

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

ROBERT GLEN COE,	)	
	)	
Petitioner,	)	
	)	
v.	)	NO. 3:92-0180
	)	JUDGE NIXON
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

**MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION  
TO DISQUALIFY THE OFFICE OF THE ATTORNEY GENERAL**

Through counsel, petitioner Robert Glen Coe respectfully submits that Attorney General Paul G. Summers of the State of Tennessee suffers from an irreconcilable conflict in this matter; that his continued participation creates an appearance of impropriety and violates the Local Rules of the U.S. District Court for the Middle District of Tennessee, and State v. Tate, 925 S.W.2d 548 (Tenn.Cr.App. 1995); that the appearance of impropriety is heightened given the intense public scrutiny of this matter; and that General Summers' continued participation in this matter has created a conflict for the entire Office of the Attorney General.

To remedy this conflict, the petitioner moves this Court to disqualify General Summers and the Office of the Attorney General from any further participation in this case, to strike any pleadings filed on behalf of the State of Tennessee under the supervision of General Summers, and to provide any other relief to which Robert Glen Coe may be entitled.

## FACTS

### I. Purported Conflict-Avoidance Procedures in the Office of the Attorney General

On January 8, 1999, Paul G. Summers was sworn in as Attorney General and Reporter for the State of Tennessee. Anticipating that Attorney General Summers' former employment as a judge on the Court of Criminal Appeals would create conflicts for him, the Attorney General's Office issued several memoranda to its employees outlining procedures to follow in conflict cases. The Office of the Attorney General also has internal "Ethics Guidelines," including a supplement which explains "How To Build a Chinese Wall" in conflict cases requiring that an attorney be screened from participation. The Supplement further indicates that in cases where a "Chinese Wall" cannot be built, "the Office may have to consider having outside counsel sought for the client on the matter or litigation."

As part of the screening procedures, Attorney General Summers signed a "Delegation of Authority" indicating that he would recuse himself "from participating in any decision-making, recommendation, advice or approval in all cases and matters upon the merits of which I acted in a judicial capacity as a Judge on the Court of Criminal Appeals . . . I further delegate authority to act in these matters to Michael E. Moore, Solicitor General of the State of Tennessee."

### II. Attorney General Summers' Participation in the Robert Glen Coe Litigation

On January 16, 1991, the Court of Criminal Appeals at Jackson issued an opinion in State v. Robert Glen Coe, CCA No. 138, 1991 WL 2873, in which the appellate court rejected the defendant's requests for relief. The author of the opinion was Judge Paul G. Summers. He had previously signed an order granting a stay of execution.

In his subsequent capacity as Attorney General and Reporter for the State of Tennessee, Paul

Summers personally reviewed and signed the "Response of Respondent-Appellant/Cross-Appellee to Motion to Reconsider and/or Rehear and to Continue Stay of Mandate in Light of Intervening Circumstances" filed at the U.S. Court of Appeals for the Sixth Circuit, on behalf of the State of Tennessee, on October 7, 1999. Attorney General Summers personally reviewed and signed the "Motion to Reconsider and Vacate Order Granting Stay of Execution" filed at the Supreme Court of Tennessee, on behalf of the State of Tennessee, on October 13, 1999. He also appeared on behalf of the Respondent in this Court on November 19, 1999, at which time Petitioner noted possible ethical problems with General Summers' participation.

During a press conference on Tuesday, October 5, 1999, Attorney General Summers stated to members of the television, radio, and newspaper media:

*These were heinous crimes. In each of these cases, a jury heard the evidence and decided a death sentence was appropriate. Those judgments have been upheld throughout the appellate process, and we intend to carry out those judgments and the law of the State of Tennessee.*

(emphasis added), Kirk Loggins, Workman, Coe Denied Appeals, The Tennessean, October 5, 1999, at 1A, 2A. Attorney General Paul Summers has made further public comments on other occasions as well.

Robert Glen Coe's case has received intense public scrutiny in Tennessee and has received heavy coverage by the media, including televised excerpts from the press conferences held by Attorney General Paul Summers.

### LAW

Attorneys appearing before the U.S. District Court for the Middle District of Tennessee must adhere to the standard of professional conduct set forth in the current Code of Professional

Responsibility of the American Bar Association, pursuant to Local Rule 1(e)(4) of the U.S. District Court M.D. Tenn. Attorneys practicing before the state courts of Tennessee must adhere to the same standards, which have been incorporated, by and large, into Rule 8 of the Rules of the Supreme Court of the State of Tennessee.

**I. Attorney General Summers' Prosecution of Robert Glen Coe Creates an Improper Conflict of Interest.**

To determine whether a prosecutor should be disqualified for an alleged conflict of interest, the Court must consider whether the circumstances establish an actual conflict of interest or the appearance of impropriety. In either situation, disqualification is required. State v. Tate, 925 S.W.2d 548, 550 (Tenn. Crim. App., 1995).

