Rule 45. Pre-disposition reports and social studies.

(a) Unless waived by the court, a pre-disposition report shall be prepared in all proceedings which result in the filing of a petition. The pre-disposition report shall be deemed waived, unless otherwise ordered, in all traffic, fish and game and boating cases, and other bailable offenses. The report shall conform to the requirements in the Code of Judicial Administration.

(b) In delinquency cases, investigation of the minor and family for the purpose of preparing the pre-disposition report shall not be commenced before the allegations have been proven without the consent of the parties.

(c) The pre-disposition report shall not be submitted to or considered by the judge before the adjudication of the charges or allegations to which it pertains. If no pre-disposition report has been prepared or completed before the dispositional hearing, or if the judge wishes additional information not contained in the report, the dispositional hearing may be continued for a reasonable time to a date certain.

(d) For the purpose of determining proper disposition of the child and for the purpose of establishing the fact of neglect or dependency, written reports and other material relating to the child's mental, physical, and social history and condition may be received in evidence and may be considered by the court along with other evidence. The court may require that the person who wrote the report or prepared the material appear as a witness if the person is reasonably available.

(e) The pre-dispositional report and social studies shall be provided to the minor's counsel, the prosecuting attorney, the guardian ad litem, and counsel for the parent, guardian or custodian of the minor at least two days prior to the dispositional hearing. When the minor or the minor's parent, guardian or custodian are not represented by counsel, the court may limit inspection of reports by the minor or the minor's parent, guardian or custodian if the court determines it is in the best interest of the minor to do so.

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RULE 53. APPEARANCE AND WITHDRAWAL OF COUNSEL

(a) Appearance. An attorney shall appear in proceedings by filing a written notice of appearance with the court or by appearing personally at a court hearing and advising the court that he is representing a party. Once an attorney has entered an appearance in a proceeding, the attorney shall receive copies of all notices served on the parties.

(b) Withdrawal.

(1) Retained Counsel. Consistent with the Rules of Professional Conduct, ~~an~~ retained attorney may withdraw as counsel of record ~~in all cases except where~~ unless withdrawal may result in a delay of trial or unless a final appealable order has been entered. In such circumstances, ~~that case~~, ~~an~~ retained attorney may not withdraw except upon written motion and ~~without the~~ approval of the court.

(2) Court-appointed counsel. Court-appointed counsel may not withdraw as counsel of record except upon motion and signed order of the court. If the court grants appointed counsel's motion to withdraw, the court shall promptly appoint new counsel.

(3) If a motion to withdraw is filed after entry by the court of a final appealable judgment, order, or decree, the motion may not be granted unless counsel, whether retained or court-appointed, certifies in a written statement: (a) that the represented party in a delinquency proceeding has been advised of the availability of a motion for new trial or a certificate of probable cause and that, if appropriate, the same has been filed; and (b) that the represented party has been advised of the right to appeal and that, if appropriate, a Notice of Appeal and a Request for Transcript have been filed.

~~(2)~~ (4) When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney by first class mail, to his or her last known address" and upon all other parties not in default and a certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

~~(3)~~ (5) A guardian ad litem may not withdraw except upon written motion and approval of the court.

~~(4) Representation by court appointed counsel shall terminate upon the entry of a final dispositional order without the filing of a formal withdrawal of counsel.~~

Rule 54. Continuances.

(a) Pre-trial and motion matters may be continued once upon stipulation of the parties and the guardian ad litem and notice to the clerk of the judge to whom the case is assigned. After the first continuance or once a matter has been set for trial, the matter may be continued only with the approval of the court.

(b) A second continuance may be requested by stipulation of the parties and the guardian ad litem, by motion in open court or by written motion clearly stating the grounds for the continuance. Notice of the hearing on the motion shall be served upon all counsel according to Rule 18. The motion and notice of hearing must be served at least 5 days prior to the date of the hearing, unless the court has ordered otherwise and a copy of the court's order is served upon counsel with the motion.

(c) Notwithstanding paragraphs (a) and (b), absent unavoidable circumstances, no continuance shall be granted in any child protection case except upon a showing by the moving party that the continuance will not adversely affect the interest of the child or cause a hearing to be held later than child welfare timelines established by statute.

(d) In sexual abuse cases involving minor victims, continuances may only be granted upon a written finding by the court, or written minute entry which shall include the reason(s) for the continuance.

