

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

**FILED**

December 7, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

<b>ROBERT GLEN COE,</b>	)	
	)	
<b>Respondent/Defendant,</b>	)	
	)	<b>S.Ct. No. M1999-01313-SC-</b>
<b>DPE-PD</b>	)	
<b>v.</b>	)	<b>Shelby County</b>
	)	
<b>STATE OF TENNESSEE,</b>	)	
	)	
<b>Movant.</b>	)	

**MOVANT'S REPLY TO RESPONDENT-S MOTIONS TO DISQUALIFY ATTORNEY  
GENERAL PAUL G. SUMMERS AND THE TENNESSEE OFFICE OF THE  
ATTORNEY GENERAL, TO STRIKE AND FOR EXTENSION OF TIME TO  
RESPOND.**

A. Introduction

Respondent Robert Glen Coe has filed a motion to strike the motion to set execution date filed in this Court by the Tennessee Office of the Attorney General and Reporter, and a motion to disqualify Tennessee Attorney General and Reporter Paul G. Summers and the entire staff of the Office of the Attorney General and Reporter from further participation in this case. In addition, respondent has requested an extension of time to respond to the motion to set execution date until these issues are resolved by this Court. As grounds, respondent alleges that General Summers participated as an appellate judge in an earlier state post-conviction case in which respondent sought to challenge the validity of his conviction and sentence. In view of this prior judicial involvement, according to respondent, General Summers= participation as "prosecutor" in this case creates an appearance of impropriety requiring his disqualification under *State v. Tate*, 925 S.W.2d 548 (Tenn. Crim. App. 1995).

Additionally, respondent claims that the entire Office of the Attorney General must be disqualified under *Tate*, because General Summers= allegedly improper participation as a lawyer in the case has somehow "tainted" his entire staff.

The motion is without merit. In the first place, this case is over as no active case or controversy exists. A motion to set execution date is simply ministerial in nature, and is neither constitutionally nor statutorily required. It is merely a request to set a date for the execution of a judgment, the constitutionality of which has been consistently upheld by both the state and federal courts after numerous appeals. Therefore, there are no further proceedings to be had before this Court from which General Summers or his staff could be disqualified. Second, even if further proceedings in the case were appropriate, *Tate* does not require disqualification of either General Summers or his staff.

#### B. Argument

I. No case exists from which to disqualify Attorney General Paul G. Summers or the Office of the Attorney General as the mandate issued by the Federal Court of Appeals effectively concluded this action.

On April 19, 1999, this Court set respondent, Robert Glen Coe-s, execution date for October 19, 1999. On October 11, 1999, this Court granted respondent a stay of the execution date solely to allow Coe to file a petition to rehear in the United States Supreme Court. Additionally, this Court ordered the State to file a motion to set execution date if and when the United States Supreme Court denied Coe-s petition to rehear. On November 29, 1999, the United States Supreme Court denied Coe-s petition to rehear. Accordingly, as per this Court-s order, a motion to set execution date was filed.

The denial by the United States Supreme Court of Coe-s petition to rehear most

definitively concludes this case<sup>1</sup>. Furthermore, a motion to set execution date serves only an administrative function: it simply advises this Court to carry out its own mandate. Because no case or controversy exists, and because the State is not constitutionally or statutorily required to file a motion to set an execution date,<sup>2</sup> nothing exists from which to disqualify Attorney General and Reporter Paul G. Summers or the staff of the Tennessee Attorney General and Reporter.

II. No ethical or legal grounds exist to disqualify Attorney General Paul G. Summers or the staff of the Tennessee Office of the Attorney General, or to strike the motion to set execution date filed by the Tennessee Office of the Attorney General in this Court.

In *State v. Tate*<sup>3</sup> 925 S.W.2d 548 (Tenn. Crim. App. 1995), the Tennessee Court of Criminal Appeals discussed the factors a court must consider in determining whether a District Attorney should be disqualified from his role as prosecutor in a criminal case based on his prior service as judge in the same prosecution. The Court stated that, in determining whether disqualification is necessary, it must consider whether an actual conflict of interest exists requiring disqualification, whether the former judge's participation as prosecutor creates an appearance of impropriety requiring disqualification, and finally, if either of the above is present, whether the District Attorney's disqualification requires disqualification of his entire office. *Tate* involved the disqualification of Knox County District Attorney General Randall Nichols. Nichols presided as trial judge over Tate's criminal prosecution, received confidential information from Tate concerning the case during ex parte proceedings he conducted as judge, and then,

---

<sup>1</sup> The mandate of the Sixth Circuit issued on October 12, 1999, as a result of the denial of certiorari by the U. S. Supreme Court on October 11, 1999. The Sixth Circuit concurrently issued an order denying Coe's motion to stay the mandate which was premised on his averment that he intended to petition to rehear within the time limit prescribed by U. S. Supreme Court Rules.

<sup>2</sup> Tennessee appellate courts routinely set execution dates without motion by the State Attorney General following affirmance of an injunction.

