IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY,

Petitioner,

v. **CASE NO. SC11-___**

PAM BONDI,
Attorney General of the
State of Florida,

and,

KENNETH S. TUCKER,
Secretary,
Department of Corrections,
State of Florida,

Respondents.
_____/

PETITION SEEKING TO INVOKE THIS COURT'S
ALL WRITS JURISDICTION

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PRELIMINARY STATEMENT

The following abbreviations will be utilized to cite to the record in this appeal, with appropriate page number(s) following the abbreviation:

"R. ____" - Record on appeal to this Court in the 1989 direct appeal;

"PC-R. ____" - Record on appeal to this Court in the 1995 collateral appeal;

"PC-R1. ____" - Record on appeal to this Court in the 2000 collateral appeal from the denial of post-conviction relief after an evidentiary hearing;

"PC-R2. ____" - Record on appeal to this Court in the 2007 collateral appeal from the denial Mr. Cherry's Atkins appeal after an evidentiary hearing.

All other citations will be self-explanatory or will otherwise be explained.

INTRODUCTION

On Thursday, November 3, 2011, the State's representative in the pending circuit court proceedings in Mr. Cherry's case, Kenneth Nunnelley, advised this Court during oral argument in the case of Hall v. State, SC10-1335, that

> Justice Pariente this is probably the next to last case I am going to have in these old cases like this because Cherry is on its way back. Eventually we will finish it off, next month, this month I think.

(44:55 [1] of Hall argument).[2]

> I would suggest that while we probably are not going to be seeing very many of these old cases like this, because I think most every time most of the cases in which this issue is being raised are coming up under the rule at trial.

(50:30 of Hall argument).[3]

> Now, I don't believe there are very many [of these mental retardation cases] left. There are a few, but this court has interpreted the statute as the legislature wrote it and directed the circuit courts to explicitly apply in very clear terms, and **that case law seems to be working well**. There is no reason for this court to recede from Cherry which is absolutely what this court would have to do to give Mr. Hall relief.

(51:13 of Hall argument)(emphasis added).

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[1] This 44:55 is the counter that appeared on this Court's website at which the oral argument video was available.

[2] In fact, Mr. Nunnelley has at least two other "old cases" in the works that the undersigned are aware of. Besides Mr. Cherry, Mr. Nunnelley is also counsel in the Sonny Boy Oats case. Mr. McClain represents Mr. Oats. An evidentiary hearing has been conducted in that case and the matter is currently pending in circuit court awaiting a ruling on Mr. Oats' Atkins claim. In Mr. Oats' case, the State had conceded mental retardation in the early 90's when Mr. Oats' ineffective assistance of counsel claim was being litigated. However, now despite IQ scores below 70, Mr. Nunnelley on behalf of the State is contesting Mr. Oats' mental retardation claim.

[3] This is not an accurate representation. In addition to Mr. Cherry and Mr. Oats, undersigned counsel have yet another old case pending in state circuit court in which an evidentiary hearing has been conducted on an Atkins claim. There are yet other old cases in which Atkins will likely be litigated because of the development of a new IQ test, the WAIS IV, which was the subject of litigation in this Court in Johnston v. State, Case No. SC10-356, and which has generally produced lower IQ scores than its predecessor. This means that in accord with this Court's relinquishment in Johnston for an evidentiary hearing on a previously rejected Atkins claim, newly discovered evidence in the form of an IQ on a revised, more accurate IQ test may require revisiting "old cases."

Mr. Nunnelley's comments clearly referred to Mr. Cherry's case and the ongoing evidentiary hearing in the circuit court. He clearly indicated that he was relying on what was going on in cases other than Mr. Hall's for his ultimate conclusion and argument that the "case law seems to be working well. There is no reason for this court to recede from Cherry".

Neither of Mr. Cherry's undersigned attorneys were present in the courtroom when Mr. Nunnelley's discussion of the ongoing proceedings in Mr. Cherry's case occurred, nor were they watching the Hall oral argument live when the State's counsel discussed Mr. Cherry's case and made representations about its status. Mr. Cherry's counsel learned that Mr. Nunnelley had discussed Mr. Cherry's pending case when Mr. McClain happened to visit a number of his clients on Tuesday, November 29, 2011. At that time, a client mentioned having watching the Hall oral argument on a television channel available at Union Correctional Institution. In light of the comment about the proceedings in Mr. Cherry's case made during the Hall argument, Mr. McClain was asked what was occurring in Mr. Cherry's case.

When Mr. McClain returned to his office, he made a point of watching the Hall oral argument several days later. It was then while watching the Hall argument that Mr. McClain first ascertained the precise nature of Mr. Nunnelley's comments regarding the ongoing proceedings in circuit court in Mr. Cherry's case.

This Petition is filed because of Mr. Nunnelley's *ex parte* communication with this Court regarding the ongoing litigation in Mr. Cherry's case and his argument which seems to be based thereon that the "case law seems to be working well. There is no reason for this court to recede from Cherry". Mr. Cherry, through his counsel, absolutely disagree with Mr. Nunnelley's assessment and seek the opportunity to respond and demonstrate that the case law is in fact not working well.[4]

[4] Mr. Cherry's counsel respectfully submit that the real basis for Mr. Nunnelley's argument that the "case law seems to be working well" is that he has been able to ride the case law to victory and keep death sentences intact without reference to whether the result is justice and comports with the holding in Atkins v. Virginia, 536 U.S. 304 (2002). Mr. Cherry's counsel submit that this is inconsistent with principle outlined by the United States Supreme Court regarding the obligations of a prosecutor in the American system of justice:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). As Mr. Nunnelley acknowledged during the Hall oral argument, he does not believe that it is his role to ever concede (44:30 of Hall argument).

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Cherry respectfully requests oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

Art. V, §3 (b)(7) of the Florida Constitution provides this Court with the authority to issue "all writs necessary to complete the exercise of its jurisdiction." This Court is vested with exclusive appellate jurisdiction over all capital cases in this State, which specifically includes "exclusive jurisdiction to review all types of collateral proceedings in death penalty cases." Orange County v. Williams, 702 So.2d 1245 (Fla. 1997); Fl. Const. Art. V, §3(b)(1). Recently this Court in Hildwin v. State, 2011 WL 5545165 (Fla. November 10, 2011), employed its all writs jurisdiction to order FDLE to upload an unknown DNA profile into the CODIS database.

Furthermore, this Court has affirmed that a corollary of its exclusive appellate jurisdiction over capital cases is its obligation to ensure the fair and equitable administration of justice in all cases where a death sentence is imposed. *See, e.g.,* Arbelaez v. Butterworth, 738 So.2d 326, 326 (Fla. 1999) (Court has "a responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner"); ; Tillman v. State, 591 So.2d 167, 169 (Fla. 1991); Wilson v.

Wainright, 474 So. 2d 1162, 1165 (Fla. 1985).

It is on the basis of this Court's longstanding jurisdictional mandate to issue such writs as may be required to ensure fundamental fairness in the administration of capital punishment, whether on a systemic or case-by-case basis, that Mr. Cherry files this Petition.

STATEMENT OF THE CASE

Mr. Cherry was indicted on September 6, 1986, with two counts of first degree murder in the deaths of Leonard and Esther Wayne, one count of burglary with assault, and one count of grand theft (R. 1070-71). Mr. Cherry pled not guilty to the charges (R. 1072).

Mr. Cherry's capital jury trial commenced on September 22, 1987. Guilty verdicts were returned on all charges on September 24, 1987. The penalty phase began on September 25, 1987. The jury recommended a death sentence by a vote of seven to five for the first degree murder of Leonard Wayne. Additionally, the jury recommended a sentence of death by a vote of nine to three for the first degree murder of Esther Wayne (R. 1060). A sentencing hearing was held on September 26, 1987, at which time Mr. Cherry was sentenced to death for the two counts of first degree murder (R. 1067).

On direct appeal, this Court vacated the death sentence for the first degree murder of Leonard Wayne and remanded the case to the circuit court for the imposition of a life sentence without the possibility of parole for twenty-five years. Cherry v. State, 544 So. 2d 184 (Fla. 1989). Also, this court vacated the sentences for the noncapital felony counts and remanded for re-sentencing on those counts. Id.

A writ of certiorari was denied by the United States Supreme Court on April 16, 1990. Cherry v. Florida, 110 S.Ct. 1835 (1990).

A motion to vacate sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure was filed on April 12, 1992. On March 12, 1993, the circuit court summarily denied all claims without an evidentiary hearing. Mr. Cherry appealed the order. This Court remanded for an evidentiary hearing on the ineffective assistance of counsel during the penalty phase claim. Cherry v. State, 659 So. 2d 1069

(Fla. 1995).

A limited evidentiary hearing was held on December 16 - 19, 1996, on Mr. Cherry's claim of ineffective assistance of counsel during the penalty phase.

On January 27, 1997 the circuit court entered an order denying relief (PC-R2. 1724-36).

This Court affirmed the circuit court on September 28, 2000, Cherry v. State, 781 So. 2d 1040 (Fla. 2000), over a strongly worded dissent by Justice Anstead, which Justice Pariente joined:

> This case serves as a primary example of why this Court has found it necessary to adopt uniform standards for the qualification of lawyers in capital cases. We are presented with a classic scenario of the ineffective assistance of counsel: an inexperienced lawyer who had never handled a capital case, who essentially defaulted and rendered no assistance to a client whose only hope for life was in the hands of his lawyer. **As a result, the penalty phase proceeding was a sham**.

Cherry, 781 So. 2d at 1055 (Emphasis added). Justice Anstead went on to state:

> The majority concedes "that counsel failed to properly conduct the penalty phase of the trial." Majority op. at 1049. Despite this recognition of trial counsel's obvious default, however, the majority nevertheless concludes that counsel was not deficient because he placed into evidence a brief psychological report finding the defendant sane and competent for trial. *See* majority op. at 1049-50. In fact, it appears that the majority's entire premise for approving counsel's performance is based on counsel's singular act of placing the report in evidence, even though counsel never referred to it once in his address to the jury, and the State used the report *against* the defendant. In finding Cherry's counsel's performance adequate, the majority virtually has ignored the essential requirement of *Strickland* that there be a vigorous testing of the appropriate punishment under our adversary system by a lawyer for the defendant who is prepared on the law and the facts, so that we can have confidence in the reliability of the outcome.

Id. at 1058.

While Mr. Cherry's case was on appeal, he filed a successive Rule 3.851 motion, involving claims of newly discovered evidence and the inadmissibility and inaccuracy of scientific evidence at Mr. Cherry's trial (PC-R3. 1-158).

The circuit court summarily denied the motion on October 16, 2001 (PC-R3. 429-435). On October 25, 2001, a motion for rehearing was filed (PC-R3. 436-45). The circuit court granted the motion and ordered an evidentiary hearing on Mr. Cherry's newly

discovered evidence claim (PC-R3. 446-7). Mr. Cherry's claim concerned James Terry's statements to Levester Hill, that Terry, not Mr. Cherry, had entered the Wayne's home on the night of the crimes.

An evidentiary hearing was held on June 10, 2002. On August 12, 2002, the circuit court denied relief (PC-R3. 486-9).

And, while Mr. Cherry's successive Rule 3.851 motion was pending, he filed another Rule 3.851 motion on April 17, 2002. Mr. Cherry's claims involved his mental retardation and Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

In 2005, the circuit court appointed experts to evaluate Mr. Cherry (SPC-R3. 290-1).

The court-appointed experts found that Mr. Cherry is mentally retarded (SPC-R3. 875, 976; Exs. 4, 6). The experts testified at the July 25, 2005, evidentiary hearing. The intelligence test administered in 2005 was the WAIS III. At the time it was administered the norms were outdated by ten years. Mr. Cherry obtained a full scale IQ of 72, though testimony was presented that the score was inflated, due to a variety of reasons. Thus, Mr. Cherry's true full scale IQ score was more than likely less than a 72.

However, on October 12, 2005, the circuit court denied Mr. Cherry's Rule 3.851 (SPC-R3. 480-526). Two days later, the lower court entered a corrected/amended order (SPC-R3. 527-73).

This Court consolidated the appeals stemming from Mr. Cherry's successive Rule 3.851 motions and denied relief. Cherry v. State, 959 So. 2d 702 (2007). As to the issue of Mr. Cherry's mental retardation, this Court held:

> Given the language in the statute and our precedent, we conclude that competent, substantial evidence supports the circuit court's determination that Cherry does not meet the first prong of the mental retardation determination. Cherry's IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that Cherry is not mentally retarded should be affirmed.

Cherry, 959 So. 2d at 714.

Mr. Cherry filed a petition for writ of habeas corpus in the federal district court. Mr. Cherry's petition is currently pending.

In April, 2010, Mr. Cherry's postconviction counsel learned that the WAIS IV had been published and that it produced more

accurate results due to improvements in the test and scoring. In August, 2010, Dr. Harry Krop administered the WAIS IV with Mr. Cherry. Mr. Cherry obtained a full scale IQ score of 64.

Mr. Cherry filed a successive Rule 3.851 motion in October, 2010, arguing that the WAIS IV score of 64 was new evidence that warranted Rule 3.851 relief. An evidentiary hearing was held on September 15 - 16, and December 20, 2011. Closing arguments are due to be filed on February 28, 2012.

