IN THE CRIMINAL COURT OF TENNESSSEE
FOR THE 30TH JUDICIAL DISTRICT, AT MEMPHIS
DIVISION I

PERVIS TYRONE PAYNE,	)	
	)	
Petitioner,	)	
	)	NOS. 87-04409; 87-04410
	)	Capital Case
vs.	)	Intellectual Disability Claim
	)	T.C.A. § 3913-203(g)
STATE OF TENNESSEE,	)	
	)	
Respondent.	)	

MOTION FOR HEARING REGARDING DISQUALIFICATION OF THE SHELBY COUNTY DISTRICT ATTORNEY GENERAL'S OFFICE

Petitioner, Pervis Payne, by counsel, submits the instant motion, requesting that the Court schedule a hearing on the issue of whether the Shelby County District Attorney General's Office possesses a disqualifying conflict of interest. Specifically, the Court should inquire into the conflict of interest of ASCDAG Stephen Jones, a former Capital Case Staff Attorney, and if he is deemed conflicted, whether his participation as counsel in this matter would necessitate the disqualification of the entire Shelby County District Attorney General's office.[1] This motion will set forth the facts as currently known to undersigned counsel, followed

[1] This response is based on Mr. Payne's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § 16 of the Tennessee Constitution.

by points and authorities to guide the Court in its consideration of the matter. As detailed below, Mr. Jones has given sworn testimony in another matter that he was a Capital Case Staff Attorney for two years, from 1996 through 1998. Judge Chris Craft has given sworn testimony in a different matter that Mr. Jones provided legal guidance to the judges of this criminal court regarding death penalty matters when Jones was employed as a Capital Case Staff Attorney. Mr. Payne's post-conviction and error coram nobis proceedings were pending in this court from 1992 through 1997. The facts as presently known create at least the appearance of impropriety that warrants judicial inquiry. Counsel is ethically obligated to bring this issue to the Court upon discovery of the potential conflict.

I. FACTUAL AND PROCEDURAL HISTORY

Mr. Payne initiated post-conviction proceedings in this court on January 12, 1992. From April 20, 1992 to November 1995, proceedings in this court were stayed pending an interlocutory appeal. *See Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). An evidentiary hearing regarding Mr. Payne's post-conviction petition was held August 29-30, 1996. On October 10, 1996, Judge Weinman denied post-conviction relief. The State filed a motion to dismiss Mr. Payne's Petition for Writ of Error Coram Nobis on December 6, 1996. Judge Weinman conducted a hearing on the State's motion on January 9, 1997. On February 10, 1997, Judge Weinman entered an order dismissing the Petition for Writ of Error Coram Nobis.

ASCDAG Stephen Jones testified about his previous work experience in a deposition in federal court in the David Ivy case. Mr. Jones testified to the following:

A: Graduated from law school in 1994.

Q: Okay. And where did you graduate from law school?

A: University of Memphis, Cecil C. Humphreys School of Law.

Q: Upon your graduation from law school where did you go for employment?

A: I worked for Judge Joe B. Jones in the Court of Criminal Appeals as a law clerk for two years.

Exh. A, Excerpt of Deposition of Stephen B. Jones in *Ivy v. Westbrooks*, at 11.[2]

Q: Okay. After your clerkship with Judge Jones, where did you go?

A: I was a staff attorney for trial judges handling death penalty cases in the Western District of Tennessee.

Q: Was that a position funded through the Tennessee Supreme Court?

A: I was hired by the Supreme Court. I presume it was funded through the AOC, which is the Supreme Court, I guess.

Id. at 12.

Q: Okay. And you held that position for how long?

A: Two years.

Q: So that was from '96 to '98? Is that –

A: Correct.

Id. at 13. Additionally, Judge Chris Craft testified in proceedings before the Board of Professional Responsibility:

> [Jones] was hired by the Supreme Court as a capital case attorney to help -- there were five of them hired across the State to help attorneys, help judges with death penalty trials, and that's when I first got to know him, when he was doing detailed work and research on that[.]

[2] The page numbers cited are page numbers from the deposition transcript.

Exh. B, Excerpt of Testimony of Judge Chris Craft in *In Re: Stephen P. Jones*, at 39.

On September 30, 2021, undersigned counsel sent the following email to Mr. Jones: "Will you please confirm in writing that the office has erected an ethics wall in the Payne case with ASCDAG Leslie Byrd due to her pervious employment as the Capital Case Staff Attorney for the courts? Thank you." Exh. C, Sept. 30, 2021 Email Correspondence. Mr. Jones replied: "Yes. Neither she nor I handle any cases for this office on which we worked on as Capital Case Staff Attorneys." *Id.*

On October 4, 2021, undersigned asked her paralegal to obtain information from the Administrative Office of the Courts as to Mr. Jones' employment dates. After the paralegal was referred to the DA's Conference, undersigned counsel called the AOC to obtain information as to Mr. Jones' employment dates. Counsel was informed that Mr. Jones began his term as Judge Jones' law clerk on August 1, 1994. Mr. Jones left the employment of the AOC on October 21, 1998, to join the Shelby County District Attorney General's office. The individual from the AOC was able to find a notation of Mr. Jones as a Capital Case Staff Attorney on February 1, 1997. Undersigned will subpoena Mr. Jones' AOC personnel file to the hearing on this motion.

