IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL
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CLERK, SUPREME COURT
BY__________

BILL McCOLLUM, etc., ET AL.,
Petitioners,

Case No. SC07-1499

v.

IAN DECO LIGHTBOURNE
Respondent.

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RESPONDENT'S RESPONSE TO PETITION FOR REVIEW OF NON-FINAL ORDER AND MOTION FOR PROTECTIVE ORDER

COMES NOW the Respondent, IAN DECO LIGHTBOURNE, by and through undersigned counsel, and hereby responds to Petitioner's Petition for Review of Non-Final Order and Motion for Protective Order. Respondent states:

Introduction

On December 14, 2006, following the botched execution of Angel Diaz, Mr. Lightbourne filed an Emergency Petition Seeking to Invoke This Court's All Writs Jurisdiction. Mr. Lightbourne requested in that petition that a special master be appointed to hear and receive scientifically reliable evidence regarding the conscious pain and suffering experienced by the condemned during lethal injection. In support of that request, Mr. Lightbourne argued that the factual underpinnings of *Sims v. State*, 754 So. 2d 657 (Fla. 2000) are no longer valid. Because concerns regarding insufficient anesthesia and lack of

monitoring became a stark reality during Mr. Diaz's execution, Mr. Lightbourne argued that Mr. Diaz's execution would be the best evidence of the unnecessary and wanton infliction of pain caused by the lethal injection procedure used by the State of Florida. Mr. Diaz's execution was newly discovered evidence of the pain and suffering inherent in Florida's lethal injection procedure. Mr. Lightbourne was requesting an evidentiary hearing and a determination regarding 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.

On the same date Mr. Lightbourne's All Writs Petition was filed, this Court ordered that "**all other issues** raised by Petitioner Lightbourne shall be acted on by the circuit court as soon as possible." *Lightbourne v. Christ*, SC06-2391, December 14, 2006. The issues raised by Mr. Lightbourne were not limited to the events of the Diaz execution.

At the time of filing the All Writs Petition, Mr.

Lightbourne's Rule 3.851 appeal challenging lethal injection was pending before this Court. On April 16, 2007, the Court affirmed the circuit court's denial of his lethal injection claim, but stated:

> as a result of Angel Diaz's execution by lethal injection, a series of events occurred that the trial court could not have considered in denying Lightbourne's motion. The impact of those events on the issue of the constitutionality of Florida's lethal injection procedures is currently being litigated in the circuit court pursuant to this Court's relinquishment order in *Lightbourne v. McCollum*, SC06-2391.

Lightbourne v. State of Florida, SC06-1241, April 16, 2007. This Court acknowledged the "better course is to allow that case to proceed[.]"

The Petitioner attempts to narrow the issues before the circuit court by misconstruing this Court's April 16, 2007 order. (Petition at 2). The Petitioner restates the issue as the "impact of Diaz execution on the constitutionality of Florida's lethal injection procedures" (Id.). Mr. Lightbourne disagrees with the Petitioner's framing of the issues. Rather, the Court contemplated that the circuit court could not have considered, when denying Mr. Lightbourne's Rule 3.851 motion, the Diaz execution, the series of events that occurred as a result of the Diaz execution and the impact of the execution and series of

events on the constitutionality of Florida's lethal injection procedures.

The series of events which were the result of the Diaz execution necessarily include the Department of Corrections December 14, 2006 Task Force to investigate the execution of Angel Diaz and subsequent findings,[1] Governor Bush's December 15, 2006 executive order, the Governor's Commission on the Administration of Lethal Injection (Commission), the Commission's March 1, 2007 Final Report,[2] and the Department of Corrections Response to the Commission's final report.[3] Furthermore, the May 9, 2007 lethal injection procedures and ultimately the August 1, 2007 lethal injection procedures, are the direct result of the events that occurred as a result of the Diaz execution. But for the Diaz execution, and the events that followed, the Department of Corrections would not have twice promulgated new procedures.

