In the Supreme Court of the State of Montana

Supreme Court No. DA 21-0483

STATE OF MONTANA,

Plaintiff and Appellee,

-vs-

JAMIE CAL FUSON,

Defendant and Appellant.

Appellant's Reply Brief

On Appeal from the Montana Ninth Judicial District Court,
Pondera County, Hon. Robert G. Olson, Presiding

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I. Introduction

It is important to clarify what Fuson is **not** requesting: He is not requesting this Court create a *Sixth Amendment* right to effective assistance of counsel in all civil proceedings. Nor is he opening the door to Monday-morning quarterbacking all civil proceedings under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). What he is seeking is a remedy for his conflicted civil counsel's gross incompetence which, but for that incompetence, would not have resulted in *Fifth Amendment* violations against Fuson. These violations gave rise to the eventual criminal prosecution against Fuson.

To the State's credit, its brief does not defend Ms. Oteri's actions nor does it suggest that Fuson was not prejudiced by those actions. Rather, the State's brief justifiably focuses on the two legal points. First, Fuson did not have a right to effective assistance of counsel. Second, he did not invoke his right to silence during the divorce proceeding. To these to points, Fuson now turns.

II. Effective Assistance of Counsel

The Constitution vests this Court with the jurisdiction over "admission to the bar and the conduct of its members." *Mont. Con.*, Art. VII, § 2(3). "[T]he primary reason for prohibiting the unauthorized practice of law is to protect the public from being advised and represented by unqualified persons not subject to professional regulation." *Mont. Sup. Ct. Comm'n on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, ¶ 73, 334 Mont. 311, 147 P.3d 200. The basis for the prohibition, and for all regulation of the bar, is not a protectionist racket to protect a privileged few who happen to have graduated from an accredited law school and passed the bar examination. Rather, the basis for the regulatory scheme is to protect the clients.

> When we consider the relationship of attorney and client and its consequences to the client, as well as to his possible adversary, it becomes manifest that insistence on the due authorization of the persons acting as attorneys is of vital importance . . . *The people have a right to presume that the law in this respect is enforced*; if it is not enforced such persons as intrust their business to an unchallenged pretender are permitted, in matters of life, of liberty and of property, to lean upon a broken reed.

In re Bailey, 50 Mont. 365, 369, 146 P. 1101, 1103 (1915) (emphasis added) (see also: *O'Neil*, ¶ 73). In *Bailey*, this Court also recognized that the practice of law is "subject entirely to state control." *Id.*

Unlike Senator O'Neil who was not licenced to practice, Ms. Oteri was licensed to practice law and subject to state control. The protection to the "client" so extolled in *O'Neil* and *Bailey* must necessarily extend beyond Senator O'Neil to Ms. Oteri. In fact, the need for state regulation to protect the client is heightened to an even greater degree when the client places their trust in one licensed by the State of Montana with "matters of life, of liberty and of property . . ." *Bailey*, 50 Mont. at 369. At the absolute minimum, there must be some remedy for those client's who, to paraphrase *Bailey*, lean on a reed, supposedly sanctioned as competent by the State, but learns that the reed is broken and the resulting fall has landed them in the soup.

Retroactively protecting Fuson from Ms. Oteri does not require the creation of a new constitutional right or even an unreasonable extension of an existing right. Rather, the protection is simply an extension of this Court's constitutional authority to both regulate the

bar and ensure due process protections.

The State proposes that Fuson's remedies include a malpractice claim or the subjecting Ms. Oteri to a disciplinary proceeding, the latter of which is not a remedy for Fuson so much as a punishment for Ms. Oteri. Neither remedy actually fixes the problem Ms. Oteri created; only this Court can do that in this case.

Concluding Fuson had a due process right to effective assistance of counsel, or at least a right to be protected against ineffective counsel, is consistent with the constitutional obligations of this Court. Suppression of the fruits of Ms. Oteri's inefficacy is an equitable remedy consistent with the due process protections of the Constitution, including *Article II, § 16* ("Courts of justice shall be open to every person and a speedy remedy afforded for every injury of person, property, or character.")