There appears to be a discrepancy between Mr. Jones' deposition testimony and the information provided orally by staff at the AOC. In either scenario, Mr. Jones was a Capital Case Staff Attorney serving the Shelby County Criminal Courts when at least one substantive order was entered in this case. If Mr. Jones worked two terms for Judge Jones with the terms running from August 1-July 31,

his employment status from August 1, 1996 through February 1, 1997 is unclear, but it is possible that he was employed as a capital case staff attorney during that time and during the post-conviction hearing in this case. There is at least an appearance of impropriety that should be explored.

II. TENNESSEE RPC 1.12 PROHIBITS ANY ATTORNEY FROM ADVOCACY IN CONNECTION WITH ANY MATTER IN WHICH HE PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A JUDICIAL LAW CLERK OR STAFF ATTORNEY

The Tennessee Rules of Professional Conduct – codified in Tennessee Supreme Court Rule 8 – specifically address limitations on former judicial law clerks and court staff attorneys. RPC 1.12 provides that:

> (a) Except as stated in paragraph (d), **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. RPC 1.12(a) (emphasis added); *accord* ABA Model R. 1.12(a) (using identical language to prohibit former law clerks and staff attorneys from representation in matters in which they "personally and substantially" participated).

The term "matter" was previously defined in Rule 1.11, governing "Special Rules for Conflicts of Interests for Current and Former Government Employees," 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. RPC 1.11(e); *accord* ABA Model R. 1.11(e) (containing identical

definition of "matter"). The Commentary to Rule 1.11 confirms that a "'matter' may continue in another form. In determining whether two matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed." Tenn. RPC 1.11, Cmt. [10].

While not specifically addressing former judicial law clerks and/or staff attorneys, this prohibition is mirrored in the relevant ABA standards for prosecutors. Standard 3-1.7(c) of the ABA Criminal Justice Standards for the Prosecution Function, governs conflicts of interest and provides that "[t]he prosecutor should not participate in a matter in which the prosecutor previously participated, personally and substantially, as a non-prosecutor, unless the appropriate government office, and when necessary a former client, gives informed consent confirmed in writing."[3] ABA Crim. Justice Std., Prosecution Function 3.17(a), (g), 4th ed; *see also* Nat'l Dist. Attys Assoc., Nat'l Prosecution Std. 1-3.3(d), 3rd ed. (Rev.) ("The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the

[3] Standard 3.17 further provides:

> (a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place.
>
> . . .
>
> (g) The prosecutor should disclose to appropriate supervisory personnel any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosure to a court or defense counsel should be made, and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure to the court and the defense.

prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised).

A motion to disqualify is the appropriate avenue by which to raise issues relating to disqualifying conflicts of interest and/or representations that give rise to an appearance of impropriety. *See, e.g.*, *Archuleta v. Turley*, 904 F. Supp. 2d 1185, 1193 (D. Utah 2012) ("When the case will be tainted without disqualification, the regularity of judicial proceedings in state court, as well as the integrity and neutrality of the proceedings . . . weigh in favor of granting the motion to disqualify."); *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996) (finding courts may disqualify attorneys not only for acting improperly but also for failing to avoid the appearance of impropriety because courts have responsibility to maintain public confidence in the legal profession); *Kessenich v. Commodity Futures Trading Comm'n*, 684 F.2d 88, 97–99 (D.C.Cir. 1982) (holding a former government lawyer should be disqualified even without evidence that he shared confidential information because of appearance of impropriety); *cf. James v. Teleflex, Inc.*, 1999 WL 98559, at *3 (E.D.Pa. Feb. 24, 1999) ("To further the courts' interests in protecting the integrity of their judgments, maintaining public confidence in the integrity of the bar, eliminating conflicts of interest, and protecting confidential communications between attorneys and their clients, a court has the power to disqualify counsel from representing a particular client").

