

IN THE SUPREME COURT OF FLORIDA

BILL McCOLLUM, etc., et al.,  
Petitioners,

v.

Case No.: SC06-2391  
Circuit Court No. 1981-170 CF

IAN DECO LIGHTBOURNE,  
Respondent.

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PETITION FOR REVIEW OF NON-FINAL ORDER  
AND MOTION FOR PROTECTIVE ORDER

COMES NOW the State of Florida, pursuant to Florida Rule of Appellate Procedure 9.142(b), and petitions this Court to exercise its discretionary jurisdiction and reverse the August 9, 2007, Order of the Circuit Court Granting Defendant's Motion for a View of Execution Chamber and Witness a Walk-Through. As grounds therefore, Petitioner states:

Procedural History

1. On December 14, 2006, Lightbourne filed an Emergency Petition Seeking to Invoke this Court's All Writs Jurisdiction. This Court relinquished jurisdiction to the Circuit Court to resolve "[all] other issues raised by Petitioner Lightbourne" as soon as possible.

2. The issues raised by Lightbourne in his Petition were couched as follows:

(a) whether the State of Florida's current lethal injection procedures, created behind closed doors by an

agency making policy outside the scope of its usual business, involve the unnecessary and wanton infliction of pain contrary to contemporary standards of decency in violation of the Eighth Amendment to the U.S. Constitution and the corresponding provision of the Florida Constitution. (Petition at 9);

(b) production of records previously requested by Lightbourne.<sup>1</sup> (Petition at 10);

(c) appoint a special master to hear and receive scientifically-reliable evidence regarding the conscious pain and suffering experienced by the condemned during lethal injection. (Petition at 11).

3. In an order issued April 16, 2007, this Court framed the issue as:

The impact of [the events at the Diaz execution] on the issue of the constitutionality of Florida's lethal injection procedures.

*Lightbourne v. State*, Case No. SC06-1241. Thus, the two narrow issues on which the Circuit Court was provided jurisdiction were:

**(1) Public records;**

**(2) Impact of Diaz execution on the constitutionality of Florida's lethal injection procedures.**

4. The Circuit Court conducted an extensive evidentiary hearing spanning three months. Thus far, hearing dates have included May 18 and 21, June 18 and 19, and July 17, 18, 19, 20, 21, and 22, 2007. Voluminous exhibits were introduced, thirty-eight witnesses testified (thirty-three of which were defense

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<sup>1</sup> In a related case, on April 16, 2007, this Court entered an order denying the request for public records "without prejudice to Lightbourne litigating the related issues currently pending in the circuit court pursuant to this Court's December 14, 2006, relinquishment order in *Lightbourne v. State*, Case No. SC06-1241."

witnesses), and 3,000 pages of transcript were produced. (Exhibit 9).

5. On July 22, 2007, Circuit Court Judge Carven D. Angel, ordered that editorial changes be made to the Department of Corrections' ("Department") May 9, 2007, execution procedures to clarify the qualifications of the execution team members and requiring a provision for certification from the Secretary of the Department. An order to that effect was signed by the Circuit Court judge on July 31, 2007. (Exhibit 1). Those editorial changes were made and the Secretary signed revised lethal injection procedures on July 31, 2007, effective August 1, 2007. (Exhibit 2).

6. On August 2, 2007, the Circuit Court entered an order setting aside 8 days in September for further evidentiary development. (Exhibit 3).

7. On August 6, 2007, this Court entered an order directing the Circuit Court judge to enter a final order by September 10, 2007. (Exhibit 4).

8. In light of this Court's Order, on August 7, 2007, the Circuit Court entered an Amended Order Setting Final Hearing. The order provided that the final hearing in this matter would occur August 28-31, 2007, allowing additional time for more unspecified witnesses to be heard. (Exhibit 5).<sup>2</sup>

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<sup>2</sup> This order repeated the timeline in this Court's July 18, 2007, order. Case No. SC06-2391. Lightbourne has filed an emergency

9. At 4:30 p.m., on August 8, 2007, Lightbourne FAXed a Motion to View Execution Chamber and Witness a Walk-Through to the Office of the Attorney General. (Exhibit 6). At 1:25 p.m., on August 9, 2007, the State FAXed its Response to the motion. (Exhibit 7). At 3:11 p.m., on August 9, 2007, the Circuit Court judge entered an Order Granting Defendant's Motion for a View of Execution Chamber and Witness a Walk-Through. (Exhibit 8).