(e) If the hearing is an "important criminal justice hearing" or an "important juvenile justice hearing" as defined by § 77-38-2 of which the victim has requested notification, the court should consider the impact of the continuance upon the victim.[1]

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1 Criminal only.

From: Alicia Davis
To: Adam F. Trupp; Alan Sevison; Alicia Davis; Brent Bartholomew; Carol Verdoia; Esther Chelsea-McCarty; internet: epeterson@co.uintah.ut.us; internet: pvickrey@juvlaw.com; internet: utahlawboy@yahoo.com; Jeanette Gibbons; Judge Elizabeth Lindsley; Judge Larry Steele; Kristin Brewer; Matty Branch; molsen@attglobal.net; nbeas-nordell@co.slc.ut.us; nelson@utlawhelp.com; randyskester@qwest.net; Shirl Don LeBaron; ucadm.paulw@state.ut.us
Date: 9/29/03 1:26PM
Subject: Friday BONUS!

If you thought you were looking forward to Friday's URJP meeting before, just WAIT! There's more!

We will also hear from Rick Schwermer about the UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT (2002).
The Uniform Child Witness Testimony by Alternative Methods Act provides procedures in taking the testimony of children in criminal or civil proceedings, permitting a child, for good cause, to testify outside the courtroom and the immediate presence of a defendant.
Idaho, Nevada and Oklahoma have adopted it. Be among the first in Utah to consider its adoption here.

You can read the Act in its entirety at:
http://www.law.upenn.edu/bll/ulc/ucwtbama/2002final.htm.

Also, consider the "New Counsel" form attached. The Board of Juvenile Judges seek to to discourage parties from waltzing in to an adjudication and announcing that they have fired their attorney and want a continuance to get new counsel.

A proposed form and amendment to URJP 53 is attached. The new language is simply:
"(6) Parties must submit a written Motion for Substitution of Counsel setting forth in detail the need for new counsel at least five days prior to the next scheduled hearing date unless otherwise allowed by the judge."

Thanks, look forward to seeing you - Alicia

Alicia Davis, J.D.
Assistant Juvenile Court Administrator
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, Utah 84114-0241
phone: (801) 578-3929
fax: (801) 578-3843
email: aliciad@email.utcourts.gov

CC: Rick Schwermer

From: Tim Shea
To: Rules Staff
Date: 9/26/03 2:20PM
Subject: rulemaking process

Earlier this week the civil procedures committee considered my proposal to roll out rules as they are developed rather than batch them twice per year. The committee supported sending rules out for comment as we reach closure on drafts and even submitting them to the Supreme Court on a more continual basis. They felt that we should stick to the twice per year effective dates. Let me know what you hear from your committees.
Thanks,
Tim

RULE 53. APPEARANCE AND WITHDRAWAL OF COUNSEL

(a) Appearance. An attorney shall appear in proceedings by filing a written notice of appearance with the court or by appearing personally at a court hearing and advising the court that he is representing a party. Once an attorney has entered an appearance in a proceeding, the attorney shall receive copies of all notices served on the parties.

(b) Withdrawal.

(1) Retained Counsel. Consistent with the Rules of Professional Conduct, an retained attorney may withdraw as counsel of record ~~in all cases except where~~ unless withdrawal may result in a delay of trial or unless a final appealable order has been entered. In such circumstances, ~~that case~~, an retained attorney may not withdraw except upon written motion and ~~without the~~ approval of the court.

(2) Court-appointed counsel. Court-appointed counsel may not withdraw as counsel of record except upon motion and signed order of the court. If the court grants appointed counsel's motion to withdraw, the court shall promptly appoint new counsel.

(3) If a motion to withdraw is filed after entry by the court of a final appealable judgment, order, or decree, the motion may not be granted unless counsel, whether retained or court-appointed, certifies in a written statement: (a) that the represented party in a delinquency proceeding has been advised of the availability of a motion for new trial or a certificate of probable cause and that, if appropriate, the same has been filed; and (b) that the represented party has been advised of the right to appeal and that, if appropriate, a Notice of Appeal and a Request for Transcript have been filed.

~~(2)~~ (4) When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney by first class mail, to his or her last known address" and upon all other parties not in default and a certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

~~(3)~~ (5) A guardian ad litem may not withdraw except upon written motion and approval of the court.