ARGUMENT

By this petition, Mr. Cherry seeks an opportunity to address the *ex parte* assertions made by Mr. Nunnelley during the Hall oral argument on November 3, 2011. Mr. Cherry's counsel could not more strenuously disagree with Mr. Nunnelley's position expressed to this Court in the *ex parte* communication during the Hall oral argument.[5] Yet, due to the circumstances of Mr. Nunnelley's statements to this Court regarding Mr. Cherry's case and the representation that the "case law seems to be working well" and "[t]here is no reason for this court to recede from Cherry", Mr. Cherry was shut out of an opportunity to be heard in response.

Of course, the touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). Mr. Cherry received neither notice nor an opportunity to be heard.

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[5] For example, the State has argued successfully in both State v. Cherry and State v. Oats that this Court's case law precludes any testimony of any kind regarding either "the standard error of measure" or "the Flynn effect." In both cases, the State has successfully argued that psychological experts must censor themselves and must not mention the principles, well-accepted in the field of psychology and psychiatry, of "the standard error of measure" and "the Flynn effect." Undersigned strenuously disagrees with Mr. Nunnelley's contention in both Cherry and Oats, that this Court's case law was meant to mandate censorship of expert testimony and require experts to not use or mention specific well-recognized psychological principles.

This Court has explained the importance of hearing from a zealous advocate for the State's adversary to insure that the adversarial process works:

> The role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, **partisan scrutiny of a zealous advocate**. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our *confidence* in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1164-65 (Fla. 1985) (emphasis added). Yet, here the State made erroneous representations about the proceedings in Mr. Cherry's case to argue during Mr. Hall's case that this Court's jurisprudence did not need to be changed and that Mr. Hall's mental retardation claim should be denied. Mr. Hall's counsel did not and does not represent Mr. Cherry, nor is he familiar with the ongoing proceedings in Mr. Cherry's case. Mr. Hall's counsel simply was not in a position to subject Mr. Nunnelley's representation to the crucible of the adversarial process.[6]

[6] Certainly, Mr. Nunnelley as the State's representative in both Mr. Hall's case and in Mr. Cherry's case knew that Mr. Hall's counsel did not represent Mr. Cherry, nor likely knew of the ongoing circuit court proceedings in Mr. Cherry's case.

The only remedy for the breakdown in the adversarial process that occurred as a result of the *ex parte* comments made by the State's representative is for this Court to use its all writs jurisdiction to permit Mr. Cherry's counsel to submit a full response to the *ex parte* comments.[7] Even though the *ex parte* comments were made in the context of arguing for the denial of mental retardation claim, clearly the State's representative believed that there is a link between the desired result in Mr. Hall's case and counsel's representation that the "case law seems to be working well" and "[t]here is no reason for this court to recede from Cherry." In addition, it is also clear to Mr. Cherry's counsel that the State's representative is seeking a ruling in Mr. Hall's case that he can use to oppose Mr. Cherry's mental retardation.[8] The State's representative in making his oral presentation in Hall v. State chose to link the two cases, Hall and Cherry. Due process demands that Mr. Cherry's counsel be given the opportunity to provide this Court with the requisite response from a "partisan scrutiny of a zealous advocate" to the assertions that State's representative made regarding the ongoing circuit court proceedings in State v. Cherry. See Wilson v. Wainwright, 474 So. 2d at 1165. Notice and an opportunity to be heard must be accorded Mr. Cherry. This Court should use its all writs jurisdiction to give Mr. Cherry his basic bedrock right under due process to have a zealous advocate present a response to the representations and arguements made by the State's representative.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Cherry respectfully urges this Court to provide him the opportunity to formally and fully

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[7] Undersigned counsel describes the comments made by the State's representative as *ex parte* even though they were made in open court in the presence of Mr. Hall's counsel, because as to Mr. Cherry the comments were made on an *ex parte* basis. As to Mr. Cherry, it is frankly no different than if the State's representative bumped into members of the Court at a bar convention and took the opportunity to discuss the merits of Mr. Cherry's case without Mr. Cherry's counsel present.

[8] In many ways, the State is seeking to have this Court in Mr. Hall's case use its rule making authority to adopt procedures that can be used in other cases in which the mental retardation claimants have been, as a result, shut out of the rule making process. This simply does not comport with due process.

respond to the *ex parte* assertions by Mr. Nunnelley that the "case law seems to be working well" and present to this Court the countervailing arguments that the pending proceedings in Mr. Cherry case in fact demonstrates that the case law is not working well, if at all.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION SEEKING TO INVOKE THIS COURT'S ALL WRITS JURISDICTION has been furnished by United States Mail, first-class postage prepaid to Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118, this 29th day of December, 2011.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

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