IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v. **Case No.: SC07-1499**

IAN DECO LIGHTBOURNE,
Respondent.
_____/

REPLY TO RESPONSE TO PETITION FOR REVIEW OF NON-FINAL ORDER AND MOTION FOR PROTECTIVE ORDER

COMES NOW the State of Florida, and replies as follows to Lightbourne's response to the State's petition for review of non-final order and for a protective order. For the reasons pleaded, the State is entitled to the relief it seeks.

RESPONSE TO INTRODUCTION

On pages 1-12 of his response, Lightbourne has set out a lengthy and argumentative "introduction" which, in material part, is not germane to the narrow issue of whether a visit and witness of a walk-through is appropriate based on the posture of this case. None of the factual averments contained in the introduction are admitted. Specific averments, which deserve a brief response, are addressed below.

According to Lightbourne, his request to view a walk-through is based on the July 19, 2007, testimony of Warden Cannon. (*Response*, at 19). If that is true, then Lightbourne

cannot support his claims of diligence when he waited almost a month (until August 9, 2007) to file his request. At the time of Warden Cannon's testimony on July 19, 2007, there were no additional dates set for "further evidentiary hearing" beyond July 20, 2007. The trial court had set "that week" to complete all testimony and it was the understanding of all the parties that testimony would end on July 20, 2007. In fact, because defense expert witness Heath was not able to timely appear on July 19, 2007, as promised, the State insisted that the hearing continue over the weekend. And, in fact, two additional days of testimony were held: Saturday, July 21, 2007, (when Dr. Heath testified all day), and Sunday, July 22, 2007, when the State's rebuttal case was presented. If any need for the visit and/or walk-through were pertinent it was at the point when Lightbourne's counsel believed all evidentiary matters would end, which was on or before the close of their case on Saturday, July 21, 2007. In fact, neither side was aware that the trial court might open up time for additional evidence until the end of the day on Sunday, July 22, 2007, following the trial court's oral pronouncement. The delay has now expanded to the instant issue, and not only underscores the abusive nature of Lightbourne's request, but also emphasizes the dilatory tactics that have been employed throughout this litigation.[1]

[1] Likewise, Lightbourne's claim that he has not sought to delay

On page 4 of the response, Lightbourne lists seven "events" that occurred as a result of the Diaz execution. The true facts, as borne out in the 3000-plus pages of transcript this case has generated to date, are that each of those matters has been exhaustively and painfully explored, with the result that nothing remains but for the circuit court (or now this Court) to determine if the August 1, 2007, procedures for execution comply with the circuit court's July 31, 2007, order. This case has narrowed to that fine point, and it is time for the matter to be decided.

To the extent that Lightbourne criticizes the State for framing the issue as being the "impact of those events [Diaz] on the issue of the constitutionality of Florida's lethal injection procedures," that language is taken squarely from this Court's April 16, 2007, order in *Lightbourne v. State,* SC06-1241. This Court's language is clear, and is not subject to interpretation. In fact, because of the position taken by the Department to move forward and embrace the Governor's Commission on the Administration of Lethal Injection recommendations in the May 9, 2007, procedures for lethal injection and, then again, to add

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this case rings hollow. He has sought multiple continuances in the circuit court (beginning before the case was even set for hearing and continuing thereafter), including the present motions for more hearing time in the trial court. And, in this Court, Lightbourne again sought extension of the long-standing deadlines, an attempt which was denied on August 14, 2007.

more specificity to the issues based on the trial court's oral pronouncements in the August 1, 2007, procedures, the underlying issue of the Diaz execution is no longer relevant to the matter at hand. *Smith v. Secretary, Department of Corrections*, (Case No. 8:06-cv-01330-T-17MAP decided August 7, 2007). This petition was made necessary because the issues have not been narrowed as this Court framed them. Because the issues have not been properly narrowed below, the circuit court has now made a ruling that is irrelevant to the issues that this Court has established. That failing has worked to the detriment of the State throughout the eleven days of hearings that have already been conducted, and culminated in the ruling that made this petition necessary.