~~(4) Representation by court appointed counsel shall terminate upon the entry of a final dispositional order without the filing of a formal withdrawal of counsel.~~

(6) Parties must submit a written Motion for Substitution of Counsel setting forth in detail the need for new counsel at least five days prior to the next scheduled hearing date unless otherwise allowed by the judge. 10

2) database.

IN THE _____ DISTRICT JUVENILE COURT,
_____ COUNTY, STATE OF UTAH

In the Int. of _____ Petitioner's Name _____ Street Address _____ City, State, ZIP Date of Birth vs. Division of Child and Family Services, Respondent 120 North 200 West, Room 225 Salt Lake City, Utah 84103 (801) 538-4100	EXPEDITED. MOTION FOR SUBSTITUTION OF COUNSEL Case No. _____ Judge _____

DOB

case.

1)

NOTE TO PETITIONER: THIS MUST BE SUBMITTED AT LEAST 5 DAYS PRIOR TO YOUR SCHEDULED HEARING OR IT MAY NOT BE GRANTED. ## initial lines.

2) 1. Petitioner hired/was appointed _____, Attorney-at-Law on or about _____. A trial on this matter is scheduled for _____, 200__ at __:____ am/pm. (Attach notice of hearing).

2. Petitioner requests substitution of counsel because: [Describe why you feel you are entitled to new counsel, for example: your specific complaints about counsel, how often you have talked to counsel, what sort of relationship you have with counsel, etc. Attach any documents or records that relate to counsel's representation.]

_____

_____

_____

_____

_____

_____

Even though u have sub this m/ y are still dep'd 2 appear at scheduled hrg.

A hr

judge will consider m/. ordered to attend.

3. For these reasons, Petitioner respectfully requests that the Court enter an order:
setting this motion for hrg prior to trial.
(CHECK EACH THAT APPLIES)

_____ Allowing petitioner to hire a new attorney

_____ Appointing new counsel for petitioner ("Affidavit of Indigency" is attached, if not already filed with the Court).

_____ Re-scheduling trial set in this matter. *By clerk*: The trial in this matter is continued for _____, 200___.

4. This motion for continuance is submitted to the Court at least five days prior to the scheduled hearing in this matter.
EVEN T SUBMISSION DOES NOT VACATE HEARING DATE IS NOT CANCELLED.

Petitioner: _____

Ct dkt still in TACT.
This is just NOTification.

INSTRUCTIONS TO THE PETITIONER

Cases alleging abuse, neglect, or dependency of a child are governed by Utah Code 78-3a-301 et seq. The procedure is set forth in the Utah Rules of Juvenile Procedure. If you have any questions not addressed in these instructions, refer to the Utah Code. You should be able to locate a copy in your local library, on the State Court Website at http://courtlink.utcourts.gov (for procedural rules), or the Legislature's Website at http://www.state.le.us (for the Utah Code).

1. FILING FOR CHANGE OF COUNSEL

The right to counsel in parental termination proceedings is granted pursuant to *Utah Code Ann. § 78-3a-913(1)(a)* (2002), which provides that parents, guardians, custodians, and the minor, if competent, shall be informed that they have the right to be represented by counsel at every stage of the proceedings. They have the right to employ counsel of their own choice and if any of them requests an attorney and is found by the court to be indigent, counsel shall be appointed by the court.

If your attorney has failed to consult with you, or provide available information as to your case, you may request that be allowed to be given time to hire or consult with new counsel. The judge is not obligated to decide that you are entitled to new counsel. Motions for substitute counsel made solely to impede the prompt administration of justice will not be granted. This claim must be made in a timely fashion, but in no case, later than 5 days prior to trial. If make this claim less than 5 days prior to trial, the judge may deny your request.

You must fill out this form completely. If you do not provide facts showing that you are entitled to new counsel, the judge may deny your request.

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call the court clerk at least three working days prior to the proceeding.

*746 P.2d 270, *; 72 Utah Adv. Rep. 38;*
*1987 Utah App. LEXIS 596, **

The STATE of Utah, Plaintiff and Respondent, v. Rick PURSIFELL, Defendant and Appellant

No. 860361-CA

Court of Appeals of Utah

746 P.2d 270; 72 Utah Adv. Rep. 38; 1987 Utah App. LEXIS 596

December 2, 1987, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Defendant challenged the judgments of conviction for burglary, attempted burglary, theft, and vehicle burglary from the trial court (Utah), following a jury trial. He asserted that he was denied his Sixth Amendment right to effective assistance of counsel because the trial court denied his request for substitute counsel, and failed to inquire adequately into the reasons for his dissatisfaction with appointed counsel.

