IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1241
Lower Tribunal No.: 81-170-CF-A-01

IAN DECO LIGHTBOURNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

SUZANNE MYERS KEFFER
Assistant CCRC
Florida Bar No. 0150177

ANNA-LIISA JOSELOFF
Staff Attorney
Florida Bar No. - Pending

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Lightbourne's motion for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on 3.850 appeal to this Court following the 1990-91 evidentiary hearings;

"PC-R2" -- record on 3.850 appeal to this Court following the 1995-96 evidentiary hearings;

"PC-R2. Sup." -- supplemental record on 3.850 appeal to this Court following the 1995-96 evidentiary hearings;

"PC-R3." -- record on 3.850 appeal following the 1999 evidentiary hearing;

"PC-R3. Sup." -- supplemental record on 3.850 appeal to this Court following the 1999 evidentiary hearing; and

“PC-R4" -- record on 3.850 appeal to this Court following the denial of Mr. Lightbourne’s 2006 3.851 motion.

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Lightbourne requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PROCEDURAL HISTORY

On April 25, 1981, Mr. Lightbourne was convicted of first-degree murder in the circuit court of the Fifth Judicial Circuit, Marion County (R. 1436), and on May 1, 1981, he was sentenced to death (R. 1500).

On September 15, 1983, Mr. Lightbourne's conviction and sentence of death were affirmed on direct appeal.[1] Lightbourne

[1] Mr. Lightbourne raised the following issues in his direct appeal: (1) The indictment did not allege the time of the offense "as definitely as possible" under Florida Rule of Criminal Procedure 3.140(d)(3), the indictment was overbroad and vague, and the indictment could be construed as charging only felony murder and charging only felony murder and proving premeditated murder is impermissible; (2) The trial court erred in denying defendant's second motion to dismiss the indictment on the grounds that aggravating circumstances to be applied at the sentencing phase in capital felony cases must be originally alleged in the indictment in order to confer jurisdiction on a court to impose a sentence of death; (3) various constitutional challenges to Florida Statutes 775.082(1), 782.04(1), and 021.141 (1981); (4) Theodore Chavers was acting as an agent of the state during the time he shared a cell with the defendant and any statements that the defendant made to Chavers should have been suppressed because defendant did not know he was talking to a government agent and such statements were obtained in violation of his constitutionally guaranteed privilege against self incrimination and his right to counsel; (5) Personal items taken from the defendant at the time of his arrests on the weapons charge should have been held inadmissible in his trial on the murder charge; (6) Defendant's detention by Officer McGowan prior to his arrest on the concealed weapons charge constituted an illegal stop under the rationale of Terry v. Ohio, 392 U.S. 1 (1968); (7) Certain videotaped statements made by defendant should have been held inadmissible under the rationale of Miranda v. Arizona, 384 U.S. 436 (1966); (8) The trial court erred in denying defendant's motion to impose sanctions under Rule 3.220(j) for the state's failure to properly notify defendant of a deposition to be taken of a listed state witness; and (9) The death sentence was not

v. State, 438 So. 2d 380 (Fla. 1983). Justice Overton dissented and would have granted Mr. Lightbourne a new trial based on a Henry[2] violation.[3] Certiorari to the U.S. Supreme Court was denied on February 21, 1984. Lightbourne v. Florida, 465 U.S. 1051 (1984).

Mr. Lightbourne thereafter sought post conviction relief on May 31, 1985.[4] No evidentiary hearing was afforded, and relief

---

justified because it was based on inappropriate aggravating circumstances, the court failed to consider an unenumerated mitigating circumstance, and the mitigating circumstances outweighed the aggravating circumstances.

[2] United States v. Henry, 447 U.S. 264 (1980).

[3] Justice Overton wrote:

> I reluctantly dissent because I find the recent United States Supreme Court decision in United States v. Henry, 447 U.S. 264 (1980), mandates a reversal under the circumstances of this case. A jailhouse informer was placed in a cell adjacent to appellant's and was requested to keep his ears open. The investigating officer understood that the informant expected something in return for his information, and the informant was paid two hundred dollars in cash, in addition to being released nineteen days early in return for his services. These factors make the informant an agent of the state under the dictates of Henry, which requires suppression of the statements made by the appellant to the informant in the absence of Miranda warnings. I find we have no choice but to grant a new trial.

Id. at 392 (Overton, J., dissenting).

[4] Mr. Lightbourne's 3.850 motion raised the following issues: (1) Lightbourne was entitled to the aid of experts; (2) trial counsel was ineffective at sentencing; (3) trial counsel's

was summarily denied the same day. The Florida Supreme Court affirmed the summary denial of relief on June 3, 1985. Lightbourne v. State, 471 So. 2d 27 (Fla. 1985). Justices Overton, McDonald, and Shaw, dissented. Id. at 29.

Mr. Lightbourne thereafter filed a petition for writ of habeas corpus in district court on June 3, 1985, which was denied on August 20, 1986.[5] The Eleventh Circuit Court of Appeals affirmed the denial of federal habeas corpus relief on

---

treatment of the jailhouse informers was a plain example of ineffective assistance; (4) trial counsel failed to investigate; (5) the prosecutor unlawfully struck black jurors; (6) the evidence was insufficient to sustain the verdict or the penalty; and (7) trial counsel was ineffective in not seeking jury sequestration.

[5] In his federal habeas petition, Mr. Lightbourne argued (1) that police interrogators violated Miranda v. Arizona, 384 U.S. 436 (1966), in the course of obtaining incriminating statements during custodial interrogation; (2) that he was denied the right to the assistance of counsel in violation of Massiah v. United States, 377 U.S. 201 (1964), and its progeny, by the admission of incriminating statements made to cellmate Chavers; (3) that an actual conflict of interest adversely affected his lawyer's representation in violation of his right to effective assistance of counsel under the rationale of Cuyler v. Sullivan, 446 U.S. 335 (1980); (4) that trial counsel was ineffective by the failure to adequately investigate petitioner's background and offer additional evidence of mitigating circumstances at the sentencing phase; (5) that trial counsel was ineffective in failing to object to the trial judge's consideration of the statements in the PSI report; and (6) trial counsel was ineffective in failing to request the sequestration of the jury between conviction and sentencing, but the court wouldn't consider the issue because it wasn't raised in the habeas petition.

September 17, 1986, over the ardent dissent of Judge Anderson, who found that the Henry violation warranted a resentencing:

> [T]he error is not harmless with regard to sentencing. Chavers' testimony contained the only direct evidence of oral sexual assault on the victim as well as the only graphic descriptions of the sexual attack and comments by the defendant about the victim's anatomy. Since this evidence would support the existence of an aggravating circumstance, and since it was likely to have been influential with the jury on the sentencing issue, I cannot conclude that the testimony was harmless with regard to sentencing.

Lightbourne v. Dugger, 829 F. 2d 1012, 1035 (11th Cir. 1987) (Anderson, J., concurring in part and dissenting in part).

On January 27, 1989, Mr. Lightbourne filed a petition for a writ of habeas corpus, which was denied on July 20, 1989.[6]

On January 30, 1989, Mr. Lightbourne filed his second Rule 3.850 motion, alleging new information establishing a Brady[7]

[6] In his petition for a writ of habeas corpus to this Court, Mr. Lightbourne argued that his appellate counsel was ineffective for failing to raise the following claims: (1) The sentencing court erred by failing to independently weigh aggravating and mitigating circumstances; (2) The trial court erroneously instructed the jury on aggravating circumstances that were duplicitous; (3) The "especially heinous, atrocious, or cruel" aggravating factor was unconstitutionally applied; (4) The "cold, calculated, and premeditated" aggravating circumstance was unconstitutionally applied; (5) The prosecutor and the court misled and misinformed the jury concerning their proper role in the sentencing proceedings; (6) The jury instructions could reasonably have been read as requiring the mitigating circumstances to be established beyond a reasonable doubt; (7) The sentencing instructions unconstitutionally shifted the burden of proof to the defendant; and (8) The court's instructions misled the jurors by informing them that a verdict of life imprisonment had to be rendered by a majority of the jury.

violation with respect to jailhouse informants Chavers and Carson/Gallman.[8] The Florida Supreme Court remanded for an evidentiary hearing. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Evidentiary hearings were held in circuit court in 1990. The circuit court granted Mr. Lightbourne's April 17, 1991 motion to reopen the evidentiary hearing, and an additional hearing was conducted. The circuit court denied relief on June 12, 1992, and Mr. Lightbourne appealed. The Florida Supreme Court affirmed on June 16, 1994. Lightbourne v. State, 644 So. 2d 54 (Fla. 1994). On January 28, 1995, Mr. Lightbourne filed a Petition for Writ of Certiorari to the U.S. Supreme Court, which was denied on March 27, 1995.

