IN THE SUPREME COURT OF FLORIDA

IAN DECO LIGHTBOURNE,

Case No. SC06-1241

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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RESPONSE TO REQUEST FOR ORAL ARGUMENT

The issues raised in this appeal are not complex. Instead, Lightbourne's claims are readily disposed of by the application of well-settled Florida law. Under that well-settled law, there is no basis for relief, and, because that is so, the State suggests that oral argument is inappropriate in this case.

THE HISTORY OF THE CASE

The "Procedural History" set out on pages 1-8 of Lightbourne's brief is argumentative and is denied. The State relies on the following factual and procedural summary of this case, which is taken from this Court's most recent opinion:

> The procedural history of this case, including the facts of the original crime, are fully set forth in our last opinion in this case. *See Lightbourne v. State,* 742 So.2d 238 (Fla. 1999). Lightbourne, a Bahamian immigrant who was twenty-one-years old at the time of the crime, is on death row for the 1981 murder of Nancy O'Farrell, the daughter of an Ocala thoroughbred horse breeder. *See id.* at 240. Lightbourne was found guilty of first-degree murder on the alternate theories of premeditation, felony murder in the commission of a burglary, and felony murder in the commission of a sexual battery. *See id*. From the time of the first appeal, Lightbourne has attacked the reliability of Theodore Chavers and Theophilus Carson, two jailhouse informants, who testified to incriminating statements allegedly made by Lightbourne regarding the circumstances of the murder.
>
> During the penalty phase, the State did not put on any additional testimony, but rather relied on the evidence presented during the guilt phase, including the testimony of Chavers and Carson. This Court recounted their testimony in its 1999 opinion:

> Theodore Chavers, a cellmate in the Marion County Jail, testified that [Lightbourne] "knew too much" about the details of Nancy's death and made some incriminating statements during the course of their conversations. According to Chavers, petitioner made references indicating that he entered Nancy's house, encountered her as she was coming out of the shower, forced her to engage in sexual intercourse, and shot her despite pleas for mercy. This version of the facts was corroborated by Theophilus Carson, another cellmate in the Marion County Jail. According to Carson, petitioner admitted forcing Nancy to have sex, shooting her because she could identify him, and taking a necklace and some money.

Id. at 240 (footnotes omitted) (*quoting Lightbourne v. Dugger*, 829 F.2d 1012, 1016 (11th Cir. 1987)).

The jury recommended the death penalty and the trial court imposed a death sentence. The trial court found the following aggravating circumstances: (1) the murder was committed during the commission of a burglary and sexual battery; (2) the murder was committed to avoid arrest; (3) the murder was committed for pecuniary gain; (4) the murder was heinous, atrocious or cruel ("HAC"); and (5) the murder was committed in a cold, calculated and premeditated manner ("CCP"). *See* 742 So.2d at 241. The trial court found only two mitigating circumstances: (1) no significant history of criminal activity; and (2) Lightbourne's relative youth at the time of the crime. *See id.*

On direct appeal, Lightbourne asserted that his statements to Chavers and Chavers' subsequent testimony regarding those statements were solicited by authorities in violation of *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), which prohibits the admission of statements deliberately elicited from the defendant by a government agent in violation of the Sixth Amendment right to counsel. *See Lightbourne v. State*, 438 So.2d 380, 386 (Fla. 1983). Lightbourne maintains that Chavers acted as an agent for the State when he

questioned Lightbourne about the murder while he and Lightbourne were in the same jail cell. This Court rejected Lightbourne's Henry claim, see id., as did the Eleventh Circuit when Lightbourne raised the same claim in a federal habeas corpus petition. *See Lightbourne v. Dugger*, 829 F.2d 1012, 1021 (11th Cir. 1987).

In his second postconviction motion, [FN1] Lightbourne attacked the reliability of Chavers and Carson, and sought to introduce affidavits and other exculpatory information concerning the two informants. *See Lightbourne v. Dugger,* 549 So.2d 1364, 1365 (Fla. 1989). These affidavits included one from Chavers in which he recanted his trial testimony. *See id.* Lightbourne contended that he was entitled to a new trial as a result of this newly discovered evidence and Brady [FN2] violations based on the State's failure to disclose that police engaged in a scheme with Chavers and Carson to elicit incriminating statements from Lightbourne. *See id.* The trial court summarily denied the motion for postconviction relief, and this Court reversed for an evidentiary hearing. *See id*. at 1367.

> [FN1] In his first postconviction motion, Lightbourne asserted that trial counsel was ineffective for failing to impeach the jailhouse informants. *See Lightbourne v. State*, 471 So.2d 27, 29 (Fla. 1985). This Court rejected that claim. *See id*.
>
> [FN2] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

After an evidentiary hearing, the trial court denied relief and this Court affirmed the trial court's order denying relief. *See Lightbourne v. State*, 644 So.2d 54 (Fla. 1994). In the opinion, this Court referred to the testimony of Richard Carnegia, another prisoner who was in the same cell as Lightbourne, as the only evidence "corroborating" Lightbourne's proffered hearsay evidence. [FN3] *See id*. at 57 n.4.

> [FN3] The trial court also concluded that Chavers and Carson were unavailable witnesses, a finding that we affirmed:

> Carson could not be located despite a diligent search. At the hearing, Chavers appeared to testify but demonstrated great difficulty answering questions. After a medical and psychological evaluation, he was found incompetent to testify. His testimony was deferred, and when he testified three months later, he professed to have a lack of memory and refused to answer questions. Chavers was found in contempt of court and declared unavailable as a witness.
>
> L*ightbourne*, 644 So.2d at 56.

In 1994, Lightbourne filed his third postconviction motion based upon the affidavits of Carson and Larry Emanuel, who also were in the same jail cell as Lightbourne. Carson alleged in his affidavit, consistent with Chavers' affidavit, that he testified falsely at trial under pressure from the State. Further, Emanuel, who did not testify at trial, swore in his affidavit that he had been solicited by the police to testify against Lightbourne and that "the other guys in the cell" also were promised leniency on their charges for testimony against Lightbourne. Emanuel stated that "one of those guys was Uncle Nut Chavers," referring to Chavers. Lightbourne alleged that these affidavits established violations of *Brady, Henry* and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), or, in the alternative, constituted newly discovered evidence that would probably produce a different result on retrial.

The trial court held an evidentiary hearing on Lightbourne's claims. At this hearing, Carson testified and again recanted his trial testimony. However, the trial court concluded that Carson's recanted testimony was not believable, based in large part on testimony by police officers that there had been no deal. The trial court did not allow Emanuel to testify because it concluded that Emanuel's testimony was procedurally barred in that it could have been presented earlier.

> In this Court's 1999 opinion, we concluded that Emanuel's testimony was not procedurally barred. *See Lightbourne*, 742 So.2d at 246. We remanded the case for an evidentiary hearing to consider Emanuel's and Carnegia's testimony in deciding whether Carson's recanted testimony would probably produce a different result on resentencing, and whether Emanuel's and Carnegia's testimony supports Lightbourne's claim that Chavers' and Carson's testimony at the original trial was false or motivated by an undisclosed deal with the State. *See id*. at 249.

Lightbourne v. State, 841 So. 2d 431, 433-435 (Fla. 2003). Following the hearing on remand, the trial court denied relief, and this Court affirmed. *Lightbourne v. State*, 841 So. 2d at 442. The United States Supreme Court denied Lightbourne's petition for certiorari on November 10, 2003. *Lightbourne v. Florida*, 540 U.S. 1006 (2003). Lightbourne next filed a successive state habeas corpus petition raising a *Ring v. Arizona* claim, which was denied on the alternative grounds of non-retroactivity and no merit. *Lightbourne v. Crosby*, 889 So. 2d 71 (Fla. 2004) (table).

THE MOST RECENT SUCCESSIVE MOTION

Lightbourne filed the motion at issue in this appeal on February 28, 2006. (Vol. 1, R1-108). The State filed its response on March 17, 2006. (Vol. 1, R110-126). Lightbourne also served demands for public records on the Office of the Attorney General, the Florida Department of Corrections, and Florida State Prison. (Vol. 1, R130-165).

A case management conference was conducted on April 14, 2006, and argument on the public records demands took place on April 24, 2006. (Vol. 2, R274-355). On May 2, 2006, the Circuit Court issued its order denying all relief. (Vol. 3, R483). Lightbourne gave notice of appeal on June 1, 2006. (Vol. 3, R485).