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[1] Summary of the Findings of the Department of Corrections' Task Force Regarding the December 13, 2006 Execution of Angel Diaz, submitted December 20, 2006 to James R. McDonough.

[2] Final Report with Findings and Recommendations of the Governor's Commission on the Administration of Lethal Injection, issued 03/01/07.

[3] Department of Corrections' Amended Response to The Governor's Commission on Administration of Lethal Injection's Final Report With Findings and Recommendations, submitted 05/07/07.

As a result of the relinquishment, the circuit court held evidentiary hearings on May 18 and 21, 2007, June 18 and 19, 2007 and July 17-22, 2007. Throughout the proceedings, the Petitioners have continued to play hide and seek, objecting to public records demands, but later producing the very same documents requested during the testimony of witnesses.

On May 18, 2007, this circuit court began hearing testimony in Mr. Lightbourne's evidentiary hearing concerning the botched Angel Diaz execution, the events following it, including the Department of Corrections' (DOC) new lethal injection protocol, released May 9, 2007, and the impact of those events on the issue of the constitutionality of Florida's lethal injection procedures. At a pre-trial hearing on May 11, 2007, counsel for Mr. Lightbourne moved for a continuance of this evidentiary hearing, arguing that counsel needed time to research the new protocol, seek new public records concerning the protocol, and consult with experts regarding the protocol. The circuit court denied that motion and the evidentiary hearing commenced on May 18, 2007.

On May 31, 2007, counsel for Mr. Lightbourne filed 3.852(i) demands to DOC, Florida Department of Law Enforcement (FDLE), the Attorney General's Office, and the

Governor's Office. A public records hearing on the demands to the Attorney General's Office and the Governor's Office was held on June 18, 2007. During that hearing, counsel for DOC agreed to turn over, within seven days, all execution checklists and/or logs that existed for all of the previous executions by lethal injection. (June 18, 2007 hearing transcript, p. 667). On June 28, 2007, the circuit court ordered the Attorney General's Office and the Governor's Office to turn over certain records to counsel for Mr. Lightbourne. On July 16, 2007, the eve of the final scheduled days of this evidentiary hearing, the Attorney General's Office and the Governor's Office turned over more than 300 pages of public records sought by Mr. Lightbourne.

A public records hearing on Mr. Lightbourne's 3.852 demands to DOC was held on July 16, 2007. At that time, counsel for DOC turned over to counsel for Mr. Lightbourne execution checklists for Clarence Hill, Arthur Rutherford, and Danny Rolling, three weeks after they were promised. Counsel for DOC objected to turning over any other of the public records concerning the May 9, 2007 protocol sought by Mr. Lightbourne.

The evidentiary hearing continued on the morning of July 17, 2007. During that morning, the State handed

counsel for Mr. Lightbourne a diagram that the State represented to reflect recent renovations to the execution chamber, as well as a twenty page technical manual for the video camera system recently installed in the execution chamber. These are documents which were included in the public records demand that Mr. Lightbourne sent to DOC on May 31, 2007, and which DOC objected to turning over the previous day. Mr. Lightbourne's counsel was forced to continue examining witnesses without the opportunity to consult their expert regarding the documents, and without even the opportunity to consult an architectural or engineering expert to understand the technical meaning of the documents.

Also on July 17, 2007, Mr. Lightbourne's counsel learned for the first time the names of the warden who has been chosen to be in charge of future executions and the warden who has been chosen to be second in command at future executions. On July 19, 2007, Mr. Lightbourne took testimony from Warden Timothy Cannon, the warden in charge of future executions, and learned the names of members of the new execution team.

On July 18, 2007, Mr. Lightbourne's counsel was handed copies of photographs which were represented to be of the execution chamber and surrounding areas. While the

photographs depict some of the changes to the execution chamber and surrounding areas, they do not, by any means, represent a complete picture of the area. For example, the defense has not been given any photographs that show the view of the gurney in the execution chamber from the viewpoint of the "medically qualified" personnel who, based on the testimony before this circuit court, are supposed to be continuously monitoring the IV sites and the consciousness of the condemned. There has been conflicting testimony over where the "medically qualified" personnel would stand and what distance that position is from the gurney and the video monitor.

On July 19, 2007, DOC Secretary James McDonough testified that part of his mission during his tenure at DOC has been to make the way in which DOC carries out the execution process **more transparent and open to the public** (T. 07/19/07 at 2077, 2110)(emphasis added). He also testified that he was not aware that Mr. Lightbourne had requested public records from DOC and that DOC had objected to turning over any records. On July 20, 2007, the circuit court granted Mr. Lightbourne's Rule 3.852(i) request to DOC and ordered DOC to turn over all the requested records. The fact remains, however, that counsel for Mr. Lightbourne has been forced to question approximately twenty DOC

witnesses without those records to which the circuit court has found Mr. Lightbourne is entitled.

At every turn, Mr. Lightbourne has been forced to move forward without public records, without discovery, and without sufficient opportunity to review those records that are turned over at the last minute. Mr. Lightbourne's counsel has been forced to try to elicit information from DOC witnesses on the stand for the very first time and has continually been confronted with new names, new documents, and new information, all of which have long been known to the State.

On July 22, 2007, the lower court orally pronounced that he was granting a temporary injunction and ordered the Department of Corrections to make changes to the existing lethal injection procedures. (Attachment A). The lower court signed a written order, submitted by Petitioners, on July 31, 2007.[4]

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[4] The circuit court requested Mr. Lightbourne draft an order reflecting his oral pronouncement. The State vehemently objected to Mr. Lightbourne drafting the order arguing:

> Your honor, I am going to object to the defendant being given permission to tell the Court whatever else they think is appropriate in a grant of temporary relief" (T. 7/22/07 at 2943).

Yet, this is precisely what the State did in the order it submitted. While Mr. Lightbourne likewise submitted an

The Department of Corrections issued a new lethal injection procedure on August 1, 2007. The State moved for a final hearing to be set for September 5, 2007. The circuit court granted the motion and set aside eight days for the hearing.

On Monday, August 6, 2007, this Court issued an order stating that the July 18, 2007 scheduling order will govern this proceeding unless the parties show good cause no later than August 10, 2007 as to why additional time is required to conclude the proceedings and for the trial court to enter a final order. On August 9, 2007, Mr. Lightbourne filed an Emergency Motion to Vacate the Scheduling Order Which Terminates Jurisdiction in the Circuit Court on September 10, 2007 Based on Good Cause. The Petitioner's responded. On August 14, 2007, this Court denied Mr. Lightbourne's motion.

A status hearing was held on August 7, 2007. At that time, it was clear that Judge Angel was concerned with *this Court's* order that the proceedings should conclude by September 10, 2007. *See* August 7, 2007 Transcript

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order for the court's consideration, counsel for Mr. Lightbourne was very careful to merely reference this court's oral pronouncement for fear that he would be making factual findings for the Court. It is Mr. Lightbourne's position that the court's oral pronouncement of July 22, 2007 is the best record of the circuit court's findings.

(Attachment B). As a direct result, the lower court moved the date of the hearing to August 28, 2007 and limited the defense presentation of witnesses to two days at the State's insistence.

As the circuit court has determined, additional hearings are necessary to address whether the temporary stay and/or injunction should be lifted (T. 7/22/07, p. 2942) and contemplated additional discovery would be appropriate (T. 07/22/07 at 2965). The circuit court further recognized that all of Mr. Lightbourne's concerns may not have been addressed with his preliminary ruling (T. 07/22/07 at 2961).

The issue raised in Mr. Lightbourne's All Writs Petition was and remains that the State of Florida's lethal injection procedures violate the Eighth Amendment to the U.S. Constitution and the corresponding provision of the Florida Constitution. While Mr. Lightbourne could not have anticipated in December 2006 two new protocols being issued, changes in personnel and training and renovations to the execution chamber, these new procedures and various changes are fully encompassed in the issues raised by Mr. Lightbourne in his All Writs Petition. At no time has Mr. Lightbourne had the opportunity to provide argument to the circuit court as to his constitutional concerns with

respect to the evidence presented, nor has Mr. Lightbourne had the opportunity to challenge yet another new lethal injection procedure.

On August 8, 2007, Mr. Lightbourne filed a Motion to View the Execution Chamber and Witness a Walk-Through. On August 9, 2007, the Petitioner responded. On the same date, the circuit court granted Mr. Lightbourne's motion. Petitioner filed the instant appeal and Mr. Lightbourne timely replies.

Jurisdiction

To invoke this Court's jurisdiction and obtain relief, the State "must establish that the order compelling discovery does not conform to the essential requirements of law and may cause irreparable injury for which appellate review will be inadequate." *Trepal v. State*, 754 So. 2d 702 (Fla. 2000). The State has failed to demonstrate that compliance with Judge Angel's order will expose them to irreparable harm, other than a generalized complaint that the lower court did 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)." (Petition at 12). The State fails to cite any authority to establish that the lower court is required to make such an explanation. Rather, maintaining secrecy

and security are the responsibility of the Department of Corrections. In any event, there is no reason that measures cannot be implemented to secure the identity of execution personnel at a Walk-Through. Any "irreparable harm" to the Department or the State would be the result of their failings, rather than compliance with Judge Angel's order.

Argument

The Petitioners argue that the State of Florida and the Department of Corrections will suffer irreparable harm from the circuit court's departure from the essential requirements of the law, arguing that the circuit court exceeded the jurisdiction allowed by this Court and his authority as a member of the judicial branch in granting Mr. Lightbourne's motion to view the execution chamber and witness a walk-through. The Petitioner's argument is nothing more than disagreement with the circuit court judge's granting of a temporary injunction and determination that the injunction can only be lifted through further hearings. In order to further their position that the circuit court has exceeded its jurisdiction and that Mr. Lightbourne is engaging in dilatory tactics, Petitioners misrepresent the record below.

The Petitioners argue that in granting Mr. Lightbourne's motion, the circuit court judge has invaded the province of the executive branch. Petitioners argument in this regard seems to be two-fold. First, Petitioners argue that the Department of Corrections has complied with the judge's oral pronouncements and he has not indicated any deficiencies with the August 1, 2007 protocol. In so arguing, the Petitioners acknowledge that the judge has the authority to order the Department of Corrections to make changes to the lethal injection procedures. Yet, they argue that the circuit court judge does not have the authority to order discovery from the Department of Corrections.

In *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994), the Florida Supreme Court held it is within the trial judge's inherent authority to allow limited discovery in postconviction proceedings. Specifically, the Court acknowledged that in post-conviction proceedings, "on a motion which sets forth good reason [the court] may allow limited discovery into matters which are relevant and material." *Lewis* at 1250. *Lewis* further finds that "the trial judge, in deciding whether to allow this limited form of discovery, shall consider the issues presented, the elapsed time between the conviction and the post-conviction

hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." *Id.* The Petitioners assert no evidence that the judge did not engage in this process. In fact, the judge's order sets forth that "nothing shall be done to compromise the confidentiality of the persons whose identity is not to be disclosed" and affirms that arrangements for viewing the chamber or witnessing a walk-through "shall not delay the final hearing previously scheduled." The circuit judge was well within his authority in granting Mr. Lightbourne's discovery motion.

The Petitioners specifically complain that the circuit court has not 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." (Petition at 7). There was much discussion below regarding the status of the circuit court's pronouncement as final or non-final. Petitioners argued to the circuit court that this could not be a final order if further proceedings were being ordered by the court (T. 07/22/07 at 2946). At one point the judge also made clear that this was temporary, indicating not final:

> Well, I may not have addressed all the issues the defendant may have contemplated in what he's requesting relief from. **We're sort of at a temporary stopping point.** I don't know what else they may want to address or get into the record.

