

IN THE SUPREME COURT OF FLORIDA

NO. SC05-2217

MICHAEL COLEMAN,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

EMERGENCY PETITION SEEKING REVIEW OF NON-FINAL ORDER
IN DEATH PENALTY POST-CONVICTION PROCEEDINGS

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Counsel for Mr. Coleman

Petitioner, Michael Coleman, through undersigned counsel, petitions this Court for review of the circuit court order of November 21, 2005, denying undersigned counsel's request that the Department of Financial Services pay his attorney fees associated with the mental retardation proceedings to be conducted in the circuit court pursuant to this Court's remand order dated September 23, 2005.

I. JURISDICTION

This is an original proceeding under Rule 9.142(b) of the Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to Art. V, sec. 3(b)(8), Fla. Const. Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978).

II. HISTORY AND STATUS OF PROCEEDINGS BELOW

Mr. Coleman is under a sentence of death. His case is currently pending in the Circuit Court of the First Judicial Circuit in and for Escambia County.

Mr. Coleman was initially indicted on four counts of first degree murder, one count of attempted first degree murder, six counts of kidnaping, two counts of sexual battery, one count of conspiracy to commit possession or transfer of more than 400 grams of cocaine, one count of burglary, and two counts of robbery (R2106). On May 22, 1989, Mr. Coleman's trial commenced. He was convicted of all counts. The jury recommended advisory sentences of life (R2446). The trial court overrode the jury's recommendation and sentenced Mr. Coleman to death (R2609-14). On direct appeal, the Florida Supreme Court affirmed the convictions and sentences. *Coleman*

v. State, 610 So. 2d 1283 (Fla. 1993). The United States Supreme Court denied certiorari review. *Coleman v. Florida*, 114 S.Ct. 321 (1994).

During the next several years, Mr. Coleman was not provided any substantive legal representation, as the courts and the Capital Collateral Representative debated who would represent Mr. Coleman. Mr. Coleman filed a Motion to Vacate Judgment and Sentence on March 24, 1997. Mr. Coleman was provided with a registry attorney, Maria Laverde. She amended the motion to vacate on February 3, 2000 (PC-R. 349). An evidentiary hearing was conducted in January of 2001. In late 2003, Ms. Laverde filed a motion seeking to be discharged as Mr. Coleman's counsel. In April of 2004, the circuit court appointed Baya Harrison as Mr. Coleman's new registry attorney. Thereafter, the motion to vacate was denied on July 16, 2004. Mr. Coleman's appeal of the denial of relief was filed by Mr. Harrison.

While his appeal was pending before this Court, Mr. Coleman's family retained undersigned counsel to handle Mr. Coleman's appeal.¹ Thereafter, undersigned counsel sought this Court's assistance in locating and obtaining Mr. Coleman's files and records from his prior attorneys. Undersigned counsel also discovered that at the 2001 evidentiary hearing evidence was presented that Mr. Coleman

¹ This appeal appears on this Court's docket as *Coleman v. State*, FSC Case No. SC04-1520.

had an IQ score of 67.² After discovering this testimony was contained in the record, undersigned counsel filed a motion seeking relinquishment of jurisdiction in order to permit presentation of a claim that Mr. Coleman was mentally retarded and that his execution was precluded by the Eighth Amendment.

Undersigned counsel also filed a motion with this Court seeking an order requiring the Department of Financial Services to pay unanticipated costs associated with the appeal. Specifically, undersigned counsel had discovered that the record on appeal was incomplete and had sought to have the record supplemented with the missing documents. After this Court ordered supplementation, the clerk of the circuit court supplemented the record with 899 pages of material. The clerk notified undersigned counsel that in order for him to receive a copy of the supplemental record on appeal, he would have to pay \$910.25.

² In reviewing the record, undersigned counsel also discovered that Mr. Coleman had diligently sought to present his mental retardation claim. Mr. Coleman's first registry attorney, Ms. Laverde, sought to raise mental retardation as a bar to his execution in February of 2002, within one year of the enactment of Section 921.137, Fla. Stat. (2001). Later in June of 2002, the United States Supreme Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002). Thereafter, Ms. Laverde submitted notice of *Atkins* as supplemental authority. When Ms. Laverde was replaced as registry counsel, her successor, Baya Harrison, purported to withdraw Mr. Coleman's claim. This was done without Mr. Coleman's knowledge or consent. As has been revealed in the proceedings on undersigned counsel's motion to obtain Mr. Coleman's attorney files, Mr. Harrison had not obtain the mental health records from Ms. Laverde that support Mr. Coleman's retardation claim when he filed to withdraw the claim.

On September 23, 2005, this Court issued orders relinquishing jurisdiction on undersigned counsel's motion for transfer of Mr. Coleman's files, his motion for payment of costs and expenses, and on his motion for a determination of Mr. Coleman's mental retardation. During the ensuing proceedings in circuit court, undersigned filed a new motion for costs on or about November 2, 2005. In this motion, undersigned counsel asserted:

10. Here, Mr. Coleman was previously represented by registry counsel. The registry counsel withdrew from the case when Mr. Coleman's family hired the undersigned to handle the appeal before the Florida Supreme Court. It had been assumed that not only had the cost of preparing the record on appeal been taken care of, but also copies of all circuit court pleadings had been maintained by registry counsel. It had also been assumed that no additional proceedings in circuit court would be necessary. Unfortunately, all of these assumptions proved to be in error.