A. CASE LAW

1. Other jurisdictions

Several court cases from outside of Tennessee are instructive on the interpretation of this rule. Notably, these cases involve state or territory rules of professional conduct with identical or near-identical language for the relevant Rule and definitions. For example, *Hamed v. Yusuf*, 69 V.I. 221 (V.I. Super. Ct. 2018), provides useful guidance on the definition of "personal and substantial"[4] In *Hamed*, a private attorney hired a former law clerk to a superior court judge, bringing the number of lawyers in his practice from one to two. Opposing counsel on one of the private attorney's cases before the judge filed a motion to disqualify both attorneys from the firm based upon Virgin Islands RPC 211.1.12 (virtually indistinguishable from Tenn. RPC 1.12). *Id*. at 223-24. In determining whether the former law clerk participated "personally and substantially" in the matters as a law clerk, the court relied upon *Comparato v. Shait*, 180 N.J. 90, 848 A.2d 770 (N.J. 2004), which interpreted and applied ABA Model Rule 1.12. The court found persuasive the interpretation in *Comparato*, which found that, although the question of personal and substantial participation will depend "on the totality of the circumstances," the most central question was whether the litigation of the relevant matter "was procedural as opposed to substantive in nature at the time of the clerk's involvement." *Id*. at 225-26 (internal quotation marks omitted). As such, relevant inquiries may include whether the law clerk "was involved in the case beyond performing ministerial functions or merely researching general legal principles for

[4] This case also has relevance to the issue of screening and imputed conflicts, discussed in detail *infra*.

the judge" as opposed to having a "substantive role," such as "recommending a disposition to the judge or otherwise contributing directly to the judge's analysis of the issues before the court." *Id*. at 226.

The court thus considered the totality of circumstances regarding his former law clerk's participation in the disputed matter: one the one hand, she primarily performed ministerial functions and research on general legal principles, and she neither recommended a particular disposition on substantive issues nor contributed to the court's analysis. However, she did perform substantive research related to a motion to strike and participated in the matters "over a period of nearly two years," during which she had "exposure to the broad range of facts and legal issues involved." *Id*. at 226. The court concluded that the participation was "sufficiently 'personal and substantial' . . . to warrant prophylactically disqualifying" his former clerk from representing her firm's client in the case. *Id*.

Archuleta v. Turley, 904 F. Supp. 2d 1185 (D. Utah 2012), provides useful guidance on the definition of "matter," the policy underlying the rule. The case arose under Utah R. Prof'l Conduct 1.12, which is identical to Tenn. RPC 1.12, and involved an attorney who worked as a capital litigation staff attorney for Utah's courts before joining the criminal appeals division of the Utah Attorney General's Office. *Id*. at 1188. An ethics screen was put into place to prevent the former staff attorney from working on one case still pending in Utah courts, but the attorney was assigned to work on federal court habeas matters involving numerous capital defendants whose cases that he had worked on as a law clerk in state court. *Id*. at

1188-89. In the action challenging the attorney's representation, the parties agreed that the clerk had participated "personally and substantially" in the state court cases but disputed the appropriate scope of "matter" under Rule 1.11(e) (again, the definition is identical to the Tennessee RPC). Specifically, the Attorney General argued that the former clerk was not barred by Rule 1.12 because he "was not involved as a law clerk in the only matter [] specifically reference[d]—[the capital defendant's] federal habeas action—because he did not work for the federal courts." *Id.*

The district court firmly rejected this interpretation, concluding that "[t]he 'matter' before the court is the same 'matter' that [the former clerk] worked on in state court: Mr. Archuleta's case." *Id.* at 1190.

> By choosing the word "matter" for Rule 1.11 and Rule 1.12, the Utah Supreme Court intended the two rules to encompass more than just the same lawsuit. In the context of interpreting "matter" for the purpose of understanding Rule 1.12, courts have held: "The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter.... [T]he same 'matter' is not involved [when] ... there is lacking the discrete, identifiable transaction of conduct involving a particular situation and specific parties." *See Poly Software Int'l v. Datamost Corp.*, 880 F. Supp. 1487, 1492 (D. Utah 1995) (citing *Sec. Investor Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1365 (C.D. Cal. 1984) (holding two civil lawsuits, filed ten years apart with some identical and some different claims, constituted the same matter because they addressed the same conduct involving a particular situation and specific parties)).

Id. at 1189–90. The court noted that the federal case involved the same parties – Mr. Archuleta and the state – as well as the same lead attorneys, "arguing about "the same issue of fact" and the "same situation or conduct": the same murder, the same trial, and the same direct appeal. The constitutional issues in Mr. Archuleta's

state habeas appeal are the same ones that will be before the court in his federal habeas appeal." *Id*.

