IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-2

ROGER LEE CHERRY

Petitioner,

v.

STATE OF FLORIDA

Respondent.

RESPONSE TO PETITION SEEKING TO INVOKE THIS COURT'S ALL WRITS JURISDICTION

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

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RESPONSE TO "PETITION SEEKING TO INVOKE THIS COURT'S ALLWRITS JURISDICTION

COME NOW the Respondents, by and through counsel, and respond as follows to Cherry's "all writs" petition, which bears a service date of December 29, 2011. For the reasons set out below, that petition should be dismissed.

PRELIMINARY MATTERS

Cherry's basis for the petition is his assertion that a statement made by counsel for the State during oral argument in another case is an "*ex* parte communication" to which he should be allowed to respond. Whether an open-court statement during oral argument can ever be *"ex parte*" is highly doubtful -- no definition supports that conclusion. What is clear is that what is framed in terms of direct attacks on the undersigned is really an attempt to severely limit this Court's ability to inquire into anything during argument.[1] Behind the personal attacks is Cherry's larger attempt to limit this Court's right of inquiry into issues that are before it and to interfere with the State's ability to respond truthfully, fully and candidly to this Court.

Under Cherry's view of the law, if a trial judge were to

[1] Cherry's co-counsel also raised a similar *"ex parte"* claim in *Hildwin v. State*, SC11-428, and *Hildwin v. Tucker*, SC 11-1137, which attempted to label another oral argument an "*ex parte* communication.". This Court has rejected those claims in those cases. If two events make a pattern, one seems to be developing.

inquire whether any other defendants have raised a specific issue, an answer to that question would be an "*ex parte* communication." Cherry's filing is a direct attempt to inhibit the ability of the Courts to properly discharge their responsibilities. This claim, if credited, would literally prohibit counsel from answering direct questions from this (or any other) Court, and would render the duty of candor to the tribunal an impossible aspiration. And, taken to the logical conclusion, even the filing of a notice of related or similar cases would be, under Cherry's view, an "*ex parte* communication." That result makes no sense at all.

RESPONSE TO "INTRODUCTION"[2]

On pages 2-4 of the petition, Cherry sets out a legally baseless claim which, as understood by the State, is that it was somehow an "improper *ex parte* communication" for counsel for the State to dare to comment, during oral argument in the *Freddie Lee Hall* case, that this Court's case law on mental retardation as a bar to execution "seems to be working well," and that there is "no need for this Court to recede from *Cherry*."[3] In his eagerness to level personal attacks against counsel for the

[2] Cherry's petition" contains multiple hyperbolic "assertions" -- **the lack of a specific response to a given "assertion" is not an admission of it**. The personal attacks deserve no more than passing mention, at best.

[3] Cherry's interpretation of the argument is, at best, a stretch. The State defers to the Court's memory of the argument and its context.

State, Cherry has purported to know the undersigned's thoughts and intentions during the *Hall* argument, and apparently regards arguments before this Court in the same fashion that he would regard a transcript from a Circuit Court proceeding. That is simply not the law. When stripped of its pretensions of a claim of some sort, Cherry's filing is no more than invective and personal attacks directed at counsel for the State. The "petition" is improper and frivolous, has no legal basis, and asks this Court to allow Cherry to "submit a full response" to the *Hall* oral argument. That request is wholly improper, and makes no sense.

RESPONSE TO REQUEST FOR ORAL ARGUEMNT

The State suggests that oral argument is inappropriate in this case.

RESPONSE TO JURISDICTIONAL STATEMENT

It is true that this Court has the authority to utilize an "all writs" proceeding in the appropriate case. This is not one of those cases -- an all writs petition, or any other court filing for that matter, is not properly used to heap personal attacks on opposing counsel.

RESPONSE TO STATEMENT OF THE CASE

In its 2005 decision, this Court summarized this case as follows:

Roger Lee Cherry appeals an order of the circuit court

denying his second motion for postconviction relief under *Florida Rule of Criminal Procedure* 3.850 and an order concluding that he is not mentally retarded under *Florida Rule of Criminal Procedure* 3.203. We have jurisdiction. See art. V, § 3(b)(1), *Fla. Const*. As explained below, we affirm the circuit court's denial of Cherry's postconviction motion and the order on mental retardation.