10. The entire order consists of the following:

UPON consideration of Defendant's Motion to View Execution Chamber and Witness a Walk Through and the State's Response, it is hereby

ORDERED that said Motion be and is hereby GRANTED, provided that nothing shall be done to compromise the confidentiality of persons whose identity is not to be disclosed and whatever is arranged with the Department of Corrections shall not delay the final hearing previously scheduled. The undersigned judge will not be available to participate in any view before August 28, 2007.

(Exhibit 8).

### Jurisdiction

11. This Court should exercise its jurisdiction to prevent irreparable harm to Petitioners. This Court has reviewed other interlocutory discovery orders in capital collateral proceedings where similar harm will occur in this litigious area. See *Trepal v. State*, 754 So. 2d 702, 706 (Fla. 2000) (jurisdiction exercised to harmful "cat-out-of-the-bag" disclosures that can result in

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motion in this Court to vacate that scheduling order. The State responded, objecting to any change in the timeline.

irreparable harm); *Sims v. State*, 750 So. 2d 622 (Fla. 1999); *Lewis v. State*, 656 So. 2d 1248, 1249 (Fla. 1994) (under section 3(b)(1) this Court reviewed two nonfinal orders, from different trial courts, that denied the State's respective motions to quash witness subpoenas issued to trial court judges); *LeCroy v. State*, 641 So. 2d 853, 853 (Fla. 1994) ("We have before us an interlocutory appeal of a disclosure order in a post-conviction capital proceeding under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const."); *State v. Kokal*, 562 So. 2d 324, 325 (Fla. 1990) (this Court reviewed a discovery order under section 3(b)(1) that had been issued by a trial court hearing a postconviction claim, where the defendant had been sentenced to death).

12. The State of Florida and Department of Corrections will suffer irreparable harm from the circuit court's departure from the essential requirements of the law, and the State has no other adequate remedy to correct the Court's order. The State has no other opportunity for review of the circuit court's unnecessary invasion of the security of Florida State Prison and the confidentiality of protected members of the execution team and the expansion of the remand based on the All Writs filed eight months ago.

13. The Circuit Court judge has not only exceeded the jurisdiction allowed by this Court but also he has exceeded his

authority as a member of the judicial branch.

14. Article II, Section 3, Constitution of the State of Florida, provides:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

15. Article III, Section 6, Florida Constitution, provides that the supervision of executive departments is the Governor or Cabinet. Section 20.04, Florida Statutes, delineates the structure of the executive branch, of which Department of Corrections is one department. Section 20.315, Florida Statutes, outlines the role of the Department of Corrections. The Secretary of the Department is appointed by the Governor. §20.315(3), Fla. Stat. (2006). Chapter 945, Florida Statutes, is the specific chapter dealing with the Department. The Department has the exclusive authority over the operation and control of correctional facilities. §945.025, Fla. Stat. (2006).<sup>3</sup>

16. The Circuit Court judge exceeded the bounds of his authority by ordering the Department to allow an unspecified number of persons to enter a secure facility. Moreover, the Circuit Court judge has ordered the Department to allow these persons into the execution chamber, an area particularly secure.

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<sup>3</sup> This Court has specifically recognized the authority of the Department to enact lethal injection procedures. *Diaz v. State*, 945 So. 2d 1136, 1142 (Fla. 2006).

Additionally, the Circuit Court has ordered the Department to conduct a walk-through (or fake execution), in order for these persons to observe procedures. The Circuit Court judge does not have the authority to invade the province of the executive branch to such an extent, or order the Department to allow activities within a secure facility.