**A. An Appearance of Impropriety Arises from General Summers' Participation as Both Judge and Prosecutor.**

"Ethical precepts preclude a former judge from prosecuting a case over which he or she presided, even when there has been no showing of an actual conflict of interest." Id. at 555. An attorney must avoid even the appearance of impropriety and "that 'goes double' for an attorney who has acted a judge." Id.

To protect the integrity of the judiciary, the ethical rules provide specific directives designed to avoid even the appearance of impropriety where judges are involved:

After a lawyer leaves judicial office or other public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility prior to leaving, since to accept employment would give rise to the appearance of impropriety even if none exists.

Sup. Ct. R. 8, Ethical Consideration 9-3. Thus, a judge who has had substantial responsibility<sup>1</sup> in a criminal matter should not "later assume the function of prosecutor on the same charges. . . . A former judge who, in his previous capacity, had undertaken substantial responsibility in the disposition of a case, and who later supervises the prosecution of that individual, gives rise to the appearance of impropriety." Tate, 925 S.W.2d at 555, 557.<sup>2</sup>

Here, Attorney General Summers' participation creates an appearance of impropriety violating the ethical standards in this Court and those established by the Supreme Court of Tennessee. As the author of the 1991 opinion of the Court of Criminal Appeals in State v. Robert Glen Coe, Attorney General Summers undertook substantial responsibility in the disposition of the case as a neutral and impartial member of the judiciary. Yet since his appointment as the Attorney General for the State of Tennessee, Attorney General Summers has supervised the prosecution team and maintained a public profile as the Attorney General seeking the execution of Robert Glen Coe. Because Attorney General Summers had substantial responsibility in the 1991 appellate court

---

<sup>1</sup> "Substantial responsibility" in this context means "a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transaction or facts in question." State v. Tate, 925 S.W.2d 548, 551 (Tenn. Crim. App. 1995) (quoting ABA Formal Ethics Opinion 342 (1975)).

<sup>2</sup> The principles of the Code of Judicial Conduct, found at Rule 10 of the Tennessee Supreme Court Rules, further explains the inappropriate nature of a former judge's participation in later proceedings. Canon Five of the Code of Judicial Conduct advises that retired judges, pro tempore judges, and continuing part-time judges "shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by the Code of Professional Responsibility." Tenn. Sup. Ct. Rule 10, Canon 5. This portion of Canon Five substantially mirrors language in former Canon Eight, and has been interpreted to mean that "a person who has served in a judicial capacity should not later act as counsel, whether public or private, on the same case or one related to it." Tate, 925 S.W.2d at 552.

decision, and subsequently has supervised the prosecution of Mr. Coe, an appearance of impropriety arises.

In this particular case, the appearance of impropriety is heightened by media attention and General Summers' public profile. General Summers has stated to the media that the death sentence is appropriate for Robert Glen Coe and that it has been upheld throughout the appellate process: "Those judgments have been upheld throughout the appellate process, and we intend to carry out those judgments and the law of the state of Tennessee." Kirk Loggins, Workman, Coe Denied Appeals, The Tennessean, October 5, 1999, at 1A, 2A. The intense public scrutiny and Attorney General Summers' prominence in the media have only served to heighten the appearance of impropriety.

**II. To Remedy the Conflict Attorney General Summers and the Entire Office of the Attorney General Must Be Disqualified.**

**A. Attorney General Summers Must Be Disqualified.**

Because his participation as prosecutor has created the appearance of impropriety, Attorney General Summers must be disqualified from further participation in the prosecution of Robert Glen Coe. The existence of an appearance of impropriety requires disqualification of the offending lawyer. An actual conflict of interest need not be present. See Tate, 925 S.W.2d at 550 (an appearance of impropriety "would also result in a disqualification").

**B. The Entire Office of the Attorney General Must Be Disqualified.**

Whether the disqualification of one district attorney general also requires the disqualification of the entire Attorney General's office is an issue to be determined on a case-by-case basis. Tate, 925 S.W.2d at 557 (citing Formal Ethics Opinion 87-F-111). Given the disregard for any screening

procedures at the Office of the Attorney General, the entire Office of the Attorney General must be disqualified from further participation in this case as a result of the taint caused by Attorney General Summers.

As a general rule, an entire district attorney general's office need not be disqualified "as long as the attorney at issue does not disclose confidences or otherwise participate in the prosecution." State v. Mason, CCA No. 01C01-9603-CC-00103 (Tenn. Crim. App. 1997)(Exhibit 1). In Mason, the attorney, then a public defender, represented the defendant in a preliminary hearing. Shortly thereafter, he obtained employment in the district attorney's office. He did not participate in the prosecution of the defendant in any way and never discussed the defendant's case in the district attorney's office. He had scrupulously followed instructions "not to have any contact with the prosecutors on any case in which the Public Defender was involved." Mason, at page 15. Because the proof demonstrated that district attorney's office had an actual screening procedure in place, and there was no proof that the attorney had shared any information with the prosecutor for the case or participated in any capacity in the prosecution of the defendant, it was not necessary to disqualify the entire district attorney's office. Mason, p. 17.

