IN THE CRIMINAL COURT OF TENNESSEE
FOR THE 30th JUDICIAL DISTIRCT, AT MEMPHIS
DIVISION I

Filed 10-29-21
Heidi Kuhn, Clerk
BY _____ D.C.

PERVIS PAYNE, Petitioner	)	
	)	Nos. 87-04409 and 87-04410
v.	)	Capital Case
	)	Intellectual Disability Claim
STATE OF TENNESSEE, Respondent.	)	T.C.A. § 39-13-203(g)

ORDER DENYING PETITIONER'S MOTION TO DISQUALIFY SHELBY COUNTY DISTRICT ATTORNEY GENERAL'S OFFICE

I. Introduction

This matter came before the Court October 15, 2021, for a hearing on the above-referenced motion, filed with the Court October 8, 2021. The Petitioner argues the Shelby County District Attorney General's Office should be disqualified from this case because the Assistant District Attorney General representing the State in this matter, Steve Jones, formerly served as a Capital Case Attorney with the state court system while Mr. Payne's post-conviction petition and petition for writ of error coram nobis were pending before this Court.[1] The Petitioner argues the possibility Mr. Jones was exposed to confidential information and judicial deliberative processes during his former employment at the very least creates an appearance of impropriety that necessitates both Mr. Jones's disqualification and the disqualification of the entire Shelby County District Attorney General's Office.

[1] The Hon. Bernie Weinman, former Judge of Division I, presided over Mr. Payne's trial, post-conviction proceedings, and coram nobis matter. Judge Weinman retired in 2004, and the undersigned Judge has presided over Division I since then.

Having conducted a hearing, and in consideration of the arguments of counsel, the relevant authorities, and the record as a whole, the Court concludes the Petitioner has failed to establish Mr. Jones worked personally and substantially on Mr. Payne's case during Mr. Jones's time as a capital case attorney, nor has the Petitioner established Mr. Jones, during his former employment, learned confidential information or other information that would otherwise require disqualification. Accordingly, neither Mr. Jones nor his office shall be disqualified from this case. The Petitioner's motion is DENIED.

II. Overview of Tennessee Court System's Capital Case Attorneys

At the hearing on Petitioner's disqualification motion, counsel for neither side addressed the role of the capital case attorney in detail. The Court takes judicial notice of the July 2004 report "Tennessee's Death Penalty: Costs and Consequences," published by the Tennessee Comptroller's Office. In the 2004 Comptroller's report, the authors noted, in relevant part:

> In 1996, the Tennessee Supreme Court requested and the General Assembly funded the capital case attorney program, part of several initiatives to limit judicial delays. The state funds one attorney for each of the five Supreme Court Judicial Districts. The trial judges in each district hire and supervise the attorneys. The attorneys may assist judges in capital trial and post conviction proceedings and some of their responsibilities include attendance at pretrial hearings, assistance with drafting jury questionnaires, attendance at hearings regarding motions for new trials, and drafting orders granting or denying the motion.

2004 Comptroller's Report, at 17. This Court would note that in the years since the publication of the report, the number of capital case attorney positions has been reduced; since September 2015, only two capital case attorneys have been employed by the court system.

III. Findings of Fact

No witnesses testified at the October 15 motion hearing. The following findings of fact result from this Court's review of records maintained by the Criminal Court Clerk and one late-filed exhibit introduced after the October 15 hearing.

A. Mr. Payne's Post-Conviction and Coram Nobis Proceedings

Mr. Payne filed a timely post-conviction petition in January 1992. An interlocutory appeal stayed proceedings in this Court between April 1992 and November 1995. After the case was remanded to this Court, the evidentiary hearing was held August 29-30, 1996. Judge Weinman issued an order October 10, 1996, denying post-conviction relief.