<sup>3</sup> Respondent's argument for disqualification is based entirely on this case.

after leaving the bench and taking up the position of District Attorney, assumed responsibility for prosecuting Tate in that same criminal case. The Court of Criminal Appeals held (1) that Nichols suffered under an actual conflict of interest which required his disqualification from participation as a lawyer in Tate's prosecution, because, as Judge, Nichols had received confidential information from Tate while presiding in the case; (2) that any participation by Nichols as a lawyer in the case would also create an appearance of impropriety requiring disqualification, because, as Judge, Nichols made rulings and considered ex parte communications from Tate and then sought to act as prosecutor "on the same charges;" and, finally, (3) that disqualification of the entire Knox County District Attorney's Office was required, because, as Judge, Nichols had received confidential information from Tate concerning the case but, as district attorney, Nichols had failed properly to screen himself from the other attorneys in the Office who were handling the case. *Id.* at 554-55, 557.

By contrast, in this case the respondent does not allege that General Summers labors under any actual conflict of interest. Moreover, there is no appearance of impropriety under *Tate* because, as Judge, General Summers received no confidential information from Coe and held no ex parte proceedings during which he could have been exposed to such information. Equally significant is the fact that General Summers is not acting as "prosecutor" of Coe on "the same charges" involved in a prior proceeding over which he presided as Judge. General Summers played no role as a Judge in the proceeding in which Coe was prosecuted, convicted and sentenced. Rather, this Office is merely asking this Court to carry out its own mandate because all substantive issues involved in this action were litigated and fully disposed of.

a. Actual conflict of interest.

Although the respondent does not allege that there is an actual conflict of interest

requiring disqualification, it is clear that no actual conflict exists. Generally, a conflict of interest requires disqualification when a lawyer represents a client with interests adverse to another client. *State v. Phillips*, 672 S.W.2d 427, 432 (Tenn. Crim. App. 1984) citing *People v. Gerold*, 107 N.E. 165, 175 (Ill. 1914). For example, a defense lawyer may not assume the role of prosecutor against his former client in the same case, since his interest in prosecuting on behalf of the state is adverse to the duties he owes his former client. *State v. Locust*, 914 S.W.2d 554, 557 (Tenn. Crim. App. 1995). The rationale behind this rule is that a lawyer is necessarily privy to confidential communications from his clients. *Tate*, 925 S.W.2d at 554 citing *State v. Willie Claybrook*, No. 3, 1992 WL 17546 (Tenn. Crim. App. at Jackson, Feb. 5, 1992). The lawyer's duty of loyalty to the former client precludes disclosure of the confidences and secrets he learned from that client, but the lawyer's duty of loyalty to the current client involved in litigation with the former dictates that the lawyer violate his duty to the former by utilizing all information at his disposal in service of the current client's cause. Disqualification is therefore appropriate even without a showing that the lawyer in fact disclosed any confidential communications from his former client to his current one or that any such disclosure could have been detrimental to the former client. *Id.*

A precisely analogous conflict of duty arises whenever a lawyer who, as judge, has received confidences from one litigant in a case then leaves the bench and attempts to represent another litigant of adverse interest in the same case. On the one hand, even after leaving the bench, the lawyer remains under a duty to preserve the confidentiality of any information he learned through ex parte communications from any party while serving as judge. On the other, the lawyer's duty of loyalty to the litigant who has now hired him would require him to divulge those ex parte confidences. That was the situation that gave rise to the conflict identified by the court in *Tate*.

Here, by contrast, none of the reasons supporting the disqualification of General

Nichols in *Tate* are present. In 1991, then Judge Summers presided over appellate review of a second post-conviction petition filed by Coe. The petition had been dismissed by the trial court without an evidentiary hearing. The Court of Criminal Appeals, in an opinion written by Judge Summers, affirmed the summary dismissal of the petition, holding that "[a]s to each of the grounds listed in his petition, [Coe] has either waived, had a fair hearing where the issues were previously determined, failed to show that a new rule is retroactive, or has presented an argument with no legal basis." *Robert Glen Coe v. State*, 1991 WL 2873 (Tenn. Crim. App., No. 138, filed Nov. 12, 1991, at Jackson). An examination of the opinion and the record on appeal in that case reveals that no ex parte proceedings occurred between Coe and the panel of judges considering the appeal and, thus, establishes that Judge Summers could not have been privy to any confidences or secrets of Coe as a result of his judicial service in that case. Furthermore, there are a plethora of other distinctions between this case and those cases in which disqualification was ordered: Judge Summers' prior exposure to Coe's conviction and sentence was as an appellate level judge on a post-conviction collateral attack; he is not currently prosecuting Robert Glen Coe and did not participate as judge in any criminal prosecution of Coe; his involvement as judge consisted merely of affirming the summary dismissal of Coe's meritless second post-conviction petition on procedural grounds; his involvement occurred nearly a decade ago; and his appointment as Attorney General occurred long after all substantive issues in this case were decided. These facts, coupled with the absence of even an allegation that General Summers, as judge, received any ex parte communications or confidential information from Coe, compel the conclusion that there is no actual conflict of interest requiring disqualification.

b. The appearance of impropriety.