To the extent that Lightbourne complains, on page 7 of the response, that a drawing of the execution area was "handed" to him during the hearing, that argument is misleading by its omissions. The true facts are that an earlier (not to scale) diagram of the area was known to Lightbourne and was marked as a joint exhibit on June 18, 2007. (*See Exhibit 9 to the Petition referencing Joint Exhibit 10 in the lower court).* Lightbourne's claims are baseless. The later, more architecturally pleasing diagram that was produced, was introduced by the State to more correctly reflect the modernization of the facility undertaken

by Department to ensure a better viewing of an execution by lethal injection. (Exhibit 1 attached hereto).

References to the 300 pages of public records documents provided by the Attorney General's and the Governor's offices which were turned over timely after the trial court ruled and were timely placed in the records repository are irrelevant to any issue. Nothing nefarious was ever asserted by Lightbourne's attorneys from those documents.[2] Moreover, while counsel for Lightbourne admittedly were responsible for handling their case, the fact remains that during most of the proceedings, there were five attorneys at Lightbourne's counsel table and at least one investigator present -- review of the records should not have presented an insurmountable task.

To the extent Lightbourne observes that the photographs admitted do not provide an adequate view of the facilities, for example, the vantage point of the "medically qualified" personnel's view of the gurney, the photographs in fact do. One of the photographs introduced into evidence was taken of the gurney looking through the window where the executioners and the medically qualified personnel are placed. (See Exhibit 10, attached to the State's Petition).

[2] After these records were produced, they seem to have become of *de minimus* interest to Lightbourne.

To the extent that Lightbourne complains, in a footnote on page 9 of the response, that the State drafted the order that the trial judge entered on July 31, 2007, the true facts are that Lightbourne never voiced any objection to that order as submitted by the State or signed by the judge. He cannot resurrect a claim related to that order at this late date, and his complaints are without legal basis.

RESPONSE TO JURISDICTION

Lightbourne misconstrues the basis upon which this Court's jurisdiction rests. There is no question that the circuit court has ordered the Florida Department of Corrections to allow Lightbourne's attorneys access to the execution chamber and its surrounding area, and that the circuit court has ordered the Department to conduct a "walk-through" of an execution by lethal injection for the benefit of Lightbourne's attorneys. While Lightbourne tries to couch the court's order as merely one for "discovery," nothing could be farther from the truth. The court has ordered the Department to open the doors to a maximum security facility, and allow numerous persons into one of the most secure areas inside that facility. That is far more than a "routine" discovery order, and, unless this Court exercises its jurisdiction to review that order, the State will have no opportunity to address and correct the lower court's error.

Moreover, the lower court has in effect directed the Department of Corrections to conduct a walk-through of a mock execution. In fact, the Department's personnel who testified stated that there had been walk-throughs (actually training) conducted **before** the entry of the court's order. However, there is nothing in the record to support the suggestion that any training session is scheduled for the week of August 28, 2007.[3] Presently, the testimony establishes that members of the execution team come from the Department's facilities all over the State. Any compelled walk-through, under the lower court's order, would require travel to Florida State Prison to conduct a demonstration for Lightbourne's counsel. With all respect, the circuit court does not have that authority. Unless this Court corrects the lower court's departure form the essential requirements of law, the State will suffer irreparable harm.

[3] On page 19 of the response, Lightbourne attempts to misconstrue testimony to suggest that Warden Cannon's testimony was "untrue" about the training schedule. (V12, R1990, transcript of evidentiary hearing July 19, 2007). Whether there is training scheduled between August 8 and August 27, 2007 is of no moment since the Court indicated that he was only available after August 28, 2007. That is not to say that the Court sought to be present but rather that if any walk through were to occur that was the time the Court was available. Without more specifics as to the how this all was to be accomplished it would seem ludicrous for the Department to agree to allow Lightbourne's counsel to view the facilities without the judge being present. (Exhibit 2 attached hereto is a CD with a complete copy of the transcripts of the evidentiary hearing in the lower court).

REPLY TO ARGUMENT

In an attempt to uphold the circuit court's *ultra vires* order, Lightbourne categorizes that order as no more than an order granting discovery. That misleading description ignores the broad effect of that order, ignores the implications of it, and disregards the invasion of the province of the executive branch of State government. For those reasons, this Court should grant the relief requested by the State, and set that order aside.[4]

In *Allen*, this Court emphasized the respect that the separation of powers doctrine is due:

> We find the resolution of the separation of powers claim to be dispositive in this case. Article II, section 3 of the *Florida Constitution* prohibits the members of one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein."

Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000). There can hardly be any power more exclusively and firmly rooted in the executive branch than the operation of Florida's prisons. Yet, the circuit court has entered an order invading that exclusive authority on a whim. Despite the fact that numerous photographs

[4] The circuit court's order is completely non-specific as to when the "inspection" may occur or who may attend. It is unlimited in any fashion. The implication is that the judge intends to attend because it states that he will not be available before August 28, 2007. If that is in fact the case, that means that the event must take place during the week of August 28 in order to meet the schedule established by this Court.

and an architectural drawing are in evidence, and, more importantly, despite the fact that a visit and walk-through will shed no light on the issues at hand before the trial court,[5] and despite the fact that Lightbourne has not and cannot articulate any gain that he does not already have if allowed into Florida State Prison, it is clear that the actions of the trial court are unwarranted and wrong. The opportunity to interfere with and disrupt the operation of that facility, as well as every other Department facilities statewide, that will have personnel removed by court order to travel to Florida State Prison for a purposeless exercise, is glaring. Instead of acknowledging the facts, that the Department has worked to enhance the lethal injection process and ensure the dignity of the condemned through the continuing review of the procedures, the circuit court has entered an order that substantially directs the micro-management of day-to-day operations of the Florida prison system and their procedures. That is beyond the authority, let alone any authorized discretion of the circuit court, contrary to the dictates of *Allen*, *supra.*

[5] Lightbourne complains that he does not know how long the intravenous tubing is. *Response,* at 23. Lightbourne's attorneys do not need to travel to Florida State Prison to answer that question, an approach that resembles swatting a fly with a hammer. A simple stipulation could resolve that question if counsel would but ask. At the least, less onerous (and far simpler) means exist to answer that question. *Lewis, supra.*

In addition to usurping the authority of the executive branch, the circuit court has abused its discretion in ordering "limited discovery" under *Lewis* when the information sought is available, **and in evidence**, anyway. While Lightbourne complains that photographs and drawings of the execution area should have been produced earlier in the proceedings, the fact remains that he has them, and used them extensively in questioning witnesses, including his death penalty expert, Dr. Heath. There was no difficulty by Dr. Heath in recognizing from the photographs and diagrams, what he characterized as similar facilities seen in other states' death chambers. (V17, R2610, transcript of evidentiary hearing July 21, 2007). Moreover, Lightbourne never claimed any deficiency with respect to the quality and quantity of those photographs, nor did his expert, Dr. Heath, express a need for more information. In *Lewis,* this Court held:

> **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.** *See People ex rel. Daley v. Fitzgerald,* 123 Ill. 2d 175, 526 N.E.2d 131, 135, 121 Ill. Dec. 937 (Ill. 1988). This opinion shall not be interpreted as automatically allowing discovery under rule 3.850, nor is it an expansion of the discovery procedures established in rule 3.220. **We conclude that this inherent authority should be used only upon a showing of good cause.**

State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1994) (emphasis added). It is clear that the circuit court considered none of the relevant factors identified in *Lewis*, and, in doing so, was lead into an improper attempt to act in an executive capacity. While the issue is controlled by the separation of powers doctrine (and the circuit court's failure to honor it), the matter is also disposed of on a secondary level -- there has been no showing of good cause under *Lewis*, and the order that resulted is an abuse of discretion.[6]

[6] In plain terms, Lightbourne has photographs depicting the area he wants to view. He is entitled to no more. There must be an end point to this litigation, and it has been reached. This case should be decided, not prolonged through endless, abusive, demands for "discovery" which are no more than tactics for delay.

CONCLUSION

The circuit court's order allowing a viewing of the execution chamber by defense counsel and requiring the Department to conduct a walk-through of a mock execution is an unauthorized exercise of authority that is vested solely in the executive branch. Further, there has been, and cannot be, any showing of good cause supporting the court's order. Because that is so, the circuit court's order is an abuse of discretion. Unless this Court sets aside the lower court's order, that court's departure from the essential requirements will result in irreparable damage to the State.

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 E-mail and U.S. Mail to: **Suzanne Myers Keffer,** Assistant CCRC-South, 101 NE Third Ave., Suite 400, Ft. Lauderdale, Florida 33301; and by U.S. Mail to: **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 __ day of August, 2007.

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Of Counsel

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