Mr. Payne also filed a petition for writ of error coram nobis. The State filed a motion to dismiss the coram nobis petition on December 6, 1996. Judge Weinman held a hearing on the State's motion January 9, 1997, and he issued an order dismissing the coram nobis petition February 10, 1997.

B. Mr. Jones's Employment as Capital Case Attorney

Mr. Jones's judicial department employment file was introduced as a late-filed exhibit to the October 15 hearing. The employment records reflect Mr. Jones began work as a law clerk to Judge Joe B. Jones of the Tennessee Court of Criminal Appeals on August 1, 1994. Mr. Jones spent two years working as a law clerk to Judge Jones. At some point in 1996, Mr. Jones began employment as one of the state court system's five capital case attorneys. A "request for personnel action" generated by the Tennessee

Department of Personnel (now Human Resources) indicates a "date appointed to present class" of November 1, 1996, suggesting Mr. Jones's employment as capital case attorney may have begun on that date. However, based on the assertions of the parties at the October 15 hearing, the capital case attorney positions may have been filled in the summer of 1996. Another "request for personnel action" indicates that on October 21, 1998, Mr. Jones began employment with the District Attorney General's Conference, assigned to the Shelby County District Attorney General's Office. He has remained so employed since then.

IV. Arguments of Counsel from October 15 Hearing

At the hearing Kelly Henry, Petitioner's lead counsel, asserted that before filing the current intellectual disability petition, she scheduled a meeting with Mr. Jones to let his office know such a petition would be filed after the General Assembly amended the intellectual disability statute to include post-conviction intellectual disability claims. When Ms. Henry arrived for the meeting, Leslie Byrd, another assistant district attorney who like Mr. Jones is a former capital case attorney, was present. Ms. Henry claimed she asked Ms. Byrd whether she had a conflict, as she [Byrd] had worked on Mr. Payne's case while employed with the judicial department. According to Ms. Henry, Ms. Byrd replied she had not worked on any of Mr. Payne's prior intellectual disability claims. According to Ms. Henry, Mr. Jones said Ms. Byrd was present only because he wanted a witness present at the meeting. Ms. Henry claims Mr. Jones did not tell her (Henry) at the time about his former employment as a capital case attorney.

According to Ms. Henry, Ms. Byrd did not appear at any subsequent meetings between Ms. Henry and Mr. Jones. Ms. Henry did notice a subsequent email referencing

a person named "Leslie," which led Ms. Henry to ask for written documentation as to whether Mr. Jones's office had created an "ethics screening" to prevent Ms. Byrd from working on the Petitioner's case. Mr. Jones sent a reply email, attached as an exhibit to Petitioner's motion, in which he stated, "Neither she [Byrd] nor I handle any cases for this office on which we worked as Capital Case Staff Attorneys." This led Ms. Henry to review her files in other cases; she located a 2017 deposition Mr. Jones gave in the federal habeas corpus case of Shelby County death row inmate David Ivy in which Mr. Jones acknowledged serving as a capital case attorney between 1996 and 1998.

Ms. Henry asserted that capital case attorneys are experts who conduct specialized functions, and trial courts rely "heavily" upon them to provide guidance. Because capital case attorneys learn information which would not be available to state prosecutors (such as ex parte proceedings involving criminal defendants and petitioners and judicial thought processes), the Petitioner reasons, Mr. Jones's serving as a capital case attorney during the time Mr. Payne's post-conviction and coram nobis claims were pending created at the very least an appearance of impropriety. Although acknowledging Mr. Jones's claims he did not work on Mr. Payne's case while serving as a capital case attorney, Ms. Henry argued the issue was not whether he (Jones) had drafted any orders in this matter, but whether he had learned any information about this case.

Ms. Henry asserted she visited Judge Weinman at his residence and asked about whether Mr. Jones assisted the Court on Mr. Payne's post-conviction and coram nobis cases. According to Ms. Henry, Judge Weinman responded that he was 87 years old and did not remember much about Mr. Payne's post-conviction case. Thus, Ms. Henry did not call Judge Weinman as a witness at the October 15 hearing.