STATEMENT OF THE FACTS

The "statement of the facts" set out in Lightbourne's brief is argumentative and is denied. To the extent that the facts play into the discrete issues contained in this appeal, the State relies on the following:

> A review of the background of this case is necessary to place Lightbourne's current claims in proper perspective. Lightbourne, a twenty-one-year-old Bahamian immigrant at the time of the crime, is on death row for the 1981 murder of Nancy O'Farrell, the daughter of a thoroughbred horse breeder in Ocala. Lightbourne was found guilty of first-degree murder on the alternate theories of premeditation, felony murder in the commission of a burglary, and felony murder in the commission of a sexual battery. [FN1] During the penalty phase, the State put on no additional testimony but relied on the evidence presented during the guilt phase, including the testimony of Chavers and Carson, who testified that Lightbourne admitted raping, murdering and shooting O'Farrell because she could identify him. Their testimony is set out in the Eleventh Circuit's 1987 decision denying habeas relief:
>
> > Theodore Chavers, a cellmate in the Marion County Jail, testified that [Lightbourne] "knew too much" [FN2] about the details of Nancy's death and made some incriminating statements during the course of their conversations. According to Chavers,

> petitioner made references indicating that he entered Nancy's house, encountered her as she was coming out of the shower, forced her to engage in sexual intercourse, and shot her [FN3] despite pleas for mercy. This version of the facts was corroborated by Theophilus Carson, another cellmate in the Marion County Jail. According to Carson, petitioner admitted forcing Nancy to have sex, shooting her because she could identify him, and taking a necklace and some money.

Lightbourne v. Dugger, 829 F.2d 1012, 1016 (11th Cir. 1987). Chavers' testimony related graphic details of what Lightbourne allegedly told him about the sexual assault and murder: that Lightbourne told him he had forced O'Farrell to perform sex acts before murdering her, including forcing her to perform oral sex "over and over," and that she "was begging him not to kill her." Carson testified that Lightbourne told him that police "had him" for "shooting a bitch," meaning O'Farrell, and that he shot her because "she could identify him."

> [FN1] The evidence at trial during the guilt phase included pubic hair matching Lightbourne's and semen consistent with his blood type, which were found on the victim's body. There was also testimony that Lightbourne, who had been an employee of O'Farrell's father prior to the crime, was seen with a unique .25 caliber pistol just a few days before the crime and was arrested a week after the murder with the weapon still in his possession. A bullet casing found in Lightbourne's automobile matched a bullet casing found at the scene of the crime and in the opinion of the expert witness, the bullet that killed Ms. O'Farrell was fired from Lightbourne's .25 caliber pistol. Lightbourne was also found in possession of a unique necklace later identified as belonging to O'Farrell. Lightbourne told police that both the necklace and gun were his.

> [FN2] "According to Chavers, petitioner knew that the police would find no fingerprints, knew that the telephone wires had been cut, and knew that Nancy was found lying on her back." *Lightbourne v. Dugger*, 829 F.2d 1012, 1016 n.2. (11th Cir. 1987).
>
> [FN3] "Although Chavers's testimony reveals that petitioner never explicitly admitted killing Nancy, Chavers stated that petitioner never denied it and made statements giving rise to the inference that he took her life." *Id*. at n.3.

> In mitigation, the defense called only Lightbourne, who testified that he was twenty-one years old, a Bahamian citizen, and a father of three who had never been convicted of a crime as an adult. No other mitigating evidence was presented to the jury.
>
> Following the jury's recommendation, the trial court imposed a sentence of death. In the sentencing order, the trial court found that the murder was committed under the following aggravating circumstances: (1) during the commission of a burglary and sexual battery; (2) for the purpose of avoiding arrest (avoid arrest); (3) for pecuniary gain; (4) that the murder was heinous, atrocious or cruel (HAC); and (5) was committed in a cold, calculated and premeditated manner (CCP).

Lightbourne v. State, 742 So. 2d 238, 241 (Fla. 1999).

SUMAMRY OF THE ARGUMENT

Lightbourne's claim that he is entitled to relief based on a violation of Article 36 of the *Vienna Convention on Consular Relations* is procedurally barred because that claim could have been but was not raised on direct appeal. Under settled Florida law, that is a procedural bar to collateral review of this

claim. Moreover, Lightbourne's claim is untimely, in addition to having no legal basis in the first place.

