

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONY EUGENE GOODSON,

Defendant.

Case No. CR07-0043

**ORDER REGARDING ATTORNEY
REPRESENTATION**

On the 26th day of July 2007, this matter came on for hearing on the Notice Regarding Issue Concerning Attorney Representation (docket number 16) filed by Attorneys Robert Montgomery and Eric Parrish on July 17, 2007. The Government was represented by Assistant United States Attorney Patrick J. Reinert. Defendant Tony Goodson appeared personally and was represented by his attorney, Robert Montgomery. Also appearing at the time of hearing was Attorney JoAnne Lilledahl, representing Maurice Moore.

In their Notice, Mr. Montgomery and Mr. Parrish (both members of the Parrish Kruidenier law firm) alert the Court to the fact that another member of their firm, Matthew Boles, previously met with Maurice Moore, who is expected to be a witness for the Government at the time of trial. The issue presented at the time of hearing was whether Mr. Montgomery and Mr. Parrish are required to withdraw their appearances on behalf of Defendant, or whether the potential conflict may be cured by appointing an attorney from the CJA panel to represent Defendant for the limited purpose of addressing the testimony of Maurice Moore.

BACKGROUND FACTS

In April or May 2007, Attorney Matthew M. Boles of the Parrish Kruidenier law firm in Des Moines was contacted by the family of Maurice Moore regarding charges then pending against Mr. Moore.¹ At Mr. Boles' request, Attorney Robert P. Montgomery of the Parrish Kruidenier law firm also attended the meeting. Mr. Montgomery reported at the instant hearing that there was a general agreement at the meeting that Mr. Boles would accept representation of Mr. Moore.

Subsequent to the meeting, Attorney Boles drove to Cedar Rapids and met with Moore, who was then in custody. Mr. Boles did not, however, enter any appearance on behalf of Moore.²

Meanwhile, according to the statement made by Mr. Montgomery at the instant hearing, Attorney Eric Parrish of the Parrish Kruidenier law firm was representing Defendant Tony Goodson in unrelated state court charges. Goodson was indicted in the instant action on June 12, 2007, however, and Mr. Parrish appeared on his behalf. According to Mr. Montgomery, he was asked by Mr. Parrish to join in Goodson's defense.

On June 27, 2007, Mr. Montgomery traveled to Cedar Rapids to review the Government's discovery file. During that process, Mr. Montgomery determined that Maurice Moore would likely be a witness in this case.³ Mr. Montgomery indicated that

¹On March 7, 2007, Maurice Tyrone Moore was charged in Counts 6 and 8 of an Indictment with distribution of crack cocaine and conspiracy to distribute crack cocaine. *See United States of America v. Maurice Tyrone Moore*, Case Number CR07-0015. Moore subsequently pleaded guilty to Count 8 and Sentencing is scheduled on August 17, 2007.

²A review of Court's Exhibits 1 and 2, offered by Ms. Lilledahl at the instant hearing, suggests that Moore's mother paid the Parrish Kruidenier law firm a \$4,000 retainer, but that a portion of the retainer was subsequently refunded to Ms. Moore.

³The circumstances surrounding this charge are briefly described in the Court's Order For Pretrial Detention (docket number 12).

he immediately alerted Mr. Parrish and the prosecuting attorney to a potential conflict of interest.

Mr. Boles, Mr. Montgomery, and Mr. Parrish subsequently met in order to discuss whether a conflict of interest would prevent the Parrish Kruidenier law firm from further representation of Goodson. Mr. Boles reported at the meeting that his conversation with Moore involved a review of the facts which are “part of the public record,” and did not involve disclosure by Moore of any secrets or confidences. At the instant hearing, however, Mr. Montgomery conceded that Moore has a different view of his meeting with Mr. Boles. Ms. Lilledahl confirmed that Moore believes that he revealed confidential information to Attorney Boles during their April meeting.

At the instant hearing, Defendant Tony Goodson acknowledged that he has been advised of the details set forth above. Defendant indicated, however, that he wished the representation of Mr. Parrish and Mr. Montgomery to continue. That is, Defendant waived any objection which he may otherwise have to a potential conflict of interest by the Parrish Kruidenier law firm.

ANALYSIS

Defendant clearly has a Constitutional right to retain counsel of his own choosing. The Sixth Amendment to the United States Constitution provides, in part, that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.” “[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v. Gonzalez-Lopez*, ___ U.S. ___, 126 S. Ct. 2557, 2561, 165 L. Ed. 2d 409 (2006) (citing *Wheat v. United States*, 486 U.S. 153 (1988)). Defendant has retained Mr. Montgomery and Mr. Parrish to represent him in this case.

The representation of Mr. Montgomery and Mr. Parrish is limited, however, by the conflict which the Parrish Kruidenier law firm has with Maurice Moore. Mr. Montgomery conceded for these purposes at the time of hearing that witness Maurice Moore conveyed

confidential information to Attorney Matthew Boles in their meeting at the Linn County Jail. Mr. Montgomery also agrees, as he must, that if Mr. Boles has a conflict of interest in this case, then Mr. Montgomery and Mr. Parrish are similarly conflicted. Since Moore is unwilling to waive any privilege which he may have in this regard, Mr. Montgomery concedes that he and Mr. Parrish are precluded from cross-examining Moore at the time of trial. Mr. Montgomery suggests, however, that the problem can be resolved by the appointment of “backup counsel,” as discussed in *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982).

