

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

**FILED**

December 9, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

ROBERT GLEN COE,  
Respondent,

V.

STATE OF TENNESSEE,  
Movant.

)  
)  
)  
)

)  
)  
)

No. M1999-01313-SC-DPE-PD

**ORDER**

On November 29, 1999, the State of Tennessee filed a Motion to Set Date for Execution in the case of the respondent, Robert Glen Coe. Thereafter, on December 6, 1999, the respondent filed three motions, including a Motion to Disqualify Attorney General Paul G. Summers & the Office of the Attorney General, a Motion to Strike the State's motion to set an execution date, and a Motion for Extension of Time. On December 7, 1999, the State filed its Reply to Respondent's Motions.

Upon due consideration, it is hereby ORDERED, ADJUDGED and DECREED by this Court that the respondent's Motion to Disqualify Attorney General Paul Summers from this case is GRANTED, that the Motion to Disqualify the Entire Office of the Attorney General is DENIED, that the Motion to Strike is DENIED, and that the respondent's motion for an extension of time is DENIED.

The result of the Court's action is that the case shall proceed with the State to be represented by the staff of the Attorney General, and that Coe, the respondent, continues to be required to answer the motion to set a date for execution by the original deadline of Thursday, December 9, 1999.

The respondent's Motion to Disqualify the Attorney General and his office notes that the Attorney General, Paul Summers, previously acted in a judicial capacity in the respondent's case when, while serving as a judge of the Court of Criminal Appeals, he authored an opinion affirming the dismissal of the respondent's second post-conviction petition and setting an execution date. See State v. Robert Glen Coe, CCA No. 138 (Tenn. Crim. App., Jackson, Jan. 16, 1991). The respondent's Memorandum filed in support of the Motion to Disqualify also notes that, because General Summers' previous involvement as a judge of the Court of Criminal Appeals created the potential for impropriety in certain cases under Supreme Court Rule 8, DR 9-101(A)<sup>1</sup> and other ethical guidelines, on January 14, 1999, the Office of the Attorney General implemented a policy of screening General Summers from all criminal appeals and matters upon the merits of which he acted in a judicial capacity as a judge of the Court of Criminal Appeals.® Exhibit B to Respondent's Memorandum in Support of Motion (Intra-Office Memo, Office of the Attorney General, dated January 14, 1999).

This policy was previously brought to the Court's attention during the appeal in State v. Bondurant, \_\_\_ S.W. 2d \_\_\_ (Tenn. 1999), when the defendant in that case filed a Motion to Disqualify the Office of the Attorney General because General Summers had served on the panel of the Court of Criminal Appeals that had reviewed the defendant's conviction and sentence. In Bondurant the State filed a response opposing the Motion to Disqualify. In support of its response the State set out the details of the screening policy it had adopted. The State represented to this Court that General Summers had recognized the impropriety of participating in cases in which he had previously acted in a judicial capacity and had recused himself from participating in any decision-making, recommendations, advice or approval in all cases and matters upon the merits of which [he] acted in a judicial capacity as a Judge of the Court of Criminal Appeals.® Delegation of Authority (signed by Paul G. Summers, effective January 8, 1999). Furthermore, the State represented to the Court that the Office of the

---

<sup>1</sup> **DR 9-101. Avoiding Even the Appearance of Impropriety. B (A) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.**

Attorney General had adopted screening procedures requiring the identification of all cases in which General Summers had acted in a judicial capacity. An intra-office memorandum submitted by the State disclosed that all members of the staff of the Criminal Justice and Enforcement Divisions had been instructed not to discuss any of these cases in the presence of General Summers. Finally, it was represented to the Court that General Summers had delegated authority to act in his behalf to Michael Moore, Solicitor General. Relying upon these representations, this Court denied Bondurant's Motion to Disqualify the Office of the Attorney General. See State v. Bondurant, S.Ct. No. 01S01-9804-CC-00064 (order filed March 9, 1999).

In the present case, the respondent alleges that General Summers' participation in the earlier appeal creates both a conflict of interest and an appearance of impropriety requiring his disqualification from the case under State v. Tate, 925 S.W.2d 548 (Tenn. Crim. App. 1995). In addition, the respondent has moved that the entire Office of the Attorney General be disqualified from the case because General Summers' participation in the proceedings to set an execution date for the respondent creates a conflict of interest for the entire office under Tate.

Additionally, the respondent moves that the Court strike all pleadings filed on behalf of the State under the supervision of General Summers, including the November 29, 1999, motion to set an execution date. The respondent also requests an extension of time to respond to the Motion to Set Date for Execution upon the Court's resolution of the motions to disqualify and to strike.

In response, the State alleges that there is no existing case or controversy from which to disqualify General Summers or his office and that the Motion to Set Date for Execution was merely an administrative act. In addition, the State alleges that no ethical or legal grounds exist to disqualify General Summers under State v. Tate since he has no actual conflict of interest and has received no ex parte or confidential information as a result of his role in the earlier appeal. The State further alleges that, because there is no danger of the disclosure of confidential information, the entire Office of the Attorney General should not be disqualified.

Upon due consideration, it appears to the Court that no actual conflict of interest exists regarding General Summers' participation in this case. However, in light of the stated policy of the Office of the Attorney General screening General Summers from any matter upon the merits of which he had acted in a judicial capacity and considering Disciplinary Rule 9-101(A), and in light of the representations made to this Court by the State in State v. Bondurant, the participation of General Summers in the proceedings against the respondent creates an appearance of impropriety that requires his disqualification. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the respondent's Motion to Disqualify Attorney General Paul Summers from this case is GRANTED.

It further appears to the Court that under the circumstances of this case the entire Office of the Attorney General should not be disqualified. General Summers' prior judicial actions did not involve ex parte or confidential matters, and thus his participation in the present proceedings against the respondent imparted no confidential information to the staff of the Office of the Attorney General and entailed no risk of disclosing confidential information to the staff. Disqualification of the governmental office in which a disqualified lawyer works is necessary only when an actual conflict exists or when there is a risk of the disclosure of confidential information. See State v. Tate, 925 S.W.2d at 556; State v. Mattress, 564 S.W.2d 678, 680 (Tenn. Crim. App. 1977). Therefore, upon due consideration, the Motion to Disqualify the Entire Office of the Attorney General is hereby DENIED.

It further appears to the Court that, as part of the screening policy implemented by the Office of the Attorney General, authority to act on behalf of General Summers in cases like the present one was delegated to Michael Moore, Solicitor General. All prior pleadings filed in the instant case by the Office of the Attorney General have been signed either by Michael Moore or other members of the staff of the Office of the Attorney General. Accordingly, there are no grounds to strike pleadings previously filed with this Court by the Office of the Attorney General. Therefore, upon due consideration, the respondent's Motion to Strike is hereby DENIED.

Finally, the respondent is DENIED an extension of time to file his response to the State's Motion to Set Date for Execution. The response shall be filed on or before Thursday, December 9, 1999.

FOR THE COURT:

---

Riley Anderson, Chief Justice