The court noted that there is no temporal or jurisdictional exception to Rules 1.11 and 1.12, and discussed the policy behind these rules:

> [E]ven when two matters are not the same as defined in Rule 1.11 and applied in Rule 1.12, a lawyer may be disqualified under Rule 1.12 if he received confidential information that tainted the litigation and resulted in an unfair advantage for one party. *See Poly Software*, 880 F. Supp. at 1494–1495. . . . The prohibition of Rule 1.11 and Rule 1.12 against subsequent representation of a client in a matter that a lawyer worked on as a government lawyer, or as a judge or law clerk, "flows from the same public policy imperative of preventing the abuse of public office or appointment." *See Poly Software*, 880 F. Supp. at 1492 (citing Geoffry C. Hazard & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.12:101 (2d ed. 1994)).

Based on this broad interpretation of the term "matter" and the public policy underpinning Rule 1.12, the court concluded that the former law clerk violated the Rules of professional conduct, "even if unintentionally," in working for the Attorney General on capital cases that he had worked on while employed for the state courts. *Id*. at 1190-91. Furthermore, the court concluded that allowing the former clerk to represent the state in Mr. Archuleta's federal habeas action "would unmistakably taint the litigation":

> Mr. Archuleta is before the court in an action for federal habeas relief from his death sentence. Based on the law and the facts, he is arguing for his life and the state is arguing for his death. **[The former staff attorney's] experience as a specialized law clerk for capital cases in state court, as well as his specific work on Mr. Archuleta's state habeas appeal, "gives him an unfair advantage in the present case" that he will leverage to the state's advantage, even if unintentionally.** *See Poly Software*, 880 F.Supp. at 1495.

> **More concerning is the risk to the integrity of the federal habeas proceeding created by the fact that Mr. Field may well have confidential information related to Mr. Archuleta's case that he inadvertently may use for the state's benefit.**
>
> **Mr. Field was not only privy to judicial thinking about Mr. Archuleta's case, but he also had access to sealed ex parte filings and other confidential information in Mr. Archuleta's case. Rule 1.12 exists for precisely this reason.** The ethical imperative against representing "anyone" in a matter that the lawyer worked on "personally and substantially" as a judge or law clerk guards against the possibility of abuse, and recognizes that lawyers themselves may not always be the best guardians of the confidential information they obtained in such positions. **The court should not have to second-guess what Mr. Field knows, or parse through case histories and docket reports to determine whether or not Mr. Field has confidential information that he is going to use for the benefit his new client. Mr. Archuleta should not be asked to bear that risk.**

Id. at 1192-93 (emphasis added).

Notably, after the court entered its order disqualifying the former clerk, the Attorney General filed a lengthy motion for reconsideration. *Id*. at 1194-95. The court deemed the motion to reconsider both inappropriate and meritless, and stated "[t]he state's lawyer must be one who can ethically appear in the case before the court. Mr. Field is not that lawyer. The court is not going to overlook an ethical violation, or allow one to continue, in a death penalty case." *Id*. at 1195.

Monument Builders of Pa., Inc. v. Cath. Cemeteries Ass'n, Inc., 190 F.R.D. 164 (E.D. Pa. 1999), is likewise relevant to the definition of "matter," as well as the policy rationale underlying the disqualification rules for former clerks. In that case, an attorney went into private practice in 1998 after serving as a law clerk for a federal judge since 1984. During her first five years as a law clerk, she performed substantial work on an antitrust class action case. *Id*. at 165-66. She was

substantially involved in the decision to award counsel attorney fees related to the action, participated in a hearing and decisions regarding default by one defendant, and had substantial involvement with research and writing regarding alleged violation of a consent decree. *Id*. Settlement agreements were reached in 1989 and entered as court orders. *Id*. In 1999, a new action was filed alleging breach of the two settlement agreements, as well as antitrust violations. *Id*. at 165. At the scheduling conference, plaintiffs disclosed that one of their attorneys was a former law clerk who had performed substantial work on the related case that was settled in 1989, and defendant's counsel subsequently moved for disqualification pursuant to Pennsylvania RPC 1.12 (identical to Tenn. RPC 1.12). *Id*. at 165-66.

Despite the decade that had passed between the settlement agreement in the 1984 cases and the commencement of the 1999 related case, the court concluded that "[t]here is little doubt that the two action should be treated as the same 'matter'." *Id*. at 166. In so finding, the court considered not only that the new action involved breach of settlement agreement entered in the first case, but also that the two actions "involve the same parties and largely the same facts and conduct[.]" *Id*. at 166-67. The fact that the two cases were "technically" different was of no consequence, given that they were "closely enough related" so as to "implicate[] at least the appearance of impropriety" by the former law clerk. *Id*. at 167.

In discussing codes relevant to federal law clerks, the court emphasized that rules prohibiting former law clerks from working on cases in which they performed work as a law clerk "stem[] from the extraordinarily close relationship that exists

between judge and law clerk. **Because of that relationship's very uniqueness and value, the Court has an institutional duty to the public—independent of any litigant's interest or consent—to assure that there is never even a hint that it is being exploited to advance a private party's interest in a lawsuit**." *Id*. at 167 (emphasis added). The court concluded that any interests weighing against disqualification – namely, a party's right to counsel of its choosing and the former clerk's interest in practicing freely – were **outweighed by the court's own "duty to protect the integrity of the bar[.]**" *Id*. (emphasis added).