In *Agosto*, all six defendants were represented by individual counsel at the time of trial. One of the defense attorneys, however, had previously represented two of the other defendants. The district court noted possible conflicts which could arise should the defendants take inconsistent positions, including (1) cross-examination of former clients, (2) planning of trial strategy, (3) arguing the relative culpability of defendants to the jury, and (4) the questioning of other witnesses regarding the defendants’ participation in the crime charged. 675 F.2d at 973. Attorneys for both of the codefendants indicated that their clients were unwilling to waive their attorney-client privilege. *Id.* The district court disqualified counsel. In reversing the district court, however, the Eighth Circuit Court of Appeals held that “[i]n the criminal context, disqualification on the basis of the attorney’s receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients’ interests are adverse.” *Id.* The Court recognized the importance of honoring Defendant’s right to choose his attorney, if possible.

[T]he chosen method for dealing with a potential conflict, in the absence of an acceptable waiver, is the one which will alleviate the effects of the conflict while interfering the least with defendant’s choice of counsel.

Id. at 970.

The Circuit Court of Appeals instructed the district court to consider “whether there exists a means of eliminating the potential conflict less burdensome than disqualification.” *Id.* Specifically, the district court was instructed to consider defense counsel’s suggestion that a “backup attorney” be appointed to cross-examine the codefendants “and do whatever else would be necessary to alleviate the conflict should their interests ever prove adverse.” *Id.* at 974.

If [the codefendants] are willing to consent, we see no reason to reject Gustafson’s proposal to employ a backup counsel as a satisfactory resolution of the conflict. If they do not consent, however, and there is a clear showing of adverse interests, then we concur in the district’s exercise of discretion and disqualify attorney Walters.

Id.

Like the codefendants in *Agosto*, witness Maurice Moore is unwilling to waive any privilege which exists with the Parrish Kruidenier law firm. Accordingly, Mr. Montgomery acknowledged at the time of hearing that he and Mr. Parrish would be unable to cross-examine Moore. In *Agosto*, the Court determined it was necessary for the codefendants to consent to the employment of a backup attorney or, if they did not consent, that there be a clear showing that the Defendants did not have adverse interests. It is unclear from the record whether Moore objects to the proposed employment of backup counsel, with continued representation of Defendant by the Parrish Kruidenier law firm. In *Agosto*, however, all of the Defendants were proceeding to trial and the Court was concerned about a conflict of interest if the various defendants had adverse interests. In the instant action, Moore has pleaded guilty and is awaiting sentencing. Accordingly, his interests cannot be affected by Mr. Montgomery’s and Mr. Parrish’s continued representation of Defendant. Therefore, the Court believes that Moore’s “consent” to the appointment of a backup attorney for Goodson is not required.

The Court in *Agosto* was also concerned, however, that if Defendant was convicted, “he may be moved to file a post-conviction motion alleging ineffective assistance of

counsel because backup counsel did not have as full a degree of familiarity with the issues and facts as did [his primary attorney] and, therefore, did not effectively cross-examine the witnesses.” *Id.* at 974. The Court instructed the district court to guard against that possibility by requiring the Defendant to waive his right to an ineffective assistance of counsel claim pertaining to the performance of backup counsel:

[W]e instruct the court to require [defendant] to waive his right to effective assistance of counsel, insofar as that right may be impinged upon by [primary defense counsel’s] conflicts of interests and the need to employ backup counsel to alleviate those conflicts.

Id. In this case, Goodson waived his right to unconflicted counsel on the record at the time of hearing. The holding in *Agosto*, requires, however, that Defendant also waive any claim that backup counsel provided ineffective assistance of counsel.

After considering Defendant’s waiver of his right to unconflicted counsel, Defendant’s right to retain an attorney of his own choosing, and the conflict which the Parrish Kruidenier law firm has with witness Maurice Moore, the Court concludes that Mr. Montgomery and Mr. Parrish should be permitted to continue their representation of Defendant, provided a “backup attorney” is retained to deal with any issues raised by the testimony of Moore, including his cross-examination at the time of trial. This determination is conditioned, however, upon Defendant filing a written waiver of his right to claim ineffective assistance of counsel by the backup attorney. If Defendant does not file such a written waiver, then Mr. Montgomery and Mr. Parrish will be required to withdraw and Defendant will be required to retain other counsel. If Defendant files a written waiver, then Mr. Montgomery and Mr. Parrish will be permitted to continue in their representation of Defendant, provided a backup attorney appears for the purposes described above.

The backup attorney will sit at counsel table throughout the trial and be part of the “defense team,” but will not be permitted to independently participate in jury selection,

make an opening statement, or present a closing argument. Defendant will be given five days in which to retain an attorney for this purpose. If counsel is not privately retained, then a CJA panel attorney will be appointed for this limited purpose, if Defendant qualifies.

ORDER

IT IS THEREFORE ORDERED that Attorneys Robert Montgomery and Eric Parrish shall be permitted to continue their representation of Defendant, provided (1) a backup attorney is retained to cross-examine Maurice Moore at the time of trial and deal with any issues relating to his testimony, and (2) Defendant files a written waiver of his right to claim during any post-conviction proceeding ineffective assistance of counsel by the backup attorney. Defendant shall have five (5) days following the entry of this Order to file a written waiver of his right to pursue a post-conviction claim of ineffective assistance of counsel by backup counsel. If such a waiver is not filed within five(5) days, then the retention of a backup attorney will not be permitted and Mr. Montgomery and Mr. Parrish will be required to withdraw. If the waiver is filed, then Defendant shall retain an attorney of his own choosing to serve as backup counsel for the purpose of questioning Moore. If Defendant cannot afford an attorney for this purpose, then a CJA panel attorney will be appointed.

DATED this 7th day of August, 2007.

JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA