

IN THE SUPREME COURT OF FLORIDA

MICHAEL COLEMAN,

Petitioner,

CASE NUMBER: SC05-2217

LOWER TRIBUNAL NO: 89-1139C-CF

vs.

STATE OF FLORIDA,

Respondent.

_____ /

STATE OF FLORIDA DEPARTMENT OF FINANCIAL SERVICES'
RESPONSE IN OPPOSITION TO DEFENDANT'S EMERGENCY
PETITION

The State of Florida Department of Financial Services (the “Department”), by and through undersigned counsel, responds to the pleading styled “Emergency Petition Seeking Review of Non-Final Order in Death Penalty Post-Conviction Proceedings” filed by attorney Martin J. McClain, in which he asks this Court to vacate the order denying the capital defendant’s request that the Department pay for attorney’s fees in circuit court. The Court is shown as follows:

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

On March 30, 2004, the trial court in the First Judicial Circuit in and for Escambia County appointed Baya Harrison, III, as counsel for the capital defendant. On or about April 2, 2004, Mr. Harrsion filed a notice of

appearance. On April 6, 2004, the Department and Mr. Harrison executed a Registry contract pursuant to Section 27.710(4), Florida Statutes. Mr. Harrison filed the notice of appeal in the denial of the capital defendant's motion for conviction relief on or about August 2, 2004.

On December 28, 2004, Martin J. McClain filed a notice of appearance with this Court, a motion for substitution of counsel, and a motion to transfer files to retained counsel. On January 10, 2005, Mr. Harrison filed a motion to withdraw as counsel for the capital defendant based on Mr. McClain's notice of appearance in this case. On February 16, 2005, this Court granted both Mr. Harrison's motion to withdraw and Mr. McClain's motion for substitution of counsel.

On or about November 2, 2005, Mr. McClain filed a motion styled "Motion for Payment of Costs and Expenses" seeking among other things payment for "costs associated with the mental retardation proceedings including attorney fees in circuit court. A hearing on the motion was heard by the circuit court on November 14, 2005. On November 21, the circuit court entered its order denying the request for attorney fees. The instant Petition seeks review of the order denying the request for attorney fees.

ARGUMENT

A. The sole basis for the payment of attorney fees in capital collateral post-conviction proceedings is contained in Chapter 27, Part IV, Florida Statutes.

Effective July 1, 1998, the Florida Legislature created a Registry for attorneys willing to represent defendants in capital collateral post-conviction proceedings via the enactment of Chapter 27, Part IV, Florida Statutes. This Chapter provides both a mechanism and limitations for payment of private counsel appointed by the trial court for the representation of capital defendants in postconviction proceedings. The Department, through its agency head, the Chief Financial Officer, is responsible for the administration of payments to Registry counsel under Chapter 27, Part IV, Florida Statutes (2005). Section 27.710(4), Florida Statutes (2005), expressly requires the Department to function as contract manager for all registry contracts and “enforce performance of the terms and conditions” of such contracts.

Section 27.711(3), Florida Statutes (2005) provides that “[t]he fee and payment schedule is the exclusive means of compensating a court-appointed attorney who represents a capital defendant.” Moreover, Section 27.7002(4), Florida Statutes (2005) states “[n]o attorney may be appointed, at state expense, to represent any defendant in collateral legal proceedings

except as expressly authorized in this chapter.” Reading these two sections in *pari materia*, the Department submits that it is not authorized in the absence of court appointment to pay attorney fees to counsel representing a capital defendant in post conviction proceedings. As the reasonable construction of law by the state agency charged with the application and enforcement of the payment provisions of Chapter 27, Part IV, Florida Statutes, the Department’s construction of these provisions should be persuasive. *See, e.g., Public Employees Relations Comm. v. Dade County Police Benevolent Assn.*, 467 So. 2d 987 (Fla. 1985); *Green v. State ex rel. Phipps*, 166 So. 2d 585 (Fla. 1964).

B. The order on review denying privately retained counsel for the capital defendant payment of attorney fees does not depart from the essential requirements of law which may cause material injury to the capital defendant.

The circuit court acted within its discretion when it denied the capital defendant’s request for attorney fees at state expense. Section 27.711(2), Florida Statutes (2005), grants the trial court the responsibility to appoint Registry counsel. Inherent in this responsibility is the trial court’s discretion to choose the attorney to be appointed from the Registry. In the instant case, the trial court exercised its responsibility and discretion by appointing Baya Harrison, III as Registry counsel. Mr. Harrison only sought to withdraw from representation of the capital defendant subsequent to Mr. McClain

informing this Court that he was privately retained counsel for the capital defendant.

In his Petition, the capital defendant cites no legal authority for the proposition that a privately retained attorney is entitled to payment of attorney fees at state expense. This Court has held that “no constitutional right exists for a defendant to choose a particular court-appointed counsel.” Spaziano v. State, 660 So. 2d 1363 at 1370 (Fla. 1995). In this case requiring the State to pay attorney fees for privately retained counsel effectively results in the capital defendant choosing his attorney to be compensated at state expense. The circuit court acted within its discretion and did not depart from the essential requirements of law in denying the motion for attorney fees. If counsel for the capital defendant is unwilling or unable to represent the capital defendant, the trial court has the authority to appoint counsel for the capital defendant.

CONCLUSION

WHEREFORE, based on the foregoing, the Emergency Petition Seeking Review of Non-Final Order in Death Penalty Post-Conviction Proceedings should be denied.

Dated this _____ day of January, 2006.

Respectfully submitted,

William J. “Chip” Thurber IV
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by U.S. mail to Martin J. McClain, Esq., McClain and McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334 and Cassandra Dolgin, Esq., Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399 this _____ day of January, 2006.

William J. “Chip” Thurber IV