

No. 32747 - *State of West Virginia ex rel. Paul M. Blake, Jr., Prosecuting Attorney
v. The Honorable John W. Hatcher, Jr., Judge of the Circuit Court of
Fayette County and Robert Eugene Carroll*

FILED
December 6, 2005
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

In this case, the majority opinion has held that the State of West Virginia has standing to move for the disqualification of defense counsel in a criminal proceeding in limited circumstances. I concur in this holding, and write separately to reconcile this holding with the position I took in my concurring opinion in *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 894, 575 S.E.2d 864, 873 (2002). In *Youngblood*, I expressed my view that the State did not have standing to disqualify defense counsel. I observed in my separate opinion in *Youngblood* that ““as a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.”” 212 W. Va. at 894, 575 S.E.2d at 873 (quoting *United States v. Rogers*, 9 F.3d 1025, 1031 (2d cir. 1993)). Moreover, I pointed out that the “implied” client who potentially stood to be prejudiced by the lawyer’s representation in *Youngblood* had “chos[en] not to seek disqualification.” 212 W. Va. at 895, 575 S.E.2d at 874.

The instant case may be distinguished from the circumstances presented in

Youngblood. In this case, the witness who was a former client of the defense attorney has intervened in this matter and has asked that his former counsel be disqualified. Furthermore, because Syllabus point 4 of the majority opinion has set forth criteria for the circuit court's decision of whether to grant a motion to disqualify defense counsel that necessarily requires the participation of the former-client/witness, it will be impossible for the State to pursue such a motion completely on its own.

Because the State will be unable to pursue disqualification of defense counsel without the participation of the former client, the concerns expressed in my separate opinion in *Youngblood* will not arise. Accordingly, I respectfully concur with the opinion of the Court.