IN THE SUPREME COURT OF FLORIDA

NO. SC06-1211

MICHAEL COLEMAN,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

EMERGENCY PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF PROHIBITION

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Petitioner, Michael Coleman and undersigned counsel, petition this Court for a writ of prohibition to require the Honorable Nicholas P. Geeker, Judge of the Circuit Court of the First Judicial Circuit, in and for Escambia County, to disqualify himself from proceedings in circuit court that this Court ordered concerning registry counsel, Baya Harrison.

On May 4, 2006, this Court entered an order in Coleman v. State, Case No. SC05-2217, stating:

> The Court has considered the allegations concerning registry counsel Harrison in note 2 on page 3 of the petition. To monitor the performance of assigned counsel in accordance with section 27.711(12), Florida Statutes (2005), Harrison shall file in the circuit court a response to note 2 of the petition within thirty (30) days of the service of the petition. This response shall also be served upon petitioner's counsel, counsel for the State of Florida, and the Executive Director of the Commission on Capital Cases. Thereafter, the circuit court shall holding a hearing and consider whether any sanctions should be imposed by reason of the allegations, including the reimbursement of the State of attorney fees paid to Harrison. Harrison, McClain, counsel for the State, and the Executive Director of the Commission on Capital Cases shall be served notice of the date and time of the hearing and shall appear at the hearing. Within thirty (30) days of the hearing, the circuit court shall file and serve a report and recommendations with this Court.

Order (5/4/06) at 2.

Pursuant to this order, undersigned counsel is required to appear and participate in the ordered hearing concerning Harrison and his conduct in the course of his work as Mr.

Coleman's registry counsel. As a party to the ordered proceedings, undersigned counsel has standing to file this motion to insure that the hearing is conducted before a judge who has not prejudged the issues to be heard. Moreover, undersigned counsel remains Mr. Coleman's counsel in the appeal currently pending before the Florida Supreme Court.

In accord with this Court's order, Mr. McClain served a copy of the petition on Mr. Harrison via the mail. Meanwhile on May 15, 2006, Judge Geeker held a hearing in Mr. Coleman's case to consider Mr. McClain's motion to withdraw from the mental retardation proceedings because Mr. Coleman's family had been unable to raise sufficient funds to hire him to handle such proceedings ordered by this Court. At the hearing, Cassandra Dolgin, appearing on behalf of the Attorney General's Office, advised Judge Geeker that if Mr. McClain were removed from the case, the mental retardation motion filed by Mr. McClain would be moot unless new counsel re-filed it. Mr. McClain objected to the position advocated by Ms. Dolgin. Judge Geeker took the matter under advisement.

Several days later, Judge Geeker issued an order granting the motion to withdraw and reappointing Mr. Harrison as registry counsel for Mr. Coleman. In this regard, Judge Geeker specifically stated: "The Court finds that Mr. Harrison meets

the statutory requirements for appointment and has the ethical standards necessary for such representation in accordance with Fla. Stat. §27.710(5)(b)." Attachment A (Order of 5/19/06) at 2.

Thereafter on May 26, 2006, Mr. McClain filed a motion to disqualify Judge Geeker from the proceedings ordered by this Court concerning Mr. Harrison. In this motion, Mr. McClain asserted:

> 2. Pursuant to this order [of the Florida Supreme Court], undersigned counsel is required to appear and participate in the ordered hearing concerning Harrison and his conduct in the course of his work as Mr. Coleman's registry counsel. As a party to the ordered proceedings, undersigned counsel has standing to file this motion to insure that the hearing is conducted before a judge who has not prejudged the issues to be heard.
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> 3. Pursuant to this order [of the Florida Supreme Court], this Court is required to preside over a hearing on the allegations against Harrison concerning his conduct in the course of his work as Mr. Coleman's registry counsel. Yet, despite the directive from the Florida Supreme Court to hold a hearing regarding Harrison and his conduct as Mr. Coleman's registry counsel, this Court has entered an order dated May 19, 2006, appointing Harrison to once again serve as Mr. Coleman's registry counsel. In this regard, this Court specifically stated: "The Court finds that Mr. Harrison meets the statutory requirements for appointment and has the ethical standards necessary for such representation in accordance with Fla. Stat. §27.710(5)(b)." Order (5/19/06) at 2. Clearly, this Court has prejudged the matter upon which the Florida Supreme Court has ordered this Court to conduct a hearing.
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> 4. Rule 2.160(d) also provides that grounds for a disqualification motion include a "specifically described prejudice or bias of the judge." Canon

> 3(E)(1)(a) of the Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge . . . has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of dispued evidentiary facts concerning the proceedings." The language of Canon 3(E)(1)(d) is mandatory. *See Roberts v. State, 840 So.2d 962 (Fla. 2002).* Judge Geeker's statement in his May 19, 2006, order appointing Mr. Harrison as Mr. Coleman's counsel is a prejudgment of the matters to be heard and demonstrate bias and prejudice. *Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988)* (a judge's statement to a newspaper following the signing of the defendant's death warrant that he did not believe that the case merited postponement demonstrated prejudice against the defendant and warranted his disqualification from proceedings on a motion to vacate the conviction and sentence of death).