OVERVIEW: Defendant was convicted of burglary, attempted burglary, theft, and vehicle burglary, and he appealed. He alleged that the trial court's denial of his request for substitute counsel and failure to adequately inquire into the reasons for his dissatisfaction with appointed counsel abridged his Sixth Amendment right to effective assistance of counsel. The court affirmed. It held that it could not conclude that the trial court's inquiry into the basis for defendant's request for substitute counsel fell below the requisite standard. When he expressed dissatisfaction with appointed counsel's representation, the trial court inquired about the "specific way" in which defendant's interests had not been represented. Defendant mentioned that he had met with counsel only once. While it would have been preferable had the trial court inquired further into defendant's other concern over counsel's pretrial preparation, failure to do so was not reversible error. Given the fairly routine nature of the underlying facts and offenses charged, and defense counsel's experience, the single meeting with defendant was not lack of preparation. Thus, substitution of counsel was not constitutionally required.

OUTCOME: The court affirmed the judgments of conviction for burglary, attempted burglary, theft, and vehicle burglary.

CORE TERMS: dissatisfaction, abuse of discretion, indigent, Sixth Amendment, substitute counsel, preparation, substitution of counsel, appointed counsel, ineffective assistance of counsel, discovery motion, good cause, substitution, appointment, prejudiced, constitutional violation, right to counsel, routine, irreconcilable conflict, reasonable probability, professional judgment, constitutional right, sound discretion, defense counsel, ineffectiveness, manipulation, propensity, deficient, prong, new counsel, appointed to represent

LexisNexis(TM) HEADNOTES - Core Concepts - ✦ Hide Concepts

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion
HN1 While an indigent defendant has a right to have counsel appointed to represent

him, he does not have a constitutional right to a lawyer other than the one appointed, absent good cause. Whether to appoint a different lawyer for an indigent defendant who expresses dissatisfaction with his court-appointed counsel, but who has no constitutional right to appointment of a different attorney, is a matter committed to the sound discretion of the trial court and will be reversed only for an abuse of discretion.

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

HN2 Motions for substitute counsel are less likely to be granted when they would result in a significant delay or mistrial or would otherwise impede the prompt administration of justice.

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

HN3 When a complaint is registered by a criminal defendant concerning his or her appointed counsel, the court must balance the potential for last minute delay and the propensity for manipulation of the system against the competing concern about the likely inability of indigent defendants to articulate and communicate their dissatisfaction in a setting which most laypersons find quite intimidating.

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

HN4 When dissatisfaction with counsel is expressed, the court must make some reasonable, non-suggestive efforts to determine the nature of the defendant's complaints and to apprise itself of the facts necessary to determine whether the defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution or even to such an extent that his or her Sixth Amendment right to counsel would be violated but for substitution. Even when the trial judge suspects that the defendant's requests are disingenuous and designed solely to manipulate the judicial process and to delay the trial, perfunctory questioning is not sufficient.

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

HN5 Courts have no discretion to allow a violation of the Sixth Amendment. Substitution of counsel is mandatory when the defendant has demonstrated good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with his or her attorney. When a defendant is forced to stand trial with the assistance of an attorney with whom he has become embroiled in an irreconcilable conflict, he is deprived of the effective assistance of any counsel whatsoever" and his Sixth Amendment right to counsel is violated.

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

HN6 Good cause for substitution of counsel cannot be determined solely according to the subjective standard of what the defendant perceives.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN7 To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation fell below an objective standard of reasonable professional judgment, and second, that counsel's performance prejudiced the defendant. The Utah Supreme Court has adopted and interpreted the Strickland standard for determining ineffective assistance claims.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN8 Under the first prong of the Strickland test, defendant must show that specific, identified acts or omissions fall outside the wide range of professionally competent assistance. The court will not second-guess trial counsel's legitimate use of

judgment.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN9 The court need not decide whether counsel's performance was deficient if defendant fails to satisfy his burden of showing that he was prejudiced as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN10 An unfavorable result does not compel a conclusion of ineffective assistance of counsel. In demonstrating prejudice, it is not enough to show that the alleged errors had some conceivable effect on the outcome of the trial but, rather, defendant must show that a reasonable probability exists that, but for counsel's error, the result would have been different. "Reasonable probability" is defined as that sufficient to undermine confidence in the reliability of the verdict.