17. In this instance the Circuit Court judge has neither identified whether there has been any lasting impact from the Diaz execution, in that the Department has readily admitted it has modified the lethal injection procedures to address concerns found in the March 1, 2007, Report of the Governor's Commission on the Administration of Lethal Injection and likewise has incorporated the editorial changes ordered by the Circuit Court judge effective August 1, 2007. Nor has the Circuit Court judge found any deficiencies with the August 1, 2007, protocols currently in place, albeit the Circuit Court judge clearly stated in his July 22, 2007, oral pronouncements that this was a final order and the Department has complied.

18. This Court has traditionally applied a "strict separation of powers doctrine." *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000). One of the fundamental prohibitions is that no branch may encroach upon the powers of another. *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991). For example, in *Dep't of Corrections v. Grubbs*, 884 So. 2d 1147 (Fla.

2d DCA 2004), the appellate court held that the trial court order directing the Department to pay for sex offender treatment violated the doctrine of separation of powers. See also *F.G. v. Agency for Persons with Disabilities*, 940 So. 2d 1095 (Fla. 2006)(trial court has no authority to compel the appearance of an executive officer).

19. The Circuit Court judge has likewise set forth an impossible task for the Petitioners. Whether the Department has planned a walk-through on the date the judge is available is of no import to the judge since there has been no determination as to whether the Department will conduct such a "test" on that date or any other date between August 28-31, 2007, based on the judge's latest order. More importantly, there is no nexus between what the judge stated was his concerns as to the procedures set forth in the Departments' written procedures and, what anyone expects to see at a visit to the death chamber and witness of a walk-through.

20. Without agreeing to any authority for the Circuit Court judge to order the visit and witnessing of a walk-through, the Department has the right to assume that the failure to orchestrate a visit and walk-through will adversely impact any result in favor of the Petitioners.

21. The execution of condemned prisoners is clearly a matter within the province of the executive branch of government.

§ 922.09, Fla. Stat. (1989); *Squires v. State*, 565 So. 2d 318, 319-320 (Fla. 1990).

22. This Court has held that "it must be presumed that members of the executive branch will properly perform their duties," *Squires*, at 319-20, and that the defendant bears the burden of alleging sufficient basis to overcome that presumption. See *Buenoano v. State*, 565 So. 2d 309, 311 (Fla. 1990). Lightbourne has not even attempted to do so, nor has the circuit judge so found. Rather, Lightbourne merely continues to engage in a dilatory and purposeless discovery that exceeds the scope of the remand and resolution of the constitutional issue before the court. *Duckett v. State*, 918 So. 2d 224, 238 (Fla. 2005)(holding that circuit court properly interpreted this order as limiting the scope of DNA testing). In this very instance for example, once it was determined that the circuit judge planned on additional hearing dates for the end of the month, defense counsel voiced concerns that their expert would be out of the country and unavailable to be there.

23. Prior attacks on the method of execution have been rejected by this Court due to a failure to establish a nexus between protocol variances and a breach of the line of constitutionality as established by both the United States Supreme Court and this Court. *Provenzano v. State*, 739 So. 2d 1150, 1157 (Fla. 1999); *Buenoano v. State*, 717 So. 2d 529 (Fla. 1998); *Squires*

*v. State*, 565 So. 2d 318, 319-320 (Fla. 1990). This Court has held that, "Despite questions raised regarding whether the protocol has been followed, there has been no showing that any of the . . . executions caused unnecessary and wanton pain" or involved "torture or a lingering death." *Jones v. Butterworth*, 701 So. 2d 76, 79 (Fla. 1997), *Provenzano v. State*, 739 So. 2d 1150, 1157 (Fla. 1999) (Lewis concurring) and see Judge Kovachevich's Order denying federal habeas review in *Derrick Tyrone Smith v. Sec. Dept. of Corrections*, Case No. 8:06-cv-01330-T-17MAP decided August 7, 2007, providing that "Diaz's execution has been under investigation to determine whether the Department of Corrections properly followed existing procedures, not to reconsider the constitutionality of Florida's lethal injection protocol. The constitutionality of Florida's lethal injection protocol is clearly established. See *Diaz v. State*, 945 So. 2d 1136, 1144 (Fla. 2006); *Sims v. State*, 754 So. 2d 657 (Fla. 2000).