The "lethal injection" claim contained in Lightbourne's brief is untimely -- lethal injection became Florida's default method of execution in January of 2000. Lightbourne made no attempt to challenge lethal injection as a method of execution for six years -- because that is so, this claim is barred by the one-year limitations period contained in *Florida Rule of Criminal Procedure* 3.851(d). Further, the collateral proceeding trial court properly denied relief on this untimely claim without an evidentiary hearing. This Court has repeatedly held lethal injection to be constitutional, and Lightbourne has done nothing to call this Court's unbroken line of decisions into question.

The collateral proceeding trial court correctly found that Lightbourne was not entitled to "public records" relating to his lethal injection claim because there was no triable issue, and because the requested records would not lead to the discovery of admissible evidence.

ARGUMENT

I. THE "CONSULAR NOTIFICATION" CLAIM

On pages 11-34 of his brief, Lightbourne argues that he is entitled to relief "based on a violation of Article 36 of the *Vienna Convention on Consular Relations.*" The collateral

proceeding trial court correctly denied relief on procedural bar grounds, and that decision, which is supported by the law and by competent substantial evidence, should be affirmed. *Diaz v. Dugger,* 719 So. 2d 865,868 (Fla. 1998) (Vol. 3, R482).

THIS CLAIM IS PROCEDURALLY BARRED

The "consular notification" claim is procedurally barred because it could have been but was not raised on direct appeal.[1] This Court has unequivocally held that a "consular notification" claim is subject to Florida's well-settled procedural bar rules, just like any other claim:[2]

> Gordon also argues that he was denied the protections of international law and deprived of the advice and assistance of officials of the Jamaican Consulate, a right which he asserts is granted under the authority of Article 36, Vienna Convention on Consular Relations. We have previously determined that such an issue is procedurally barred in a motion for postconviction relief because it could have and should have been raised on direct appeal. *See Maharaj v. State*, 778 So. 2d 944, 959 (Fla. 2000) (holding that petitioner's claim alleging a violation of the Vienna Convention was procedurally barred where it was not raised on direct appeal); *Harvey v. Dugger,* 656 So. 2d 1253, 1256 (Fla. 1995) (holding that claims not raised on direct appeal are procedurally barred from consideration in a rule 3.850 motion). Furthermore, Gordon has failed to establish that he has standing to assert such a claim, as we have held that such

[1] Lightbourne's case has been before the Florida Supreme Court 13 times. The United States Supreme Court has denied certiorari review five (5) times. There can be no suggestion that this case has not been vigorously litigated.

[2] Lightbourne has not acknowledged the long line of authority holding that this claim is subject to well-settled procedural bar law.

> treaties constitute agreements between countries, not citizens. *See Maharaj*, 778 So. 2d at 959. Finally, as noted by the trial court, Gordon has failed to demonstrate prejudice. *See Darling v. State*, 808 So. 2d 145 (Fla. 2002) (holding that petitioner's claim that his rights under the Vienna Convention were violated did not merit relief due to petitioner's failure to demonstrate prejudice resulting from the violation).

Gordon v. State, 863 So. 2d 1215, 1221 (Fla. 2003); *accord, Arbelaez v. State,* 898 So. 2d 25, 47 (Fla. 2005) ("Because Arbelaez failed to raise or preserve the issue of the alleged Vienna Convention violation, his appellate counsel would have been procedurally barred from raising the issue on appeal."); *Conde v. State*, 860 So. 2d 930, 953 (Fla. 2003) (suppression of statement not remedy for violation, assuming standing);[3] *Darling v. State*, 808 So. 2d 145, 165-166 (Fla. 2002) (procedural bar); *Maharaj v. State,* 778 So. 2d 944, 959 (Fla. 2000) (procedural bar); *State v. Riechmann*, 777 So. 2d 342, 365 (Fla. 2000) (same). Nothing contained in Lightbourne's successive motion compels a different result, and this Court should follow settled Florida law and affirm the denial of this claim on procedural bar grounds.

