guilty on all three counts.⁶

Prior to Cheetham's sentencing hearing, defense attorney Steven Scott filed a motion to dismiss for negligent destruction of evidence.⁷ Scott argued that the "State failed to provide and preserve an exculpatory medical report of a forensic medical examination performed in 2006 on N.S. by Dr. Salisbury."⁸ Scott quoted the report as stating "N.S.'s exam was within normal limits with copious amounts of hymen intact."⁹ This does not negate the possibility of a penetration injury.¹⁰ The narrowing noticed in the above exam, could be consistent with patient's history and suspicious of a previous injury."¹¹ When Scott tried to obtain the medical report from the county attorney, the county attorney told Scott that the report "could not be obtained through Child Protective Services (CPS)."¹² Because CPS referenced the report, Scott determined the medical report

¹ *Wilson v. Mintzes*, 761 F.2d 275, 283 (5th Cir.1985) (citation omitted).

² 373 P.3d 45 (Mont. 2016).

³ *Id.*

⁴ *Id.* at 48.

⁵ *Id.*

⁶ *Id.* at 49.

⁷ *Id.* at 48.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 48.

¹¹ *Id.*

¹² *Id.*

had been negligently destroyed.¹³ The State was neither able to obtain the report nor did it find the report favorable to Cheetham because it did not “negate the possibility of penetration injury.”¹⁴ Eventually, Scott was able to obtain the 2006 medical report.¹⁵ However, Scott decided to withdraw his motion before the district court ruled on it.¹⁶

On the day of his sentencing hearing, Cheetham appeared with a letter addressed to the court and the chief public defender.¹⁷ The letter alleged that Scott had failed to effectively assist Cheetham in his defense.¹⁸ In his letter, Cheetham argued that, because N.S.’s hymen was intact, the medical report could have created reasonable doubt that the penetration incident had occurred; therefore, Cheetham requested that Scott be dismissed and replaced.¹⁹

After questioning the county attorney, Scott, and Cheetham, the district court determined that there was “no total breakdown of communication” between Cheetham and Scott.²⁰ Cheetham was sentenced to the Montana State Prison for 150 years.²¹ Cheetham appealed to the Montana Supreme Court, raising two issues: (1) whether the district court abused its discretion by failing to conduct an adequate inquiry into Cheetham’s request for substitute counsel; and (2) whether Cheetham was denied effective assistance of counsel.”²²

Finding Cheetham’s second issue as not record-based, the State, in its brief, allocated a majority of its analysis to the issue of substitution of counsel.²³ While the State argued that the district court’s inquiry into Cheetham’s claim was adequate, the State also insisted that the Court clarify its substitution of counsel standard.²⁴ The State claimed that the Court should adopt the good cause standard applied in federal courts.²⁵ Under this standard, the State asserted that a defendant’s motion for substitution of counsel would be granted if the defendant showed good cause by establishing that there was a “conflict of interest, a complete breakdown of communication, or an irreconcilable conflict.”²⁶ The State further argued that record-based ineffective assistance of counsel claims should be raised on direct appeal and should not be considered by the district court to determine whether the defendant should have been

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 49.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 49, 52.

²³ Appellee’s Brief at 13, *State v. Cheetham*, Feb. 24, 2016, No. DA 15-0156.

²⁴ *Id.* at 20, 23.

²⁵ *Id.* at 20.

²⁶ *Id.*

afforded substitute counsel.²⁷ Instead, the state argued that courts should focus on whether a defendant has shown good cause to warrant substitution of counsel.²⁸

III. MAJORITY OPINION

A. *District Court's Inquiry into Cheetham's Request for Substitute Counsel.*

The Court first held that the district court's inquiry into Cheetham's request for substitution of counsel was adequate and any further hearing on Cheetham's complaint was unnecessary.²⁹ Forgoing the State's suggestion that the Court adopt the federal standard for substitution of counsel, the Court applied the following test grounded in Montana case law: "the defendant bears the burden of presenting material facts to establish a 'complete collapse' of the attorney-client relationship, a total lack of communication, or ineffective assistance of counsel."³⁰ The majority stated that a district court's inquiry into a defendant's substitution of counsel claim is adequate when the court considers the "defendant's factual complaints together with counsel's specific explanations addressing the complaints."³¹ A cursory inquiry into the defendant's complaint will not suffice.³² A hearing on the validity of the defendant's complaint is only necessary when the court finds the defendant's complaint is "seemingly substantial."³³