On November 7, 1994, Mr. Lightbourne filed a new Rule 3.850 motion requesting another evidentiary hearing to present additional evidence in support of his Brady claim.[9] A hearing

---

[7] Brady v. Maryland, 373 U.S. 83 (1963).

[8] In this 3.850 motion, Mr. Lightbourne argued (1) that the state deliberately used false and misleading testimony and intentionally withheld material exculpatory evidence; (2) that the State's unconstitutional use of jailhouse informants to obtain statements violated Mr. Lightbourne's constitutional rights; (3) that he was denied his constitutional rights because he was tried, convicted, and sentenced to death before a judge who was not impartial; and (4) that his trial counsel was ineffective for failing to present mitigating evidence at the sentencing phase of his trial.

[9] In this 3.850 motion, Mr. Lightbourne argued that: 1) he was denied an adversarial testing when critical, exculpatory

was held on October 23 and 24, 1995. On February 23, 1996, Mr. Lightbourne filed a motion to reopen the hearing to present additional testimony and a motion to disqualify the state attorney. The circuit court held a hearing on these motions on March 15, 1996, and denied both motions. The circuit court denied relief on June 19, 1996. On appeal, the Florida Supreme Court held that Mr. Lightbourne was not barred from presenting the testimony of Larry Bernard Emanuel, an inmate who was incarcerated with Mr. Lightbourne prior to trial, and remanded "for an evidentiary hearing as to Emanuel's testimony and for the trial court to consider the cumulative effect of the post-trial evidence in evaluating the reliability and veracity of Chavers' and Carson's trial testimony in determining whether a new penalty phase is required." Lightbourne v. State, 742 So. 2d 238 (Fla. 1999).

On August 13, 1999, Mr. Lightbourne filed a motion to disqualify Judge Angel based on an *ex parte* communication

---

evidence was not presented to the jury during the guilt or penalty phase of his trial, 2) the State's unconstitutional use of jailhouse informants to obtain statements violated Mr. Lightbourne's Fifth, Sixth, Eighth, and Fourteenth Amendment rights; 3) access to files and records pertaining to Mr. Lightbourne's case in the possession of certain state agencies has been withheld in violation of Chapter 119, Fla. Stat., and Mr. Lightbourne cannot prepare an adequate Rule 3.850 motion until he has received public records materials and been afforded due time to review those materials and amend; 4) Mr. Lightbourne is innocent of the death sentence.

between his office and the State Attorney's Office (PC-R3. Supp. 1418-24). On September 28, 1999, Mr. Lightbourne supplemented his motion to disqualify, arguing that under the authority of Anderson v. Glass, 727 So. 2d 1147 (Fla. 5th DCA 1999), the motion had to be granted due to the delay in excess of thirty (30) days in ruling on the motion, and that no hearing on the motion was requested (PC-R3. 27-30). On October 12, 1999, with no ruling still from the trial court, Mr. Lightbourne sought a writ of prohibition and mandamus from the Florida Supreme Court, requesting that Judge Angel be disqualified (PC-R3. 45-55).[10] On October 14, 1999, the Court ordered the State to respond to the writ. The response was filed on October 18, 1999 (Id. at 123-42). On the same day Judge Angel held a hearing on the motion to disqualify (PC-R3. 79-119) and ultimately denied the motion (Id. at 118). Two days later, on October 20, 1999, the Florida Supreme Court denied Mr. Lightbourne's writ (PC-R3. Supp. 1432). The evidentiary hearing occurred on December 2, 1999 (PC-R2. 911-1088). On February 26, 2001, the circuit court denied relief. (Id. at 1395-97).

On March 12, 2001, Mr. Lightbourne filed a 3.850 appeal, which was denied on January 16, 2003. On June 17, 2003, Mr.

[10] Lightbourne v. State, No. 96,727.

Lightbourne filed a Petition for Writ of Certiorari to the U.S. Supreme Court, which was denied on November 10, 2003.

Mr. Lightbourne thereafter filed a Petition for Writ of Habeas Corpus to this Court on June 18, 2003, which was denied on August 17, 2004.[11] On February 14, 2005, Mr. Lightbourne filed a Petition for Writ of Certiorari to the U.S. Supreme Court, which was denied on June 20, 2005.

On February 27, 2006, Mr. Lightbourne filed a successive Rule 3.851 motion, alleging that his rights under the Vienna Convention had been violated and that Florida's lethal injection statute as well as the existing procedure by which Florida carries out executions by lethal injection violate the Florida and U.S. Constitutions (PC-R4. 1-108). A case management conference was held on April 10, 2006 (PC-R4. 274-326). A hearing on Mr. Lightbourne's request for additional public records was held on April 24, 2006 (PC-R4. 327-355). On May 2, 2006, the circuit court denied Mr. Lightbourne's Rule 3.851 motion and his demands for additional public records without an evidentiary hearing (PC-R4. 482-483). On June 1, 2006, Mr. Lightbourne filed a timely notice of appeal.

[11] In this petition, Mr. Lightbourne argued that Florida's capital sentencing procedures, as employed in his case, violated his Sixth Amendment right to have a unanimous jury return a verdict addressing his guilt of all the elements necessary for the crime of capital first degree murder, in violation of Ring v. Arizona, 536 U.S. 584 (2002).

STATEMENT OF FACTS

Mr. Lightbourne, a Bahamian citizen, was arrested on January 24, 1981 for carrying a concealed weapon. While Mr. Lightbourne was detained pending the concealed weapon charge, one of his cellmates reported to authorities that Mr. Lightbourne had made some incriminating statements regarding the murder of Nancy A. O'Farrell on January 17, 1981. On February 3, 1981, when Mr. Lightbourne was questioned by officials from the Marion County Sheriff's Department, he admitted that he owned the .25 caliber pistol found on his person and that he owned a rose shaped pendant bearing three Greek letters attached to a fine gold chain. Mr. Lightbourne was charged with murder after a ballistics report connected his gun to the homicide.

At no time was Mr. Lightbourne, who speaks with a very thick Bahamian accent, informed of his right to contact the Bahamian consulate, and at no time was the Bahamian consulate notified of Mr. Lightbourne's arrest and detention. Mr. Lightbourne's purported statements to his cellmates and his statements regarding ownership of the .25 caliber gun and the gold necklace featured prominently in the State's case at trial and were used to obtain a conviction and death sentence.

SUMMARY OF THE ARGUMENTS

1. The lower court erred in denying, without an evidentiary hearing, Mr. Lightbourne's claim that his rights

under the Vienna Convention were violated. The lower court erred in finding that Mr. Lightbourne's claim was procedurally barred. Mr. Lightbourne's claim could not have been raised before, and is therefore not procedurally barred. Alternatively, this Court should not apply the procedural bar rule to Mr. Lightbourne's claim because the State of Florida is obligated to give meaningful review and reconsideration to the violation of Mr. Lightbourne's rights under the Vienna Convention.

2. The lower court erred in denying an evidentiary hearing on Mr. Lightbourne's claim that Florida's lethal injection statute and the existing procedure by which Florida carries out executions by lethal injection are unconstitutional under the Florida and United States Constitutions as it constitutes cruel and unusual punishment. New scientific research not presented to and/ or not considered by this Court in previous cases necessitates an evidentiary hearing on this claim.

3. The lower court erred in denying Mr. Lightbourne's demands for additional public records involving Florida's lethal injection protocol as the requested records would themselves be admissible evidence or were reasonably calculated to lead to the discovery of admissible evidence.

STANDARD OF REVIEW

The Constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690 (1996); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT I

THE LOWER COURT ERRED IN FINDING THAT MR. LIGHTBOURNE'S CLAIM THAT HE WAS DENIED HIS RIGHT TO CONSULAR NOTIFICATION WAS PROCEDURALLY BARRED, IN VIOLATION OF ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS.

A. Introduction.

In his successive 3.851 motion, Mr. Lightbourne, a Bahamian citizen, argued that the State of Florida violated his rights under Article 36 of the Vienna Convention on Consular Relations, (Apr. 24, 1963), [1970] 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820.[12] The United States signed the Vienna Convention on April

[12] Article 36 of the Vienna Convention on Consular Relations reads as follows:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

24, 1963, and with the unanimous advice and consent of the Senate, see CONG. REC. 30,997 (Oct. 22, 1969), President Nixon ratified it on December 24, 1969. See 21 U.S.T. 77,185. Pursuant to the Vienna Convention, Mr. Lightbourne, a Bahamian

---

> (a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) If he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.
>
> (c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is inprison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

citizen, was entitled to consular notification at the time of his arrest.

Article 36 of the Vienna Convention establishes a system of rights that enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of the arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance. Finally, Article 36(2) directs that the rights in paragraph 1 "be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The State Department distinguishes between foreign nationals from countries for which consular notification is at the foreign national's option and foreign nationals from countries for which consular notification is mandatory. The U.S. has entered into bilateral agreements with numerous countries under which consular notification of the arrest or

detainment of a foreign national from that country is mandatory. On June 6, 1951, the United States signed a bilateral agreement with United Kingdom of Great Britain and Northern Ireland, under which consular notification is mandatory upon the arrest or detention of a foreign national from the sending state.[13] Under international law principles relating to successor states, a treaty that applied to a country when it was part of another country may in some circumstances continue to apply to that country when it becomes independent. The Bahamas declared independence from the United Kingdom on July 10, 1973. The State Department lists The Bahamas as a mandatory notification country.[14]

Mr. Lightbourne argued in his successive 3.851 motion that the State of Florida violated his rights under Article 36 of the Vienna Convention by not informing him of his right to contact the Bahamian Consulate and by not informing the Bahamian

[13] Consular Convention, 3 UST 3426, Article 16, paragraph 2 (signed 1951; entered into force 1952) ("A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district.").

[14] See *Consular Notification and Access* 51, available at http://travel.state.gov/pdf/CNA_book.pdf (last accessed September 15, 2006) (referring to the 1951 Bilateral Agreement between the U.S. and the United Kingdom of Great Britain).

Consulate that he had been arrested. On May 2, 2006, the lower court denied this claim without an evidentiary hearing:

> With respect to the Defendant's first claim, the Florida Supreme Court has held that a consular notification claim is subject to Florida's procedural bar rules. Therefore, since this claim could have been, but was not raised on direct appeal, it is procedurally barred. Gordon v. State, 863 So. 2d 1215 (Fla. 2003).
>
> Order at 1.

On June 28, 2006, the United States Supreme Court decided Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) and held that states may apply procedural bar rules to Vienna Convention claims. Mr. Lightbourne's argument in this appeal is (1) Mr. Lightbourne's claim is not procedurally barred because it could not have been raised before, or (2) in the alternative, this Court should not apply the procedural bar rule in this case.

B. Mr. Lightbourne's Vienna Convention claim is not procedurally barred because it could not have been raised before.

Lightbourne could not have raised his Vienna Convention claim before, for several reasons. First, Mr. Lightbourne did not know that he had a claim because he was not aware of his rights under the Vienna Convention, and his lack of knowledge was directly attributable to the Convention violation itself, i.e., the failure of law enforcement to notify him of his rights. Second, the issue was not raised or preserved at trial,

and therefore could not have been raised on direct appeal. See Arbelaez v. State, 898 So. 2d 25, 47 (Fla. 2005) (stating that "appellate counsel cannot be deemed ineffective for failing to raise this [Vienna Convention] issue because it was not raised or preserved at trial"). Third, the International Court of Justice's (I.C.J.) interpretation of Article 36 and President Bush's implementing memo did not exist at the time of Mr. Lightbourne's direct appeal or prior post-conviction proceeding.

The I.C.J. has interpreted Article 36 in two recent cases. In 2001, the I.C.J. decided LaGrand Case (F. R. G. v. U.S.), 2001 I. C. J. 466 (Judgment of June 27) (LaGrand), a case involving two brothers, both German citizens, who were arrested, tried, convicted, and executed in Arizona for committing capital murder. There was no dispute that the Arizona authorities had failed to inform the brothers that they could request that the German Consulate be notified of their arrests. Germany brought suit in the I.C.J., claiming that the U.S. had "violated the *individual rights* conferred on the detainees by Article 36." Id. at ¶ 48 (emphasis added). Agreeing with Germany's construction of Article 36, the I.C.J. rejected the U.S.'s assertion that "rights of consular notification and access under the Vienna Convention are rights of States, not individuals." Id. at ¶ 76.

In 2004, the I.C.J. decided the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31) (Avena), after Mexico argued that the U.S. had denied 54 Mexican nationals their individual rights under the Vienna Convention. Citing LaGrand, the I.C.J. again held that Article 36 creates individual rights in detained foreign nationals. Id. at ¶ 40. The I.C.J. confirmed that an individual's rights under Article 36 "are to be asserted, at any rate in the first place, within the domestic legal system of the United States." Id. Importantly, the I.C.J. also ruled that the U.S. was obligated to provide judicial review and reconsideration of the convictions and sentences of the Mexican nationals in question, and that procedural default rules may not be invoked to prevent meaningful review and reconsideration of cases in which violations of Article 36 have occurred. Id. The Court also made clear that *its judgment should apply to all individuals in similar circumstances in the United States, regardless of nationality.* Id. at ¶ 151.

On February 28, 2005, President Bush issued a memorandum directing that "the United States will discharge its international obligations under the decision of the [I.C.J.] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51

Mexican nationals addressed in that decision." George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). Although the President's memo referred specifically to the Mexican nationals involved in the Avena decision, it must apply equally to Mr. Lightbourne because limiting its application to only those individuals would violate the Equal Protection Clause of the Fourteenth Amendment. Furthermore, courts in the U.S. cannot provide a remedy to Mexican nationals that is not equally applicable to non Mexicans without violating the United States' obligations under the Convention on the Elimination of All Forms of Racial Discrimination, which was ratified by the U.S. Senate in 1994. Finally, since the I.C.J. clearly stated in Avena that its judgment should apply to all individuals in similar circumstances in the U.S., regardless of nationality, the memo must be read as directing state courts to give effect to the Avena decision in Mr. Lightbourne's case.

Mr. Lightbourne could not have raised his claim before because the triggering event for Mr. Lightbourne's claim was President Bush's memo, which directed state courts to give effect to the I.C.J.'s Avena decision in the cases of 52 individuals who were identically situated to Mr. Lightbourne. As the Mexican nationals are now entitled to review and reconsideration of the Article 36 violations in their cases, so

too is Mr. Lightbourne. Prior to the President's memo, which was written within a year of the filing of Mr. Lightbourne's successive Rule 3.851 motion, Mr. Lightbourne could not have raised this claim.

Furthermore, recent court decisions may be read to suggest that if a foreign national is required to show how he was prejudiced by an Article 36 violation, postconviction proceedings are a more appropriate forum for claims involving Article 36 violations than direct appeals. Although the precise standard of review for violations of Article 36 rights is not yet clear, both the I.C.J. and the U.S. Supreme Court have indicated that some showing of prejudice may be required. See Breard v. Greene, 523 U.S. 371, 377 (1998) ("Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."); Avena, at ¶ 121. Proof of prejudice, however, generally requires a record. If a Vienna Convention violation is not raised or preserved at trial, there will be no record on which to rely in raising the issue on direct appeal. Such is the case for Mr. Lightbourne. Therefore, his claim was properly raised in postconviction, where he may have the opportunity to develop a

record via an evidentiary hearing, and could not have been raised on direct appeal.

C. Alternatively, this Court should not apply the procedural bar rule to Mr. Lightbourne's Vienna Convention claim.

Although the U.S. Supreme Court recently held that state courts may apply their procedural bar rules in cases involving violations of Article 36, this Court should provide meaningful review and reconsideration of the state's violation of Mr. Lightbourne's Article 36 rights, and not apply the procedural bar rule in his case, for several reasons.

First, while Article 36 itself directs that the rights contained therein be exercised in conformity with the laws and regulations of the receiving State, the direction is expressly subject to the proviso that "the said laws and regulations must enable *full effect* to be given to the purposes for which the rights accorded under this Article are intended." Second, the I.C.J. has interpreted Article 36(2) to preclude the application of procedural bar rules. Third, President Bush's memo in response to the I.C.J.'s Avena decision directs state courts to give effect to the Avena decision in the case of 51 Mexican nationals, and the Equal Protection Clause of the Fourteenth Amendment demands that Mr. Lightbourne not be treated differently. Fourth, in Sanchez-Llamas v. Oregon, while the

U.S. Supreme Court held that states may apply their procedural bar rules to claims of Article 36 violations, the Court left open the possibility that state courts could refrain from applying such rules to give effect to foreign nationals' rights under Article 36. Finally, it would be manifestly unfair to apply the procedural bar rule to Mr. Lightbourne's Vienna Convention claim.

Paragraph 2 of Article 36 expressly directs that the rights created by paragraph 1 "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Vienna Convention on Consular Relations, (Apr. 24, 1963), [1970] 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820. The plain meaning of this paragraph is clear: countries may apply their own procedural rules to claims involving Article 36 rights, so long as those rules enable full effect to be given to the purpose for which the rights were created.

The I.C.J. has twice interpreted Article 36 as prohibiting the application of procedural bar rules when those rules preclude full effect from being given to Article 36 rights. See Avena; LaGrand. Although the U.S. Supreme Court has recently

rejected the I.C.J.'s interpretation that procedural bar rules can *never* be applied to deny full effect to Article 36 rights, it is helpful to consider the I.C.J.'s reasoning because the I.C.J.'s emphasis was on the U.S. providing meaningful review and reconsideration to Article 36 violations, and the U.S. Supreme Court has left open the possibility that state courts may refrain from applying their usual procedural bar rules to Article 36 claims. See discussion, infra.

The LaGrand case involved a dispute between the United States and Germany over 1) whether Article 36 creates individual rights, and 2) whether the application of the procedural default rule violated Article 36, paragraph 2. The United States conceded that it had violated Article 36, paragraph 1 by failing to promptly inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention. Id. at ¶ 15. The LaGrands learned of their rights under Article 36 after their convictions and sentences had been upheld on direct appeal and in state postconviction, and they raised the issue for the first time in petitions for writs of habeas corpus in federal court. Id. at ¶ 22-23. Their claims were rejected as procedurally defaulted because they had not raised them in state court. Id.

As mentioned supra, the I.C.J. decided in LaGrand that Article 36, paragraph 1 created individual rights. Id. at ¶ 77. Furthermore, the I.C.J. decided that in itself, the procedural default rule used in U.S. courts does not violate Article 36 of the Vienna Convention. Id. at ¶ 90. Under the circumstances of the cases involving the LaGrand brothers, however, the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended," in violation of paragraph 2 of Article 36. Id. at ¶ 91.

The U.S. had argued that counsel assigned to the LaGrands had failed to raise the Article 36 violation in a timely fashion, but the I.C.J. refused to allow the U.S. to rely on that fact, "as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers." Id. at ¶ 60. The I.C.J. reasoned that the application of the procedural default rule prevented U.S. courts from attaching any legal significance to the fact that the LaGrand brothers' Article 36 rights had been violated and that violation "prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defense as provided for by the Convention." Id. at ¶ 91. Therefore, concluded the I.C.J., the application of the

procedural default rule prevented “”full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36.” Id.

The I.C.J. again had occasion to interpret Article 36 in its Avena decision in 2004, a case involving 52 Mexican nationals whose Article 36 rights had been violated. In Avena, the I.C.J. referred to its conclusion in its LaGrand decision, that “the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds” and declared that “this statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.” Avena, at ¶ 112. The I.C.J. emphasized that review and reconsideration of Article 36 violations must be effective and must take account of the violation of the rights set forth in Article 36 of the Vienna Convention. Id. at ¶ 138. The Court also stressed that “the rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law.” Id. at ¶ 139.

After the I.C.J. decided Avena, and before the United States withdrew from the Optional Protocol that gave the I.C.J. jurisdiction to decide Vienna Convention disputes involving the United States,[15] President Bush issued a memo to the Attorney General declaring that "the United States will discharge its international obligations under the decision of the [I.C.J.] in the [Avena] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." This memo means that state courts must provide review and reconsideration of the Article 36 violations in the cases of the Mexican nationals. Although the memo addresses only the 51 Mexican nationals specifically, it would violate the Equal Protection Clause of the Fourteenth Amendment to afford such protections to certain Mexican nationals and not to Mr. Lightbourne, who is similarly situated. The President's determination provides an independent ground under federal law by which Mr. Lightbourne may enforce his Article 36 rights. The President's determination establishes a "binding federal rule" and hence constitutes the supreme law of the Land. See, e.g.,

[15] Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (March 7, 2005).

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401, 413-20 (2003) (Presidential foreign policy preempts contrary state law).

This Court has previously found claims involving Article 36 violations which were raised for the first time in postconviction to be procedurally barred, Gordon v. State, 863 So. 2d 1215 (Fla. 2003). However, based on the combination of events including the decision of the I.C.J. in Avena and the President's memo, this Court should allow meaningful review and reconsideration to be given to the violation of Mr.Lightbourne's Article 36 rights.

In fact, the United States Supreme Court has left it to the states to apply or not apply procedural default rules to Vienna Convention claims. After the lower court issued its order denying Mr. Lightbourne's Vienna Convention claim, the U.S. Supreme Court decided Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006), concerning the availability of judicial relief for violations of Article 36 of the Vienna Convention. Sanchez-Llamas involved two consolidated non-capital cases of foreign nationals who had not been informed of their rights under Article 36. Id. Before his trial, Moises Sanchez-Llamas, a Mexican national, moved to suppress some incriminating statements he had made on the ground, *inter alia*, that the authorities had failed to comply with Article 36. Id. at 2676.

Mario Bustillo, a Honduran national, first raised his claim involving the failure of authorities to comply with Article 36 in his state habeas petition, after his murder conviction became final on direct appeal. Id.

The consolidated cases presented three questions to the U.S. Supreme Court:

> *First*, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding? *Second*, does a violation of Article 36 require suppression of a defendant's statements to police? *Third*, may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial?

Id. at 2674. In deciding the cases, the Court held that even assuming without deciding that the Convention creates judicially enforceable rights,[16] suppression is not an appropriate remedy for a violation, and a State may apply its regular procedural default rules to Convention claims. Id.

While the Court noted that the I.C.J.'s interpretation of Article 36 deserved "respectful consideration," it held that it was not bound by the interpretation that prevented American courts from applying procedural default rules to Article 36 claims. Importantly, the Court's holding does not mean that a

[16] Justices Ginsberg, Breyer, Souter, and Stevens agree with the I.C.J. that the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2688, 2691 (2006).

state court or legislature *must* apply the procedural default rule to Vienna Convention cases. In fact, the Court expressly recognized that "the United States has agreed to "discharge its international obligations" in having state courts give effect to the decision in Avena, [although] it has not taken the view that the I.C.J.'s interpretation of Article 36 is binding on our courts." Id. at 2685, quoting President Bush, Memorandum for the Attorney General (Feb. 28, 2005). As the Court has left it to the states to apply or not apply their procedural default rules in Vienna Convention claims, and as Justice Ginsberg, concurring, did not foreclose the possibility that there may be "some times when a Convention violation, standing alone, might warrant … the displacement of a State's ordinarily applicable default rules," Id. at 2690, this Court should refrain from applying the procedural bar rule to his claim.

Finally, it would be manifestly unfair to apply the procedural bar rule to Mr. Lightbourne's claim where his failure to raise the issue at trial or on direct appeal is directly attributable to the Vienna Convention violation of which he complains, i.e., law enforcement's failure to notify him of his Article 36 rights.

D. Appropriate Remedy.

Although the U.S. Supreme Court in Sanchez-Llamas held that a violation of Article 36 does not by itself require suppression of evidence, the decision does not preclude any effective remedy in other cases if it can be shown that a defendant was actually prejudiced by the failure to inform him or her of the right to contact the consulate. 126 S. Ct. 2669 (2006). In Avena, the ICJ, relying on its LaGrand decision, noted that it was immaterial whether Mexico would have offered consular assistance, "or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights" (*I.C.J. Reports 2001*, p. 492, ¶ 74), which might have been acted upon. Based on this holding, Mr. Lightbourne maintained below that he need not demonstrate what the Bahamian consulate *would* have done to help him. Instead, Mr. Lightbourne asserted that it would be helpful to consider what a consular officer *could* have done to assist him. However, Mr. Lightbourne did indicate to the lower court that if it interpreted existing precedent to require a showing of prejudice, he was prepared to do so at an evidentiary hearing. The trial court did not address whether Mr. Lightbourne was required to prove prejudice.

One of the most important functions of a consul is to serve as "a cultural bridge for detained nationals who must otherwise

navigate through an unfamiliar and often hostile legal system." United States v. Chapparro-Alcantara, 226 F.3d 616, 622 (7th Cir. 2000). Arrested foreign nationals in the U.S. are often isolated from family and friends, speak English only as a second language or not at all, and fail to understand their rights under the U.S. criminal justice system.

Consular assistance for detained nationals generally serves three basic purposes: providing protective assistance, by ensuring that foreign nationals are not mistreated in custody; humanitarian assistance, by providing detainees with access to the outside world and ensuring that they have the basic necessities of life; and legal assistance, by advising detainees on the basic procedures under the local legal system and providing them with lists of local lawyers to defend them. The most essential function of the consul in these cases is to explain to the detainee what their legal rights are and the differences between the U.S. criminal justice system and that of the home country—in terms that the foreign national will understand.

Even in capital cases where a foreign national is familiar with U.S. criminal justice procedures, the consulate still provides an indispensable function. Consular assistance in a capital case may include: monitoring the performance of court-

appointed attorneys; attending court hearings; contacting friends and family in the home country; ensuring that the detainee and the defense attorney are in close contact; funding expert witnesses and investigators, where the courts deny adequate defense funding; notarizing and conveying documents from the home country (e.g., medical, educational, military records); funding mitigation investigations in the home country; bringing mitigation witnesses to testify; submitting amicus briefs or motions based on any violations of international law; participating directly or indirectly in appellate review; petitioning for clemency; and any other assistance necessary to ensure that the national receives fair, equal and humane treatment, both before trial and after sentencing.

Mr. Lightbourne, a Bahamian citizen, was arrested on January 24, 1981 for carrying a concealed weapon. While Mr. Lightbourne was detained pending the concealed weapon charge, one of his cellmates reported to authorities that Mr. Lightbourne had made some incriminating statements regarding the murder of Nancy A. O'Farrell on January 17, 1981. On February 3, 1981, when Mr. Lightbourne was questioned by officials from the Marion County Sheriff's Department, he admitted that he owned the .25 caliber pistol found on his person and that he owned a rose shaped pendant bearing three Greek letters attached

to a fine gold chain. Mr. Lightbourne was charged with murder after a ballistics report connected his gun to the homicide and witnesses identified the necklace as belonging to the victim.

At no time was Mr. Lightbourne, who speaks with a very thick Bahamian accent, informed of his right to contact the Bahamian consulate, and at no time was the Bahamian consulate notified of Mr. Lightbourne's arrest and detention. At his trial, Mr. Lightbourne's purported statements to his cellmates and his statements regarding ownership of the .25 caliber gun and the gold necklace featured prominently in the State's case and were used to obtain a conviction and death sentence.

Had Mr. Lightbourne been informed of his rights under the Vienna Convention, there is a likelihood that contact with consulate would have resulted in assistance. With regard to the statements and admissions made by Mr. Lightbourne, consular assistance would have proved critical in several ways. The very obvious assistance would have been to explain the importance of legal representation prior to making such statements or waiving his right to counsel during his initial conversations with law enforcement. Further, consular assistance would have been vital in challenging the voluntariness of his statements and the voluntariness of his waiver of Miranda.[17] The consulate would

[17] Miranda v. Arizona, 384 U.S. 436 (1966).

have provided information crucial to assessing the totality of the circumstances before the trial court at Mr. Lightbourne's suppression hearings.[18] As such, Mr. Lightbourne's statements would have been suppressed.

Additionally, assistance from the Bahamian consulate would have been vital in the investigation of mitigation and the presentation of mitigating circumstances at the penalty phase. Most importantly, notification and the subsequent involvement of the Bahamian consulate would have curtailed the ineffectiveness of trial counsel. Instead, Mr. Lightbourne's attorney's failed to present any meaningful mitigation.

Mr. Lightbourne has asserted throughout his postconviction proceedings that his trial counsel was ineffective for failing to present mitigating evidence at the sentencing phase of his trial. See, Lightbourne v. State, 471 So. 2d 27 (Fla. 1985); see also, Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). For example, Mr. Ligthbourne has previously alleged that trial counsel never obtained any records pertaining to Mr. Lightbourne such as school records or medical records. The Bahamian

[18] Mr. Lightbourne filed numerous pretrial suppression motions including a motion to suppress the videotaped statement of the accused, motion to suppress the statements of state witness Theodore Chavers on the grounds that he interfered with the right to counsel, motion to suppress the statement of Theophilous Carson and motion to suppress items seized from the personal property of the accused at the Marion County Jail.

consulate would have been able to assist in obtaining these types of documents. Additionally, family and friends located in the Bahamas were not contacted by trial counsel. The consulate would have been able to assist in locating, contacting and bringing forth the witnesses to testify. Trial counsel himself has indicated that he was not provided funds to travel to the Bahamas to investigate or secure relevant information. The consulate would have been an invaluable resource given the restraints placed on trial counsel.

The record in Mr. Ligthbourne's case does not conclusively refute that Mr. Lightbourne was not notified of his rights under the Vienna convention and that prejudice ensued. This Court should remand this case to the circuit court for an evidentiary hearing on Mr. Lightbourne's claim to allow him to present evidence of how he was prejudiced by the violation of his Article 36 rights.

E. Conclusion.

The lower court's order finding Mr. Lightbourne's Vienna Convention claim procedurally barred is erroneous. This Court should reverse the lower court's order and remand this case for an evidentiary hearing.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. LIGHTBOURNE'S CLAIM THAT FLORIDA'S LETHAL INJECTION STATUTE AND THE EXISTING PROCEDURE THAT THE STATE USES FOR LETHAL INJECTION VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 AND ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION AS THEY CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AND VIOLATE THE SEPARATION OF POWERS DOCTRINE.

A. Cruel and Unusual Punishment

In his successive 3.851 motion, Mr. Lightbourne argued that new scientific evidence, not previously available to this Court when it decided Sims v. State, 754 So. 2d 657 (Fla. 2000), and not considered by this Court in the cases, Hill v. State, 921 So. 2d 579 (Fla. 2006), and Rutherford v. State, 926 So. 2d 1100 (Fla. 2006), demonstrates that the existing procedure that the State of Florida uses in executions violates the Eighth Amendment to the U.S. Constitution and the corresponding provision of the Florida Constitution, as it will inflict upon Mr. Lightbourne cruel and unusual punishment. The lower court denied an evidentiary hearing on this claim, stating that:

> With respect to the Defendant's second claim, the Florida Supreme Court has consistently held that Florida's lethal injection process is constitutional. Suggs v. State, 923 So. 2d 419 (Fla. 2005). See, e.g., Sochor v. State, 883 So. 2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); Provenzano v. State, 761 So. 2d 1097 (Fla. 2000) (concluding that execution by lethal injection does not amount to cruel and/ or unusual punishment); and Sims v. State, 754 So. 2d 657 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment).

Order at 2.

The lower court's order is erroneous. The lethal injection claims in Ernest Suggs's and Dennis Sochor's 3.850 motions were summarily denied without evidentiary hearings. In Sims v. State, 754 So.2d 657 (Fla. 2000), Terry Sims, who was to be the first death-sentenced inmate to be executed by lethal injection in Florida, challenged Florida's lethal injection procedure as a violation of the Eighth Amendment. This Court denied relief, finding the possibility of mishaps during the lethal injection process insufficient to support a finding of cruel and unusual punishment.

Similarly, in Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000), this Court affirmed a circuit court's finding that Florida's lethal injection procedure does not constitute cruel and unusual punishment. There, after the Governor had signed a death warrant for Thomas Provenzano, a circuit court granted Mr. Provenzano a two-day evidentiary hearing on his claim that the lethal injection method used by the State of Florida in Bennie Demps's execution then-recent execution constituted cruel and unusual punishment. Id. at 1098. After hearing testimony from eyewitnesses to the Demps execution, the circuit court held that the lethal injection procedure did not constitute cruel and unusual punishment and this Court affirmed. Id. Notably, the

circuit court excluded testimony from members of the execution team, as well as evidence regarding their qualifications. Id. at 1099.

The lower court's reliance State v. Suggs, State v. Sochor, State v. Provenzano, and State v. Sims is misplaced as these cases are no longer applicable in light of new scientific evidence discussed infra. Furthermore, Provenzano does not control this case because of the very nature of Mr. Lightbourne's claim. As recent research shows, a conclusion that a lethal injection procedure does not constitute cruel and unusual punishment cannot be based on the testimony of eyewitnesses to an execution by lethal injection. As explained infra, one of the major problems with the lethal injection procedure is that while the condemned remains conscious as he suffers the excruciating pain of chemicals burning through his veins and then a massive heart attack, he is completely paralyzed and unable to communicate his consciousness. Despite the agonizing pain that the inmate suffers as he remains conscious, the chemicals used in Florida's lethal injection procedure ensure that eyewitnesses observe what appears to be a humane and painless death.

This Court decided Sims and Provenzano more than six years ago. As Mr. Lightbourne argued in his 3.851 motion, a large

amount of new scientific research has been published since 2000. This research, explained below, makes clear that the possibility of lethal injection mishaps that this Court considered in Sims is no longer speculative. Rather, it is the stark and certain reality of executions by lethal injection as carried out under Florida's protocol. The lower court failed to consider any of the new research and thus, erred in denying Mr. Lightbourne an evidentiary hearing on this issue. Since the recent scientific research has been conducted in other states, an evidentiary hearing is necessary in order for Mr. Lightbourne to prove that the problems that occur under lethal injection procedures in other states also occur in Florida, and will occur when the State uses the same protocol to execute Mr. Lightbourne.

In Sims v. State, this Court summarized Florida's lethal injection protocol:

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

754 So.2d 657, 666, fn. 17 (Fla. 2000).[19] Mr. Lightbourne was compelled to file his recent 3.851 motion by several recent developments which lead him to conclude that the use of the above combination of drugs creates a risk that Mr. Lightbourne will experience excruciating pain if the dose of sodium pentothal is not sufficient to produce anesthesia or is not properly administered before the injection of the pancuronium bromide and the potassium chloride. The developments relied upon by Mr. Lightbourne in his Rule 3.851 motion included (1) an April 16, 2005 article published in the medical journal THE LANCET, (2) a September 25, 2005 letter from Dr. Richard Weisman to THE LANCET, (3) the U.S. Supreme Court's January 2006 grant of stays of execution in two Florida capital cases and grant of a writ of certiorari in one of those cases to hear a § 1983 claim challenging Florida's lethal injection procedure;[20] and (4), on February 14, 2006, a California district court judge

[19] As discussed in Argument III, infra, Mr. Lightbourne has been unable to obtain a copy of Florida's written lethal injection protocol, and therefore Mr. Lightbourne has no way of knowing whether the protocol has changed since 2000.

[20] In January 2006, the U.S. Supreme Court granted of stays of execution in two Florida capital cases, Hill v. Crosby, 126 S.Ct. 1189 (U.S. 2006); Rutherford v. Crosby, 126 S.Ct. 1191 (U.S. 2006), and granted of a writ of certiorari in Hill to decide whether a § 1983 claim is a proper format for challenging Florida's lethal injection procedure. The Court subsequently held that Hill could proceed with a § 1983 challenge. Hill v. McDonough, 2006 U.S. LEXIS 4674 (U.S. 2006).

requiring the state to change its lethal injection procedure before proceeding with an execution, because of concerns that lethal injection as administered poses a substantial risk of pain.[21]

[21] A federal district court judge agreed that a California death row inmate had raised substantial questions regarding whether administration of California's lethal injection protocol would create an undue risk that Morales would suffer excessive pain when he is executed. Morales v. Hickman, No. C 06 926 JF RS (N. D. Cal. Feb. 14, 2006) (PC-R4 59-73). California's lethal injection protocol uses the same combination of three drugs as Florida, but provides for 5 grams of sodium thiopental, in contrast to Florida's 2 grams.

U.S. District Court Judge Jeremy Fogel ordered that the State could proceed with the execution scheduled for February 21, provided that it 1) certify that it will use only sodium thiopental or another barbiturate or combination of barbiturates in Morales's execution, or 2) agree to independent verification, through direct observation and examination by a qualified individual or individuals, in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that Morales in fact is unconscious before either pancuronium bromide or potassium chloride is injected. Id.

The State of California opted to have two anesthesiologists present for the execution. See Defendants' Response to Court's Conditional Denial of Preliminary Injunction, in Morales v. Hickman, No. C 06 219-JF (N.D. Cal. Feb. 15, 2006). The anesthesiologists scheduled to monitor the execution, however, backed out at the last minute, citing ethical concerns. See AP, Legal Wranglings Delay California Execution, N.Y. Times, Feb. 21, 2006. The American Medical Association, the American Society of Anesthesiologists and the California Medical Association all opposed the anesthesiologists' participation as unethical and unprofessional. Id.

The State of California then chose to go ahead with the execution using a higher dosage of one drug, sodium thiopental, but had to postpone the execution indefinitely when it could not comply with the further conditions imposed by Judge Fogel to prevent a botched and painful execution. Judge Fogel ordered

A 2005 study published in the prestigious medical journal THE LANCET detailed the results of research on the effects of chemicals in lethal injection. See Leonidas G. Koniaris et.al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 THE LANCET 1412 (2005) (PC-R4. 49-51). The study analyzed lethal injection protocols and autopsy and toxicology reports from a number of states that made such data available. This study confirmed, through the analysis of empirical after-the-fact data, that the use of sodium thiopental, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed. The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium thiopental in their bloodstream to provide anesthesia. In other words, in close to

---

that the drug be administered by a licensed professional and injected directly into the prisoner's vein, rather than flowing through an intravenous tube from outside the death chamber. See Order on Defendant's Motion to Proceed with Execution Under Alternative Condition to Order Denying Preliminary Injunction, in Morales v. Hickman, No. C 06 219-JF (N.D. Cal. Feb. 21, 2006) (PC-R4. 75-78).

An evidentiary hearing on whether California's lethal injection protocol constitutes cruel and unusual punishment is scheduled for late September 2006.

half of the cases, the prisoner may have felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride. The chemicals used in Florida executions are identical to those used by the states included in the study. Sims v. State, 754 So.2d 657 (Fla. 2000).

Sodium thiopental, also known as sodium pentothal, is an ultra-short acting barbiturate that produces shallow anesthesia. Healthcare professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and then use different drugs to create a "surgical plane" of anesthesia to last through the operation and block the stimuli of surgery which would otherwise cause pain. Sodium thiopental is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is *supposed* to be able to wake up and signal that something is wrong. Sodium thiopental is unstable in liquid form, and must be mixed up and applied in a way that requires the expertise associated with licensed healthcare professionals who cannot by law and professional ethics participate in executions.

The authors of the study note that it is simplistic to assume that 2 to 3 grams of sodium thiopental will assure loss

of sensation, especially considering that personnel administering it are unskilled, that the execution could last up to 10 minutes, and that people about to be executed are extremely anxious and their bodies are flooded with adrenaline, thus necessitating more of the drug to render them unconscious.

In a letter to THE LANCET dated September 24, 2005, Dr. Richard Weisman explained that the actions of sodium thiopental in a dying individual undergoing lethal injection are not comparable to its actions in a ventilated surgical patient. See *Correspondence*, Robyn S. Weisman et al., 366 THE LANCET 1074 (2005) (PC-R4. 53). According to Dr. Weisman, studies on living dogs showed that after a dog is injected with sodium thiopental, breathing slows and carbon dioxide builds up in the blood, leading to acidosis. See Id. Acidosis causes the sodium thiopental to leave the blood and enter the fatty tissues. This suggests that the same dose of sodium thiopental may wear off more rapidly in an inmate undergoing lethal injection than in a surgical patient who is ventilated and not experiencing hypoxia and acidosis, risking that the inmate will be conscious and in pain from the effects of the pancuronium bromide and potassium chloride, but unable to communicate because he is paralyzed by the pancuronium (see discussion infra). This also indicates that the effects of dosages used in clinical practice cannot be

extrapolated to determine their effects on inmates during execution.

The second chemical used in lethal injection in Florida is pancuronium bromide, sometimes referred to simply as pancuronium or by its trade name, Pavulon, a chemical that paralyzes the muscles but has no anesthetic effect and that also stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech.

Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. Its only function is cosmetic -- to prevent spasms that would be disturbing to witnesses. See Human Rights Watch report, So Long as They Die: Lethal Injections in the United States (April 2006) at 26-27, available at http://hrw.org/reports/2006/us0406/index.htm (last visited September 20, 2006) ("The pancuronium will prevent motor manifestations of physiological processes that could be perceived by witnesses as unpleasant or suffering on the part of the inmate.") (quoting Testimony of Dr. Mark Dershwitz, Reid v. Johnson, No. Civ. A. 3:03CV1039, August 30, 2004, p. 27-28).

The American Veterinary Medical Association (AVMA) panel on euthanasia specifically prohibits the combination of pentobarbital with a neuromuscular blocking agent to kill animals because of the risk of unrecognized consciousness. 2000 Report of the American Veterinary Medical Association (AVMA) Panel on Euthanasia, 218 J. Am. Veterinary Med. Ass'n 669, 680. (March 1, 2001). (PC-R4. 80-107). Pentobarbitol is an intermediate-acting anesthetic with a half-life of many hours, which means that its effects last much longer than the ultra-short acting sodium thiopental.

The use of sodium thiopental in combination with a neuromuscular blocking agent would certainly be even more unacceptable under the AVMA standards because of the increased risk (compared with pentobarbital) that an animal would regain consciousness after the ultra-short acting anesthetic wears off. Additionally, 19 states have expressly or implicitly prohibited the use of a neuromuscular blocking agent in animal euthanasia because of the risk that it would prevent veterinarians from detecting consciousness in animals.

Section 828.058, Florida Statutes, prohibits the use of paralyzing agents in euthanizing dogs and cats. The statute also specifies that only sodium pentobarbital or another agent approved by rule by the Board of Veterinary Medicine may be used

in euthanizing dogs or cats. The statute also specifies the training required for an individual performing euthanasia. Therefore, the protocol used in Florida to execute condemned inmates would be illegal to euthanize a dog or cat.

The third chemical used in Florida lethal injections is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart and causes massive muscle cramping before inducing cardiac arrest when it reaches the heart. Without adequate anesthesia, the condemned would feel the intense burning and the pain of a heart attack, but is unable to communicate his pain because the pancuronium bromide has paralyzed his entire body so that he cannot express himself either verbally or otherwise.

Since Mr. Lightbourne filed his 3.851 motion, there have been even more developments which underscore the importance of Mr. Lightbourne's need for an evidentiary hearing on this claim. On August 21, 2006, Oklahoma altered the way it administers the lethal injection drugs so that now inmates receive larger doses of the anesthetic, sodium thiopental, before the potassium chloride is administered. Associated Press, *Oklahoma Alters Lethal Injection Procedure*, available at http://www.chickashanews.com/malicoat/local_story_233142149.html

(August 21, 2006). Additionally, on August 29, 2006, South Dakota Governor Mike Rounds delayed the state's first execution in 59 years, citing concerns that the state's plan to use a three-drug protocol did not comply with a state statute specifying a two-drug combination. Reuters, *South Dakota: Execution Postponed*, available at http://www.nytimes.com/2006/08/30/us/30brfs-003.html (August 30, 2006).