Given these due process and regulatory protections, this Court should interpret "effective assistance of counsel" as a concept distinct from the traditional, narrower interpretation of the phrase in the *Sixth Amendment*. There is nothing about the notion of effective assistance

of counsel that necessarily limits itself to criminal proceedings. As the State highlights, the lion's share of the jurisprudence on ineffective assistance of counsel occurs within a *Sixth Amendment - Strickland* context.

A number of courts, including this one, have extended the idea to other proceedings in which fundamental rights are at issue, e.g., immigration and parental rights. These are non-criminal proceedings, but due process principles have extended to ensure effective counsel at those proceedings. Additionally, due process protections extend broader than the narrow confines of proceedings that trigger a *Sixth Amendment* right to counsel. For example, although there is no right to counsel at a *Terry* stop, if law enforcement beat a confession out of an individual during that stop then due process protections would certainly apply.

All Montanans, and especially the members of the Bar, can hope that the circumstances in this case are so unique as to be a one-off, but that hope does not rectify the wrong that occurred in Fuson's cases. Simply because Fuson did not have a *Sixth Amendment* right to

counsel, i.e., appointed counsel, does not mean that he is deprived of a due process right to have effective counsel. Suppression of his statements made as a direct result of that due process violation is the only way to remedy the wrong. Fuson requests this Court do so.

III. Invocation of the Right

The State argues that Fuson's appeal should be denied, in part, because he did not invoke his *Fifth Amendment* right to silence. Fuson, like Mr. Ackerson, trusted Ms. Oteri to his detriment. Fuson simply did not know any better. He was the only person in the courtroom that could reasonably assert that justification. Everyone else, including his own lawyer, should have known better.

Further, the State adopts an unnecessarily restrictive interpretation of the *Fifth Amendment* in the context of this case. The United States Supreme Court recognizes that the *Fifth Amendment* embraces a concomitant right to the advice of counsel distinct from that protected by the *Sixth Amendment*.

> The privilege against compelled self-incrimination would be drained of its meaning if counsel, being lawfully present, as here, would be penalized for advising his client in good faith to assert it. The assertion of a testimonial privilege, as of

> many other rights, often depends upon legal advise from someone who is trained and skilled in the subject matter, and who may offer more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his *Fifth Amendment* privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.

Maness v. Meyers, 419 U.S. 449, 465-466 (1975).

The Court in *Maness* also recognized that due process interests require any litigant "civil or criminal" to have the presence of retained counsel in a court proceeding.

> It requires no expansion of this well-established principal to hold that just as a state court may not arbitrarily prohibit retained counsel's presence in a courtroom, so too it may not arbitrarily prohibit or punish good-faith advice given by retained counsel. The 'right to be heard by counsel' is frustrated equally by denying the right to have counsel present during trial as by preventing counsel, once in the courtroom, from giving good-faith professional advice to his client.

Id. 471-472. (Stewart, J., concurring). "To punish [counsel] for performing his professional duty in good faith would be an arbitrary interference with his client's right to the presence and advice of retained counsel – and thus a denial of due process of law." *Id.* at 472.

While *Maness* presents different legal questions, the United States Supreme Court's answer to the question guides this Court's analysis in this case. *Maness* resolved the question of whether a court could punish a lawyer for advising his client to assert the client's *Fifth Amendment* right. The Court's resolution of the issue was not for the protection of the attorney; rather, it was for the protection of the client.

> We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the *Fifth Amendment* privilege against self-incrimination in any proceeding embracing the power to compel testimony. To hold otherwise would deny the constitutional privilege against self-incrimination the means of it's own implementation. When a witness is so advised the advice becomes an integral part of the protection accorded the witness by the *Fifth Amendment*."

Maness, 419 U.S. at 468.

Maness supports Fuson's claim. Unlike *Maness*, which contemplated competent counsel as a necessary component of the due process protection for a litigant, including advising her client of his *Fifth Amendment* rights, Ms. Oteri highlights the peril when retained counsel fails in that duty, thus depriving the client of his due process protection. It is a logical extension of *Maness* to conclude that a client

is deprived of due process just as much by incompetent counsel as with non-existent counsel.