Lightbourne attempts to argue around the procedural bar by claiming that he could not have raised this claim before. That

[3] The preamble to the treaty states "that the purpose of such privileges and immunities is not to benefit individuals **but to ensure the efficient performance of functions by consular posts on behalf of their respective States**." *Vienna Convention*, preamble, 21 U.S.T. at 79.

claim fails for two reasons. First, **according to Lightbourne**, the Vienna Convention was ratified by President Nixon on December 24, 1968. *Initial Brief*, at 12. Because that is so, Lightbourne cannot claim that he did not know about the Vienna Convention -- it had existed for years before he was arrested in 1981. Second, Lightbourne disingenuously claims that the "triggering event" for this claim was a 2005 Presidential memorandum. **All of the Florida cases (including *Arbalaez*) finding a procedural bar to litigation of the consular notification claim pre-date that memorandum.** If those defendants could raise the claim, Lightbourne could have raised it as well.

Finally, the United States Supreme Court has explicitly held that State procedural bar rules are applicable to a claim that the "consular notification" provision of the Vienna Convention was violated. The Court held:

> [the petitioner] asks us to require the *States* to hear Vienna Convention claims raised for the first time in state postconviction proceedings. Given that the Convention itself imposes no such requirement, we do not perceive any grounds for us to revise state procedural rules in this fashion. *See Dickerson,* supra, at 438, 120 S. Ct. 2326, 147 L. Ed. 2d 405 .
>
> **We therefore conclude, as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.**

Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2687 (U.S. 2006) (italics in original, emphasis added). The Court concluded:

> Although these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law. Our holding in no way disparages the importance of the Vienna Convention. The relief petitioners request is, by any measure, extraordinary. Sanchez-Llamas seeks a suppression remedy for an asserted right with little if any connection to the gathering of evidence; Bustillo requests an exception to procedural rules that is accorded to almost no other right, including many of our most fundamental constitutional protections. It is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself.

Sanchez-Llamas v. Oregon, 126 S. Ct. at 2687-2688. The Circuit Court properly followed settled Florida law in denying relief on procedural bar grounds. That ruling should be affirmed.

THE CLAIM IS UNTIMELY

In addition to being procedurally barred, the "consular notification" claim is untimely. According to Lightbourne, the pertinent part of the Vienna Convention was ratified by the President on December 24, 1969. Initial Brief, at 12. Accordingly, Lightbourne has no claim that this claim was unavailable to him at the time of his trial, and also at the time of his previous post-conviction litigation. *See*, *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998). Likewise, the consular notification issue was being litigated in the State courts long before this successive motion was filed:

> It is unclear that the Vienna Convention creates individual rights enforceable in judicial proceedings. [footnote omitted] *Cf. Maharaj v. State*, 778 So. 2d

> 944, 959 (Fla. 2000) (observing that Maharaj's claim that the State had failed to comply with its international obligation to inform the British Consul that a British citizen had been charged with a capital crime, as required under the Vienna Convention, failed not only because the issue was, in that case, procedurally barred, but also because Maharaj had "failed to establish that he has standing, as treaties are between countries, not citizens") (*citing Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990)). Indeed, the preamble to the treaty reflects the recognition "that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Vienna Convention*, preamble, 21 U.S.T. at 79.

Darling v. State, 808 So. 2d 145, 165-166 (Fla. 2002). Lightbourne's "consular notification" claim is untimely under *Florida Rule of Criminal Procedure* 3.851(d)(2) -- relief should be denied on that basis, as well.[4]

THE CLAIM HAS NO LEGAL BASIS

Finally, this claim does not state grounds for relief because it has no legal basis. In addressing an identical claim, the Eleventh Circuit Court of Appeals stated:

> First, Florida's state courts are bound (just as we are) by the Supreme Court's decision in *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998). In *Breard*, the Court unambiguously held that a habeas petitioner's Vienna Convention claim was procedurally barred in federal court because it was not raised in the state court proceedings. *Id.* at 375, 118 S. Ct. at 1354. The Court noted the well-recognized principle of international law that "absent

[4] Lightbourne attempts to explain away his failure to raise this claim by alleging ineffectiveness of trial counsel at the penalty phase of his capital trial. That issue has already been litigated, and is not available again.

> a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of [a] treaty in that State." *Id*. The Supreme Court has not retreated from its position in *Breard,* and none of the recent developments cited to us call the holding of *Breard* into substantial question, let alone overrule *Breard*. Thus, there is no reasonable probability that Florida's state courts could find themselves free of the constraints of *Breard*, regardless of the I.C.J.'s holding in *Avena*.

