

IN THE SUPREME COURT OF FLORIDA

NO. SC06-1211

MICHAEL COLEMAN,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

REPLY TO RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF,
FOR A WRIT OF PROHIBITION

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ARGUMENT IN REPLY

On June 23, 2006, Petitioner, Michael Coleman, and undersigned counsel petitioned this Court for a writ of prohibition to require the disqualification of the Honorable Nicholas P. Geeker, Judge of the Circuit Court of the First Judicial Circuit, in and for Escambia County, from proceedings in circuit court. This petition followed the circuit court's order denying a motion seeking his disqualification. In that order, Judge Geeker specifically found "that the instant motion is legally insufficient." See Petition, Attachment C.

On July 11, 2006, this Court requested that the State file a response to the petition. In its responsive pleading filed on July 20, 2006, the State completely ignored the fact that the order entered by Judge Geeker found the motion seeking disqualification to be "legally insufficient." Nowhere in the response did the State address the merits of the motion seeking disqualification, nor defend Judge Geeker's ruling that the motion was "legally insufficient."

Instead, the State focused the entirety of its three page argument upon whether the circuit court should have entertained the motion in the first place. In this vein, the State argued that undersigned counsel did not have

standing to file the motion. This argument is advanced even though the State acknowledged that this Court issued an order on May 4, 2006, directing "that the circuit court hold a hearing to determine whether the allegations made by McClain warranted sanctions. It was further ordered that Harrison, McClain, counsel for the State, and the Executive Director of the Commission on Capital Cases appear at the hearing." Response at 2.

According to the State, undersigned counsel's only involvement at the hearing ordered by this Court on "the allegations made by McClain" would be if he were "called as a witness at the hearing." Response at 4. Apparently, the State believes that this Court's order directing that "the circuit court shall holding a hearing" does not mean that the hearing will be adversarial in nature, but instead a proceeding at which the judge can just pick who he wants to hear from and exclude whomever he does not want to hear from.¹ According to the State, standing to file a motion to

¹Apparently, the State has lost its belief in the bedrock of American jurisprudence, *i.e.* the adversarial process. Or perhaps the State is just seeking expediency, a hearing at which the State's representative, Mr. Harrison, and Judge Geeker can condemn undersigned counsel and in essence turn off his microphone and preclude him from presenting the evidence of what actually occurred and from advocating on behalf of Mr. Coleman.

It was the State at the May 15, 2006, hearing on undersigned counsel's motion to withdraw that was filed

disqualify only extends to named parties in the caption, *i.e.* "A party to an action is defined as a person whose name is designated on record as plaintiff or defendant." Response at 4. According to the State because this Court ordered this proceeding to occur in the case styled, *State v. Coleman*, only the State and Mr. Coleman are parties who can raise a challenge to a judge's predetermination of the issue to be heard. Thus, following the logic of the State's argument, Mr. Harrison would be precluded from filing a motion to disqualify if the presiding judge had predetermined that sanctions were warranted.²

only because the circuit court refused to appoint him as Mr. Coleman's registry counsel, that suggested to Judge Geeker that once he removed undersigned counsel from the case, the mental retardation claim filed by undersigned counsel would be moot if the newly appointed attorney chose not to adopt it. It was after hearing that argument that Judge Geeker removed undersigned counsel from the case and appointed Mr. Harrison as Mr. Coleman's counsel, the same Mr. Harrison who previously waived the mental retardation claim based upon his conversations with the State. Apparently, neither the State nor Judge Geeker wants to have the adversarial process play out on Mr. Coleman's mental retardation claim.

²Surely, the absurdity of the State's argument is exposed by the fact that under its logic, Mr. Harrison could not file a motion to disqualify if he feared the judge presiding over the proceeding ordered to determine whether sanctions are warranted had pre-judged the matter. And certainly, if Mr. Harrison has standing to file a motion to disqualify, then the person who made the factual representations upon which the hearing has been ordered must have standing to challenge judicial bias as well.

But over and above the issue of undersigned counsel's standing, there is Michael Coleman, a death row inmate with an IQ scored at 67. Mr. Coleman's family hired undersigned counsel to represent him before this Court. Certainly, a criminal defendant has a right to have counsel of his choice, so long as he can afford to pay for that counsel. *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006). Accordingly, Mr. Coleman had the right to undersigned counsel's representation before this Court, and still has that right. Unfortunately for Mr. Coleman, undersigned counsel discovered in the course of reading the record that his IQ had been scored at 67, and Mr. Coleman's family has been unable to come up with the funds necessary to pay for counsel's fees and expenses to represent him in the course of the costly mental retardation proceedings.

