

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

V.

CRIMINAL CASE NO. 3:07CR192-B-A

RICHARD F. "DICKIE" SCRUGGS,
DAVID ZACHARY SCRUGGS,
SIDNEY A. BACKSTROM

ORDER DENYING MOTION TO RECONSIDER

This cause comes before the court upon defendant Richard F. Scruggs' Motion to Reconsider *Ore Tenus* Motion for Kenneth H. Coghlan to Appear as Counsel for Richard F. Scruggs. Upon due consideration, the court finds that the motion should be denied.

Mr. Coghlan made an entry of appearance as counsel on behalf of Steven A. Patterson on November 28, 2007, but moved to withdraw and substitute Hiram Eastland as counsel on December 17. The court granted the motion the same day. On January 15, 2008, Patterson pleaded guilty to Count One of the indictment and agreed to testify against the co-defendants.

On January 9, 2008, Mr. Coghlan filed a notice of attorney appearance on behalf of defendant Richard F. Scruggs, but the court refused to approve Mr. Coghlan's appearance, citing that to do so would mean that Mr. Coghlan's former client, Patterson, would be testifying against Mr. Coghlan's present client, Scruggs. Scruggs renewed his request for Coghlan's entry of appearance at the discovery hearing held on January 16, and the court denied the motion from the bench as well as in a written order filed subsequent to the hearing. Now the court finds itself addressing this matter a third time.

A situation similar to the Coghlan matter developed when attorney Anthony Farese, who represented defendant Zachary Scruggs, took on the representation of attorney Joey Langston when Langston pleaded guilty to another charge of judicial bribery and agreed to testify in the

present case against defendant Richard Scruggs about Langston's knowledge of alleged prior similar bad acts by Scruggs as provided for by Rule 404(b) of the Federal Rules of Evidence. The Langston plea was initially under seal; thus, no record of the matter was before the undersigned district judge when Mr. Farese moved to withdraw as counsel for Zachary Scruggs. The court denied the motion because to rule otherwise would have left Scruggs without representation at that time. When the Langston guilty plea and agreement to testify against Scruggs were made public, it became obvious that Mr. Farese could not continue in his representation of both Langston and Zachary Scruggs, even though Zachary Scruggs had signed a waiver of conflict of interest. Mr. Farese then filed a second motion to withdraw, and the court granted the motion excusing Mr. Farese from any further representation of Scruggs.

Defendant Richard F. Scruggs bases the present motion on his assertion of an alleged Sixth Amendment right to the counsel of his choice, requesting "that the Court give due weight to his constitutional right to counsel of his own choosing." The primary purpose of the Sixth Amendment right to counsel, however, is to guarantee a defendant the right to *effective* counsel – not to counsel of his own choosing. As Justice Rehnquist stated in *Wheat v. U.S.*,¹

[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

* * *

The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects.

¹486 U.S. 153, 159 (1988).

The Court listed a number of situations in which a defendant is not entitled to the attorney of his choice and stated,

Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy.²

Justice Rehnquist went on to say:

Petitioner insists that the provision of waivers by all affected defendants cures any problems created by the multiple representation. But no such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.³

The petitioner in *Wheat* was a criminal defendant who requested to substitute the same counsel shared by his co-defendants. The district court refused to allow the defendant to substitute his counsel with counsel of the co-defendants despite the willingness of all defendants to waive the conflict. The Ninth Circuit affirmed the district court's ruling, and the Supreme Court affirmed the court of appeals. The Supreme Court held that where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and that is what this court now does again in this case.

As Justice Rehnquist stated, the Sixth Amendment right to counsel is meant to guarantee *effective* counsel – not counsel that the defendant chooses regardless of whether counsel is

²486 U.S. at 159.

³*Id.* at 160.

conflicted or has other problems. Defendant Richard Scruggs can hardly complain that to deny his motion to approve Mr. Coghlan as one of his attorneys is to deprive him of the assistance of counsel under the Sixth Amendment. Defendant Scruggs has five eminent attorneys of record at present. The court has waived for the defendant the local rule requiring local counsel – a rule not strictly enforced in criminal cases when the court finds a defendant represented by competent counsel from other federal court districts. It would, thus, appear disingenuous for Scruggs to claim that without Mr. Coghlan on his team, he will be deprived of his Sixth Amendment right to effective assistance of counsel.

The court understands the request to employ Mr. Coghlan as one of the attorneys assisting the defense team. Mr. Coghlan often practices in this court, is knowledgeable of the court's policies and practices, and works well with the court and other attorneys; but to bring him back onto the defense team under the circumstances now existing is not worth the risk that something could develop later that would cause a problem in the upcoming trial, notwithstanding the waivers that have been offered. As the Supreme Court noted,

[A] district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials.⁴

⁴*Id.* at 162-63.

For the foregoing reasons, the court finds that defendant Richard Scruggs' Motion to Reconsider *Ore Tenus* Motion for Kenneth H. Coghlan to Appear as Counsel for Richard F. Scruggs should be and the same is hereby **DENIED**.⁵

SO ORDERED AND ADJUDGED this, the 30th day of January, 2008.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE

⁵As to the extra-judicial matters for which the defendant states he intends to employ Mr. Coghlan, the court has no opinion at this time.