

## Judicial Inquiry Commission

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February 26, 1993

This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. Your question is whether you are disqualified in the Washington County case of State v. Stewart, CC-92-013K, under the following facts.

Michael LeRaund Stewart [the Defendant] is charged with capital murder of Anthony and Emma Davis in Washington County. He is indigent and is represented by appointed counsel. Your brother is attorney William A. Kimbrough, Jr., who is a partner in the law firm of Turner, Onderdonk, Kimbrough, and Howell [the Firm]. The following members of the firm are assistant district attorneys in Washington County: Edward P. Turner, Jr., Michael Onderdonk, Gordon K. Howell, E. Tatum Turner, and Halron W. Turner. Attorney Edward P. Turner, Jr., a partner in the Firm, is the attorney of record in probate court for the victims' estates.

Defense counsel allege in their motion to recuse that the Firm has "a possible financial interest in the outcome of the trial of the Defendant."

The District Attorney of Washington County filed a response to the motion to recuse. By affidavit, he states that none of the above named assistant district attorneys "have in any way been involved in the prosecution of" the Defendant.

By affidavit, attorney Turner states that his employment is negotiated on a flat fee basis and not on a contingency fee basis; that he has no agreement to file a wrongful death action against the Defendant; that neither he nor any member of the Firm has any financial interest in the outcome of the criminal proceedings against the Defendant; and that neither he nor any member of the Firm has participated in or had any involvement in any phase of the criminal proceedings against the Defendant.

A judge is not disqualified from presiding over a criminal case merely because the judge's brother is an assistant district attorney where the brother has not participated in the investigation or prosecution of the defendant. Advisory Opinion 88-346. See also Advisory Opinions 87-303, 86-277, 83-171, 80-101, 80-90, 80-89 (involving the judge's son). Consequently, the mere fact that the judge's brother is a member of a legal firm composed of several part-time assistant district attorneys does not constitute a ground

for disqualification where none of the assistants have been involved in any way with the prosecution of the defendant.

Here it does not appear, from the facts provided, that the judge's brother has "an interest that could be substantially affected by the outcome of the proceeding" under Canon 3C(l)(d)(ii), Alabama Canons of Judicial Ethics.

However, it does appear from the facts provided that your recusal is required in order to "avoid the appearance of impropriety" and to "promote public confidence in the integrity and impartiality of the judiciary." Canon 2A. Here, it appears that every partner in your brother's law firm is an assistant district attorney except your brother. Your brother's partner who has been retained to represent the victims' estates is an assistant district attorney. Although no civil action has been filed against the defendant, "[a] person's conviction in a criminal case, ... is admissible against him, as a general rule, in a civil case as tending to show that he did the act for which he was convicted, if such act is material to be proved in the civil action." C. Gamble, McElroy's Alabama Evidence § 269.05(l) (4th ed. 1991). Even though attorney Turner states that a civil suit against the defendant is not contemplated, the possibility remains that one could be filed at some later date.

This Commission cannot overlook the fact that this case involves a criminal prosecution in which the defendant faces a possible sentence of death. In Alabama, capital cases receive the closest scrutiny from both the media and the judicial system. In Ex parte Monk, 557 So.2d 832, 836 (Ala. 1989), the Alabama Supreme Court recognized that "[t]he capital case is 'sufficiently different' from other cases, because there is no other criminal case in which the crime is murder and the possible punishment is death or life imprisonment without parole." In a capital case, there should not even be the slightest hint that the judge might be partial or biased.

This Commission does not question your ability to be objectively impartial in this case and commends you for your courage in seeking an advisory opinion. However, the appearances of impartiality are such that public confidence in the integrity and impartiality of the judiciary is best served by your recusal.

This opinion has been approved and adopted by the Judicial Inquiry Commission and is the opinion of the Commission.