

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT GLEN COE,)
)
 Petitioner,)
) Case No. 3:92-0180
 v.) (Senior Judge Nixon)
)
 RICKY BELL, Warden,)
)
 Respondent.)

RESPONDENT'S BRIEF CONCERNING THE DISQUALIFICATION OF ATTORNEY
GENERAL PAUL G. SUMMERS AND THE IMPUTED DISQUALIFICATION OF THE
TENNESSEE OFFICE OF THE ATTORNEY GENERAL.

A. Introduction

Petitioner Robert Glen Coe has filed a motion to disqualify Tennessee Attorney General and Reporter Paul G. Summers and, in addition, the entire staff of the Office of the Attorney General and Reporter from further participation in this habeas corpus action. As grounds, petitioner alleges that General Summers participated as an appellate judge in an earlier state post-conviction case, in which petitioner sought to challenge the validity of his conviction and sentence. In view of this prior judicial involvement, according to petitioner, General Summers' participation as "prosecutor" in this habeas action creates an appearance of impropriety requiring his disqualification under *State v. Tate*, 925 S.W.2d 548 (Tenn. Crim. App. 1995). Additionally, petitioner 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, for the reasons set forth in respondent's memorandum of law filed November 24, 1999, and stated in open court by counsel for respondent during the hearing conducted November 29, 1999, this habeas action is over, and the Court is under a duty to enter an order dismissing the case consistent with the mandate of the Court of Appeals. Accordingly, 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

1. 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 Court of Appeals effectively concluded this action.

As noted in respondent's brief filed on November 24, 1999, in *Coe v. Bell*, 161 F.3d 320, 355 (6th Cir. 1998), the Sixth Circuit specifically and unequivocally held that

(b)ased on the foregoing, we REVERSE the district court insofar as it granted habeas corpus relief, and AFFIRM insofar as it denied relief. Therefore, the award to Coe of habeas corpus relief is REVERSED.

Because "[a] State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief," *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 160 L.Ed.2d 728 (1998), and because after a case has been decided by an appellate court and the mandate has issued, the district court may not

vary [the mandate] or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded,

(*In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895)), this Court is compelled to dismiss the petition. As this effectively concludes this action, no case exists from which to disqualify Attorney General Summers or his staff. See *In re Chambers Development Company, Inc.*, 148 F.3d 214, 224 (3d Cir. 1998); *Caldwell v. Puget Sound Electrical Apprenticeship and Training Trust*, 824 F.2d 765, 767 (9th Cir. 1987); *Feldman v. Menman*, 815 F.2d 1318, 1321-22 (9th Cir. 1987); *Frederick G. McGavran, et al.*, *Sixth Circuit Federal Practice Manual*, at 5 (2d ed. 1999).

II. No grounds exist to disqualify Attorney General Paul G. Summers or the entire under State v. Tate.

In *State v. Tate*,² 925 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, 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

² Petitioner's argument for disqualification is based entirely on this case.

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, 555, 557.

By contrast, in this case the petitioner 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 his Office is defending the legality of Coe's conviction and

sentence against collateral attack in a habeas corpus action, an entirely separate lawsuit both from the proceeding in which Coe was convicted and sentenced as well as from Coe's second state post-conviction action in which General Summers sat as Judge on the Court of Criminal Appeals. Finally, all substantive issues involved in this habeas action were litigated and fully disposed of long before Summers' appointment as Attorney General.

a. Actual conflict of interest.

Although the petitioner 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 1992, 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 2673 (Tenn. Crim.App., No. 136, 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. See Addenda Nos. 19-26. 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 prior to the case from which petitioner suggests he must be disqualified; and his appointment as Attorney General

occurred long after all substantive issues in this habeas action were tried to and decided by this Court. 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.

Petitioner'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 (No. 1959); *State v. Detroit Motors*, 163 A.2d 227, 231 (N.J. 1950); *Sherplin 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 here 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 his statutory duty as Attorney General to represent the State of Tennessee and its officers in all litigation in the federal courts. Tenn. Code Ann. § 8-6-110. Nor can it be argued that General Summers' previous involvement as an appellate judge on Coe's second post-conviction appeal could possibly affect the outcome of the current case. It is clear from the record that Judge Summers received no confidential information and was not privy to any ex parte communications. His involvement consisted of affirming the summary dismissal of a meritless post-conviction petition nearly a decade ago in another lawsuit that in no way relates to any issue currently in controversy. It is simply 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 a habeas corpus proceeding. 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 the federal district 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.

Petitioner 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, 690 (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).

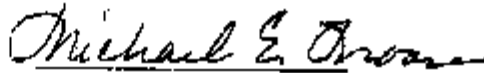
In the current action, it is clear that General Summers has never been privy to any confidential information regarding Robert Glen Coe. Judge Summers' opinion for the Court of Criminal Appeals on Coe's second post-conviction appeal was based solely on the public record, was issued nearly a decade ago,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


exists to either screen General Summers or disqualify any member of his Office.⁴


C. Conclusion.

For the reasons stated, petitioner's Motion to Disqualify should be denied.

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⁴Petitioner's argument that General Summers' current participation creates for his staff a potential divided loyalty between defending his prior judicial decision and maintaining independence in the habeas action borders on the absurd. The Office's position in this habeas action has at all times been entirely consistent with the decision, and at no time during the pendency of the habeas action did the Attorney General's Office question the correctness of the post-conviction opinion. 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.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by hand-delivery to Henry A. Martin and Paul R. Bottei, Federal Public Defender's Office, 610 Broadway, Suite 200, Nashville, TN 37203 and James H. Walker, 601 Woodland Street, Nashville, TN 37206 on this the 6th day of December, 1999.



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