Maharaj v. Sec'y. for the Dep't. of Corr., 432 F.3d 1292, 1306 (11th Cir. 2005). In addressing the scope of remedy for a violation of the consular notification provisions, the Eleventh Circuit held:

> . . . **the State Department has consistently stated that the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law**. *Emuegbunam*, 268 F.3d at 392; *Li,* 206 F.3d at 63-64; *Jimenez-Nava*, 243 F.3d at 197. And the State Department's interpretation of a treaty is entitled to great deference. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S. Ct. 662, 671, 142 L. Ed. 2d 576 (1999); *Emuegbunam*, 268 F.3d at 392; *United States v. De la Pava,* 268 F.3d 157, 165 (2nd Cir. 2001); Li, 206 F.3d at 63. Furthermore, no party to the Vienna Convention has dismissed a criminal charge based on a violation of Article 36. *Emuegbunam*, 268 F.3d at 393; *Page,* 232 F.3d at 541; *Li*, 206 F.3d at 65. Indeed, two parties, Italy and Australia, have specifically rejected that possibility. P*age*, 232 F.3d at 541; *United States v. Lombera-Camorlinga*, 206 F.3d 882, 888 (9th Cir. 2000) (*en banc*). And "international agreements should be *consistently interpreted among the signatories." Jimenez-Nava*, 243 F.3d at 195.
>
> Therefore, we join our sister circuits by holding that a violation of Article 36 of the Vienna Convention on Consular Relations does not warrant the dismissal of an indictment. *See De la Pava*, 268 F.3d at 165; *Page,* 232 F.3d at 541; *Li,* 206 F.3d at 60.

United States v. Duarte-Acero, 296 F.3d 1277, 1282 (11th Cir. 2002). [emphasis added]. In addition to Lightbourne's lack of standing, this claim has no legal basis. Moreover, it is far from clear that the claimed violation of a **treaty** stands on equal footing with a constitutional violation. As the United States Supreme Court noted in *Medellin*, "[defendant] must demonstrate that his allegation of a treaty violation could satisfy this standard [of the violation of a **constitutional right**]. *See Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)." *Medellin v. Dretke*, 125 S. Ct. 2088, 2091 (2005). And, in any event, Lightbourne seeks a remedy that is not available to him:

> . . . while we recognize that the United States Supreme Court has stated that "the Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest," *Breard v. Greene*, 523 U.S. 371, 376, 140 L. Ed. 2d 529, 118 S. Ct. 1352 (1998), we also conclude that suppression of a post-arrest statement is not an appropriate remedy for an alleged violation of article 36 of the Vienna Convention. *See, e.g., United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir. 2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000); *United States v. Li*, 206 F.3d 56, 66 (1st Cir. 2000); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000). We conclude that even if Conde had standing to assert a right to consular assistance under the Vienna Convention and were to show that right was violated, this would not be grounds for suppression of an otherwise voluntary confession.

Conde v. State, 860 So. 2d 930, 953 (Fla. 2003). That is exactly the result reached by the United States Supreme Court when it

decided *Sanchez-Llamas* in 2006. *Sanchez-Llamas* is controlling, and there is simply no basis for relief.

Finally, while Lightbourne does not recognize it, the United States has withdrawn from the jurisdiction of the International Court of Justice:

> Following the I.C.J.'s decision in *Avena*, President Bush issued a memorandum to the Attorney General in which he ordered that the United States discharge its international obligations under the *Avena* decision 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." *Medellin*, 125 S. Ct. at 2090 (citing the February 28, 2005 memorandum from President George W. Bush to the Attorney General) (emphasis added). Shortly thereafter, however, **the Secretary of State transmitted a letter to the Secretary General of the United Nations withdrawing the United States from the Optional Protocol**, *see Medellin*, 125 S. Ct. at 2101 (O'Connor, J., dissenting), **thereby removing the United States from the provision of the Vienna Convention that provides jurisdiction to the I.C.J.**

Maharaj v. Sec'y. for the Dep't. of Corr., 432 F.3d at 1305. [emphasis added]. Regardless of the theory advanced by Lightbourne, the “consular notification” claim fails on both procedural and substantive grounds. The trial court followed settled Florida law when it denied relief, and that denial of relief should be affirmed in all respects.