Awareness under anesthesia is a phenomenon known to happen during surgery when a patient is insufficiently sedated and becomes conscious during surgery. When the patient has been given a paralyzing agent, the patient is unable to alert surgical staff that the sedation has worn off. Survivors of anesthetic awareness describe the experience as nightmarish and horrifying. The American Society of Anesthesiologists has issued a practice advisory:

> Intraoperative awareness occurs when a patient becomes conscious during a procedure performed under general anesthesia and subsequently has recall of these events.

American Society of Anesthesiologists, "Practice Advisory for Intraoperative Awareness and Brain Monitoring: A Report by the American Society of Anesthesiologists Task Force on Intraoperative Awareness" *Anesthesiology* 2006; 14:847-64, at 848. The report advises:

> Intraoperative monitoring of depth of anesthesia, for the purpose of minimizing the occurrence of awareness, should rely on multiple modalities, including clinical techniques (*e.g.*, checking for clinical signs such as purposeful or reflex movement) and conventional monitoring systems (e.g., electrocardiogram, blood pressure, HR, end-tidal anesthetic analyzer, capnography). The use of neuromuscular blocking drugs may mask purposeful or reflex movements and adds additional importance to the use of monitoring methods that assure the adequate delivery of anesthesia.

Id. at 854.

On April 24, 2006, Human Rights Watch released a report, So Long as They Die: Lethal Injections in the United States, recommending that states suspend lethal injections:

> [U]ntil each state convenes a blue ribbon panel of medical, scientific, legal, judicial, and correctional experts authorized to review and recommend changes to lethal injection execution protocols as necessary to ensure the protocol adopted causes the inmate the least possible pain and suffering.

Finally, Florida's procedure is similar to procedures in California, North Carolina, Missouri, Arkansas, and Ohio, where federal district courts have issued orders addressing serious Eighth Amendment questions raised by lethal injection. In North Carolina, a federal district court conditionally denied an inmate's motion for a preliminary injunction:

> [O]n the condition that there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure that Plaintiff is in all respects unconscious prior to and at the time of the administration of any pancuronium bromide or potassium chloride. Should Plaintiff exhibit effects of consciousness at any time

> during the execution, such personnel shall immediately provide appropriate medical care so as to insure Plaintiff is immediately returned to an unconscious state.

Order, Brown v. Beck, No. 5:06-CT-03018-H (E.D. N.C., Western Division, April 7, 2006) (PC-R4. 230-244). It is notable that the original North Carolina protocol called for 3000 mg of sodium pentothal, a higher dose than the 2 grams (2000 mg) called for in Florida.

In response, the North Carolina Department of Corrections implemented the following changes to their lethal injection procedure. The Defendants purchased a bispectral index monitor ("BIS monitor"), a diagnostic device approved by the Food and Drug Administration ("FDA") that is used extensively in clinical settings to ensure the unconsciousness of surgical patients; revised the execution protocol to utilize the BIS monitor to measure the Plaintiff's level of consciousness throughout the execution procedure; revised the execution protocol to provide for the administration of additional quantities of sodium pentothal beyond the initial dose of not less than 3000 mg, if the Plaintiff, based on the readings of the BIS monitor, has not been rendered unconscious; and revised the execution protocol to insure that Plaintiff is in fact unconscious, as measured by the BIS monitor, prior to the administration of any pancuronium

bromide. See Defendant's Notice and Response to 7 April 2006 Order, Brown v. Beck, (April 12, 2006) (PC-R4. 356-360).

A number of federal district courts have granted stays of execution in response to lethal injection challenges. See, e.g., Order, Jackson v. Taylor, Civ. No. 06-300-SLR. (D. Del. May 9, 2006); Order Granting Preliminary Injunction, Hill v. Taft, No. 2:04-cv-1156 (S.D. Ohio, Eastern Division, April 28, 2006). See also Order, Anderson v. Evans, No. Civ-05-0825-F, (W.D. Okla. Jan. 11, 2006) *and* Report and Recommendation, Anderson v. Evans, (Dec. 20, 2005), (district court accepted in its entirety a Magistrate Judge's report finding that death-sentenced inmates stated a valid claim that Oklahoma's administration of the same three-chemical sequence for lethal injection "creates an excessive risk of substantial injury" and pain under the Eighth Amendment). Subsequent to the U.S. Supreme Court's decision allowing a condemned Florida inmate to go forward with a § 1983 challenge to Florida's lethal injection protocol, Hill v. McDonough, 2006 U.S. LEXIS 4674 (U.S. 2006), two courts have granted relief in response to such challenges. See, e.g., Order, Nooner v. Norris, No. 5:06CV0011OSWW (E.D. AK, June 26, 2006) (granting inmate plaintiff's motion for stay of execution and preliminary injunction in § 1983 action); Order, Taylor v. Crawford, No. 05-4173-CV-C-FJG (W.D. MS, June 26,

2006) (granting relief on inmate plaintiff's § 1983 claim and staying all executions in the state pending approval of protocol incorporating provisions for monitoring of inmate's consciousness by board certified anesthesiologist); see also Order, Taylor v. Crawford, No. 05-4173-CV-C-FJG (W.D. MS, September 12, 2006) (rejecting Missouri's revised protocol and ordering the state to submit another revised protocol on or before October 27, 2006).

While the circuit court did not rely on this Court's decision in Hill v. State, 921 So. 2d 579 (Fla. 2006), it is important to distinguish Hill from Mr. Lightbourne's case. This Court's decision in Hill v. State does not preclude this Court from reversing the lower court's order denying an evidentiary hearing on Mr. Lightbourne's lethal injection claim. The procedural posture of Hill was different from that of Mr. Lightbourne's claim as Mr. Hill was under a death warrant. Mr. Lightbourne is not under warrant and his claim was a timely filed Rule 3.851 claim. Further, the Hill opinion addressed only the constitutionality of sodium thiopental as a lethal injection agent. This Court did not address the use of pancuronium bromide and potassium chloride, the second and third drugs used in Florida's lethal injection protocol. The Hill opinion also did not address Dr. Weisman's September 24, 2005

letter to THE LANCET (discussed supra) or the American Veterinary Medical Association's euthanasia standards.

Since the scientific research described here was all conducted based on the lethal injection protocols and executions in other states, an evidentiary hearing is necessary to prove that this research also applies to lethal injections under Florida's protocol. The lower court erred in denying an evidentiary hearing on this claim because Sims and Hill do not control the issue and because Mr. Lightbourne's claim required a factual determination. This Court should reverse the lower court's order and remand the case for an evidentiary hearing on Mr. Lightbourne's lethal injection claim.

B. Separation of Powers

In his 3.851 motion, Mr. Lightbourne argued that Florida's lethal injection statute, Section 922.105, Florida Statutes, violates Article II, section 3 and Article I, section 17 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution because it is an unlawful delegation the legislature's lawmaking power. Mr. Lightbourne's argument was twofold: the delegation is unlawful because the legislature did not give the Department of Corrections sufficient standards formulated for guidance to create a rule of lethal injection protocol, and/or because the legislature's exemption of policies

and procedures relating to the lethal injection protocol from the constraints and procedures of Florida's Administrative Procedure Act, without offering alternative procedures, gives the Department of Corrections unfettered discretion to create a lethal injection protocol.

The lower court denied this claim, finding that:

> No court has held that the lethal injection statute is an unconstitutional delegation of legislative authority. See Sims v. State, 754 So. 2d 657 (Fla. 2000).

Order at 2.

The lower court's order is erroneous and its reliance on Sims is again misplaced. In Sims, this Court found that the legislature's failure to define the chemicals to be administered in the lethal injection did not necessarily render the statute unconstitutional, but Terry Sims did not raise, and this Court did not consider, the argument that the legislature's explicit exemption of the policies and protocols from the procedural safeguards of the Administrative Procedure Act gave the Department of Corrections unfettered discretion to legislate, in violation of Article II, section 3 of the Florida Constitution. Sims v. State, 754 So. 2d 657 (Fla. 2000).