COUNSEL: [1]**

Walter F. Bugden, Jr., of Bugden, Collins & Keller, for Appellant.

David L. Wilkinson, State Attorney General, Sandra J. Sjogren, Assistant Attorney General, for Respondents.

JUDGES: Davidson, Greenwood, and Orme. Richard C. Davidson, Judge, Pamela T. Greenwood, Judge, concur.

OPINIONBY: ORME

OPINION: [*272] Defendant was convicted of burglary, attempted burglary, two counts of theft, and two counts of vehicle burglary. On appeal, defendant claims he was denied his Sixth Amendment right to effective assistance of counsel in two respects: First, by the trial court's denial of his request for substitute counsel and, in that regard, by the court's failure to inquire adequately into the reasons for defendant's dissatisfaction with appointed counsel, and second, in the presentation of his defense at trial. We affirm.

FACTUAL BACKGROUND

The facts relevant to this appeal are those relating to defendant's request for substitute counsel. Following arraignment, Frances Palacios of the Salt Lake Legal Defenders Association was appointed to represent the defendant. On the morning of the first day of trial, the defendant informed the court that he did not want to proceed with Ms. Palacios as his **[**2]** counsel because he did not "feel that she's done everything that she could in [his] case."

The trial court asked the defendant to specify his reasons for thinking that counsel had not represented his interests. Defendant reiterated his general complaint, mentioned that he had met with counsel only once, and complained that he had not received timely notification of a hearing scheduled on a motion to discover filed by Palacios. A lengthy exchange ensued concerning the details of the discovery matter, from which it emerged that the prosecution agreed to provide the requested discovery and no hearing was ever held. The court did not delve further into defendant's earlier statement that he had met with counsel just once before trial. Nor did defendant provide any details on that subject during his remarks about his dissatisfaction with counsel. Defendant focused exclusively on the belated receipt of his

copy of the discovery notice. The court concluded that, consistent with her past performance, Ms. Palacios had done a good job in representing defendant's interests. The court denied defendant's motion for substitute counsel. Defendant was subsequently tried before a jury and convicted **[**3]** on all counts.

REQUEST FOR NEW COUNSEL

HN1 While an indigent defendant has a right to have counsel appointed to represent him, *Gideon v. Wainwright,* 372 U.S. 335, 344-45, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), he does not have a constitutional right to a lawyer other than the one appointed, absent good cause. *See, e.g., United States v. Young,* 482 F.2d 993, 995 (5th Cir. 1973). Whether to appoint a different lawyer for an indigent defendant who expresses dissatisfaction with his court-appointed counsel, but who has no constitutional right to appointment of a different attorney, is a matter committed to the sound discretion of the trial court and will be reversed only for an abuse of discretion. *Id.*

It is suggested on this appeal that, had the trial court conducted a more extensive **[*273]** inquiry into the reasons for defendant's dissatisfaction, it would have uncovered a myriad of complaints about the quality of defendant's representation. Accordingly, we consider first the nature and extent of the court's inquiry and then turn to a consideration of whether, in light of what the court learned, denial of the motion for substitute counsel violated the defendant's Sixth **[**4]** Amendment right to counsel and, if not, whether it nonetheless constituted an abuse of discretion.

A. *Duty to Inquire*

Typically, HN2 motions for substitute counsel are less likely to be granted when they would result in a significant delay or mistrial or would otherwise impede the prompt administration of justice. *See Hudson v. Rushen,* 686 F.2d 826, 831 (9th Cir. 1982), *cert. denied,* 461 U.S. 916, 77 L. Ed. 2d 285, 103 S. Ct. 1896 (1983). Courts are also aware of the propensity for manipulation of the process by criminal defendants and some have cautioned that "requests for appointment of a new attorney on the eve of trial should not become a vehicle for achieving delay." *See United States v. Llanes,* 374 F.2d 712, 717 (2d Cir. 1967).

We fully appreciate the possibility that defendants will fabricate complaints about counsel in an effort to promote delay or otherwise manipulate the system. Weighed against that realization, however, must be recognition of the inability of many indigent defendants, in view of their level of education and sophistication, to adequately articulate their legitimate complaints involving appointed counsel. Therefore, HN3 when a complaint is registered **[**5]** by a criminal defendant concerning his or her appointed counsel, the court must balance the potential for last minute delay and the propensity for manipulation of the system against the competing concern about the likely inability of indigent defendants to articulate and communicate their dissatisfaction in a setting which most laypersons find quite intimidating.