2. Tennessee

Tennessee cases on this topic primarily involve the issues of screening and imputed conflicts of interests (discussed in Section III, *infra*) and conflicts that arise when defense attorneys switch sides. For example, in *State v. Phillips*, 672 S.W.2d 427 (Tenn. Crim. App. 1984), a defense attorney neglected to have himself relieved as counsel of record in a particular case, accepted appointment with the district attorney's office, and then worked on the case for the prosecution. The CCA found it an "inescapable" conclusion that the conviction be reversed, noting it "inconceivable that the challenged attorney and his new employer" were unaware of the principles implicated by the former defense attorney's involvement in the prosecution. *Id*. at 435. The court collected and discussed cases from numerous jurisdictions, noting that, while some cases stood upon minimal, ministerial participation by a

previously involved attorney on another side – which was nonetheless chastised[5] – the vast majority found such participation ethically impermissible. *Id.* at 432-35. Relevant quotes from this collection are as follows:

- *Sharplin v. State*, 330 So.2d 591, 594 (Miss. 1976), (where attorney represented a client in a civil matter and then prosecuted the criminal case growing out of the same circumstances, the court found that "the relationship between the civil representation and the criminal prosecution was so substantial and the facts of each so intertwined that no attorney could be expected to lay aside the confidences imparted to him during the civil suit and proceed with a criminal prosecution of his former client without violating the legal and ethical obligations owed to the former client");

- *State v. Britton*, 203 S.E.2d 462, 466 (W.Va. 1974) (where prosecutor had previously had "gratuitous consultations with defendant," he could not be permitted to participate in a criminal case if, by reason of his professional relations with the accused, he has acquired any knowledge of facts upon which the prosecution is predicated or closely related" because the prosecutor "could have" gained a possible advantage over the defense");

- *State v. Burns*, 322 S.W.2d 736, 740-42 (Mo. 1959) (noting that it may, after the fact, be "impossible to tell precisely how active" a challenged attorney was in the prosecution "or whether the information he procured from [his former employment] played any part therein, directly or indirectly. But the very fact that he had acquired that information as counsel for the defendant, and that he might use it, renders his subsequent position wholly untenable," and that prosecuting officials, "ought to be above suspicion");

- *People v. Gerold*, 107 N.E.165, 177 (Ill. 1914) (noting that the conflict rules are "rigid" and designed to prevent both "the dishonest practitioner from fraudulent conduct" and "the honest practitioner from putting himself in a position where he may be required to choose between conflict duties. . . . It is unnecessary that the prosecuting attorney be guilty of an attempt to

[5] *See Pisa v. Commonwealth*, 393 N.E.2d 386, 387–388 (Mass. 1979) (where law student worked as a research assistant for the defendant's counsel and prepared memo in connection with motion for a new trial, subsequently joined district attorney's, and two years later proofread an appellate brief in the case for "typographical and grammatical errors and to check citations," court condemned the conduct of the prosecutor's office and found that the former law student should not have participated at all, but found his minimal participation to be harmless).

> betray confidence; it is enough if it places him in a position which leaves him open to such charge.”).

In *State v. White*, 114 S.W.3d 469 (Tenn. 2003), the Tennessee Supreme Court was asked to determine whether a part-time assistant district attorney could ethically represent criminal defendants in the same jurisdiction. This case was decided under the precursor to the current Tenn. RPC, which defined a conflict of interest as “any circumstances in which an attorney cannot exercise his or her independent professional judgment free of compromising interests and loyalties,” and an “appearance of impropriety” as “those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the ... representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.” *Id.* at 476-77 (citations and internal quotation marks omitted); *cf.* Formal Ethics Op. 82-F-32 (noting, under prior version of Tennessee ethical rules, that rules designed to avoid even the appearance of impropriety by former judicial officers “should be strictly construed . . . and no practice must be permitted which invites doubt or distrust of the integrity in our law, our courts and in the administration of justice”). The Court noted its own “independent interest in ensuring that criminal [proceedings] are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Id*. at 476 (quoting *Wheat v. United States,* 486 U.S. 153, 160 (1988)). The Court concluded that dual roles of prosecutor and defense attorney were ethically irreconcilable: that is, the “ethical obligations of these dual roles required [the attorney] to represent the interests of two adverse parties

simultaneously and forced him to attempt to reconcile his duty to vigorously prosecute criminal offenses on behalf of the State with his duty to zealously defend the criminal defendant." *Id*. at 478.

