

FILED

STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORD

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RUTHERFORD COUNTY, O.S.C.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 15-CRS-154-155, 164

STATE OF NORTH CAROLINA, #)

Plaintiff,)

vs.)

BROOKE MCFADDEN COVINGTON,)
SARAH COVINGTON ANDERSON, and)
JUSTIN BROCK COVINGTON,)

Defendants.)

**MEMORANDUM OF LAW
IN SUPPORT OF
THE STATE'S MOTION TO DISMISS
THE DEFENDANTS' MOTION
FOR RECONSIDERATION**

NOW COMES the State of North Carolina, by and through the undersigned Assistant District Attorney, and submits this Memorandum of Law in Support of the State's Motion to Dismiss the Defendants' Motion for Reconsideration. The State respectfully shows the following:

Procedural History and Material Facts

1. On August 3, 2015, this Honorable Court heard the State's Motion to Disqualify Counsel in Rutherford County Superior Court. After hearing the arguments of counsel, reviewing the briefs of counsel, and the hearing of evidence in support of said motion, the Court retired to consider the matter and to review the various cases submitted by defense counsel during the hearing.
2. On August 6, 2015, the Court entered an Order disqualifying Mark Morris (State Bar #32846), Josh Farmer (State Bar #32669), Andrea Farmer (State Bar #32668), the law firm of TOMBLIN, FARMER & MORRIS, PLLC (SOSID #0746187), and their associates (hereinafter referred to individually and collectively as "disqualified counsel" or "opposing counsel"), from representing the above-named defendants in these criminal cases.
3. Thereafter on August 20, 2015, despite being removed from these cases by the Court and being ordered to cease representation of the defendants in these matters, disqualified counsel continued representation of the

defendants by filing a document captioned "Notice of Appeal" in each of these three cases. This document purported to appeal the Court's Order of August 6 to the North Carolina Court of Appeals. Defendants asserted that, in appealing the Court's Order they proposed to ". . . ask the North Carolina Court of Appeals to reverse the Order disqualifying counsel entered on August 6, 2015, and to remand the cause for further proceedings."

4. Disqualified counsel also filed a document captioned "Motion to Stay Proceedings" – a pre-trial motion in the substantive cause of each case – on the same date that they filed the aforesaid "Notice of Appeal." In this document, disqualified counsel moves the Court ". . . to stay proceedings in these cases until all appellate matters are resolved . . . with the exception of ruling on the Movants Motion for Reconsideration of the Disqualification Order. . ."
5. Continuing on, disqualified counsel also on August 20 filed a "Motion to Reconsider Order Disqualifying Counsel." In this document, they assert ". . . there has been a substantial change in circumstances warranting this Court's reconsideration of the prior order and denial of the State's motion." In this motion, disqualified counsel go on *to detail their continued and uninterrupted representation* of the defendants after the entry of the Court's Order on August 6 up to and including the present.
6. A total of **9 separate acts** of representation appear in the official record **as filings** on the part of disqualified counsel after the entry of the Court's Order of August 6 which disqualified them all as legal counsel in these matters. This number does not include the drafting and execution of the Affidavits or other supporting documents which are included in the defendants' Motion for Reconsideration, nor does it include the number of meetings conducted with the defendants to advance the documents filed and other acts surrounding these prohibited filings. This number also does not include their appearance before the Court to advance these causes on behalf of the defendants.
7. A total of **24 separate acts** of representation that are reflected and appear in the official record **as exhibits** which were prepared by disqualified counsel after the entry of the Court's Order of August 6 which disqualified them as legal counsel in these matters.
8. Altogether, a total of **33 separate acts** of representation appear in the official record by disqualified counsel after this Court ordered them removed as counsel. These include the following in chronological order:

- a. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Sarah Covington Anderson* – executed August 13, 2015;
- b. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Brooke McFadden Covington* – executed August 13, 2015;
- c. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Justin Brock Covington* – executed August 13, 2015;
- d. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Robert Louis Walker* – executed August 13, 2015;
- e. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Adam Bartley* – executed August 13, 2015;
- f. *Rejection of Plea Offer to Adam Christopher Bartley on behalf of Sarah Covington Anderson* – obtained on or about August 13, 2015;
- g. *Rejection of Plea Offer to Adam Christopher Bartley on behalf of Brooke McFadden Covington* – obtained on or about August 13, 2015;
- h. *Rejection of Plea Offer to Adam Christopher Bartley on behalf of Justin Brock Covington* – obtained on or about August 13, 2015;
- i. *Rejection of Plea Offer to Adam Christopher Bartley on behalf of Adam Christopher Bartley* – obtained on or about August 13, 2015;
- j. *Informed Consent of Robert Louis Walker, Jr., for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Sarah Covington Anderson* – executed August 18, 2015;
- k. *Informed Consent of Robert Louis Walker, Jr., for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Brooke McFadden Covington* – executed August 18, 2015;