Responding for the State, Mr. Jones asserted he had told Ms. Henry about his

work as a capital case attorney even before Mr. Payne's current intellectual disability petition was filed. He also claimed that at the initial meeting, he told Ms. Henry that Ms. Byrd would not be working on Mr. Payne's intellectual disability case because she had worked on the Petitioner's case as a capital case attorney.

Mr. Jones stated he did not work on Mr. Payne's post-conviction and coram nobis cases during the time they were pending in Division I. He explained that at the time of his employment as capital case attorney, trial judges were responsible for contacting him if they requested assistance. According to Mr. Jones, most of the judges in West Tennessee at the time of his judicial department employment did not request his assistance. He specifically denied working with Judge Weinman in Mr. Payne's case; Mr. Jones said he may have "tracked" the case, but that would have been the extent of his work on this case. He said that at some point during his judicial employment, capital case attorneys became responsible for compiling monthly reports on the procedural statuses of all death penalty cases in the state court system.

He specifically recalled working on several Shelby County cases, including that of David Keen (who has filed an intellectual disability petition in Division VIII; Mr. Jones said he is not working on Mr. Keen's current petition), John Bane, and Michael Sample. He recalled working on one or more cases with the late Judge James Beasley, Jr. (former Judge of Division X), one or more cases with Judge Chris Craft (Division VIII), and several cases with Judge Joseph Dailey (former Judge of Division V, who presided over most capital cases at the time of Mr. Jones's employment with the judicial department). Mr. Jones said he did not recall working with Judge Weinman during his (Jones's) court system employment.

In response, Ms. Henry disputed Mr. Jones's claim that he had told her about his

former employment with the judicial department before the current petition was filed. She also argued that the Shelby County prosecutors should have created written screening mechanisms for situations such as the one in the current case and filed such reports with the Court. Ms. Henry reiterated that in the Petitioner's view, it mattered little whether Mr. Jones produced any previous work product in this case; it only mattered whether he had been exposed to information related to this case while employed with the court system. Ms. Henry added that the prosecutors' failure to address potential conflicts adequately, including those potentially involving Ms. Byrd, had created a "pall" over the case and created issues that did not need to exist.

IV. Analysis

A. General Principles

"In determining whether to disqualify an attorney in a criminal case, the trial court must first determine whether *the party questioning the propriety of the representation* met its burden of showing that there is an actual conflict of interest." *State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003) (emphasis added). Although the *White* opinion was filed before the current Rules of Professional Conduct were enacted, appellate opinions addressing the disqualification of a prosecutor's office continue to cite to this standard. *See, e.g., State v. Rhasean Lowry*, No. E2019-00113-CCA-R3-CD, 2020 WL 1873477 (Tenn. Crim. App. Apr. 15, 2020), *perm. app. denied*, (Tenn. Sept. 16, 2020); *State v. Perry Lewis Sisco*, No. M2017-01202-CCA-R3-CD, 2018 WL 1019870, at *9 (Tenn. Crim. App. Feb. 21, 2018), *perm. app. denied*, (Tenn. May 17, 2018).

As relevant to the current matter, Rule 1.12(a) of the Tennessee Rules of Professional Conduct provides,

> [A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk or staff attorney to such a person or as an arbitrator, unless all parties to the proceeding give informed consent, confirmed in writing.

Tenn. Sup. Ct. R. 8, RPC 1.12(a).

Rule 1.12(c) provides,

> If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless both the disqualified lawyer and the lawyers representing the client in the matter have complied with the requirements set forth in RPC 1.11(b)(1), (b)(2), and (b)(3) and have advised the appropriate tribunal in writing of the circumstances that warranted the utilization of the screening procedures required by this Rule and the actions that have been taken to comply with this Rule.

Tenn. Sup. Ct. R. 8, RPC 1.12(c).