Focusing on ineffective assistance of counsel, the Court reasoned that a complaint for ineffective assistance of counsel is "seemingly substantial" if it satisfies the two-prong Strickland test: (1) that counsel's performance was deficient; (2) that deficient performance prejudiced the defendant.³⁴ Relying on *State v. Dethman*, the Court claims that a difference in opinion over trial strategy between the defendant and his counsel does not give rise to a seemingly substantial complaint.³⁵ Therefore, the Court determined that the district court's inquiry was adequate because the district court correctly compared Cheetham's factual allegations to Scott's explanations of Cheetham's complaints to conclude Cheetham did not raise a substantial complaint.³⁶

²⁷ *Id.* at 22.

²⁸ *Id.*

²⁹ *Cheetham*, 373 P.3d at 49, 51–53.

³⁰ *Id.* at 50, 52.

³¹ *Id.* at 51.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 50.

³⁵ *Id.* at 50.

³⁶ *Id.* at 51.

Since the district court suggested a total breakdown of communication was required to obtain new counsel, the Montana Supreme Court acknowledged that a “total breakdown of communication may be separate grounds for obtaining new counsel from a claim that counsel is rendering ineffective assistance.”³⁷ Without articulating a test for determining whether there was a total breakdown of communication between Cheetham and his attorney, the Court agreed with the district court’s finding that it was relevant to inquire whether the communication between the two was civil because the complaint occurred late in Cheetham’s court proceedings when only the sentencing hearing remained.³⁸ Affirming the district court’s finding, the Court found that Cheetham failed to raise a seemingly substantial claim; therefore, further inquiry by the district court was unnecessary.³⁹

B. Ineffective Assistance of Counsel

Because Cheetham’s claim of ineffective assistance of counsel for Scott’s failure to introduce the 2006 medical report was not record-based, the Court declined to address Cheetham’s second issue on direct appeal.⁴⁰

IV. JUSTICE MCKINNON’S CONCURRENCE

Agreeing with the Court’s analysis on the second issue, Justice McKinnon focused her concurrence solely on the first issue.⁴¹ Justice McKinnon stated that the Court failed to articulate a standard for district court judges to apply when conducting their initial inquiry into a defendant’s substitution of counsel claims.⁴² In her analysis, Justice McKinnon noted that the Court continues to require satisfaction of both prongs of *Strickland* “without setting forth any analytical distinction from a substitution claim.”⁴³ Justice McKinnon also claimed that the Court does not actually apply the *Strickland* test; rather, the Court determined that “Cheetham did not raise a ‘seemingly substantial’ complaint of ineffective assistance of counsel.”⁴⁴

Finding the majority’s blending of ineffective assistance of counsel with a substitution of counsel claim flawed, Justice McKinnon, like the State, urged the Court to clarify its inconsistent precedent on substitution of counsel claims by adopting the standard applied in the

³⁷ *Cheetham*, 373 P.3d at 51–52.

³⁸ *Id.* at 52.

³⁹ *Id.*

⁴⁰ *Id.* at 52–53.

⁴¹ *Id.* at 54 (McKinnon, J., concurring).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

majority of federal courts.⁴⁵ The standard, Justice McKinnon states, should require the defendant to show “a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant” to warrant substitution of counsel.⁴⁶ In evaluating whether substitution of counsel is warranted, Justice McKinnon noted that the trial court should employ the following facts and circumstances test: “timeliness of the motion, adequacy of the court’s inquiry into the defendant’s complaint, and whether the attorney-client conflict was so great that it resulted in total lack of communication preventing an adequate defense.”⁴⁷

Unlike the majority, Justice McKinnon further analyzed the total breakdown in communication issue. In her reasoning, Justice McKinnon asserted that conflict over differences of trial strategy between the defendant and his attorney could lead to a total breakdown in communication.⁴⁸ Therefore, Justice McKinnon asserted that the trial judge’s inquiry into the defendant’s claim must focus on “whether the serious breakdown in communication results in an inadequate defense.”⁴⁹ While Justice McKinnon furthers the Court’s analysis and urges the adoption of a clearer standard for substitution of counsel claims, Justice McKinnon agreed with the majority that there was no total breakdown in communication between Cheetham and his attorney.⁵⁰ Therefore, Justice McKinnon, like the majority, found that further inquiry by the district court was unwarranted.⁵¹