11. Under the circumstances, Mr. Coleman seeks an order directing the Department of Financial Services to pay the costs associated with the preparation of a supplemental record that included 899 pages of material filed in circuit court that was not included in the record on appeal previously submitted and paid for by the State, and to pay the costs associated with the mental retardation proceedings before this Court, including attorney fees.

Motion at 5 (Appendix A). This motion was served on the Department of Financial Services. The Department did not file a written response to the motion. However, the Department was represented at the hearing on the motion that occurred on

November 14, 2005, by William J. Thurber, IV.³ During that hearing, Mr. Thurber expressed the Department's willingness to pay reasonable costs and expenses incurred by the defense, but the Department opposed either the appointment of undersigned counsel as registry counsel or the payment of attorney fees. Though Mr. Thurber stipulated to undersigned counsel's qualifications to be appointed as registry counsel, he indicated that the Department was concerned that undersigned counsel's actions constituted an end run around the provisions of §27.710, and accordingly, the Department opposed either the appointment of the undersigned or the payment of his attorney fees.

On November 21, 2005, the circuit court entered its order denying that portion of the motion seeking the payment of attorney fees - "attorney fees for counsel McClain are **not** to be paid by DFS." Order (11/14/05) at 2 (Appendix B)(emphasis in original). It is this order of the circuit court that Mr. Coleman petitions this Court to review.

III. REASONS FOR GRANTING PETITION

³ Following this Court's remand on September 23, 2005, status hearings have been held in the circuit court on October 20th, November 1st, November 7th, November 14th, November 28th, and December 8th. However, it was at the November 14th hearing at which the Department was represented by Mr. Thurber that Mr. Coleman's motion at issue in this petition was heard. The other proceedings concerned undersigned counsel's ongoing efforts to locate and secure all of Mr. Coleman's legal files. The next hearing is currently set for December 20, 2005.

Mr. Coleman, through his family, retained undersigned counsel to represent him during the course of the appeal in the Florida Supreme Court. After undersigned counsel filed a motion seeking to be substituted as counsel in Mr. Coleman's appeal before this Court, Mr. Harrison sought to withdraw as counsel. Thereafter, this Court substituted the undersigned as counsel and permitted Mr. Harrison to withdraw.

However, at the time that undersigned counsel was hired to represent Mr. Coleman, it was understood that proceedings were over in circuit court, that the case was pending in the Florida Supreme Court, and that the full record on appeal had been prepared and submitted. It was not anticipated that the record on appeal was incomplete because the prior registry attorney had failed to designate the full record. Nor was it anticipated that prior registry counsel had sought to withdraw Mr. Coleman's mental retardation claim without obtaining all of Mr. Coleman's mental records of his predecessor counsel, and that as a result, a remand for a determination of mental retardation would be necessary.⁴ The negotiated fee for representation of Mr. Coleman in his appeal of the denial of Rule 3.850 relief simply did not cover additional proceedings in circuit court, nor could it have been expected to - the circumstances found by the undersigned when he was substituted as counsel were entirely unforeseen.

⁴ It is the actions of Mr. Harrison, as Mr. Coleman's registry counsel, that created the difficulty. He attempted to waive a claim without obtaining all of the files and records from predecessor counsel.

However, when counsel discovered that Mr. Coleman had been tested and received an IQ score of 67, he felt both obligated as Mr. Coleman's counsel and as an officer of the court to notify this Court. By filing with this Court for a determination of Mr. Coleman's mental retardation, undersigned did not commit himself to represent Mr. Coleman in such proceedings on a *pro bono* basis.

When this Court remanded for an evidentiary hearing to determine whether Mr. Coleman is mentally retarded, it relinquished jurisdiction for a period of 180 days. An evidentiary hearing addressing Mr. Coleman's mental retardation claim will undoubtedly require a considerable number of attorney hours. The circuit court by virtue of its ruling will require either that counsel donate his time on a *pro bono* basis, or that he move to withdraw as counsel in circuit court. He simply cannot afford the former, and the latter will cause considerable chaos and delay.⁵ If the order denying attorney fees is allowed to stand, Mr. Coleman will be materially injured if undersigned counsel is forced to withdraw as his counsel in circuit court. Moreover, resolution of Mr. Coleman's mental retardation claim will be

⁵ If the undersigned seeks to withdraw in the circuit court, the problems will multiply. Given that he has been retained for purposes of the appeal pending in this Court, the undersigned will remain as counsel for appellate purposes and will need to retain copies of Mr. Coleman's files and records. However, the circuit court will be obligated to appoint new counsel who will need an additional copy of the files and records.

significantly delayed. Accordingly, Mr. Coleman seeks review of the circuit court's decision.

WHEREFORE, Petitioner, Michael Coleman, by and through the undersigned counsel, respectfully urges that the Court enter an order to show cause, and thereafter vacate the November 21, 2005, order of the circuit court denying Mr. Coleman's request that the Department of Financial Services pay Mr. Coleman's attorney fees in circuit court.

Respectfully submitted,

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Counsel for Mr. Coleman

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 Nickolas P. Geeker, Circuit Judge, First Judicial Circuit of Florida, M.C. Blanchard Building, 190 Governmental Center, Pensacola, FL 32502, William J. Thurber, IV, Assistant General Counsel, Department of Financial Services, 200 East Gaines Street, Tallahassee, FL 32399-0355, on December 16, 2005.

MARTIN J. McCLAIN