Section 922.105, Florida Statutes, violates the Separation of Powers clause of the Florida Constitution because it delegates to the DOC the complete power to create policies and

procedures for lethal injection and exempts the making of such policies and procedures from the requirements of Chapter 120, Laws of Florida, Florida's Administrative Procedure Act (APA). Absent the statutory exemption, the DOC policies and procedures would fall under the definition of a "Rule" under the APA. § 120.52(15), Fla. Stat. (2006).[22] They would thus be subject to

[22] Section 120.52, Florida Statutes, defines "Rule":

> (15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:
> (a)Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
>
> (b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.
> (c) The preparation or modification of:
> 1. Agency budgets.
> 2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.
> 3. Contractual provisions reached as a result of collective bargaining.
> 4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

formal or informal rulemaking requirements of the APA, including notice, comments/ and or a hearing, and a complete rulemaking record. See § 120.54, Fla. Stat. (2006). The rulemaking procedures of the APA are designed to ensure that an agency is informed to its fullest before making a rule on a particular subject. See Adam Smith Enterprises, Inc. v. State Dep't of Environmental Regulation, 553 So. 2d 1260, 1270 (Fla. Dist. Ct. App. 1989).

While the State may argue that the lethal injection protocols do not have general application because they apply only to those inmates under sentence of death, this argument would not be persuasive. The protocols apply uniformly to all inmates under sentence of death, without exception. See Dep't of Highway Safety & Motor Vehicles v. Schluter, 705 So. 2d 81, 83 (Fla. 1st DCA 1997).

Similarly, the lethal injection policies and procedures cannot be construed as internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memoranda. The lethal injection protocols address the tremendous task of carrying out a sentence of death. The DOC is charged with accomplishing this task without violating the Eighth Amendment of the United States Constitution or Article I, section 17 of the Florida Constitution. Ensuring that the State complies with the Constitution is an interest in which all Florida citizens have a stake, not just those under a sentence of death. Therefore, it cannot be said that the lethal injection protocols are internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memoranda. See Dep't of Highway Safety & Motor Vehicles v. Schluter, 705 So. 2d 81, 83 (Fla. 1st DCA 1997).

In Section 922.105, Florida Statutes, the Legislature has given the DOC unfettered discretion to devise a method by which to execute a human being in a manner that complies with the Eighth Amendment – a task which clearly requires specialized knowledge and training – and has given the DOC *carte blanche* to do so behind closed doors, without the safeguards that the APA rulemaking procedures provide and without providing any alternative procedures to ensure that the DOC makes its policies in an informed and unbiased manner.[23]

The lower court erred in denying Mr. Lightbourne's claim. Mr. Lightbourne asks this Court to reverse the lower court's order and remand this case for an evidentiary hearing on the claim so that Mr. Lightbourne will not be executed using a procedure that was created behind closed doors by an agency making policy outside the scope of its usual business, that will likely involve the unnecessary and wanton infliction of pain contrary to contemporary standards of decency (see Argument IIA,

[23] By analogy, Section 120.63, Florida Statutes, allows the Administration Commission to exempt any process or proceeding of an agency governed by the APA from one or more requirements of the APA, but the Commission may not exempt an agency from any requirement of the APA under this section until "it establishes alternative procedures to achieve the agency's purpose which shall be consistent, insofar as possible, with the intent and purpose of the act." Id. It stands to reason that the Legislature should have provided the DOC with alternative procedures by which to create an informed and unbiased rule of lethal injection.

supra), and that Mr. Lightbourne has been prevented from challenging effectively because the lethal injection policies and procedures that were created in secret still remain in the dark (see Argument III, infra).

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. LIGHTBOURNE'S REQUEST FOR PUBLIC RECORDS PURSUANT TO FLA. R. CRIM. P. 3.852, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION.

After filing his successive 3.851 motion, Mr. Lightbourne sought public records pursuant to Fla. R. Crim. P. 3.852(i). On March 23, 2006, Mr. Lightbourne sent public records requests to the Florida Department of Corrections, the Office of the Attorney General, and Florida State Prison. The Department of Corrections filed written objections to Mr. Lightbourne's demands, and on April 24, 2006, the lower court held a hearing at which the Office of the Attorney General and the Department of Corrections orally objected to Mr. Lightbourne's demands. The lower court refrained from ruling on the requests and objections at that time.

On May 2, 2005, the lower court issued an order denying Mr. Lightbourne's 3.851 motion as well as his public records requests. The lower court based its denial of the public records requests on its denial of the 3.851 motion:

> Since the Defendant's motion fails to present any issue requiring evidentiary hearing, his demands for additional public records would be moot, as there is no issue before the Court to be tried, and the Defendant has failed to show how it could be reasonably calculated to lead to the discovery of admissible evidence. See Robinson v. State, 913 So. 2d 514 (Fla. 2005); Elledge v. State, 911 So. 2d 57 (Fla. 2005); Johnson v. State, 904 So. 2d 412 (Fla. 2005); and Parker v. State, 904 So. 2d 370 (Fla. 2005).

Order at 2.

This Court applies the "abuse of discretion" standard when reviewing appeals from denials of requests for public records. Hill v. State, 921 So. 2d 579 (Fla. 2006). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." Parker v. State, 904 So. 2d 370, 379 (Fla. 2005).

While the Assistant Attorney General and the Department of Corrections objected to the requests as being overly broad, unduly burdensome, and irrelevant, the lower court did not find them to be so. Rather, the lower court denied Mr. Lightbourne's requests for public records on the basis that (1) such requests were moot because Mr. Lightbourne failed to present any issue requiring an evidentiary hearing, and thus there was no issue before the Court to be tried, and (2) Mr. Lightbourne failed to

show how his requests for public records were reasonably calculated to lead to the discovery of admissible evidence.

At the outset, it is important to note that this Court's opinions in Hill v. State, 921 So. 2d 579 (Fla. 2006) and Rutherford v. State, 926 So. 2d 1100 (Fla. 2006) regarding public records requests do not control this case. Both Mr. Hill and Mr. Rutherford were under warrant at the time they made their public records requests relating to lethal injection, so their requests were governed by Fla. R. Crim. P. 3.852(h)(3), which does not allow requests to agencies from which the inmate has not previously requested records. Mr. Lightbourne is not under warrant, and therefore his records requests fall under Fla. R. Crim. P. 3.852(i).

As to the first basis, the lower court erred in denying Mr. Lightbourne's claim that Florida's lethal injection procedure is unconstitutional. See Argument I, supra. As to the second basis, the lower court abused its discretion in finding that Mr. Lightbourne failed to establish that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence. The records requested, including the types and doses of drugs used, the order in which they are injected, and the method used to inject the drugs,

would either be admissible evidence or were reasonably calculated to lead to admissible evidence in the form of expert opinions as to whether lethal injection, as conducted under Florida's protocol, causes unnecessary pain.

As argued supra, new evidence suggests that lethal injection may cause extremely painful and torturous death such as would violate the Eighth Amendment. Since this research was developed in other jurisdictions, Mr. Lightbourne's expert witnesses would need to review records related to Florida's lethal injection protocol in order to apply the new research to Florida's procedures. The requested records are necessary for Mr. Lightbourne's experts to determine whether Florida's lethal injection procedures pose a risk of causing an unnecessarily painful and torturous death.

In order to fairly form an opinion on the lethal injection protocol, the experts would have to know the qualifications of the personnel involved in the execution. Lethal injection requires the mixing of drugs, insertion of IV catheters, administration of drugs, and other tasks requiring medical training and skills. The use of unqualified and untrained personnel would make it more likely that errors will occur and that the designated drugs will not function as intended under the protocol, causing unnecessary suffering.

The experts would also need to review reports of observations of previous executions by lethal injection, including autopsies and toxicology reports and reports of complications, in order to form an opinion on the likelihood that condemned inmates in Florida have suffered painful and torturous deaths by lethal injection.

It would also be necessary for the experts to review the documents related to the adoption of lethal injection as a means of execution in Florida in order to assess, among other issues, the criteria used for choosing the lethal injection protocols, whether the protocols were evaluated scientifically before being adopted, whether alternative protocols were considered, and whether there was an awareness of the risk of inflicting pain. Only after reviewing these records would Mr. Lightbourne's expert witnesses be able to testify fully and fairly.

Since the lethal injection protocol itself would be admissible evidence, and since expert testimony on the issue of whether lethal injection is constitutional would be admissible, all of the records sought were reasonably calculated to lead to admissible evidence, and the lower court abused its discretion in finding that this requirement of Fla. R. Crim. P. 3.852(i) was not met.

The lower court abused its discretion in denying Mr. Lightbourne's public records requests because no reasonable person would take the view adopted by that court. Effective collateral representation has been denied Mr. Lightbourne because of the lower court's erroneous denial of his request for pertinent public records. This Court should remand the case to the circuit court for full public records disclosure and to permit amendment of his Rule 3.851 motion based on future records received.

CONCLUSION

In light of the foregoing arguments, Mr. Lightbourne submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for an evidentiary hearing on his claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Kenneth S. Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118 and Rock E. Hooker, Assistant State Attorney, 19 NW Pine Avenue, Ocala, FL 34475on September 21, 2006.

SUZANNE MYERS KEFFER
Assistant CCRC
Florida Bar No. 0150177

ANNA-LIISA JOSELOFF
Staff Attorney
Florida Bar No. – Pending

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Courier 12-point font.