IV. ANALYSIS

A. *Judicial Skepticism of Substitution of Counsel Claims*

Judicial skepticism may lead judges to deny even worthy substitution of counsel motions.⁵² For indigent defendants like Cheetham, judges are less likely to find a breakdown in the attorney-client relationship to justify granting a motion for substitution of counsel.⁵³ Judicial skepticism results from a judge’s suspicions of the defendant and his counsel, coupled with imperfect tests that district courts are required to apply to substitution of counsel motions.⁵⁴ Generally, judges may

⁴⁵ *Id.*

⁴⁶ *Id.* at 55–56.

⁴⁷ *Id.* at 56.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Lindsay R. Goldstein, *A View From the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship—An Analysis and Proposal for Reform*, 73 *FORDHAM L. REV.* 2665, 2682 (2005).

⁵³ *Id.* at 2680–81.

⁵⁴ *Id.* at 2682.

experience the following concerns about a defendant's motion for substitute counsel: (1) granting the motion will not actually resolve the conflict between the defendant and his counsel; (2) the defendant is manipulating the judge into delaying the defendant's trial; (3) the defendant will "abuse the judicial process;" (4) appointing a new lawyer will create an economic burden on society; and (5) the defendant's concerns about his attorney are related to the larger issue of the defendant having criminal charges brought against him.⁵⁵

While judges often recognize that disagreements between the defendant and his counsel exist, judges are unlikely to find any disagreement rising to the level of a breakdown in the attorney-client relationship.⁵⁶ Judges often note that conflicts between a defendant and his attorney are inevitable since the defendant objects to the criminal charges being brought against him, the defendant may have difficulty working with others, or the defendant and his counsel disagree on counsel's proposed trial strategy.⁵⁷ One of the root causes of judicial skepticism is the economic implication of appointing new counsel and the impact granting a motion for substitution of counsel will have on judicial economy. Judges often doubt whether granting a defendant's motion for substitution of counsel is worth the increased expense of appointing a new attorney to represent the defendant.⁵⁸ Further, substituting counsel requires a pause in the judicial process, leading to overcrowded judicial dockets.⁵⁹

B. Reliance on Strickland Standard in Substitution of Counsel Claims

The Sixth Amendment affords a defendant the right to choice of counsel.⁶⁰ A defendant's implicit right to substitute counsel is often viewed as an extension of the right to choice of counsel.⁶¹ However, the right to choice of counsel does not extend to indigent defendants who have appointed counsel.⁶² Instead, indigent defendant's implied right to substitution of counsel is based on the defendant's Sixth Amendment right to counsel.⁶³ A defendant's right to substitute counsel is invoked when a breakdown in communication between the defendant and his counsel becomes so grave that it frustrates counsel's ability to provide an adequate defense.⁶⁴ Therefore, this qualified right is afforded when counsel's failure

⁵⁵ *Id.* at 2691–92, 2697.

⁵⁶ *Id.* at 2693.

⁵⁷ *Id.* at 32 at 2694.

⁵⁸ *Id.* at 2697.

⁵⁹ *Id.* at 2697–98.

⁶⁰ U.S. CONST. amend. VI.

⁶¹ *United States v. Smith*, 640 F.3d 580, 587 (4th Cir. 2011).

⁶² *Id.* at 587–88.

⁶³ *Id.* at 588.

