

Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET
SUITE 201
MONTGOMERY, ALABAMA 36104

November 13, 1998

The Judicial Inquiry Commission has considered your request for an advisory opinion whether a judge is disqualified from presiding over a capital murder trial involving the death of a police officer when the judge was not acquainted with the officer but did, on the day of the funeral, go to the church to pay his respects, and briefly expressed condolences to the widow. The judge does not have any opinion that the defendant is guilty, nor has he ever expressed such an opinion.

Your inquiry is governed by the general provision in Canon 3C(1) that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. A judge is disqualified under this provision when "a person of ordinary prudence in the judge's position knowing all of the facts known to the judge [would] find that there is a reasonable basis for questioning the judge's impartiality." In re Sheffield, 465 So.2d 350, 356 (Ala. 1984).

Three courts have published opinions on the situation described in your inquiry. Each concluded that the judge did not err in refusing to recuse himself. Commonwealth v. Perry, 468 Pa. 515, 523-526, 364 A.2d 312, 316-318 (1976); United State ex rel. Perry v. Cuyler, 584 F.2d 644, 646-649 (3rd Cir. 1978), cert. denied, 440 U. S. 925 (1979); and, Tafero v. Wainwright, 796 F.2d 1314, 1321-1322 (11th Cir. 1986), cert. denied, Tafero v. Dugger, 483 U. S. 1033 (1987) (capital murder case). The Sixth Circuit reached the same conclusion in an unpublished opinion in 1985. However, dissenting opinions on direct appeal and in the federal habeas proceeding in the Perry case expressed the view that the appearance of impartiality was seriously threatened by the judge having attended the victim's funeral and, therefore, the judge should have recused himself from the trial when requested to do so. Perry, 364 A.2d at 318-322; and, Cuyler, 584 F.2d at 649-652. Also, the Third Circuit relied in its decision on the fact that the trial did not occur until two years after the funeral. Cuyler, 584 F.2d at 647. The Eleventh Circuit stated that the judge's attendance and emotional reaction at the victim's funeral may have constituted adequate grounds for him to recuse himself, but did not mandate recusal or constitute disqualification. Tafero, 796 F.2d at 1322.

It is the opinion of the Commission that the judge is not disqualified in the case in question. However, it is also the opinion of the Commission that, given the nature of the case, the judge should disclose the facts to the parties.

Yours truly,

JUDICIAL INQUIRY COMMISSION