That Fuson did not invoke his *Fifth Amendment* right is not a failing to be attributed to Fuson but to Ms. Oteri. As a trained practitioner of law, licensed by the State of Montana, Ms. Oteri had an obligation to act as counsel contemplated by the United States Supreme Court in *Maness*. But, Ms. Oteri also had an obligation to Fuson to not act as his counsel in a proceeding where her conflict of interest was so readily apparent. She failed on both accounts, and ultimately failed Fuson miserably. If due process is fulfilled by the presence of competent counsel, due process is denied when counsel is both incompetent and operating under such a direct conflict of interest as Ms. Oteri was in this matter.

Fuson not invoking his right against self-incrimination highlights the constitutional failure that occurred in the civil proceeding. The State, in the criminal case, should not be able to profit from Fuson's ignorance of his constitutional rights especially when his own attorney was so lacking in competence that she failed to advise him, at

minimum, that he had the right to invoke the right to silence.

IV. The District Court's Obligation

The State refutes Fuson's assertion that the district also had an obligation to advise Fuson of his *Fifth Amendment* rights. (State's Br. at 17). In support of its argument, the State points to the district court's finding that the "criminal nature of Defendant's conduct was not clearly apparent to the court. There could be reasons and facts still unknown to the Court justifying the Defendant's actions." (Appellant's App. A at 2) (State's Br. at 17).

Fuson readily concedes that Ms. Oteri was in a far better position to recognize the potentially criminal nature of Fuson's conduct than the district court was. However, the court is not relieved of its burden simply because the criminal nature was not obvious. The *Fifth Amendment* not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984), but also it "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him

in future criminal proceedings," *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

Further, the criminal nature of the question need not be readily apparent. For *Fifth Amendment* purposes, the privilege against self-incrimination extends not only to answers that would themselves support a conviction but also to those that would furnish a link in the chain of evidence needed to prosecute the accused." *Ohio v. Reiner*, 532 U.S. 17, 20 (2001). "The right not to incriminate oneself is not triggered solely by the existence or even likelihood of a criminal prosecution; rather '[w]hen a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster.'" *Steiner v. Minn. Life Ins. Co.*, 85 P.3d 135, 142-43 (Colo. 2004) (quoting *In re Folding Carton Antitrust Litig.*, 609 F.2d 867, 871 (7th Cir. 1979)).

In *In re Folding Carton Antitrust Litig*, the Court of Appeals for the Seventh Circuit concluded that "however much we appreciate the legitimate practical concerns of the trial court, we cannot agree that a

witness' constitutional privilege against self-incrimination depends on the judge's prediction of criminal prosecution." *Id.* at 871.

Even if the district court was unaware of the inevitable theft charges that would arise from Fuson's testimony in the civil case, opposing counsel in the case raised the specter of a possible perjury prosecution early in the proceedings. (Appellant's Appendix D at 19). Perjury is a crime. *Mont. Code Ann. § 45-7-201*, as is false swearing, *Mont. Code Ann. § 45-7-202*, and unsworn falsification to authorities, *Mont. Code Ann. § 45-7-203*. During the hearing on the property settlement, opposing counsel was accusing Fuson of fraudulently undervaluing the semi-truck in a sworn financial disclosure to the court. Be it theft, perjury, false swearing, or any number of other offenses, it should have evident to a seasoned and experienced jurist that the questions posed to Fuson by his ex-wife's attorney in the civil proceeding presented a less-than-fanciful risk of criminal prosecution to Fuson.

Even if the district court failed to recognize Ms. Oteri's conflict of interest until after Fuson testified, the risk of criminal culpability

should have been evident to the district court. But that is beside the point. The record before the same district court in the criminal case was created long after both Mr. Ackerson and Fuson testified in the civil case. Evidence of Ms. Oteri's conflict and inefficacy in the civil case, and thus due process violations, were evident to the district court in the criminal case where Fuson sought relief. Consequently, the district court erred in failing to take steps to remedy the constitutional violations *after* it became aware of them.

Conclusion

Given unique circumstances present in both this case and the civil case, coupled with the absence of any remedy for Fuson other than the relief sought here, Fuson respectfully requests this Court reverse the district court's denial of his motion to suppress.

Respectfully submitted this 21st day of June 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Reply Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 5,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates is 2,479.

Dated this 21st day of June 2022.

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I, Colin M. Stephens, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-21-2022:

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