

STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NUMBERS: 15-CRS-154, 155 & 164

STATE OF NORTH CAROLINA,)

Plaintiff,)

vs.)

BROOKE McFADDEN COVINGTON,)
SARAH COVINGTON ANDERSON, and)
JUSTIN COVINGTON)

Defendants.)

**RESPONSE TO STATE’S MOTIONS TO
DISMISS and MOTION TO STRIKE**

FILED
2015
AUG 24
PM 5:01
CLERK
SUPERIOR COURT
RUTHERFORD COUNTY

COME NOW defendants in the above-captioned matters, Brooke McFadden Covington, Sarah Covington Anderson and Justin Covington (collectively, the “Defendants”), by and through their attorneys Mark N. Morris and Joshua B. Farmer of Tomblin, Farmer & Morris, PLLC (the “Firm”), and Angela Beeker of F.B. Jackson & Associates Law Firm, PLLC (“Beeker”), responding to the State’s “Motion to Dismiss Defendants’ Motion to Reconsider Order Disqualifying Counsel,” “Memorandum of Law in Support of State’s Motion to Dismiss the Defendants’ Motion for Reconsideration,” and the “Motion to Strike the Defendants’ Notice of Appeal and Motion to Stay Proceedings,” all of which were filed in these criminal actions on August 24, 2015. The Defendants respectfully present to the Court as follows:

*The Firm has not acted in violation of the
Court’s Order of August 6, 2015*

1. The State argues that adherence to the Court’s August 6 Order prohibits certain actions reflected in certain filings made in the above-captioned criminal actions subsequent to the August 6 Order. Defendants respectfully disagree. Any actions taken have merely been in an effort to seek review of the Court’s August 6 Order. Such review is being sought first with this trial court, and subsequently with the appropriate appellate court.
2. Any related decisions made by Defendants and any related documents executed by Defendants have – as is evident from the filings with the Court – been made with the full benefit and advice of counsel independent of the Firm.
3. The State’s arguments on this point ignore the fact that these filings have also been signed by attorney Angela Beeker, who was not disqualified by the August 6 Order.

4. The undersigned believe it to be a fundamental principle as well as common practice that an attorney may seek review or reconsideration of a court's prior order, either with the court itself or with an appellate court. This principle seems especially relevant in instances where there has been a substantial change in circumstances underlying the court's decision.

5. The Motion to Reconsider the Order Disqualifying Counsel, Motion to Stay Proceedings and Notice of Appeal do not involve the merits of the Defendants' cases, but rather is limited to seeking review of the August 6 Order disqualifying the Defendants' choice of retained counsel. This does not equal to "advanc[ing] a cause on behalf of forbidden clients," as the State suggests.

6. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987) is a case which has been frequently referenced in these pleadings, which case involved joint representation, the initial disqualification of defense counsel in the trial court and a subsequent reversal of the disqualification order by the North Carolina Court of Appeals. In *Yelton*, the disqualified attorney himself filed writs of certiorari and supersedeas with the North Carolina Court of Appeals. The actions of defense counsel in *Yelton* are similar to the actions of the Firm, in the sense of his seeking review in some capacity of the trial judge's order of disqualification. In *Yelton's* Court of Appeals decision and underlying record on appeal, no issue was raised that defense counsel's actions in advancing the appeal were in violation of the Superior Court's order disqualifying him. In contrast, the Court of Appeals agreed with the position advanced by the previously-disqualified attorney.

7. The State suggests that the rejection of a plea offer by Co-Defendant Adam Bartley was somehow the product of the Firm's efforts. Such assertion is erroneous. Mr. Bartley retained Robert Denton as counsel on August 3, 2015, and has not been represented by the Firm in any capacity since that date. Further, Mr. Bartley's written rejection of the plea offer states on its face: "Robert Denton discussed this plea with me on 8/13/15. He explained my choices and I understand the same...."

8. Since the Court's Order of August 6, The Firm has limited its representation of the Defendants to seeking review of said Order. The Firm has not proceeded with any act of representation addressed to the merits of these criminal actions. Thus, the Firm has not violated the August 6 Order in any way.