Rule 1.11, cross-referenced in Rule 1.12(c), relates to "Special Conflicts of Interest for Former and Current Government Officers and Employees." Rule 1.11(b)(1)-(3) provides,

> When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless both the personally disqualified lawyer and the lawyers who are representing the client in the matter act reasonably to:
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> (1) ascertain that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and
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> (2) determine that no lawyer representing the client has acquired any material confidential government information relating to the matter; and
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> (3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers in the firm[.]

Tenn. Sup. Ct. R. 8, RPC 1.11(b)(1)-(3).

Rule 1.11(e) defines "matter" as "(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation,

charge, accusation, arrest, or other particular matter involving a specific party or parties; and (2) any other matter covered by the conflict of interest rules of the appropriate government agency." Tenn. Sup. Ct. R. 8, RPC 1.11(e)(1)-(2).

In addressing appearances of impropriety and whether a disqualified prosecutor's conflict of interest should be imputed to the entire District Attorney General's office, Tennessee's appellate courts have long concluded—even before the current Rules of Professional Conduct were instituted—that "a prosecutor's disqualification need not be imputed to the 'entire district attorney general's office . . . so long as the attorney at issue does not disclose confidences or otherwise participate in the prosecution.'" *State v. Coulter*, 67 S.W.3d 3, 32 (Tenn. Crim. App. 2001) (emphasis in original deleted, quoting *State v. Tate*, 925 S.W.2d 548, 556 (Tenn. Crim. App. 1995)); *abrogated in part on other grounds by State v. Jackson*, 173 S.W.3d 401, 407-08 (Tenn. 2005). More recently, the Court of Criminal Appeals has stated "district attorneys general's offices are not subject to" a "per se disqualification rule based upon the appearance of impropriety," because such a rule would "fail[] to consider the primary concern in criminal cases of preventing the disclosure of a defendant's confidential information for the protection of constitutional rights." *State v. Orrick*, 592 S.W.3d 877, 889 (Tenn. Crim. App. 2018) (citing *Coulter*, 67 S.W.3d at 32).

Instead, "When considering disqualification [of an entire office] in a criminal case, '[t]he trial court's determination requires an inquiry into whether the prosecutor who has the conflict of interest has participated in the ongoing prosecution, including the disclosure of any confidences, and whether the prosecution has established that the prosecutor has been screened from the prosecution.'" *State v. Thomas Paul Odum*, No.

E2017-00062-CCA-R3-CD, 2017 WL 5565629, at *8 (Tenn. Crim. App. Nov. 20, 2017)[2] (alteration added; quoting *State v. Davis*, 141 S.W.3d 600, 613 (Tenn. 2004)). "The implementation of screening procedures usually resolves the problems pertaining to actual conflicts or the appearance of impropriety." *Odum*, 2017 WL 5565629, at *8 (citing *Tate*, 925 S.W.2d at 556)).

Thus, the Court agrees with the Petitioner that any member of the Shelby County District Attorney General's Office who worked on any portion Mr. Payne's case "personally and substantially" while employed as a staff attorney would be disqualified from working on Mr. Payne's current intellectual disability claim, even if the prior work did not involve the subject matter of Petitioner's current claim. Ms. Byrd is clearly disqualified under the ethical rules and prevailing case law, and if Mr. Jones worked personally and substantially on the post-conviction and coram nobis proceedings, he would also be disqualified in the current proceedings. Given Mr. Jones's work on Mr. Payne's case over the past six months, if Mr. Jones were disqualified, this Court would likely conclude the entire Shelby County District Attorney General's Office would be disqualified.