24. This Court should exercise its jurisdiction to prevent irreparable harm, the State of Florida and Department of Corrections from the Circuit Court's departure from essential requirements of the law. The State has no other adequate remedy to correct the Court's order. The State has no other opportunity for review of the Circuit Court's unnecessary invasion of the security of Florida State Prison, to protect the confidentiality of protected members of the execution team and limit that

expansiveness of litigation unauthorized by this Court's remand. See *Trepal v. State*, 754 So. 2d 702, 706 (Fla. 2000) (jurisdiction exercised to harmful "cat-out-of-the-bag" disclosures that can result in irreparable harm.)

25. The Circuit Court order in this case, in addition to exceeding the authority of the judiciary by invading the province of the executive branch, is untenable, unworkable and essentially orders the State to create evidence outset the scope of the remand for the defense's purposes.

26. As noted through the testimony by an assortment of witnesses comprising the current execution team, any walk-through exercises practiced by the execution team will consist of reviewing the protocols for a routine execution exercise and/or involve contingency exercises, to address potential issues that might arise, neither of which occurs for the benefit of observers but rather is done in preparation for an actual lethal injection procedure. Just as DOC is not required to create a public record that does not exist, the Department should not be required to orchestrate a run-through simply to allow CCRC to observe a fake execution.

27. The DOC does not have a Walk-Through scheduled for the time period delineated by the Circuit Court and, therefore, any such Walk-Through would be created solely for the benefit of CCRC's discovery request.

28. Further, the order does not specify the time, parameters, or attendees of the Walk-Through. While the order purports to protect the confidentiality of persons, it does not explain how a Walk-Through can be conducted without revealing the identities of personnel specifically exempted from disclosure by Section 945.10(1)(g). That section provides that the records and information on the following persons are confidential:

Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.

29. The Circuit Court order does not attempt to address how to protect the identity of these persons. Furthermore, if these persons did not participate in the "Walk-Through," the Circuit Court does not address the value of conducting a "Walk-Through" without the confidential qualified personnel who examine the inmate, attach the leads to the heart monitors, purchase, maintain and mix the drugs, insert the IV, monitor the IV sites, and monitor the heart monitor. (See Exhibit 2, pages 2-3). Again, the persons who are qualified to perform these activities are confidential. Lest we not forget that the issues that arose in the Diaz execution were not that the drugs were not mixed properly or that the equipment was not functioning, but rather, through unintended human error, the IV failed at some point during Diaz's execution, and it took longer for the drugs to have their effect.

30. The Circuit Court judge has exceeded the scope of this

Court's order relinquishing jurisdiction. The sole issue before the Circuit Court is the impact of the events at the Diaz execution on the issue of the constitutionality of Florida's lethal injection procedures. As stated previously, those issues have been explored through the extensive evidentiary development, and the Department has made modifications pursuant to the Circuit Court's July 31, 2007, order.

31. The invasion of the security of Florida State Prison is unnecessary. Diagrams of the execution areas have been admitted into evidence. Multiple photographs and an architectural diagram of the renovations to the execution area have also been admitted. (Exhibit 9, List of Evidence at Lightbourne Hearing, *State Exhibit #8*). The IV products and equipment used in the execution process have also been introduced and examined by three experts: Dr. Dershwitz, Dr. Sperry, and Dr. Heath. (Exhibit 9, List of Evidence at Lightbourne Hearing, *State Exhibit #1 and Demonstrative Aid #1*). It is curious how defense counsel, and, for that matter the judge, who have no particularized skill or knowledge on this subject, will be able to enhance their assessment of what the experts have already testified to, based upon an hour's worth of observation of the facilities and equipment. Moreover, what will a walk-through prove? That the Department is training? Or that the Department can go through a walk-through? Even if a walk-through occurs, will the defense then need to explain to the judge what happened? Or

will they need to have an expert present?

32. On balance, the detrimental effect to the Department outweighs any benefit to the defendant, especially given the fact the defense has color photographs of all aspects of the execution area, the execution equipment is in evidence and the Department has already made the remedial changes required by the circuit court.