⁶⁴ *Id.*

to assist the defendant in his defense violates the defendant's right to effective assistance of counsel.⁶⁵

While a defendant's right to substitution of counsel concerns the right to effective assistance of counsel, the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuit Courts do not equate the *Strickland* ineffective assistance of counsel standard with the substitution of counsel standard.⁶⁶ Like these circuit courts, Justice McKinnon proposes that to warrant substitution of counsel, the standard should require a defendant to demonstrate "conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between attorney and the defendant."⁶⁷ However, unlike the federal standard, the Montana Supreme Court outlines a substitution of counsel standard that includes ineffective assistance of counsel,⁶⁸ thus concluding that the *Strickland* standard applies to Cheetham's complaints.⁶⁹

The Sixth Circuit has ruled on the issue of incorporating *Strickland* into substitution of counsel claims in *Wilson v. Mintzes*. The Sixth Circuit notes that *Strickland* should not be applied to substitution of counsel claims because the violation of the right to counsel of choice does not mean that the defendant's right to effective assistance of counsel is also violated.⁷⁰ In *Wilson*, the Sixth Circuit stated that applying the *Strickland* standard for substitution of counsel motions would require a defendant "who cannot communicate with counsel, who is dissatisfied with counsel or whose defense is burdened by a conflict of interest to prove that counsel's conduct rises to the level of constitutional ineffectiveness."⁷¹ The Sixth Circuit further stated that this high burden for proving ineffective counsel should not be placed on any criminal defendant.⁷² Placing such a burden on the defendant would undermine certain principles of the defendant's qualified right to counsel of choice;⁷³ therefore, applying the *Strickland* ineffective assistance standard to substitution of counsel claims is flawed.⁷⁴

In *Wilson*, the Sixth Circuit noted that it was not aware of any court that places on defendants the high burden proving ineffective assistance of counsel before granting the defendant's motion for

⁶⁵ *Id.*

⁶⁶ *United States v. Whaley*, 788 F.2d 581, 583 (9th Cir. 1986); *United States v. Jones*, 795 F.3d 791, 796 (8th Cir. 2015); *United States v. Sullivan*, 431 F.3d 976, 979–80 (6th Cir. 2005); *United States v. Padilla*, 819 F.2d 952, 955 (10th Cir. 1987); *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973); *United States v. Morris*, 714 F.2d 669, 673 (7th Cir. 1983); *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981).

⁶⁷ *Cheetham*, 373 P.3d at 55–56 (McKinnon, J., concurring) (citing *United States v. Swinney*, 970 F.2d 494, 499 (8th Cir. 1992) (citations omitted), cert. denied, 506 U.S. 1011, 113 S. Ct. 632 (1992)).

⁶⁸ *Id.* at 50 (majority opinion).

⁶⁹ *Id.*

⁷⁰ *Wilson*, 761 F.2d at 283 (6th Cir. 1985).

⁷¹ 761 F.2d 275, 283 (6th Cir. 1985).

⁷² *Wilson*, 761 F.2d at 283.

⁷³ *Id.*

⁷⁴ *Id.*

substitution of counsel.⁷⁵ This statement is true when focusing on substitution of counsel cases in the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuit Courts. While these circuit courts are not as forward as the Sixth Circuit about the problematic effects of equating the ineffective assistance standard with substitution of counsel, these circuit courts, nonetheless, do not incorporate the *Strickland* standard into the substitution of counsel analysis.⁷⁶

In her concurrence, Justice McKinnon claims that the Court incorporates ineffective assistance of counsel with substitution of counsel without providing any analytical distinction.⁷⁷ Justice McKinnon correctly notes that while the Court looks to *Strickland* when reviewing Cheetham's substitution of counsel claim, the Court does not actually apply *Strickland* to Cheetham's claim.⁷⁸ However, the district court, following the Court, appears to have applied *Strickland* to Cheetham's complaint. During the district court's questioning of Cheetham and his attorney, the district court focused on whether communication between the two parties was civil.⁷⁹ Nevertheless, in its finding, the district court also noted that it had reservations about replacing Scott as Cheetham's attorney because Scott had effectively assisted Cheetham in his defense.⁸⁰ By allowing effective counsel to be an issue in Cheetham's substitution of counsel claim, the district court is following the *Strickland* standard. In doing so, Montana courts have placed a high burden on a defendant that requires a showing that his attorney's performance was deficient rather than simply showing a breakdown in communication, a conflict of interest, or an irreconcilable conflict.⁸¹ Therefore, the Court justified the Sixth Circuit's concern when the Court's chosen substitution of counsel standard required a defendant to show that he has received ineffective assistance of counsel prior to granting substitute counsel.