Attachment B (Motion to Disqualify at 3-4 (footnotes omitted)).

Mr. McClain observed in a footnote:

> It would appear that Harrison's representation of Mr. Coleman is burdened by a conflict of interest given that Mr. Coleman's allegations against Harrison lead to the Florida Supreme Court to order a hearing on those allegations. Undersigned counsel has been advised by prison officials that Harrison appeared at Union Correctional Institution immediately after the Florida Supreme Court's order and demanded that he be provided access to Mr. Coleman's personal effects. When denied such access, Harrison made a public records demand on prison officials in order to gather information regarding Mr. Coleman. Harrison's actions occurred before this Court's order re-appointing him as registry counsel. When the prison officials advised Mr. Coleman of Harrison's actions, Mr. Coleman was petrified. He was afraid that Harrison was working with the State in order to try speed up his execution.

Attachment B (Motion to Disqualify at 3, n. 2).

On June 6, 2006, Judge Geeker signed an order denying the motion to disqualify. In this order, Judge Geeker found "that the instant motion is legally insufficient." Attachment C.

On June 8, 2006, Mr. Harrison filed a motion to withdraw as reappointed counsel for the defendant. In his motion, Mr. Harrison stated:

> 4. Complicating the matter is the fact that, per the May 4, 2006 Supreme Court Opinion, I must respond to allegations against me made by Mr. McClain to the effect that I abandoned Mr. Coleman's Atkins (mental retardation) claim without just cause. He served me with a copy of his petition on June 1 or 2, 2006. According to the May 4, 2006 Opinion, I am afforded 30 days thereafter within which to submit a response.
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> 5. In the process of answering those charges, it puts me in a conflict situation in terms of further representation of Mr. Coleman, especially regarding the mental retardation issue.

Attachment D (Motion to Withdraw as Reappointed Counsel for the Defendant at 2). Accordingly, Mr. Harrison "requested that the Court enter an order allowing [him] to withdraw as counsel for Mr. Coleman." Attachment D (Motion at 3).[1]

[1]In his motion, Mr. Harrison took issue with representations that Mr. McClain had made in the motion to disqualify:

> 7. I am aware of the fact that Mr. McClain has filed a motion to disqualify Your Honor. In his motion, he asserts in a footnote that I demanded to see certain items of Mr. Coleman's personal effects when I was recently at UCI. That is not correct. I simply wanted to confirm that Mr. Coleman had

It would appear that Mr. Harrison's motion confirmed the point made in the motion to disqualify that Judge Geeker's order reappointing Mr. Harrison not only constituted "a prejudgment of the matters to be heard and demonstrate[d] bias and prejudice," but also burdened Mr. Coleman with an attorney laboring under an obvious conflict of interest.[2]

I. JURISDICTION

This is an original action under Rule 9.100(a) of the Florida Rules of Appellate Procedure. This Court has original

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> received certain boxes of files that I sent to him some time ago. I did not examine any of his property. The court will recall that Mr. McClain continued to insist for months that I had not provided him or Mr. Coleman with the materials I had. That was incorrect since some were sent to Mr. McClain and others were sent to Mr. Coleman at UCI. Mr. McClain has never acknowledged receipt of the subject documents.
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> 8. I sought and obtained certain public records information regarding my visits to UCI on Mr. Coleman's behalf, which I had every right to do especially in the context of responding to Mr. McClain's false allegations against me.

Attachment D (Motion at 3).

[2]In fact in his "Wherefore" clause, Mr. Harrison sought a speedy ruling on the motion explaining:

> I ask further that his motion be ruled upon without a hearing just as soon as is reasonably possible since, as noted above, I must submit my response to Mr. McClain's allegations soon. I am uncomfortable doing that while I am still record counsel.

Attachment D (Motion at 3).

jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Art V, sec. 3(b)(8), Fla. Const. Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978).

II. HISTORY AND STATUS OF PROCEEDINGS BELOW

On May 4, 2006, this Court entered an order stating:

> The Court has considered the allegations concerning registry counsel Harrison in note 2 on page 3 of the petition. To monitor the performance of assigned counsel in accordance with section 27.711(12), Florida Statutes (2005), Harrison shall file in the circuit court a response to note 2 of the petition within thirty (30) days of the service of the petition. This response shall also be served upon petitioner's counsel, counsel for the State of Florida, and the Executive Director of the Commission on Capital Cases. Thereafter, the circuit court shall holding a hearing and consider whether any sanctions should be imposed by reason of the allegations, including the reimbursement of the State of attorney fees paid to Harrison. Harrison, McClain, counsel for the State, and the Executive Director of the Commission on Capital Cases shall be served notice of the date and time of the hearing and shall appear at the hearing. Within thirty (30) days of the hearing, the circuit court shall file and serve a report and recommendations with this Court.

Attachment A (Order at 2). This order was entered in the case of Coleman v. State, Case No. SC05-2217, an interlocutory appeal by Mr. Coleman in which he was represented by Mr. McClain.