(T. 07/22/07 at 2961)(emphasis added). Ultimately, the parties and the judge agreed that his ruling was a temporary injunction. Petitioners specifically stated:

> So a temporary injunction is the proper terminology, which is in itself a non-final non-appealable order, I believe.

(T. 07/22/07 at 2968). The circuit court agreed (Id. at 2969). The Petitioner is overlooking the fact that the circuit court set the final hearing to determine whether deficiencies remain with the latest protocol and whether lifting the temporary injunction is appropriate. Petitioners cannot now claim that the circuit court order was final because it suits their latest complaints.

The second prong of the Petitioner's argument asserts that the circuit court judge violated the separation of powers doctrine. Petitioner's separation of powers argument is misplaced. While it is true that this Court has traditionally applied a strict separation of powers doctrine, that doctrine is not implicated by the issues currently before the Court.

This Court has distinguished the two "fundamental prohibitions" of the doctrine:

> The first is that no branch may encroach upon the powers of another. *See, e.g., Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953). The second is that no branch may delegate to another branch its constitutionally assigned power. *See, e.g., Smith v. State*, 537 So. 2d 982, 987 (Fla. 1989).

Chiles v. Children A, B, C, D, E & F, 589 So. 2d 260 (Fla. 1991). Judge Angel has violated neither prohibition. Contrary to the State's assertion, by merely exercising its discretion in granting discovery, the circuit court has not delegated a constitutionally assigned power, nor encroached on the powers of another branch.

The cases relied on by Petitioners do not support their contention. In *Dep't of Corrections v. Grubbs*, 844 So. 2d 1147 (Fla. 2d DCA 2004), the District Court of Appeal held that, "where the legislature has determined that all those who are placed on community supervision for, inter alia, committing a lewd and lascivious act must as a condition of that supervision participate in and successfully complete a sex offender treatment program at their own expense," the Department of Corrections may not be ordered to pay for Grugg's sex offender treatment. The DCA reasoned that "the judiciary branch may not interfere with legislative discretion in determining the funds

required of an executive agency nor with the agency's executive discretion in spending appropriated funds." Nothing in *Grubbs* prevents the circuit court from granting a defendant's discovery request, as is the issue here.

In *State v. Cotton*, 769 So. 2d 345 (Fla. 2000), cited in the State's Petition, this Court held that it was not a violation of the separation of powers doctrine for the State, and not the court, to exercise discretion in whether to apply the Prison Releasee Reoffender Punishment Act. As in *Grubbs*, nothing in the fact or legal conclusions in *Cotton* is applicable to Judge Angel's exercise of discretion in granting Mr. Lightbourne discovery.

In fact, the only case cited to by the State involving a separation of powers issue in the context of discovery actually supports Mr. Lightbourne's position. The State's patently false assertions notwithstanding, in *F.G. v. Agency for Persons with Disabilities*, 940 So. 2d 1095 (Fla. 2006), this Court held that "the separation of powers . . . [does] not preclude a circuit court from calling before it a member of the executive branch for narrowly defined informational purposes." *F.G.* at 1099, citing *State Dep't of Health and Rehab. Servs. v. Brooke*, 573 So. 2d at 371; (*cf.* Petition, p. 8.).

The Petitioners allege that the circuit court has set forth an impossible task for the Petitioners because there is no determination that a walk-through has been planned for the dates of August 28-31, 2007. While the judge indicated in his order that he was not available before August 28, 2007, Mr. Lightbourne has made no such restrictions and is in fact available at any date between now and the start of the final hearing on August 28. Petitioner complains that the Department of Corrections should not be forced to "orchestrate a run-through simply to allow CCRC to observe a fake execution." (Petition at 11). Mr. Lightbourne requested no such orchestration. Mr. Lightbourne's request is based on the sworn testimony of the warden designated to carry out executions, Warden Timothy Cannon, that **the execution team conducts a walk through of a mock execution every other week**. (T. 07/19/07 hearing, p. 1990)(emphasis added). Therefore, between August 8 and 28, 2007, certainly a walk-through should be occurring. Is the Petitioner now stating this testimony was untrue?