When this Court affirmed that Judge Geeker had the discretion to refuse to appoint the undersigned as Mr. Coleman's registry counsel for the mental retardation proceedings, Judge Geeker held a status hearing on May 15, 2006. At that time, the State asserted that once Judge Geeker removed undersigned counsel from the case, the mental retardation claim could be declared moot if the

Surely, the adversarial process incorporates the notion that the adversaries will compete on a level playing field.

newly appointed counsel chose not to pursue it. On May 19, 2006, Judge Geeker removed undersigned as Mr. Coleman's counsel in circuit court and appointed Mr. Harrison as Mr. Coleman's registry counsel, saying "The Court finds that Mr. Harrison meets the statutory requirements for appointment and the ethical standards necessary for such representation." Petition, Attachment A, at 2.

So, from the moment of the order, dated May 19th, Mr. Coleman's only recognized attorney in the circuit court has been Mr. Harrison, an attorney who filed a motion to withdraw due to a conflict on June 8, 2006. Petition, Attachment D. Not only has Mr. Harrison filed a motion to withdraw,³ he has filed a Status Report in this Court in which makes arguments that are clearly not in Mr. Coleman's best interest.⁴ In the pleadings that Mr. Harrison has filed since his May 19th appointment as Mr. Coleman's

³The circuit court has yet to rule on the motion to withdraw.

⁴As to the claim that Mr. Coleman is mental retardation, Mr. Harrison advised this Court on July 14, 2006, "that is simply not true." Status Report at 8. As to Mr. Coleman's predecessor counsel, Maria Laverde, Mr. Harrison asserted in his June 23, 2006, pleading filed in circuit court and attached to the Status Report as Exhibit A, "I do not suggest that she formally abandoned the claim, but she certainly did not 'diligently' pursue it after 2002 from what I have been able to learn, despite Mr. McClain's allegation to the contrary." Status Report, Exhibit A, at 4.

registry attorney,⁵ he has done nothing but denigrate Mr. Coleman, and his mental retardation claim, as he seeks to defend his May of 2004 waiver of the claim.⁶ Thus, Mr. Coleman's court-appointed representative in circuit court has actively sought to damage the claim that Mr. Coleman is mentally retarded. *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988) ("A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." *Faretta v. California*, 422 U.S. 806, 821 (1975). In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's

⁵Mr. Harrison filed a Status Report with this Court in *Coleman v. State*, Case No. SC04-1520. Attached to the Status Report as Exhibit A was the June 23, 2006, pleading that Mr. Harrison filed in circuit court.

⁶Perhaps not too surprisingly, Mr. Harrison in his Status Report filed with this Court on July 14, 2006, defended Judge Geeker - "it is hard to imagine how Mr. McClain can suggest that Judge Geeker is biased against Mr. Coleman because he (Judge Geeker) reappointed me." Status Report at 6. Clearly, Mr. Harrison wants Judge Geeker to remain on the case and preside over the hearing that this Court has ordered, given that Judge Geeker not only previously approved payment of all of Mr. Harrison's attorney fees and costs, but in reappointing him also pre-judged the issue to be heard.

position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.”).

Thus, the question that really needs to be asked in light of the State’s position is who is it that is representing Mr. Coleman in circuit court at this point in time - who is looking out for interests? According to the State, who exactly is it that could prepare and file a motion to disqualify for Mr. Coleman, who has an IQ of 67, according to the expert testimony that Mr. Harrison seeks to denigrate? Judge Geeker knowingly reappointed Mr. Harrison as Mr. Coleman’s registry counsel, even in the face of this Court’s May 4, 2006, order. He appointed an attorney who clearly is as interested in denigrating Mr. Coleman’s mental retardation claim as the State is. A clearer conflict of interest is hard to imagine than the circumstances presented here, where Mr. Harrison has repeatedly filed pleadings seeking to defeat Mr. Coleman’s mental retardation claim.

Judge Geeker’s order appointing Mr. Harrison was a prejudgment of the issue that this Court order the circuit court to hear in its May 4th order. Accordingly, the motion to disqualify was legally sufficient. The writ of prohibition should issue.

WHEREFORE, Mr. McClain and Mr. Coleman respectfully urge that the Court 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; Lori Jobe, Assistant
General Counsel, Dept. Of Financial Services, 200 E. Gaines
St., Tallahassee, Florida 32399-6502; on August 10, 2006.

MARTIN J. McCLAIN