Respondent's principal contention is that General Summers must be disqualified to

avoid "an appearance of impropriety." While a simple appearance of impropriety may indeed sometimes require disqualification, (Tenn. Sup. Ct. Rule 8, Canon 9), the universal cornerstone of the authorities requiring disqualification of an attorney on such grounds is that there is a danger that his participation in the litigation may risk disclosure of confidential information he is otherwise under a duty to keep secret. *Tate*, 925 S.W.2d at 555-56, *Phillips*, 672 S.W.2d at 436; *Gerold*, 107 N.E. at 177; *State v. Burns*, 322 S.W.2d 736, 740 (Mo. 1959); *State v. Detroit Motors*, 163 A.2d 227, 231 (N.J. 1960); *Sharplin v. State*, 330 So.2d 591, 594 (Miss. 1976); *State v. Britton*, 203 S.E.2d 462, 466 (W.Va. 1974); *Pisa v. Streeter*, 491 F.Supp. 530, 594 (D.C.Mass. 1980); *Cho v. Superior Court*, 39 Cal.App.4th 113, 122 (1995). Disqualification is deemed necessary under such circumstances, because demonstrating prejudice or a breach of a confidence would be nearly impossible. *Detroit Motors*, 163 A.2d at 231.

Petitioner has wholly failed to identify what "impropriety" could possibly "appear" as result of General Summers' participation at this stage of the case. As previously noted, there can be no claim that General Summers is in possession of any confidences or secrets of Coe as a result of his prior judicial service. Nor can there be any claim on these facts that General Summers has somehow improperly "marketed" his prior judicial involvement with Coe's second post-conviction appeal in order to obtain employment from one of adverse interest for a fee.

On the contrary, General Summers' participation is solely the consequence of this Court's order ordering the State to file a motion to set execution date of a sentence previously affirmed by this Court on four separate occasions. In addition, General Summers' previous involvement as an appellate judge on Coe's second post-conviction appeal could not possibly affect the outcome of the motion to set execution date as no information that was not previously known to this Court was provided in that motion. Not only is it clear from the record that Judge Summers received no

confidential information and was not privy to any ex parte communications, the motion to set execution date contains no confidential information, and simply states that the United States Supreme Court has denied Coe's petition to rehear. It is impossible to fathom how anything General Summers learned as a result of his prior judicial service could possibly be used to the detriment of petitioner at this stage of the case. Similarly, it cannot be seriously argued that, because of his prior service as a state appellate judge, General Summers can, now, somehow exert special influence on this Court in order to achieve an outcome favorable to the State. Accordingly, no grounds exist to disqualify General Summers based on any "appearance of impropriety."

c. Disqualification of the Tennessee Office of the Attorney General.

Respondent also alleges that the entire Tennessee Office of the Attorney General must be disqualified. However, so-called imputed disqualification, once again, is necessary only when there is a danger of the disclosure of confidential information. *Tate*, 925 S.W.2d at 556-57; *Mattress v. State*, 564 S.W.2d 678, 680 (Tenn. Crim. App. 1977); *Cho*, 39 Cal.App.4th at 125; *SK Handtool Corporation v. Dresser Industries, Inc.*, 619 N.E.2d 1282, 1290 (Ill. App. 1993).

In the current action, it is clear that General Summers has never been privy to any confidential information regarding Robert Glen Coe. Judge Summers' opinion for the Court of Criminal Appeals on Coe's second post-conviction appeal was based solely on the public record, was issued nearly a decade ago, and did not involve any issue currently in controversy. There is no risk that any member of the Office of the Attorney General could have been tainted by such information as no confidential information



exists, and, accordingly no reason exists to either screen General Summers or disqualify any member of his Office.<sup>4</sup>

C. Conclusion

For the reasons stated, respondent's Motion to Strike, Motion to Disqualify, and Motion for an Extension of Time should be denied.

PAUL G. SUMMERS  
Attorney General & Reporter

---

MICHAEL E. MOORE (BPR #6440)  
Solicitor General

---

GLENN R. PRUDEN (BPR #15333)  
Assistant Attorney General

---

ERIK W. DAAB (BPR #19356)  
Assistant Attorney General  
Office of the Attorney General  
425 Second Avenue North  
Nashville, Tennessee 37243  
(615) 741-5648

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class mail,

---

<sup>4</sup>Petitioner's argument that General Summers' current participation creates for his staff a potential divided loyalty between defending his judicial decision and maintaining independence in this case borders on the absurd. The Office's position in this case has at all times been entirely consistent with the decision, and at no time during the pendency of this case did the Attorney General's Office question the correctness of the post-conviction. Now that the Sixth Circuit's mandate has issued, it is difficult to conceive of any circumstances under which Judge Summers' opinion for the Court of Criminal Appeals affirming the dismissal of Coe's second state post-conviction appeal could possibly become relevant.

postage pre-paid, to Henry A. Martin and Paul R. Bottei, Federal Public Defender-s Office, 810 Broadway, Suite 200, Nashville, TN 37203 and James H. Walker, 601 Woodland Street, Nashville, TN 37206 on this the \_\_\_ day of December, 1999.

---

GLENN R. PRUDEN  
Assistant Attorney General