In establishing a standard of inquiry in the context of requests for substitution of counsel, we decline to impose an affirmative duty on the trial court to rountinely initiate its own inquiry, and thereby in effect solicit grievances from indigent defendants where no dissatisfaction has been expressed. Likewise, we decline defendant's invitation to prescribe a checklist which trial courts must run through if any indicia of dissatisfaction should emerge. However, HN4 when dissatisfaction is expressed, the court must make some reasonable, non-suggestive efforts to determine the nature of the defendant's complaints and to apprise itself of the facts necessary to determine whether the defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution or even to such **[**6]** an extent that his or her Sixth Amendment right to counsel would be violated

but for substitution. Even when the trial judge suspects that the defendant's requests are disingenuous and designed solely to manipulate the judicial process and to delay the trial, perfunctory questioning is not sufficient. *United States v. Welty,* 674 F.2d 185, 187 (3d Cir. 1982).

On the record before us, we cannot conclude that the quality of the trial court's inquiry did not meet this standard. Defendant expressed dissatisfaction with appointed counsel's representation. Appropriately, the court inquired about the "specific way" in which defendant's interests had not been represented. Defendant did mention he had met with counsel only once, but focused his remarks on the discovery matter. As a result, the court's follow-up questions of defendant and counsel were exclusively devoted to that matter. It clearly would have been preferable had the court inquired further into the other concern alluded to by defendant, namely the extent of counsel's pretrial preparation. n1 Failure to do so, however, was not reversible **[*274]** error in view of the emphasis defendant placed on his other concern and since **[**7]** a single, face-to-face meeting before trial is not, in itself, indicative of a lack of preparation in cases like the instant one. n2

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 As indicated, the trial court referred to its prior, positive experience with Ms. Palacios in finding defendant's representative had been adequate. A good overall reputation by counsel is no substitute for careful inquiry by the court since there is no guaranty even an excellent attorney, especially a very busy one, has not botched a particular case.

n2 The charges against defendant and the factual setting in which they arose would be a matter of routine for an experienced criminal defense attorney. Multiple interviews might have given defendant more of a sense that a committed advocate was diligently working on his behalf, but would not necessarily have furthered his cause.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. *No Constitutional Violation*

Having determined that the court's inquiry into defendant's complaints was sufficient under the circumstances, we next consider whether the complaints themselves **[**8]** disclosed problems of a constitutional dimension. Of course, HN5 courts have no discretion to allow a violation of the Sixth Amendment. Substitution of counsel is mandatory when the defendant has demonstrated good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with his or her attorney. *United States v. Welty,* 674 F.2d 185, 188 (3d Cir. 1982); *McKee v. Harris,* 649 F.2d 927, 931 (2d Cir. 1981), *cert. denied,* 456 U.S. 917, 72 L. Ed. 2d 177, 102 S. Ct. 1773 (1982). When a defendant is forced to stand trial "with the assistance of an attorney with whom he has become embroiled in an irreconcilable conflict," he is deprived of the "effective assistance of any counsel whatsoever" and his Sixth Amendment right to counsel is violated. *Brown v. Craven,* 424 F.2d 1166, 1170 (9th Cir. 1970). *See United States v. Hart,* 557 F.2d 162, 163 (8th Cir.), *cert. denied,* 434 U.S. 906, 54 L. Ed. 2d 193, 98 S. Ct. 305 (1977).

In viewing defendant's remarks in a light most favorable to him, it is clear from the record that his dissatisfaction with appointed counsel was not so substantial as to rise to a constitutional level requiring **[**9]** the appointment of new counsel.

As indicated, we discern only one specific complaint registered by defendant in this case, i.e., that counsel was derelict in notifying defendant of a discovery motion, and arguably a complaint that defense counsel was inadequately prepared. While it is true that defendant did not receive notice of the discovery motion filed by defense counsel until after a stipulation had been entered, the routine discovery motion required no input from defendant. Though

the motion might have been subjectively important to defendant, HN6"good cause for substitution of counsel cannot be determined 'solely according to the subjective standard of what the defendant perceives.'" *Thomas v. Wainwright,* 767 F.2d 738, 742 (11th Cir. 1985) (quoting *McKee v. Harris,* 649 F.2d at 932), *cert. denied,* 475 U.S. 1031, 106 S. Ct. 1241, 89 L. Ed. 2d 349 (1986).