B. The Term "Personally and Substantially"

Tennessee's appellate courts have not had the opportunity to define the term "personally and substantially" as it appears in RPC 1.12. This Court observes that the New Jersey Supreme Court, in the appeal of a divorce case in which a law clerk for the judge presiding over the case went to work for one of the litigants' law firms before the divorce matter concluded, offered this assessment of the "personal and substantial"

[2] The Tennessee Supreme Court denied application for permission to appeal in *Odum* on February 15, 2018).

language as it applied to a New Jersey ethical rule which resembled Tennessee's RPC 1.12:

> Whether [personal and substantial] participation has occurred ultimately depends on the totality of circumstances in a given case. Relevant to the inquiry is whether the law clerk was involved in the case beyond performing ministerial functions or merely researching general legal principles for the judge. Conduct rising to the level of "personal and substantial" participation would involve a substantive role, such as the law clerk recommending a disposition to the judge or otherwise contributing directly to the judge's analysis of the issues before the court.

Comparato v. Schait, 848 A.2d 770, 775 (N.J. 2004). The law clerk-turned-attorney in *Comparato* had, during her judicial employment, "calendared the motions filed during her tenure and performed other related ministerial tasks." *Id.* Although the New Jersey Supreme Court concluded the attorney had not participated in the divorce case "personally and substantially" during her judicial employment, the attorney's firm proposed, and the appellate court agreed, that the attorney should be screened from the case "not as an admission that an ethical violation had occurred, but to eliminate any potential argument in that respect." *Id.* at 776.

C. Tennessee Cases Involving Judicial Employees Joining Prosecutor's Offices

Both cases addressing judicial employees joining a prosecutor's office predate the enactment of the current lawyer ethical rules. In *Tate*, Knox County Criminal Court Judge Randy Nichols left the bench to become the District Attorney General in the same judicial district after the previous prosecutor died. *Tate*, 925 S.W.2d at 549. While serving as judge, he ruled on several "routine" motions in Mr. Tate's case, and the defendant's attorney filed several ex parte motions while then-Judge Nichols presided over the case. *Id.* After Mr. Nichols became district attorney, Mr. Tate's attorney field a

motion to disqualify the Knox County district attorney's office; during the hearing on that motion, defense counsel recalled "some of the information revealed by defense counsel in the private hearing[s on ex parte motions] had been provided by the defendant or members of his family." *Id.* (alteration added) Once the judge left to become district attorney, "he had as many as four lengthy discussions with the assistant district attorney general assigned to prosecute the defendant." *Id.* At the disqualification hearing, Mr. Nichols and the assistant prosecutor on Mr. Tate's case both asserted any information discussed in those conversations had already been made known to the State before Mr. Nichols left the bench to become district attorney. *Id.* Mr. Nichols also asserted that if, as prosecutor, he revealed to his assistants any information he had encountered in ex parte pleadings and proceedings as judge, such information had been made known to the State previously through other means. *Id.*

The trial judge who replaced Mr. Nichols held a hearing on Mr. Tate's motion, denying it. *Id.* In an interlocutory appeal, however, the Court of Criminal Appeals reversed. The appellate court first observed,

> in his previous capacity as judge, General Nichols was privy to confidential, case-related communications—at least in the sense that the state was not entitled to receive the information. *See State v. Barnett,* 909 S.W.2d 423 (Tenn.1995) ("defendants [seeking expert assistant] . . . should not be required to reveal their theory of defense when [the prosecution] . . . [is] not required to"). By the same rationale used to disqualify a defense attorney who receives a client's confidences and then later desires to assist the prosecution, the trial judge who subsequently becomes the district attorney general should also be disqualified. Conflicts of interest may extend beyond the parties involved in the dispute. Those in the legal profession may "not undertake to discharge inconsistent duties" either. *Mattress v. State,* 564 S.W.2d 678 (Tenn.Crim.App.1977).

Tate, 925 S.W.2d at 554 (alterations in original).