B. FEDERAL ETHICS OPINIONS & OTHER GUIDANCE

Though sometimes governed by standards that diverge slightly from Tennessee RPC 1.11 and 1.12, several federal ethics opinions and court documents are also instructive both to the interpretation of Tennessee's rules and to the overarching policy considerations underlying conflict walls for formal judicial employees.

The Committee on Codes of Conduct for the Judicial Conference of the United States has published several formal advisory opinions with relevant guidance. *See* United States Courts, Ethics Policies (last visited Sept. 28, 2021, 10:40 a.m.); Guide to Judiciary Policy, Published Advisory Ops., Vol. 2B, Ch. 2, *available at* https://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf.[6] Notably, while the term "law clerk" is used throughout these opinions, the code of conduct and ethical obligations for federal judicial law clerks and federal court staff attorneys are identical.

Opinion No. 81 directs federal courts as to the continued use of law clerks who have been offered employment with a U.S. Attorney's Office upon completion of

[6] These opinions are issued using the ethical standards established by the Code of Conduct for Judicial Employees. *See* https://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees. Although the Committee notes in some opinions that it is not authorized to interpret the ABA Model Rules of Professional Conduct, its opinions nonetheless reflect consideration of and application of the ABA Model Rules where relevant.

their clerkship. The Opinion concludes that, despite the lack of financial interest in the office, any such law clerk should be isolated from cases involving the office that has offered her employment, as failure to do so "may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel." It concludes:

> To avoid a future appearance of impropriety or potential grounds for questioning the impartiality of the court, a former law clerk should be disqualified from work in the United States Attorney's office on any cases that were pending in the court during the law clerk's employment with the court.

Id.

Opinion No. 109, Providing Conflict Lists to Departing Law Clerks, is a lengthy 2012 opinion providing judges with guidance regarding whether to provide law clerks and/or their new employers with case lists for conflict screening upon their departure from the court. *Id.* at 211-14. The Opinion discusses the root of the obligations of judicial employees to "never disclose any confidential information received in the course of official duties," an obligation that is binding even after their employment with the court:

> **This provision is intended to protect the ability of judges to confer privately with their law clerks without fear that those interactions will later be revealed**, thus chilling the ability of judges to receive assistance from their clerks. **[This rule] also insures that present and former law clerks will not later use their privileged access to the judiciary for personal gain**.

Id. at 211 (emphasis added). In their post-clerkship employment, former judicial employees are thus "trusted to recognize those cases whose very pendency is confidential but from which they should be isolated due to clerkship related

conflicts." *Id.* at 212. That is, "a former clerk **must refrain from working on all cases in which he or she participated during the clerkship, and may be required by the judge, by court rule, or by attorney ethical rules to refrain from work on cases pending before the judge even if the law clerks had no personal involvement in them**." *Id.*[7] Ultimately, "**[t]he onus remains on the law clerks to identify cases as to which they have a disqualifying connection**." *Id.*

Opinion No. 51, concerning a judicial law clerk working on cases in which the law firm employing the clerk's spouse represents a party, similarly reflects the policy behind walling judicial staff off from certain cases. Opinion 51 discusses the "significance of the relationship between judge and law clerk":

> [L]aw clerks in are in a unique position since their work may have **direct input into a judicial decision**. Even if this is not true in all judicial chambers, **the legal community perceives that this is the case based upon the confidential and close nature of the relationship between clerk and judge**.

Id. at 66 (emphasis added).

These same concerns are reflected in a 2014 advisory opinion from the U.S. District Court for the District of Columbia regarding disqualification of former law

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[7] *See also, e.g.*, Federal Judicial Center, Maintaining the Public Trust—Ethics for Federal Judicial Law Clerks at p. 25 (3d ed. 2012) ("You may not participate in any matter that was pending before your judge during your clerkship."); 9th Cir. R. 46-5 (2011) ("No former employee of the Court shall participate or assist, by way of representation, consultation, or otherwise, in any case that was pending in the Court during the employee's period of employment. It shall be the responsibility of any former employee, as well as the persons employing or associating with a former employee in the practice of law before this Court, to ensure compliance with this rule. . . . An attorney who is a former employee may apply to the Court for an exemption."); Fed. Cir. R. 50 (2011) ("No former employee of the court may participate or assist, by representation, consultation, or otherwise, in any case that was pending in the court during the period of employment.").

clerks. Advisory Committee on Judicial Conduct of the D.C. Cts., Advisory Op. No. 13, Disqualification When Former Clerks Appear Before Judges (July 9, 2014). The Opinion reaffirmed that judicial staff should leave their employment with a clear understanding "that they may not participate in matters in which they were involved during their clerkships, and that they may not use or disclose confidential information obtained in the course of their duties[.]" *Id*. at 1. "Confidential information includes the content of case-related discussions with a judge or a judge's decision-making process in specific cases, but it does not include information about a court's procedures and practices or information disclosed in public court proceedings." *Id*. at 8-9.