A serious lack of preparation might, in some circumstances, have such a disadvantageous effect on a defendant's representation as to rise to a constitutional violation. In this case, defendant conceded that he met with counsel on at least one occasion prior to trial. In view of the fairly routine nature of the underlying **[**10]** facts and offenses charged, and defense counsel's experience, the fact that counsel met with the defendant only once before trial is not necessarily indicative of a lack of preparation. *See* Note 2, *supra.* Therefore, defendant's complaints did not warrant substitution of counsel as a matter of constitutional law. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 Defendant's constitutional arguments are limited to the United States Constitution and we are not asked to consider whether the Utah Constitution requires more.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

C. *No Abuse of Discretion*

This determination, however, does not end our analysis. While a defendant's complaints may not be of constitutional magnitude, denial of the motion may, under some circumstances, nonetheless constitute an abuse of discretion. As we have previously stated, however, defendant's complaints in this case were insubstantial. While it might have been preferable to delve deeper into defendant's arguable claim of inadequate preparation, the failure to do so was neither a constitutional violation nor an abuse **[**11]** of discretion.

[*275] QUALITY OF REPRESENTATION

Unsuccessful motions for substitution of counsel are typically followed by the claim that defendant received ineffective assistance of counsel at trial. *See, e.g., Thomas v. Wainwright,* 767 F.2d 738 (11th Cir. 1985); *Hudson v. Rushen,* 686 F.2d 826 (9th Cir. 1982). This case is no exception.

In *Strickland v. Washington,* 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), the United States Supreme Court established the standard for determining claims of ineffective assistance of counsel at trial. HN7To prevail, the defendant must demonstrate, first, that counsel's representation fell below an objective standard of reasonable professional judgment, and second, that counsel's performance prejudiced the defendant. *Id.* at 690. The Utah Supreme Court has adopted and interpreted the *Strickland* standard for determining ineffective assistance claims. *See, e.g., State v. Frame,* 723 P.2d 401 (Utah 1986).

HN8Under the first prong of the *Strickland* test, defendant must show that "specific, identified acts or omissions fall outside the wide range of professionally competent assistance." *State v. Frame,* 723 P.2d **[**12]** at 405. As we have previously stated, however, "this court will not second-guess trial counsel's legitimate use of judgment." *Layton City v. Noon,* 57 Utah Adv. Rep. 26, 736 P.2d 1035, 1040 (Utah Ct. App. 1987) (citing *Codianna v. Morris,* 660 P.2d 1101, 1110 (Utah 1983)). *See State v. McNicol,* 554 P.2d 203, 205 (Utah 1976).

We need not consider whether defendant's complaints n4 were "sufficient to overcome the

strong presumption that counsel rendered adequate assistance and exercised 'reasonable professional judgment,'" *State v. Frame,* 723 P.2d at 405 (quoting *Strickland v. Washington,* 466 U.S. at 690), because we are able to decide this case solely on the second prong of the *Strickland* test. HN9 We need not decide whether counsel's performance was deficient if defendant fails to satisfy his burden of showing that he was prejudiced as a result of the alleged deficiencies. *Id.* "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." *Strickland v. Washington,* 466 U.S. at 697.

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n4 Specifically, defendant claims counsel was deficient in (1) failing to challenge the propriety of defendant's initial detention; (2) failing to challenge the unnecessarily suggestive identification procedure; and (3) in failing to impeach the identification testimony of a witness with a prior inconsistent statement.

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Pointing to little more than his conviction, defendant has suggested on appeal that he was prejudiced as a result of counsel's performance. However, HN10 "an unfavorable result does not compel a conclusion of ineffective assistance of counsel." *State v. Frame,* 723 P.2d at 405. In demonstrating prejudice, it is not enough to show that the alleged errors "had some conceivable effect on the outcome" of the trial but, rather, defendant must show that a "'reasonable probability exists' that, but for counsel's error, the result would have been different." *Id.* "Reasonable probability" is defined as "that sufficient to undermine confidence in the reliability of the verdict." *Id. See also State v. Royball,* 710 P.2d 168 (Utah 1985); *State v. Lenzing,* 688 P.2d 492 (Utah 1984).

Defendant has failed to show that but for the alleged deficiencies of counsel there is a reasonable probability that the jury would have decided differently. Accordingly, his convictions are affirmed.

Richard C. Davidson, Judge, Pamela T. Greenwood, Judge, Concur.