After concluding Mr. Nichols had a conflict of interest, the appellate court

concluded the conflict should be imputed to his entire office:

> General Nichols has candidly acknowledged that no attempts had been made to screen his involvement in the prosecution. He has maintained the role of supervisor. On several occasions, he has openly discussed the case with the assistant district attorney or attorneys assigned to undertake the prosecution. Because the burden of proof must rest upon the state to establish that 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. 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. When, as judge, the district attorney received confidential information, even if not prejudicial to the defense, there is an actual conflict. The failure to later screen himself from participation irretrievably taints those employed in his newer office.
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> [. . . .]
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> In these particular circumstances, the more cautious approach is to disqualify the office and appoint an entirely new prosecution team. That preserves the integrity of the criminal justice system. No screening measures have been taken. There is a presumption of shared confidences.

Id. at 557-58 (alteration added).

In another case more analogous to Mr. Payne's current motion, early in one Davidson County death penalty case the trial judge's law clerk attended "one or two ex parte hearings regarding this case." *State v. Davis*, 141 S.W.3d 600, 612 (Tenn. 2004). Before the cases of Mr. Davis and his codefendant went to trial, the law clerk, Philip Wehby, was hired by the Davidson County District Attorney General's Office. *Id.* The codefendants filed a motion to disqualify the Nashville district attorney's office; at the hearing on the motion, Mr. Wehby "testified that he did not work on this case after being hired by the District Attorney General and that he had never discussed the case with anyone in the office." *Id.* Mr. Wehby also testified "he was unaware of any written policies in the District Attorney General's office regarding conflicts of interest," but "it was 'understood' that he was to have no involvement in this prosecution and . . . he had

no knowledge where the case file in this case was kept." *Id.* The trial court denied the defendants' motion. *Id.* at 613. On appeal, the Tennessee Supreme Court concluded the Nashville District Attorney General's office was not precluded from prosecuting the case:

> In our view, [. . .] the trial court properly exercised its discretion in refusing to disqualify the District Attorney General's office in the present case. The evidence revealed that Wehby had worked as a law clerk for the trial court and had attended "one, maybe two" ex parte hearings involving the trial judge and defense counsel. The trial court specifically found that his "level of involvement while a law clerk was at most minimal." Indeed, there was no evidence as to what was discussed at the hearings and no showing that Wehby had a substantial relationship to these proceedings.
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> In addition, after being employed by the District Attorney General, Wehby did not participate in the prosecution of this case, did not have any discussions about the prosecution of this case, and did not share or reveal any information with those who were prosecuting this case. As the trial court noted, Wehby had "not discussed the case with anyone within the office" and had "no access to the case file, which [was] apparently kept separate from the office's other files." Moreover, although Wehby was not aware of a formal screening procedure in the District Attorney General's office, he testified that it was understood he was to have no contact or involvement with this ongoing prosecution.
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> [. . . .]
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> In . . . this case there was no evidence that Philip Wehby had a substantial role as a law clerk for the trial judge in the defendant's case, that he "switched sides" in the defendant's case, that he received confidential information, that he revealed confidential information, or that he participated in the prosecution of Davis. The undisputed evidence is that Wehby was effectively screened from this case after his employment with the District Attorney General and that he had no involvement or communications regarding this case.

Id. at 614-15 (alterations added).

D. Application to Present Case

At the October 15 hearing counsel for the Petitioner raised concerns over Leslie Byrd's potential involvement in the current intellectual disability proceedings. However, Petitioner's written motion to disqualify and Mr. Payne's response to the State's answer

focused exclusively on Petitioner's claims concerning Steve Jones's potential work on Mr. Payne's case while Mr. Jones served as capital case attorney. Therefore, this Order will address only those claims relating to Mr. Jones.

