

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

GREGORY THOMPSON)	
)	
)	No. M1987-00067-SC-DPE-DD
v.)	Coffee County Circuit Court
)	No. 20,014
)	DEATH PENALTY CASE
STATE OF TENNESSEE)	Filed March 30, 2004

**GREGORY THOMPSON'S MOTION TO
VACATE TRIAL COURT ORDER, OR, IN THE ALTERNATIVE
SUPPLEMENTAL BRIEF IN SUPPORT OF APPEAL**

On appeal from the Coffee County Circuit Court's order denying a hearing
on the issue of competency to be executed.

Comes Gregory Thompson ("Mr. Thompson") by and through counsel and files
this Motion to Vacate Trial Court Order, or, in the alternative, Supplemental Brief in
Support of Appeal. For cause, Mr. Thompson would show and state as follows:

1. The original trial court judge presiding over the trial for first-degree murder
in this cause¹ was the Honorable Gerald L. Ewell, Sr. ("Judge Ewell"). Judge Ewell
initially presided over Mr. Thompson's post-conviction proceedings but during the early
stages of those proceedings Judge Ewell recused himself from the case. (R. 114) See
Thompson v. State, 958 S.W.2d 156, 170-72 (Tenn.Crim.App. 1997), *perm. app.*
denied. (See Exhibit 1) Subsequently, Judge Ewell retired from the bench.

2. On February 25, 2004, this Court remanded the case to the Coffee
County Circuit Court for competency to be executed proceedings. On March 8, 2004,

¹The instant case has carried the docket number of No. 20,014 in the Coffee
County Circuit Court during the original trial and in the recent competency proceedings.

Judge Ewell entered the “order denying hearing on issue of competency to be executed” (hereinafter referred to as “Order”) (R.308) currently at issue in this cause. Mr. Thompson had no formal notice that Judge Ewell was to hear this cause until the entry of the Order at issue had already occurred.

3. Courts have uniformly held that a trial judge who recuses himself should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge and any orders, other than of a ministerial nature, subsequently entered by the disqualified judge are void. See *El Fenix de Puerto Rico v. The M/Y Johanny*, 36 F.3d 136, 142 (1st Cir.1994) (general rule that recused judge "should take *no further action* except to enable administrative reassignment of the case"; therefore, it was error for recused judge to set aside final judgment simultaneously with recusal order); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir.1988) (holding that once a judge has disqualified himself, he may only perform the ministerial duties necessary to transfer case to another judge and may not enter any further orders in the case, except for "housekeeping" ones), *cert. denied*, 489 U.S. 1078 (1989); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 904 (4th Cir.1983) ("Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred."), *cert. denied*, 464 U.S. 1040 (1984); *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260-61 (5th Cir.1983) (disqualification cannot be waived; disqualified chief judge prohibited from selecting judge who would handle case in which chief judge is disqualified because of statutory law and the creation of suspicion that chief judge would select successor whose views were consistent with

his); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025 (9th Cir.1982) (noting that disqualified judge may perform "ministerial duties such as assigning a case to another judge"); *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir.1956) (after district judge disqualified himself he was confined to perform only the "mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication" and the judgment entered would be vacated); *Rohrbach v. AT & T Nassau Metals Corp.*, 915 F.Supp. 712, 716 & n. 5 (M.D.Pa.1996) ("As a general rule, a trial judge who has recused himself 'should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge.' "); *Gubler v. Commission on Judicial Performance*, 688 P.2d 551, 567-68 (Cal. 1984) ("Since petitioner was disqualified under [California law] from hearing the fee-setting issue, it was highly improper for him to give unsolicited advice to another judicial officer on how to decide it"); *Bolt v. Smith*, 594 So.2d 864, 864 (Fla.Ct.App.1992) ("Florida case law is well settled that once a trial judge has recused himself, further orders of the recused judge are void and have no effect"); *State v. Evans*, 371 S.E.2d 432, 433 (Ga. 1988) ("A disqualified judge can take no judicial action in the case and any attempt at such action is a mere nullity"), *overruled on other grounds by State v. Smith*, 485 S.E.2d 491 (Ga. 1997); *Ferguson v. Pony Express Courier Corp.*, 898 S.W.2d 128, 130 (Mo.Ct.App.1995) ("It is true that a judge who disqualifies himself or who has been disqualified by one of the parties has no further right to hear the case"); *State ex rel. Johnson v. Mehan*, 731 S.W.2d 887, 888 (Mo.Ct.App.1987) ("Once a change of judge has been entered and the case transferred to another judge the disqualified judge has

no further authority in the case and any orders made after the disqualification are void"); *Byrd v. Brown*, 613 S.W.2d 695, 699-700 (Mo.Ct.App.1981) ("Judge Moore's disqualification was effective upon the docket entry and the case was transferred to Judge Northern. Judge Moore had no further authority in the case. Therefore, the orders made after the initial docket entry of disqualification ... were void") (footnotes omitted); *Pueblo of Laguna v. Cillessen & Son, Inc.*, 682 P.2d 197, 199 (N.M. 1984) ("Since the district court was properly disqualified, it had power only to perform mere formal acts subsequent to the disqualification. After the affidavit of disqualification was filed, the judge had no jurisdiction to act in matters involving the exercise of his discretion. Its subsequent consolidation order was therefore without legal effect") (citations omitted); *State v. Nossaman*, 666 P.2d 1351, 1355 (Or.Ct.App.1983) ("A judgment entered by a judge who has been disqualified in the manner prescribed in the statute is void"), *abrogated on other grounds by Matter of Marriage of Benson*, 919 P.2d 496 (Or. Ct. App. 1996); and *McElwee v. McElwee*, 911 S.W.2d 182, 186 (Tex.Ct.App.1995) ("If a judge is disqualified under the Texas Constitution, he is without jurisdiction to hear the case, and therefore, any judgment he renders is void and a nullity"). The authorities are uniform, indeed it is black letter law that a disqualified judge may not issue any orders or rulings other than of a "housekeeping" nature in a case in which he or she is disqualified.

4. Tennessee law is in accord. See, e.g., *Bolling v. Anderson*, 63 Tenn. 550, 552 (1874) (Tennessee Supreme Court ruled that a decree entered by an incompetent chancellor "fails, and with it all subsequent proceedings based upon it."); see also *In re*

Cameron, 126 Tenn. 614, 662, 151 S.W. 64, 77 (1912)(“the trial judge should not have entered any judgment at all, being incompetent as he was ... there is no doubt that under such circumstances the judgment of the court below is void.”).

7. Mr. Thompson’s rights under the state and federal constitutions to due process of the law are violated where the judge who recused himself from this case subsequently entered an order of the magnitude entered in this cause. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-22 (1986).

WHEREFORE, PREMISES CONSIDERED, Mr. Thompson prays:

1. That this Court vacate the order of the trial court as void and remand this cause to the Circuit Court of Coffee County with direction that another judge be designated to hear this cause in accordance with the Court’s order of February 25, 2004;

2. That, in the alternative, in the interests of judicial economy, this Court appoint **the Honorable Frank Clement, Jr.**, a judge who sits on the middle section of the Tennessee Court of Appeals, as Special Judge to hear this cause. Judge Clement heard the conservatorship proceedings involving Mr. Thompson and his familiarity with the case will expedite these proceedings and insure fuller consideration of issues. Further, Judge Clement formerly sat as a Davidson County Probate judge and regularly presided over issues regarding mental health and competency on a regular basis; and,

3. That Mr. Thompson receive such other relief as this Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was forwarded by U. S. Mail, postage prepaid, to

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this 30th day of March, 2004.

MICHAEL J. PASSINO