

STATE OF NORTH CAROLINA, RUTHERFORD COUNTY, C.R.C.

Plaintiff, *MS*)  
 vs. )  
 BROOKE McFADDEN COVINGTON, )  
 SARAH COVINGTON ANDERSON, and )  
 JUSTIN COVINGTON )  
 Defendants. )

**MOTION TO RECONSIDER ORDER  
 DISQUALIFYING COUNSEL**

COMES NOW defendants in the above-captioned matters, Brooke McFadden Covington, Sarah Covington Anderson and Justin Covington (collectively, "Movants"), by and through their attorneys Mark N. Morris and Joshua B. Farmer of Tomblin, Farmer & Morris, PLLC, and Angela Beeker of F.B. Jackson & Associates Law Firm, PLLC, pursuant to the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, Section 23 of the North Carolina Constitution, asking this Court to reconsider its previous order of August 6, 2015 which granted the State's Motion to Disqualify Counsel. Defendants aver 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 support of this motion to reconsider, the undersigned show unto the Court the following:

1. On August 6, 2015, the Honorable Marvin P. Pope, Jr. entered an order granting the State's Motion to Disqualify Counsel ("the Order").
2. Prior to entry of the Order, a plea offer had been transmitted by the State to co-defendant Adam Bartley ("Bartley") by letter dated July 22, 2015 (the "Plea Offer," attached hereto as "Exhibit 1").
3. The Plea Offer had not been accepted by Bartley at the time the Order was entered.
4. The Plea Offer provided in part that, in exchange for the State dismissing the charge of Second Degree Kidnapping, Bartley would provide truthful testimony in the prosecution of his remaining co-defendants, Brooke Covington, Sarah Covington Anderson, Justin Covington and Robert Walker, Jr. (collectively, "the Co-Defendants").
5. In the Order, the Court found as fact that the Plea Offer "raises the distinct possibility of a conflict of interest, breach of previous confidences of to the defense counsel, difficulty in effective cross-examination of Mr. Bartley, as well as other procedural issues." ¶ 18.

6. The Court thus concluded that joint representation of the Co-Defendants “is a concurrent conflict of interest which exists and cannot effectively be waived by a defendant absent knowledge of what a co-defendant may testify on behalf of the State against the remaining co-defendants.” ¶ 3.
7. On November 28, 2014, Bartley had executed an affidavit (“Affidavit I”, attached hereto as “Exhibit 2”) in which he declared his innocence and the innocence of the co-defendants.
8. On August 13, 2015, Bartley signed another affidavit (“Affidavit II”, attached hereto as “Exhibit 3”) in which he describes, among other things, the facts and circumstances surrounding his signing Affidavit I.
9. In Affidavit II, Bartley states: “Previous to and at the time of signing Affidavit I on November 28, 2014: (1) I was not a client of Tomblin, Farmer & Morris, PLLC, Joshua Farmer, Mark Morris, Andrea Farmer, or other associates of Tomblin, Farmer & Morris, PLLC (“the Firm”); (2) I had not discussed and I did not discuss any matters relating to this case with Firm; (3) I had not and I did not discuss the contents of Affidavit I with the Firm.” ¶4. Bartley further states: “I signed Affidavit I in the presence of Dewitt and Andra Prince, who are personal friends of mine.” ¶ 5. Bartley further states that: “...Affidavit I was not intended to constitute a confidential communication between myself and the Firm” and “that I do not consider Affidavit I to be protected by the attorney-client privilege.” ¶¶ 7-8.
10. Bartley in Affidavit II further indicates the Firm does not hold Bartley’s confidential information. See Bartley’s statement in which he states “I have had no conversations with the Firm in which I have made statements that I did not make to anyone else who has asked me about this matter.” ¶ 9.
11. In Affidavit II, Bartley – now represented by Rob Denton of the Burke County bar – knowingly and voluntarily rejected the Plea Offer and indicated that he does “not intend to testify in any manner inconsistent with Affidavit I and [his] prior protestations of innocence.” ¶ 14. *See also* Exhibit B to Affidavit II.
12. On August 13, 2015, Bartley executed a document entitled “Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants” (attached hereto as “Exhibit 4”). In this document, Bartley consents to the Firm’s continued representation of the Co-Defendants in these criminal actions, even if Bartley’s interests become materially adverse to those of the Co-Defendants. Bartley also acknowledges the possibility that the Firm may cross-examine Bartley’s testimony while still complying with

the Firm's duties to Bartley under Rule 1.9 of the North Carolina Rules of Professional Conduct.