III. IMPUTED CONFLICTS & SCREENING

If a former judicial law clerk or staff attorney is found to have a disqualifying conflict, the reviewing court must make one additional determination: whether the office employing the former clerk may continue representation in the matter, or whether the conflict must be imputed to the entire office. Tenn. RPC 1.12(c) provides

> If a [former law clerk or staff attorney] 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.

The cross-referenced requirements provide that both the personally disqualified lawyer and his colleagues who are advocates in the disputed matter must act

reasonably to: (1) "ascertain that the personally disqualified lawyer is prohibited from participating in the representation of the current client;" (2) "determine that no lawyer representing the client has acquired any material confidential government information relating to the matter;" and (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. RPC 1.11(b)(1)-(3); *see also* Tenn. RPC 1.11(c) (defining "confidential government information" as "information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public).

"Screening" is defined as the process by which a conflicted lawyer is isolated "from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." Tenn. RPC 1.0(k). The commentary makes clear that the purpose of screening rules is dual: to "assure the affected parties that confidential information known by the personally disqualified lawyer remains protected" and to avoid or remove an imputation of the disqualified lawyer's conflict. Tenn. RPC 1.0, Cmts. [8], [9]. "In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening." Tenn. RPC 1.0, Cmt. [10]. Screening measures may differ

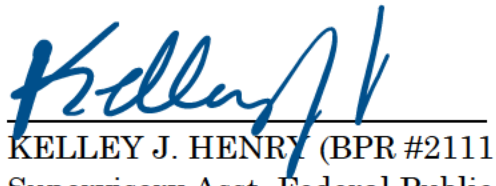
depending on the circumstances and the matter in question, but at a minimum, the rules make clear that effective screening requires that the "personally disqualified lawyer [] acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter," and that "other lawyers in the firm who are working on the matter [] be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter."[8] Tenn. RPC 1.0, Cmt. [9]; *cf.* Formal Ethics Op. 89-F-118 (although specifically aimed at law firms, ethics committee found – under precursor rules to Tenn. RPC – that effective screening mechanisms should, at a minimum "prohibit discussion of sensitive matters, limit the circulation of sensitive documents, and restrict access to files, and that organizations should consider both the structure of their office and the likelihood of contact between the "infected" person and the attorneys and support staff involved in the quarantined representation).

These authorities show that the facts known to undersigned counsel at this time are sufficient to raise questions as to whether there exists a disqualifying conflict, or at least the appearance of impropriety based on the participation of Mr. Jones – and by extension, the SCDAG's office – in this matter. Thus, Mr. Payne respectfully requests that the Court convene a hearing to fully address the factual and legal issues surrounding disqualification.

[8] Additional possible procedures contemplated by the commentary include "a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel." Tenn. RPC 1.0, Cmt. [9].

Respectfully submitted this 8th day of October, 2021.

FEDERAL PUBLIC DEFENDER FOR
THE MIDDLE DISTRICT OF TENNESSEE



KELLEY J. HENRY (BPR #21113)
Supervisory Asst. Federal Public Defender
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Phone: (615) 736-5047
Fax: (615) 736-5265
Email: Kelley_Henry@fd.org

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served via United States Mail and email to opposing counsel, Asst. Shelby County District Attorney General, Steve Jones, 201 Poplar Avenue, 11th Floor, Memphis, TN 38103-1945 on the 8th day of October, 2021.

Kelley J. Henry

Exhibit A

In the Matter Of:

DAVID IVY VS.

BRUCE WESTBROOKS, WARDEN

STEPHEN JONES

February 21, 2017

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riverside
REPORTING

22 North Second Street/Suite 303, Memphis, TN, 38103 (901) 527-1100

1 before we get into the meat of the deposition?
2 A None that I'm aware of.
3 Q Okay, great. I'd like to ask you,
4 Mr. Jones, if -- to just go over some of your
5 general background and experience. When did
6 you graduate from law school?
7 A Graduated from law school in 1994.
8 Q Okay. And where did you graduate from
9 law school?
10 A University of Memphis, Cecil C. Humphreys
11 School of Law.
12 Q Upon your graduation from law school,
13 where did you go for employment?
14 A I worked for Judge Job B. Jones in the
15 Court of Criminal Appeals as a law clerk for
16 two years.
17 Q Okay. And was that the Court of Appeals
18 or Court of Criminal Appeals? I don't know
19 Judge Jones.
20 A Court of Criminal Appeals.
21 Q Okay. So you worked on criminal cases
22 for two years?
23 A On appellate cases, criminal cases --
24 Q Okay.
25 A -- as assigned by Judge Jones.