In this Court's order, Mr. McClain was directed to appear at the hearing to be conducted concerning the allegations he made in the petition instituting Case No. SC05-2217. As a party ordered to appear at a hearing to be conducted on

allegations contained in a pleading he drafted, Mr. McClain filed the motion to disqualify. The motion to disqualify was premised upon findings made by Judge Geeker in his order discharging Mr. McClain as counsel and reappointing Mr. Harrison as registry counsel. In being ordered to appear at the hearing to be conducted on statements he made in a pleading before this Court, Mr. McClain is entitled to due process, which includes a fair hearing before an impartial tribunal. In re Murchison, 349 U.S. 133 (1955); Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995).

Moreover, Mr. McClain continues to represent Mr. Coleman before this Court on his pending appeal. By virtue of Judge Geeker's order thrusting upon Mr. Coleman an attorney burdened by an obvious conflict of interest, Mr. Coleman was left with no means of challenging Judge Geeker's impartiality.

Accordingly, Mr. McClain filed the motion to disqualify in circuit court, the denial of which is at issue in this petition.

III. REASONS FOR GRANTING PETITION

Mr. McClain filed a verified motion to disqualify Judge Geeker from presiding over the proceedings that this Court has ordered. On the basis of Judge Geeker's prejudgment of the issue remanded by this Court, Mr. McClain sought his

disqualification. Mr. McClain signed the verification to the motion. Mr. McClain is in fear that he will not receive a fair hearing regarding the allegations he made on Mr. Coleman's behalf. Likewise, Mr. Coleman is in fear that Judge Geeker's predetermination of the issues remanded by this Court means that he will not receive a fair hearing before Judge Geeker. Mr. Coleman's fear is that Judge Geeker is unable to provide a fair and impartial assessment of his entitlement to a collateral relief. This fear is objectively reasonable.

All parties before a court are is entitled to full and fair proceedings, including the fair determination of the issues by a neutral, detached judge. In re Murchison, 349 U.S. 133 (1955); Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995). The aforementioned circumstances of this case are of such a nature that they are "sufficient to warrant fear . . . that [neither Mr. McClain nor Mr. Coleman will] receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988). The proper focus of this inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993). In capital cases, the trial judge "should be especially sensitive to the basis for the fear,

as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Id.

Due process guarantees to every party the right to a neutral detached judiciary in order "to convey to [him] a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978). "Judges should be especially vigilant that every litigant gets that to which he or she is entitled: the cold neutrality of an impartial judge." Rose v. State, 601 So. 2d 1181, 1184 (Fla. 1992). The United States Supreme Court has explained that in deciding whether a particular judge is able to preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

The purpose of the disqualification rules direct that a judge must avoid even the appearance of impropriety:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. Crosby v. State, 97 So.2d 181 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).
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> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

In Steele, the Court concluded that "[a] judge must not only be impartial, he must leave the impression of impartiality upon all those who attend court." Id. at 401 (emphasis added) (citation omitted). "The attitude of the judge and the atmosphere of the courtroom should be such that no matter what charge is lodged against a litigant or what cause is before the court, the litigant can approach the bar with every assurance that he is in a forum which is everything a court represents: impartiality and justice." Id. Judge Geeker had the duty to "scrupulously guard [the parties' right to the cold neutrality of an impartial judge] and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought into question." Id. Because Judge Geeker has breached this duty, he has "discredit[ed] and place[d] the judiciary in a compromising attitude which is bad for the administration of justice." Id.

Mr. McClain and Mr. Coleman both have a reasonable fear that they will not receive the benefit of a neutral and impartial judge in light of Judge Geeker's predetermination of the issue remanded by this Court. Mr. McClain and Mr. Coleman request that the Court grant the

writ and order the disqualification of Judge Geeker from this case.

WHEREFORE, Mr. McClain and Mr. Coleman respectfully urge that the Court enter an order to show cause, and thereafter enter a writ prohibiting Judge Nicholas P. Geeker from hearing any further proceedings in this case, direct that the case be assigned by random selection to another judge, and grant any other relief as deemed just and proper by the Court.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing pleading has been furnished by United States Mail, first class postage prepaid, to The Honorable Nicholas P. Geeker, Circuit Court Judge

First Judicial Circuit, M.C. Blanchard Judicial Bldg., 190 Government Center, Pensacola, Florida 32502; John C. Spencer, Assistant State Attorney, Office of the State Attorney, M.C. Blanchard Judicial Bldg., 190 Government Center, Pensacola, Florida 32501; Cassandra Dolgin, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; Baya Harrison III, Esq., P.O. Drawer 1219, Monticello, Florida 32345-1219; Michael Pearce Dodson, General Counsel, The Florida Legislature, Office of Legislative Services, 111 W. Madison St., Room 874, Tallahassee, Florida 32399-1400; William J. Thurber, IV, Assistant General Counsel, Dept. Of Financial Services, 200 E. Gaines St., Tallahassee, Florida 32399-6502; on June 22, 2006.

MARTIN J. McCLAIN