The Petitioner complains that the order does not specify the time, parameters or attendees of the walk-through. These are not matters which would cause

irreparable harm, but rather matters for the parties to work out in scheduling attendance at a walk-through.

Petitioner further complains that the lower court did 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)." (Petition, p. 12). As previously stated, Petitioners fail to cite any authority to establish that the lower court is required to make such an explanation. Rather, maintaining secrecy and security are the responsibility of the Department of Corrections. Based on the testimony during the hearings below, it is clear that those persons protected by statute are in fact disguised during walk-throughs just as they would be during an execution. Robert Wheeler, Assistant General Counsel to the Governor, testified that the executioners were present at the walk through he attended on July 11, 2007 (T. 07/20/07 at 2295). The executioners wore medical-type garb, described as a bio-hazard suit (Id.). Mr. Wheeler testified that any medical personnel present were dressed similarly (Id.). Mr. Wheeler confirmed that he could not identify the executioners or any members of the medical component of the execution team (Id.). Timothy Westveer, an agent of the Florida Department of Law Enforcement, also testified that he was

present for the walk-through on July 11, 2007. Mr. Westveer also confirmed that the executioners were in disguise, "covered from head to toe" (Id. at 2251) and the medical technicians were in disguise also (Id. at 2251). Finally, Warden Cannon testified that even his own team members are not privy to the identities of the protected personnel, therefore protected personnel's participation in training exercises necessarily requires that these persons be disguised. The protection of those persons whose identity must be protected by statute is the only security concern articulated by Petitioners. As these persons' identities are routinely concealed during training exercises, there can be no irreparable harm.

There has been testimony that DOC invited several dignitaries, including the Governor's assistant general counsel, to tour the execution chamber and surrounding areas, and to observe a recent walk-through of a mock execution. In order to help investigate and present evidence regarding DOC's ability to follow the new protocol, counsel for Mr. Lightbourne should also have an opportunity to view the execution chamber and to observe a mock execution, which, according to Warden Cannon, occur every other week.

The issue of viewing the chamber and witnessing a walk-through is not one being raised as a dilatory tactic to delay the proceedings in the circuit court and the remand of this Court. Rather, Mr. Lightbourne's discovery requests and public records requests have been an attempt to level the playing field throughout these proceedings. In fact, this very request was made at least twice previously by Mr. Lightbourne. During the questioning of a Department of Corrections witness, Mr. Lightbourne specifically asked the circuit court to grant a request for Mr. Lightbourne's team and experts to visit the death row chamber (T. 06/19/07 at 1193). The court denied the request but agreed that a visit to the chamber might be helpful (Id.).

On July 21, 2007, Mr. Lightbourne filed a Motion to Leave the Evidentiary Hearing Open based in part on the disclosure of public records just 5 days earlier and the fact that the Department of Corrections had been ordered to comply with Mr. Lightbourne's public records demand on July 20, 2007. *See* Motion to Leave Evidentiary Hearing Open, Attachment C. In that motion, Mr. Lightbourne requested an opportunity to view the execution chamber and to observe a mock execution. This was, in part, based on the questions and comments of the Petitioners during the evidentiary

hearings indicating that the State has viewed the execution chamber, while counsel for Mr. Lightbourne has had no opportunity to do so. During the State's direct examination of Robert Wheeler, Assistant General Counsel to the Governor, Assistant Attorney General Kenneth Nunnelley asked how Mr. Wheeler was dressed during his observation of the mock execution on July 11, 2007. When Mr. Wheeler indicated that he was dressed in a suit, Mr. Nunnelley commented that "Its hot back there" (T. 07/20/07 at 2280).