1 Q And so was it during the tenure that you
2 spent as Judge Jones' law clerk that you wrote
3 your law review article about a prosecutor's
4 obligations under Brady?
5 A No.
6 Q It was published in 1995. Were you still
7 a law student when you wrote it?
8 A That was my third year note, I believe.
9 Q Okay. So you wrote your -- your third
10 year note on Brady while --
11 A Correct.
12 Q -- you were still in law school? Got it.
13 It just didn't get published until after --
14 A Yeah, I wasn't aware it was '95, but --
15 Q Okay. After your clerkship with
16 Judge Jones, where did you go?
17 A I was a staff attorney for trial judges
18 handling death penalty cases in the Western
19 District of Tennessee.
20 Q Was that a position funded through the
21 Tennessee Supreme Court?
22 A I was hired by the Supreme Court. I
23 presume it was funded through the AOC, which
24 is the Supreme Court, I guess.
25 Q Is that what we colloquially call the

1 death clerk?
2 A I've never heard it called that.
3 Q Capital case staff attorney?
4 A Yeah, that's what I've heard.
5 Q Okay. And you held that position for how
6 long?
7 A Two years.
8 Q So that was from '96 to '98? Is that --
9 A Correct.
10 Q Okay. So while you were serving as a
11 capital case staff attorney, did you have an
12 occasion to deal with any of the allegations
13 of the withholding of exculpatory evidence by
14 the Shelby County District Attorney General's
15 Office?
16 A I don't recall any.
17 Q Okay. After you left your position as a
18 capital case staff attorney in 1998, what was
19 your next position -- professional position?
20 A Assistant district attorney.
21 Q With Shelby County?
22 A Uh-huh.
23 Q Is that a yes?
24 A Yes.
25 Q Okay. And how long have -- did you hold

Exhibit B

In the Matter Of:

BPR HEARING

EXCERPT OF PROCEEDINGS

TESTIMONY OF CHRIS CRAFT

January 26, 2017

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riverside
REPORTING

22 North Second Street/Suite 303, Memphis, TN, 38103 (901) 527-1100

1 criminal court.
2 Q. So did you have -- is it fair to say you had
3 limited experience working with him on cases at the
4 time of the Noura Jackson trial in the courtroom?
5 A. And I don't know when this was, but it was
6 in the 90's. He was hired by the Supreme Court as a
7 capital case attorney to help -- there were five of
8 them hired across the State to help attorneys, help
9 judges with death penalty trials, and that's when I
10 first got to know him, when he was doing detailed
11 work and research on that, and then I had heard that
12 -- I didn't see him around anymore, and I heard he
13 had been hired by the D.A.'s office as an assistant,
14 but he was not assigned to Division 8.
15 Ms. Alexia Fulgham-Crump and Ms. Weirich
16 were assigned to Division 8 as prosecutors, but he
17 was a third prosecutor in this case who came in, but
18 I had never tried a case with him before I don't
19 think.
20 Q. And despite never having tried a case with
21 him before, you were confident that the explanation
22 he was giving you was credible?
23 A. Absolutely because of the work as a capital
24 case attorney and because he was helping to do the
25 training of the D.A.'s in ethics and obligations.

Exhibit C

From:	Jones, Steve
To:	Kelley Henry
Cc:	David Fletcher; Dee Goolsby; Ben Leonard
Subject:	RE: Pervis Payne Case: Ethics Wall
Date:	Thursday, September 30, 2021 8:36:36 AM

Yes. Neither she nor I handle any cases for this office on which we worked on as Capital Case Staff Attorneys.

From: Kelley Henry [mailto:Kelley_Henry@fd.org]
Sent: Thursday, September 30, 2021 7:59 AM
To: Jones, Steve <Steve.Jones@scdag.com>
Cc: David Fletcher <David_Fletcher@fd.org>; Dee Goolsby <Dee_Goolsby@fd.org>; Ben Leonard <Ben_Leonard@fd.org>
Subject: Pervis Payne Case: Ethics Wall

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******* DO NOT open attachments from unknown senders or unexpected email *******
******* DO NOT click links from unknown senders or in an unexpected email *******

[This EMAIL was not sent from a Shelby County Government email address. Please use caution.]
Steve,

Will you please confirm in writing that the office has erected an ethics wall in the Payne case with ASCDAG Leslie Byrd due to her pervious employment as the Capital Case Staff Attorney for the courts? Thank you.

Kelley J. Henry
Supervisory Asst. Federal Public Defender
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Nashville, TN 37203
Direct:615-695-6906
Cell: 615-337-0469
Office: 615-736-5047
Fax: 615-736-5265
Email: Kelley_Henry@fd.org

"…AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."

We have moved. We are now located on the 11th floor of 201 and have one main phone line---901-222-1300