- l. *Informed Consent of Robert Louis Walker, Jr., for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Justin Brock Covington* – executed August 18, 2015;
- m. *Affidavit of Robert Louis Walker, Jr., obtained on behalf of Sarah Covington Anderson* – executed August 18, 2015;
- n. *Affidavit of Robert Louis Walker, Jr., obtained on behalf of Brooke McFadden Covington* – executed August 18, 2015;
- o. *Affidavit of Robert Louis Walker, Jr., obtained on behalf of Justin Brock Covington* – executed August 18, 2015;
- p. *Affidavit of Sarah Covington Anderson on behalf of Sarah Covington Anderson* – executed August 18, 2015;
- q. *Affidavit of Sarah Covington Anderson on behalf of Brooke McFadden Covington* – executed August 18, 2015;
- r. *Affidavit of Sarah Covington Anderson on behalf of Justin Brock Covington* – executed August 18, 2015;
- s. *Affidavit of Brooke McFadden Covington on behalf of Sarah Covington Anderson* – executed August 19, 2015;
- t. *Affidavit of Brooke McFadden Covington on behalf of Brooke McFadden Covington* – executed August 19, 2015;
- u. *Affidavit of Brooke McFadden Covington on behalf of Justin Brock Covington* – executed August 19, 2015;
- v. *Affidavit of Justin Brock Covington on behalf of Sarah Covington Anderson* – executed August 19, 2015;
- w. *Affidavit of Justin Brock Covington on behalf of Brooke McFadden Covington* – executed August 19, 2015;
- x. *Affidavit of Justin Brock Covington on behalf of Justin Brock Covington* – executed August 19, 2015;

- y. *Notice of Appeal on behalf of Sarah Covington Anderson* – filed August 20, 2015;
- z. *Notice of Appeal on behalf of Brooke McFadden Covington* – filed August 20, 2015;
- aa. *Notice of Appeal on behalf of Justin Brock Covington* – filed August 20, 2015;
- bb. *Motion to Stay Proceedings on behalf of Sarah Covington Anderson* – filed August 20, 2015;
- cc. *Motion to Stay Proceedings on behalf of Brooke McFadden Covington* – filed August 20, 2015;
- dd. *Motion to Stay Proceedings on behalf of Justin Brock Covington* – filed August 20, 2015;
- ee. *Motion to Reconsider Order Disqualifying Counsel on behalf of Sarah Covington Anderson* – filed August 20, 2015;
- ff. *Motion to Reconsider Order Disqualifying Counsel on behalf of Brooke McFadden Covington* – filed August 20, 2015; and
- gg. *Motion to Reconsider Order Disqualifying Counsel on behalf of Justin Brock Covington* – filed August 20, 2015.

9. As the official record of these cases indicates, disqualified counsel's representation of the defendants has continued without interruption and in clear violation of the Order of this Court which remains in effect. The fact that disqualified counsel have another hearing before this Court, ***to advance a cause on behalf of forbidden clients***, illustrates the gravity of the situation.

10. Angela S. Beeker (State Bar #18420), Attorney at Law, of the Henderson County Bar, signed the aforesaid documents along with disqualified counsel as attorney for the defendants. Attorney Beeker has, in doing so, entered a general and unlimited appearance as counsel for the captioned defendants in these ongoing criminal matters as provided for by N.C. Gen. Stat. § 15A-141(2). The State takes due notice thereof and will proceed accordingly.

*The Defendants Waiver of Ineffective Assistance
of Counsel is Forbidden under the Revised Rules
of Professional Conduct of the North Carolina State Bar*

11. The defendants allege that the *Yelton* case is controlling authority for this Court and that this Court erred in refusing to follow the holding in *Yelton*. This is incorrect and the defendants misapply the law - - specifically the current state of the law - - as it intersects with this case.

12. In disqualified counsel's own words:

After granting certiorari, the Court overturned the ruling of the trial court after finding that the defendants knowingly waived the right to bring a post-conviction challenge based on ineffective assistance of counsel stemming from a conflict of interest, **such waivers having been executed by Movants herein.**

(Defendants Motion to Reconsider Paragraph. 18)
(Emphasis added)

13. Exhibit 9 to the defendants' Motion to Reconsider is a document captioned "Affidavit of Sarah Covington Anderson." Paragraph 8 of that document reads as follows:

After consulting with Mr. Roth about the matter, I wish to **waive any right** I might have **to appeal** a conviction in this matter **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.

(Emphasis added).

14. Exhibit 10 to the defendants' Motion to Reconsider is a document captioned "Affidavit of Brooke McFadden Covington." Paragraph 11 of that document reads as follows:

After consulting with Mr. Long about the potential

conflict, I hereby **waive any right** I might have to **appeal** or otherwise seek to set aside any conviction of me in this case **based on grounds of ineffective assistance of counsel** stemming from a potential conflict of interest of the Firm and its attorneys related to the Firm's joint representation of my children and me going forward and the prior representation of the other co-defendants with similar charges.