At the October 15 hearing, Mr. Jones asserted that while he served as capital case attorney, he did not assist Judge Weinman on Mr. Payne's case as capital case attorney while the case was pending in Division I. Petitioner has not presented proof to suggest otherwise. Nor was any proof introduced at the October 15 hearing suggesting Mr. Jones had otherwise obtained confidential information regarding Mr. Payne's case while Mr. Jones served as a capital case attorney. No testimony was offered at the October 15 hearing, and Mr. Jones's court system personnel file contains no information about the cases on which he worked while serving as capital case attorney. Nor does the personnel file contain information about the nature of Mr. Jones's work while so employed. Mr. Jones suggested he may have "tracked" Mr. Payne's case during his judicial department work; while Mr. Jones did not define the term precisely, he did note that later in his employment with the judicial department capital case attorneys were tasked with tracking the procedural progress of each capital case as it went through the state court system, regardless of whether the staff attorney assisted the trial judge in a particular case. If Mr. Jones's "tracking" of Mr. Payne's case while serving as capital case attorney meant monitoring the procedural progress of the case, this Court finds such work does not constitute "personal and substantial" work within the meaning of the Rules of Professional Conduct. For a former law clerk, staff attorney, or employee with similar responsibilities, the Court finds persuasive the New Jersey Supreme Court's assessment that "'personal and substantial' participation would involve a substantive role, such as the law clerk recommending a disposition to the judge or otherwise contributing directly to

the judge's analysis of the issues before the court." *Comparato*, 848 A.2d at 775. The Petitioner has failed to establish Mr. Jones offered such assistance in Mr. Payne's case.

Because the Petitioner has failed to establish Mr. Jones performed personal and substantial work on Mr. Payne's case while serving as capital case attorney, or that Mr. Jones otherwise received confidential case information during his employment as capital case attorney, the Petitioner has failed to establish Mr. Jones should be disqualified from working on the case as a member of the Shelby County District Attorney General's Office.

Because Mr. Jones is not disqualified from working on Mr. Payne's case, it follows that there is no reason why his employer should be disqualified from representing the State in this case. The Petitioner argues the continued participation of Mr. Jones and the Shelby County prosecutors creates an appearance of impropriety that should lead the Court to disqualify both. However, in one oft-cited opinion regarding the imputation of an attorney's disqualification to an entire law firm, the Tennessee Supreme Court stated,

> The appearance of impropriety standard is not amorphous. There are subtle, but identifiable, contours of the rule that aid in its application. First, the mere possibility of impropriety is insufficient to warrant disqualification. It cannot be a fanciful, unrealistic or purely subjective suspicion of impropriety of disqualification. The appearance of impropriety must be real. Second, the standard is objective. Avoidance of the appearance of impropriety is intended to promote public confidence in the legal system. Therefore, objective public perception rather than the subjective and "anxious" perceptions of the litigants governs.

Clinard v. Blackwood, 46 S.W.3d 177, 187 (Tenn. 2001) (internal citations and quotations omitted). Thus, despite the well-intentioned arguments of Petitioner's counsel to the contrary, an objective view of Mr. Jones's former work as capital case attorney during the pendency of Mr. Payne's case in Division I reflects there is no conflict of

interest that would disqualify him from working on this case as an Assistant District Attorney General. Absent a disqualifying conflict of interest on Mr. Jones's part, the Shelby County District Attorney General's Office is similarly not precluded from its continued participation in this case.

V. Conclusion

For the reasons stated above, the Petitioner's motion is DENIED. However, the Court observes that the Shelby County District Attorney General's Office has not complied with Rules of Professional Conduct 1.11(b) and 1.12(c) regarding the composition of written screening measures relative to Ms. Byrd. Nor have such procedures been filed with this Court. Accordingly, the Court ORDERS that the State shall comply with Rules of Professional Conduct 1.11(b) and 1.12(c) within thirty days of the filing of this order. Should the State fail to do so, the Court would be willing to entertain a renewed motion from the Petitioner to disqualify the Shelby County District Attorney General's Office.

IT IS SO ORDERED this the 29 day of Oct, 2021.

Paula Skahan, Judge
Criminal Court, Division I
30th Judicial District, at Memphis