In stark contrast, in Robert Glen Coe's case, no screening procedure has been employed, and Attorney General Summers has participated as a supervisor, spokesman, and advocate for the State in the prosecution of Mr. Coe. "Because the burden of proof must rest upon the state to establish appropriate screening measures have been taken and because no precautions whatsoever have been taken during the course of the prosecution, the result here is inevitable." Jate, 925 S.W.2d at 557. The failure to screen Attorney General Summers from participation "irretrievably taints those employed in his newer office." Id. To preserve the integrity of the criminal justice system, it is

necessary to require the appointment of an entirely new prosecution team.

Very recently, in State v. Bondurant, the Supreme Court of Tennessee considered whether it was necessary to disqualify the Office of the Attorney General. In that case, based on the State's representations that "General Summers has recused himself from this case in accordance with the screening procedure that has been implemented," the Court determined it was unnecessary to recuse the entire Office. See Order filed March 9, 1999 in State v. Bondurant, No. 01S01-9804-CC-00064 (Exhibit 2).

In Robert Glen Coe's case, the Office of the Attorney General failed to employ its own conflict-avoidance procedures. In January 1999, the Attorney General's Office made an internal determination that DR 9-101 (a) required Attorney General Summers' disqualification in cases in which he had acted as a judge on the merits. See Affidavit of Michael E. Moore in Response To Motion To Disqualify the Office of the Attorney General, notarized on January 25, 1999, paragraph 5 (Exhibit 3). An internal memorandum implemented screening procedures for the Attorney General's Office. See Memorandum from Solicitor General Michael E. Moore, Re: Screening Procedures for Incoming Attorney General Paul G. Summers, dated January 14, 1999 (Exhibit 4). These procedures included excluding Attorney General Summers "from all criminal appeals and matters upon the merits of which he acted in his judicial capacity as a Judge of the Court of Criminal Appeals." Id. Moreover, Attorney General Summers completed a "Delegation of Authority" in which he stated the following:

**□ I RECUSE myself from participating in any decision-making, recommendations, advice or approval in all cases and matters upon the merits of which I acted in a judicial capacity as a Judge of the Court of Criminal Appeals.**

**I further DELEGATE authority to act in these matters to**



Michael E. Moore, Solicitor General of the State of Tennessee,  
effective the 8th day of January, 1999.

See Delegation of Authority (Exhibit 5).

The internal guidelines imposed by the Attorney General's office required Attorney General Summers, as the author of the 1991 opinion Court of Criminal Appeals in State v. Coe, to recuse himself from participation on the case, and required the implementation of the internal screening procedures by the Office of the Attorney General to prevent the appearance of impropriety from arising. Instead of implementing screening procedures or recusing himself, however, Attorney General Summers introduced himself into Robert Glen Coe's case in a very public way. Attorney General Summers affixed his signature atop the rest of the State's attorneys. He held press conferences covered by state and local media discussing Robert Glen Coe's case.

Merely excluding Attorney General Summers from participation, and allowing the Office of the Attorney General to remain involved, would not remedy the conflict or the appearance of impropriety which has been created. Through Attorney General Summers' opinion issued as a judge on the Court of Criminal Appeals, and through the press conferences and participation in the current prosecution, Attorney General Summers has made clear to his Assistants his position on the prosecution and execution of Robert Glen Coe. Any Assistant Attorney General who might take charge upon the recusal of Attorney General Summers nevertheless would be discouraged from conceding error or taking a position different than that already articulated by Attorney General Summers. Should the Office of the Attorney General remain involved, the loyalty of the Assistants would be divided between the interests of their employer, Attorney General Summers, and their duty as a prosecutor "to seek justice, not merely to convict." See Sup. Ct. R. 8, EC 7-13 Tate, 925 S.W.2d


at 555 (citing Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935)).

**WHEREFORE**, for the above-stated reasons, petitioner Robert Glen Coe respectfully requests that Paul G. Summers and the Office of the Attorney General and Reporter be disqualified from further participation in this prosecution. The petitioner further requests that this court grant him any and all other relief to which he may be entitled.

Respectfully Submitted,

Henry A. Martin  
Federal Public Defender  
Paul Borrei  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
810 Broadway, Suite 200  
Nashville, TN 37203  
(615) 736-5047

James H. Walker  
Attorney at law  
601 Woodland Street  
Nashville, TN 37206  
(615) 254-0202

By: 

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to Glenn R. Pruden, Assistant Attorney General, 425 5th Avenue, North, Nashville, TN 37243, on this the 24 day of November, 1999.