II. THE LETHAL INJECTION CLAIM

On pages 35-57 of his *Initial Brief*, Lightbourne asserts that Florida’s three-drug protocol used in lethal injection is cruel and unusual punishment in violation of the Eighth

Amendment based on a "**research letter**" published in the April 16, 2005, issue of *The Lancet*, and on a letter to the **editor** of *The Lancet* which appeared in the September 24, 2005, issue. (Vol. 1, R48-53). The law and competent substantial evidence support the trial court's ruling. *Diaz, supra*.

THE LETHAL INJECTION CLAIM IS UNTIMELY

This claim is time-barred because it was not brought until years after the lethal injection statute took effect. The statute making lethal injection Florida's default method of execution took effect in January of 2000. See Ch. 2000-2, § 1, Laws of Fla. (eff. Jan. 14, 2000). Lightbourne has known since that time that his execution would be carried out by lethal injection (since he did not elect electrocution during the statutory window), yet he made no attempt to challenge that execution method until years later. Lightbourne has made no attempt to explain the six-year delay in bringing this challenge to Florida's lethal injection statute, presumably because there is no good-faith basis for his dilatory tactics. There is nothing associated with this method of execution claim that could not and should not have been raised long ago. This claim is untimely under the express provisions of *Florida Rule of Criminal Procedure* 3.851(d), which establishes a one-year statute of limitations for the presentation of post-conviction

claims. Relief should be denied because the claim was not brought in a timely fashion.[5]

THE TRIAL COURT CORRECTLY FOLLOWED FLORIDA PRECEDENT IN DENYING RELIEF WITHOUT A HEARING

In denying relief on the lethal injection claim, the trial court correctly noted that this Court has repeatedly held Florida's lethal injection process constitutional. (Vol. 3, R483). *Suggs, supra* (collecting cases); *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment); *Sochor v.* State, 883 So. 2d 766, 789 (Fla. 2004); *Provenzano v.* State, 761 So. 2d 1097 (Fla. 2000). This Court rejected the "parade of horribles" argument advanced in *Sims* about what **might** happen **if** the drugs used in the lethal injection process are not administered properly. *Sims*, 754 So. 2d at 667. And, at the evidentiary hearing held in *Sims*, defense expert Dr. Lipman, a neuropharmacologist, provided examples of what **might** happen if

[5] Moreover, Florida law is well-settled that a method of execution claim is barred if not raised on direct appeal. *See, Suggs v. State/Crosby*, 923 So. 2d 419, 441 (Fla. 2005) (finding a claim that execution by electrocution or lethal injection constitutes cruel and unusual punishment was procedurally barred because it was not raised on direct appeal). While it is true that lethal injection was not the method of execution at the time of Lightbourne's direct appeal, it is also true that he has **never** raised **any** method of execution claim in any of his prior proceedings. Raising such a claim for the first time in a successive postconviction relief motion filed 23 years after his direct appeal was final is an abuse of the postconviction process.

the drugs are not administered properly or if the personnel are not adequately trained to administer them. *Sims*, 754 So. 2d at n.19. Lipman opined that if too low a dose of sodium pentothal (also referred to as thiopental) is administered, the inmate might feel pain because low dosages of that drug have the opposite effect -- it makes the pain more acute. In addition, if the drugs are not injected in the proper order, the inmate might suffer pain because he might not be properly anesthetized. Lipman further noted that if the drugs are not administered in a timely manner, the sodium pentothal might wear off, causing the inmate to regain consciousness. *Sims*, 754 So. 2d at n.19. However, as this Court observed, Dr. Lipman admitted that lethal injection is a simple procedure and that if the drugs used are administered in the proper dosages and in the proper sequence at the appropriate time, they will "bring about the desired effect." **Lipman also admitted that at the high dosages intended to be used by the Department of Corrections, death would certainly result quickly and without sensation**. This Court concluded that this testimony concerning the speculative "parade of horribles" that **might** happen during an execution did not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. *Sims*, 754 So. 2d at 668.