I. FACTS AND PROCEDURAL HISTORY

Cherry was convicted of two counts of first-degree murder, one count of burglary with assault, and one count of grand theft following the 1986 murders of Ester and Leonard Wayne. *Cherry v. State*, 544 So. 2d 184, 184-85 (Fla. 1989). We affirmed both murder convictions and the death sentence imposed for Ester's murder; however, we reversed the death sentence imposed for Leonard's murder on proportionality grounds. *Id*. at 186-88. The facts of this case are fully set out in our prior opinion in Cherry's direct appeal. *See id*. at 185-86.

The circuit court summarily denied each of the claims in Cherry's first motion for postconviction relief. On appeal, we affirmed that denial with respect to most claims but remanded for an evidentiary hearing on Cherry's ineffective assistance of penalty phase counsel claims. *Cherry v. State*, 659 So. 2d 1069, 1074 (Fla. 1995). After an evidentiary hearing, the circuit court again denied relief, and we affirmed that denial on appeal. *Cherry v. State*, 781 So. 2d 1040, 1055 (Fla. 2000).

On August 7, 1997, Cherry filed a second postconviction motion, raising five claims. [FN1] The circuit court held a *Huff* [FN2] hearing, after which it summarily denied all five of Cherry's claims. *State v. Cherry*, No. 1986-04473 (Fla. 7th Cir. Ct. order dated Oct. 16, 2001) [hereinafter Postconviction Order I]. Following Cherry's motion for rehearing, the circuit court reversed part of its decision and granted Cherry's motion for an evidentiary hearing to address the claim of newly discovered evidence.

> [FN1] The claims raised by Cherry were: (1) he was denied access to important files and

> records by State agencies and offices; (2) newly discovered evidence would have altered the outcome of his trial; (3) inadmissible, inaccurate scientific evidence was improperly admitted at his trial; (4) execution by electrocution is cruel or unusual punishment or both; and (5) appellate lawyers should not be prohibited from interviewing trial jurors.
>
> [FN2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

At the hearing on June 10, 2002, Cherry presented the testimony of several witnesses regarding his newly discovered evidence claim, including Levester Hill, one of his childhood friends, who testified that another man, James Terry, confessed to playing a role in the murders. Terry also testified at the hearing, claiming that while he had talked with Hill about Cherry's case, he never said that he played any part in the murder of the Waynes.

After the hearing, the circuit court denied relief on this claim. *State v. Cherry*, No. 1986-04473 (Fla. 7th Cir. Ct. order dated Aug. 12, 2002) [hereinafter Postconviction Order II]. Cherry appealed the denial of his postconviction motion, raising two issues. [FN3]

> [FN3] Cherry raised the following issues on appeal: (1) newly discovered evidence existed, which if introduced at his trial, would have altered the outcome of the trial; and (2) certain scientific evidence was improperly admitted at his trial.

While review of the circuit court's decision was pending before this Court, Cherry filed a third motion for postconviction relief, based on the decisions in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The State filed a motion to relinquish jurisdiction on the basis of this third motion. On November 18, 2004, we relinquished jurisdiction to the circuit court for a determination of mental retardation pursuant to rule

> 3.203. The circuit court held a hearing on July 25, 2005, at which the defense presented evidence.
>
> Following this hearing, the circuit court found that Cherry did not meet the statutory definition for mental retardation. *Cherry v. State*, No. 86-4473 (Fla. 7th Cir. Ct. order filed Oct. 14, 2005) [hereinafter Supplemental Order].
>
> On November 2, 2005, we granted leave to Cherry and the State to supplement their initial briefs to this Court on the basis of the circuit court's determination that Cherry is not mentally retarded. Following oral argument on January 5, 2007, we now affirm the circuit court's denial of each of Cherry's claims.

Cherry v. State, 959 So. 2d 702, 704-705 (Fla. 2007).

Cherry has a federal habeas corpus petition pending in the district court, and also has a successive *Florida Rule of Criminal Procedure* 3.851 motion pending in the Volusia County Circuit Court. The basis of that petition is Cherry's claim that he is entitled to litigate his mental status again based upon the results of testing conducted using the *Weschler Adult Intelligence Scale-IV*. The evidentiary portion of that proceeding has been concluded, and closing arguments will be filed on or before February 28, 2012.