13. On August 13, 2015, Bartley wrote by his own hand on the Plea Offer that he rejects the Plea Offer and reasserts his innocence (*see* attached hereto as "Exhibit 5").
14. On August 18, 2015, Robert Louis Walker, Jr. ("Walker") retained the services of Matthew Cabe ("Cabe") of the Burke County bar. Cabe filed a Notice of Appearance in that related case on August 18, 2015 (attached hereto as "Exhibit 6").
15. After retaining Cabe, Walker executed a document on August 18, 2015, entitled "Informed Consent of Robert Louis Walker, Jr. for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants" (attached hereto as "Exhibit 7"). In this document, Walker consents to the Firm's continued representation of the Movants in these criminal actions, even if Walker's interests become materially adverse to those of the Movants. Walker also acknowledges the possibility that the Firm may cross-examine Walker's testimony while still complying with the Firm's duties to Walker under Rule 1.9 of the North Carolina Rules of Professional Conduct.
16. Further, after retaining Cabe, Walker executed an affidavit on August 18, 2015 ("Walker Affidavit", attached hereto as "Exhibit 8") in which Walker indicates the Firm does not hold Walker's confidential information. See Walker's statement in which he states "I have had no conversations with the Firm in which I have made statements that I did not make to anyone else who has asked me about this matter." ¶ 2.
17. On August 18, 2015, Sarah Anderson, and on August 19, 2015, Brooke Covington and Justin Covington – after individual consultation with independent counsel other than the undersigned – did each execute affidavits which, in pertinent part, state that each Movant: (1) reviewed the Order with independent counsel; (2) discussed with independent counsel the possibility of incrimination by other co-defendants; (3) discussed among themselves and reiterated to each other Movants' innocence in these matters; (4) expressed Movants' intentions to reject any plea offer(s) made to them similar to the Plea Offer advanced to Bartley; and (5) declared Movants' intentions to "waive any right ... 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." Said affidavits are attached hereto as "Exhibit 9", "Exhibit 10," and "Exhibit 11."
18. Movants also rely on the opinion of the North Carolina Court of Appeals in *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987), in which the Court of Appeals granted certiorari of a pre-trial order for disqualification of counsel jointly representing a father and son

accused of the same or similar offenses. 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. Furthermore the Court stated as follows:

In joint representation cases, only where there is an actual conflict of interest which denies the defendants the effective assistance of counsel does a problem arise. A *potential* conflict of interest, as distinguished from an *actual* conflict of interest, is not sufficient to warrant the State's interference with the constitutionally guaranteed right of a criminal defendant to retain and be represented by the counsel of his choice.

*Yelton*, 87 N.C. App. at 561, 361 S.E.2d at 758.

19. 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.

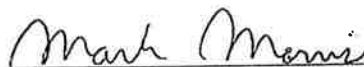
20. In light of the averments contained herein as supported by the Exhibits attached hereto, Movants respectfully submit that the Order's findings and conclusions referenced above cannot be sustained. Movants thus move the Court to reconsider the findings and conclusions pronounced in the Order and deny the State's motion to disqualify counsel.

**WHEREFORE**, Movants pray that the Court reconsider its previous order granting the State's Motion to Disqualify Counsel in this matter based upon a substantial change in circumstances from those existing at the time of the entry of the Order and deny the State's motion to disqualify counsel.

This is the 20 day of August, 2015.



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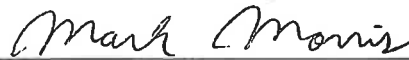
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### CERTIFICATE OF SERVICE

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 20 day of August, 2015.



Mark Morris