33. This Court should exercise its jurisdiction to prevent irreparable harm. *See Trepal v. State*, 754 So. 2d 702, 706 (Fla. 2000) (jurisdiction exercised to harmful "cat-out-of-the-bag" disclosures that can result in irreparable harm). If required to comply with the instant order, the State of Florida and the Department of Corrections will suffer irreparable harm from the Circuit Court's departure from essential requirements of the law. The State has no other adequate remedy to correct the Court's order and no other opportunity for review of the Circuit Court's unnecessary invasion of the security of Florida State Prison and the confidentiality of protected members of the execution team.

34. Additionally, Petitioners request this Court enter a protective order from the defendant's continuous delaying tactics in seeking to expand the scope of the remand, demanding the creation of evidence and seeking endless public records that are not relevant to the narrow issue before the lower court. Fla. R. Civ. P. 1.280(c).

35. Recognizing that generally the trial court has broad

discretion in overseeing discovery, and protecting the parties that come before it, *Bush v. Schiavo*, 866 So. 2d 136, 138 (Fla. 2nd DCA 2004), that discretion is not unfettered. *State v. Buenoano*, 707 So. 2d 714 (Fla. 1998). Petitioners implore this Court to put an end to CCRC's abuse of process being indulged by the lower court.

36. The production of public records is not intended to authorize fishing expeditions for records unrelated to claims properly before the court. *Diaz v. State*, 945 So. 2d 1136, 1150 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1116 (Fla. 2006); *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000)). See *Syken v. Elkins*, 644 So. 2d 539, 545 (Fla. 3d DCA 1994) (finding the requests to the defense expert physicians to be unduly burdensome, while yielding "little useful information.") Lightbourne has failed to establish how observation of the Execution Chamber and of a heretofore unscheduled Walk-Through will yield any information at this late date that is relevant to the limited remand. *Duckett v. State*, 918 So. 2d 224, 238 (Fla. 2005)(holding that circuit court properly interpreted this order as limiting the scope of DNA testing.)

37. Accordingly, Petitioners requests this Court enter a protective order precluding the entry of any further order mandating a viewing of the execution facility at Florida State Prison, or requiring the Department to conduct a walk-through for purposes of allowing counsel for Lightbourne to observe that

process.

**Conclusion**

WHEREFORE, based upon the foregoing arguments and authorities, the State requests this Court enter its order granting extraordinary relief, and hold therein that the order entered by the Circuit Court is a departure from the essential requirements of law which is unenforceable in all respects, and to set that order aside. Additionally, Petitioners request this Court enter a protective order from further discovery requests. The State further moves this Court to order that no further continuances shall be granted without order of this Court, and to make clear that this Court intends for this matter to be resolved by final order from the Circuit Court no later than September 1, 2007.

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 FAX and U.S. Mail to: **Suzanne Myers Keffer**, Assistant CCRC-South, 101 NE Third Ave., Suite 400, Ft. Lauderdale, Florida 33301, and **Rock E. Hooker**, Office of the State Attorney, 19 N.W. Pine Avenue, Ocala, FL 34475, and **Judge Carven D. Angel**, Circuit Court Judge, Marion County Justice Center, 110 N.W. First Ave., Ocala, Florida 34475 on this 10th day of August, 2007.

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Of Counsel

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IAN DECO LIGHTBOURNE,  
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INDEX TO APPENDIX

- Exhibit 1. Circuit Court Order dated July 31, 2007
- Exhibit 2. Department of Corrections "Execution by Lethal Injection Procedures," effective for executions after August 1, 2007
- Exhibit 3. Circuit Court Order dated August 2, 2007
- Exhibit 4. Florida Supreme Court Order dated August 6, 2007
- Exhibit 5. Circuit Court Order dated August 7, 2007
- Exhibit 6. Defendant's Motion to View Execution Chamber and Witness a Walk Through
- Exhibit 7. State Response to Defendant's Motion to View Execution Chamber and Witness a Walk Through
- Exhibit 8. Circuit Court Order dated August 9, 2007
- Exhibit 9. Evidence List from Lightbourne Evidentiary hearing
- Exhibit 10. One set of 14 photos introduced as State's Exhibit 8, July 18, 2007