RESPONSE TO "ARGUMENT"[4]

On pages 11-15 of the petition, Cherry intersperses citations to inapposite decisions with personal attacks on

[4] By way of example, footnotes 2, 3, 4 and 5 actually do exactly what Cherry has accused counsel for the State of doing. Those "arguments" have nothing to do with the all writs petition.

counsel for the State. However, Cherry's real "claim" is found in the first paragraph of the argument section (and repeated in the conclusion), and is no more than Cherry's claim that it was "improper" for counsel for the State to argue that this Court should follow the precedent of its 2007 decision in *Cherry* because "Cherry was shut out of an opportunity to be heard in response." That argument stands reason on its head.

The "basis" for Cherry's argument is his unsupported "definition" of an "*ex parte* communication." While Cherry would define that phrase to (at least) include any statement by counsel for the State that refers to another case **during oral argument in an open court proceeding**, that interpretation is, simply, unsupported by practice, common sense, or reason.[5] In his dissenting opinion in *McKoy v. North Carolina*, Justice Scalia said:

> If petitioner should seek reversal of his sentence because two jurors were wearing green shirts, it would be impossible to say anything against the claim except that there is nothing to be said for it -- neither in text, tradition, nor jurisprudence.

McKoy v. North Carolina, 494 U.S. 433, 466-467, 110 S.Ct. 1227, 1246 (1990). The extreme to which Cherry's argument takes

[5] *Jones v. State*, 966 So. 2d 319, 327 (Fla. 2007) ("*See* Lewis Carroll, *Through the Looking-Glass* (1872) ("When I use a word, it means just what I choose it to mean -- neither more nor less."), *quoted in Hartford Ins. Co. of the Midwest v. Minagorri*, 675 So. 2d 142, 144 (Fla. 3d DCA 1996)").

reality is similar, but worse, in that the applicability of precedent, and whether or not an appellate court should follow it, is part and parcel of the appellate process (and has been for centuries). Under Cherry's view of appellate practice, any defendant whose case was mentioned by name during an oral argument would be entitled to brief and argue the merits of **his** case within the appeal of **another** case. That is not the law, and, if it were, the State would be able to file such "pleadings" as well. And, under Cherry's view of appellate practice, counsel would be severely constrained in answering questions from this Court, out of concern of being accused of an "*ex parte* communication." That result would not serve the interests of justice because **the end result would be to limit the scope of questions this Court could even ask**. Cherry's argument, if it was the rule, would, for example, preclude the frequently-occurring discussion during oral argument about the progress or result of a co-defendant's case. Likewise, any argument about the proportionality of a death sentence which mentioned another case would be off limits. That result would turn the truth-seeking function of the courts on its head.

Cherry says, in the conclusion to the "petition," that he wants to "formally and fully respond" to the undersigned's statement that the "case law seems to be working well" with respect to mental retardation as an execution bar claims.

Cherry, through his attorney, has made it clear that he holds a contrary opinion, and that is no surprise to anyone. However, his disagreement with the law does not mean that the law from this Court is not binding precedent or that counsel is precluded from arguing for the application of precedent to a pending case. That is the nature of the appellate process, and Cherry has seized upon that process as an excuse to launch a lengthy personal attack on the undersigned. That is not the purpose of an all writs petition -- such tactics have no place.

RESPONSE TO "RELIEF SOUGHT"

The relief Cherry wants is, apparently, to be allowed to file a brief addressing the state of this Court's law concerning mental retardation as a bar to execution. The problem is that Cherry wants to file that brief in another defendant's case. When all is said and done, this Court does not need to do anything to insure "the complete exercise of its jurisdiction." *Fla. R. App. Pro.* 9.030(a)(3). Cherry's pending case will be decided in due course -- when it is, this Court may or may not be called on to decide various matters. Until such time as Cherry's current case reaches this Court (if it does), there is nothing that this Court should do, or needs to do, with respect to that proceeding. The "all writs petition" should be denied in all respects.

CONCLUSION

Based upon the foregoing, the Respondents respectfully request that this Court deny relief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Martin McClain**, McClain & McDermott, P.A. 141 N. E. 30th St., Wilton Manors, FL 33334; on this _____ day of January, 2012.

Of Counsel