In the future, the Court should adopt the federal standard for substitution of counsel claims in order to avoid blending effective assistance of counsel with substitution of counsel claims at the expense of a defendant's Sixth Amendment rights. The Sixth Amendment affords criminal defendants the right to a fair trial.⁸² For indigent defendants, implicit in this right is the right to choice of counsel when the defendant's appointed counsel has failed to provide effective legal assistance.⁸³ Central

⁷⁵ *Wilson*, 761 F.2d at 283 (6th Cir. 1985).

⁷⁶ *Whaley*, 788 F.2d at 583 (9th Cir. 1986); *Jones*, 795 F.3d at 796 (8th Cir. 2015); *Sullivan*, 431 F.3d at 979–80 (6th Cir. 2005); *Padilla*, 819 F.2d at 955 (10th Cir. 1987); *Young*, 482 F.2d at 995 (5th Cir. 1973); *Morris*, 714 F.2d at 673 (7th Cir. 1983); *Welty*, 674 F.2d at 188 (3d Cir. 1982); *McKee*, 649 F.2d at 931 (2d Cir. 1981).

⁷⁷ *Cheetham*, 373 P.3d at 54 (McKinnon, J., concurring).

⁷⁸ *Id.*

⁷⁹ *Id.* at 51 (majority opinion).

⁸⁰ *Id.*

⁸¹ *Id.* at 55–56 (McKinnon, J., concurring).

⁸² U.S. CONST. amend. VI.

⁸³ *Smith*, 640 F.3d at 588.

to the attorney-client relationship are the principles of trust and confidence.⁸⁴ If a client does not trust his attorney, the attorney's ability to assist the client will be materially impaired.⁸⁵ Effective representation is unlikely when there is a complete breakdown in the attorney-client relationship.⁸⁶ Without a clear standard for substitution of counsel claims that ensures an indigent defendant has a meaningful level of confidence in their counsel, Montana risks obtaining convictions that are less reliable. Therefore, the Court must ensure the defendant's Sixth Amendment rights are not violated in order to avoid a breakdown in the adversarial process.

V. FUTURE IMPLICATIONS

The Court's refusal to eliminate the *Strickland* test from the substitution of counsel standard will arguably result in more denials of defendants' motions for substitution of counsel. After a court denies an indigent defendant's motion for substitution of counsel, the defendant will have two options: (1) continue with his present counsel, or (2) proceed pro se.⁸⁷ If the defendant continues with his present counsel, it is likely that the relationship between the two could be strained and the defendant's trust in his counsel, and the justice system, will deteriorate. If the defendant continues pro se, the defendant will likely be prejudiced by his lack of legal expertise.⁸⁸ Furthermore, the rise in pro se litigants has "disrupted the efficiency of the courts, causing courtroom delays and overburdening judges, attorneys, and court staff."⁸⁹ Therefore, future implications of not adopting the federal standard for substitution of counsel claims could prejudice the defendant and have a negative impact on Montana courts.

VI. CONCLUSION

A criminal defendant's right to choice of counsel is distinguishable from a defendant's right to effective assistance of counsel.⁹⁰ In *Cheetham*, the Court refused to adopt the federal standard for substitution of counsel claims, leaving district courts with an unclear standard to apply to a defendant's substitution of counsel claims.⁹¹ In doing so, the Court blended the *Strickland* ineffective assistance standard

⁸⁴ *Goldstein*, *supra* n. 52 at 2668.

⁸⁵ *Id.* at 2669.

⁸⁶ *Id.* at 2674.

⁸⁷ *Cheetham*, 373 P.3d at 50.

⁸⁸ Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005).

⁸⁹ *Id.* at 1548.

⁹⁰ *Wilson*, 761 F.2d at 283 (5th Cir.1985) (citation omitted).

⁹¹ *Cheetham*, 373 P.3d at 52.

with the substitution of counsel standard.⁹² Therefore, unless a defendant can articulate that he received ineffective assistance of counsel, Montana courts likely will not grant a defendant's motion for substitution of counsel. If the Court continues to use the Montana standard for substitution of counsel claims, there will likely be a rise in both the number of strained attorney-defendant relationships and pro se defendants. This rise will likely have a detrimental effect on indigent criminal defendants and Montana courts. Therefore, the Court should reconsider Justice McKinnon's concurrence and the State's recommendation and choose to adopt the federal substitution of counsel standard.

⁹² *Id.* at 54 (McKinnon, J., concurring).