Following the circuit court's oral pronouncement on July 22, 2007, the circuit court returned to the bench to ask defense counsel "have you had an opportunity, or do you need, or are you expecting or looking forward to an opportunity to go through the death house or death chamber up there - in order to review those things?" (T. 07/22/07 at 2973). At this time, the circuit court judge also expressed concern over the length of the intravenous tubing which goes from the inmate's arm to where the saline bag hangs in the executioner's room (T. 07/22/07 at 2974). Despite these concerns from the judge, the Petitioners argue that there is no nexus between what the judge stated his concerns were as to the Department of Corrections' procedures and "what anyone expects to see at the a visit to the death chamber and witness a walk-through" (Petition

at 8). This certainly is not an issue that's been raised for the first time in an attempt to delay the final hearing or resolution of the issues for which this Court relinquished jurisdiction.

While diagrams of the execution chamber and photographs of the chamber have been admitted in to evidence, there has been much conflicting testimony over the accuracy of the diagram and the photographs. While the photographs depict some of the changes to the execution chamber and surrounding areas, they do not, by any means, represent a complete picture of the area. For example, the defense has not been given any photographs that show the view of the gurney in the execution chamber from the viewpoint of the "medically qualified" personnel who, based on the testimony before this circuit court, are supposed to be continuously monitoring the IV sites and the consciousness of the condemned. There has been conflicting testimony over where the "medically qualified" personnel would stand and what distance that position is from the gurney and the video monitor.

As in the instant Petition, Petitioners have repeatedly complained that Mr. Lightbourne's presentation of evidence and testimony exceeds the scope of this Court's remand. This simply is inaccurate. In his all Writs

petition, Mr. Lightbourne requested a determination regarding whether the State of Florida's 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. It cannot be more clear that Mr. Lightbourne was challenging the State of Florida's lethal injection procedures as being violative of the Eighth Amendment. The circuit court judge has evaluated the evidence presented thus far and determined that Mr. Lightbourne was entitled to temporary relief. The litigation in the circuit court is well within the boundaries of this Court's relinquishment.

Mr. Lightbourne is only seeking discovery in an expeditious manner based on the limited time frames set forth by the circuit court and this Court. In complaining that the circuit court is indulging CCRC's abuse of process (Petition at 15), Petitioners ignore the fact that the circuit court has denied many of Mr. Lightbourne's motions, quashed subpoenas for many witnesses and denied many public records demands. Both Mr. Lightbourne and the circuit court have worked expeditiously to meet the deadlines

imposed by this Court. Now that the circuit court has again expedited the proceedings below to meet the demands of the Petitioners and this Court, the Petitioners again for no articulated reason other than dissatisfaction with the circuit's ruling attempts to curtail that schedule even further. There is no authority or basis for that request.

The circuit has scheduled final hearings in this matter to be concluded on August 31, 2007. No motions or discovery requests filed in the circuit court on behalf of Mr. Lightbourne seek a continuance of that final hearing. Rather, Mr. Lightbourne has sought a hearing below as soon as possible to address those matters, and if necessary act on those matters, prior to the start of the final hearing on August 28, 2007. At every step off the way there has been timely progress on this case.

Conclusion

Based on the foregoing arguments, Mr. Lightbourne requests that Petitioner's Petition and Motion be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and facsimile to Kenneth S. Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118; Carolyn Snurkowski, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida, 32399-1050; Rock E. Hooker, Assistant State Attorney, 19 NW Pine Avenue, Ocala, FL 34475; Maximillian J. Changus, Assistant General Counsel, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, FL 32399; and the Honorable Carven D. Angel, Circuit Court Judge, Marion County Judicial Center, 110 NW First Avenue, Ocala, FL 34475 on this ___ day of August, 2007.

SUZANNE MYERS KEFFER
Assistant CCRC
Florida Bar No. 0150177