(Emphasis added)

15. Exhibit 11 to the defendants' Motion to Reconsider is a document captioned "Affidavit of Justin Covington." Paragraph 9 of that document reads as follows:

After consulting with Mr. Gresham about the matter, I wish to **waive any right** I might have to **appeal** a conviction in this matter **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.

(Emphasis added).

16. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987) was heard in the North Carolina Court of Appeals on September 29, 1987, and filed as an opinion of that Court on November 17, 1987.
17. From November 17, 1987, through the year 1992, the State believes that the conduct of disqualified counsel was probably acceptable. However, the state of the law changed dramatically on January 15, 1993, when the North Carolina State Bar published an ethical opinion on the issue in the form of **RPC 129**. A copy of RPC 129 is attached hereto and incorporated herein by reference as "State's Exhibit 1."
18. The preamble to RPC 129 reads as follows: "Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, **except in regard to allegations of**

ineffective assistance of counsel or prosecutorial misconduct.”
(Emphasis added).

19. The opinion goes on to say that “. . . the **waiver of rights arising from the ineffective assistance of counsel . . . appears to be, and shall be prospectively deemed to be, in conflict with the ethical duties express or implied in the rules.**” (Emphasis added).

20. Additionally, the opinion states: “Attorneys are **expressly prohibited** from making agreements prospectively limiting their liability for malpractice. Rule 5.8.” (Emphasis added).

21. The opinion also specifically addresses its application in the criminal context:

In the context of a criminal case, a logical and appropriate interpretation of the rules is a **prohibition** against agreements waiving the client’s right to complain about an attorney’s incompetent representation of misconduct.

(Emphasis added).

22. Thus, the aforementioned waivers of claims for ineffective assistance of counsel that were signed by the named defendants herein are “. . . in conflict with the ethical duties [of disqualified counsel] express or implied in the rules” and disqualified counsel was “. . . expressly prohibited from making agreements prospectively limiting their liability for malpractice” under RPC 129.

23. The waivers are, therefore, worthless and invalid and there has been no “substantial change in circumstances warranting this Court’s consideration.”

24. Based upon the foregoing, the State moves to dismiss the defendants’ Motion for Reconsideration.

*The State had Standing to Bring the Motion
to Disqualify Counsel as Supported by
the Yelton Case which the Defendants “Rely On”*

25. In Paragraph 19 of the defendants’ Motion to Reconsider, the defendants allege the following:

The Movants further contend that the State of North Carolina did not have standing to bring the State's Motion to Disqualify Counsel. Standing to raise the issue of disqualification lies with the clients to whom the Firm owes its professional obligations.

26. In the *Yelton* case, which defendants themselves cite, the issue of disqualification of the defense lawyer was actually raised by the State and our Court of Appeals had no problem with the State doing so. The case opinion reads:

On 17 October 1986 the State filed a motion requesting the trial court determine whether Mr. Lamb's representation of both petitioners was proper under the circumstances.

...

In effect, the State merely brings the conflict issue to the court's attention. Through the course of the hearing the trial court will determine whether an attorney who jointly represents co-defendants must be disqualified from representing either of them.

...

27. Further, the *Yelton* Court referenced the fact that this procedure is appropriate under the law of the 4th Circuit United States Court of Appeals as well as the United States Supreme Court:

Once a motion by the State or the defense, or the court on its own motion, raises a possible conflict of interest in a dual representation situation, the trial court must conduct a hearing. *Cuyler*, 446 U.S. at 346. *See also United States v. Duklewski*, 567 F.2d 255 (4th Cir. 1977)

...

28. The State thus had standing to bring the issue of conflict of interest to the attention of the trial court by appropriate motion and the defendants' argument is without merit.

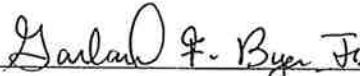
Conclusion

Wherefore, the State of North Carolina respectfully requests that this Honorable Court dismiss the defendants' Motion to Reconsider Order Disqualifying Counsel.

This the 24th day of August, 2015.

Respectfully submitted,

FOR THE STATE:



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CERTIFICATE OF SERVICE

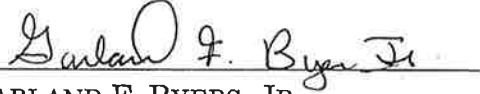
This is to certify that I have this day served Angela S. Beeker, Post Office Box 1666, Hendersonville, NC 28793, counsel for Brooke McFadden Covington, Sarah Covington Anderson & Justin Brock Covington, in the foregoing matter with a copy of the attached document by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon in the manner prescribed by Chapter 15A of the North Carolina General Statutes.

This is to certify that I have this day served Joshua Farmer, Mark Morris, and the law firm of TOMBLIN, FARMER & MORRIS, PLLC, in the foregoing matter with a copy of the attached document by placing a copy thereof in the mailbox for said counsel which is located in the Rutherford County Clerk's Office as permitted by agreement between counsel and the State.

This the 24th day of August, 2015.

Respectfully submitted,

FOR THE STATE:


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