*This Court lacks jurisdiction over any challenge to the Defendants'
appeal as to the Court's Order of August 6, 2015*

9. The State takes the position that Defendants are not entitled to appellate review of the August 6 Order as a matter of right, but may only petition the appellate division for review by writ of certiorari.

10. Defendants respectfully submit that the proper forum for the State to contest appellate jurisdiction is before the appellate division itself. "The general rule is that an appeal takes the case out of the jurisdiction of the trial court." *In re Duke Energy Corp*, 760 S.E.2d 740, 743, quoting *Estrada v. Jaques*, 70 N.C. App. 627,637, 321 S.E.2d 240, 247 (1984).

11. The State cites *State v. Williams*, 116 N.C. App. 354, 447 S.E.2d 437 (1994) and *State v. Waters*, 122 N.C. 504, 470 S.E.2d 545 (1996) to support its assertion that Defendants have no right of appeal. These cases are both distinguishable on the facts and procedural histories involved. More importantly to the instant proceeding, the issue of appellate jurisdiction in both *Williams* and *Waters* was argued before and decided upon by the North Carolina Court of Appeals and the North Carolina Supreme Court, respectively.

*The Defendants' recent waivers are in accord with the North
Carolina Rules of Professional Conduct*

12. The State's Motion to Dismiss alleges that certain waivers recently signed by Defendants and provided to the Court on August 20, 2015 in affidavits by the Defendants are "ineffective," "contrary to the law," and "worthless and invalid." In its supporting memorandum, the State's rather spurious reading of the law on this subject is founded in RPC 129, an ethical opinion of the North Carolina State Bar published on January 15, 1993. RPC 129 references Rule 5.8 of the North Carolina Rules of Professional Conduct [as no such numbered rule now exists, Defendant's assume this to be a reference to a prior revision of the Rules of Professional Conduct. Defendants further assume that Rule 5.8 is now embodied in Rule 1.8 of the current revision of the Rules].

13. RPC 129 is entitled "Waiver of Appellate and Postconviction Rights in Plea Agreement." The hypothetical proposed in RPC 129 specifically relates to plea negotiations between prosecutor and defense attorney. Here, Defendants' waivers have no relation whatsoever to any negotiated or proposed plea agreement.

14. The State additionally cites a portion of RPC 129 which says that "[a]ttorneys are expressly prohibited from making agreements prospectively limiting their liability for malpractice. Rule 5.8." Defendants' waivers are not an agreement with the Firm. The waivers, entered into upon the advice of legal counsel independent of the Firm, essentially state that each Defendant wishes to be represented by the Firm and that they each "wish to waive any right I might have to appeal a conviction based on grounds of ineffective assistance of counsel stemming from a conflict of interest of the Firm and its attorneys related to the Firm's joint representation of myself and the other co-defendants in this matter."

15. The ethical implications raised in RPC 129 are inapplicable. To the extent it is implicated, Defendants and the Firm have precisely complied with Rule 1.8(h) of the current Rules of Professional Conduct which reads in pertinent part:


A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement....

Firstly, the waivers are not an "agreement" with the Firm. Secondly, they are clearly made pursuant to independent representation.


16. Thus, the Defendants' waivers are valid and consistent with the North Carolina Rules of Professional Conduct as well state law – specifically the precedent set in *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

WHEREFORE, Defendants pray that the Court deny the State's Motion to Dismiss Defendants' Motion to Reconsider Order Disqualifying Counsel, and that the Court deny the State's Motion to Strike the Documents Captioned "Notice of Appeal" and "Motion to Stay Proceedings."


This is the ____ day of August, 2015.



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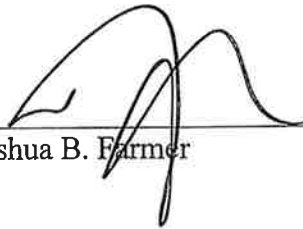


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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this document in the above entitled action upon all other parties to this cause by hand delivery to an associate or employee with the Rutherford County District Attorney's Office.

This the 26th day of August, 2015.



Joshua B. Farmer