After *Sims*, this Court addressed the claims pressed here in the context of three cases that were litigated under death warrant. *Hill v. State,* 921 So. 2d 579, 583 (Fla. 2006), *stay denied*, *In re Hill*, 437 F.3d 1080 (11th Cir. 2006), *stay denied*, *Hill v. Florida*, 126 S.Ct. 1189 (2006), *cert. denied*, *Hill v. Florida*, 126 S.Ct. 1441 (2006); *complaint dismissed*, *Hill v. McDonough,* 2006 U.S. Dist. LEXIS 62831 (N.D. Fla. Sept. 1, 2006), *motion and injunction denied*, *Hill v. McDonough,* 464 f.3D 1256 (11th Cir. 2006)*, stay denied, Hill v. McDonough,* 165 L.Ed. 2d 1013 (U.S. 2006); *Rolling v. State*, 31 Fla. L. Weekly S667 (Fla. Oct. 18, 2006), *cert. denied*, *Rolling v. Florida,* 2006 U.S. LEXIS 8002 (U.S. Oct. 25, 2006); *Rutherford v. State*, 926 So. 2d 1100, 1113-1114 (Fla. 2006), *cert. denied*, *Rutherford v. Florida*, 126 S.Ct. 1191 (2006), *petition dismissed, Rutherford v. Crosby,* 19 Fla.L.Weekly Fed. D203 (N.D. Fla. 2006)*, affirmed, Rutherford v. McDonough,* 20 Fla.L.Weekly Fed. C9 (11th Cir. 2006), *cert. denied*, *Rutherford V. McDonough*, 2006 U.S. LEXIS 7996 (U.S. Oct. 18, 2006), *petition denied*, *Rutherford v. State*, 2006 Fla. LEXIS 2370 (Fla. Oct. 12, 2006), *cert. denied*, *stay denied*, *Rutherford v. Florida*, 2006 U.S. LEXIS 7997 (U.S. Oct. 18, 2006). (same). In each case, the same claims that Lightbourne presses here were rejected without an evidentiary hearing. There is no reason for a different result here, and the collateral proceeding trial court should be affirmed.

THE SEPARATION OF POWERS SUB-CLAIM

On pages 52-57 of is brief, Lightbourne argues that the lethal injection statute is an "unlawful delegation of the legislature's lawmaking power," and that the postconviction court's reliance on *Sims v. State*, *supra*, was "misplaced." The problem for Lightbourne, which he has failed to discuss, is that this Court has repeatedly rejected the separation of powers argument. *Francis v. State*, 808 So. 2d 110 (Fla. 2002); *Thompson v. State*, 796 So. 2d 511 (Fla. 2001); *Bryan v. State*, 753 So. 2d 1244, 1254 (Fla. 2000). While none of those decisions are acknowledged in Lightbourne's brief, the true state of the law is that this Court has decided the separation of powers claim adversely to the position taken by Lightbourne. There is no reason to deviate from settled law, and the postconviction court should be affirmed in all respects.[6]

III. THE PUBLIC RECORDS CLAIM

On pages 57-62 of his brief, Lightbourne argues that the lower court abused its discretion in finding Lightbourne "failed to establish that 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

[6] This sub-claim to the lethal injection claim is untimely, as well, just as the other parts of this claim are untimely.

evidence." *Initial Brief*, at 59. In deciding this claim, the collateral proceeding trial court held:

> 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).

(R483).

THE PROCEDURAL POSTURE OF THIS CLAIM

On March 27, 2006, Lightbourne filed his demand for additional public records from the Office of the Attorney General, Florida State Prison, and the Florida Department of Corrections, pursuant to *Fla. R. of Crim. Proc*. 3.852(i). (R130-165). The demand listed sixty-one specific items, which contained various sub-parts, that encompassed nearly every document ever produced or possessed by the Department of Corrections (hereinafter referred to as "DOC") concerning execution by lethal injection. In addition, the demand also sought detailed information such as time sheets, wage and hour information, and other personnel data on every single employee who works or has worked at the prison during every single execution by lethal injection ever undertaken. On April 10, 2006, the State filed an objection to the demand on the grounds

that it is "overly broad and unduly burdensome" as well as **"not reasonably calculated to lead to the discovery of admissible evidence."** (SR496). On April 19, 2006, DOC filed an objection to the demand stating that Lightbourne failed to **"establish how these 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."** (R255). Further, "Discovery of this subsection [3.852(i)] was meant to be extraordinary and that is why Defense counsel must establish that the requirements have been satisfied before the court may order the production of these third-time requests." (R255). The trial court held a hearing on the public records issue on April 24, 2006. (R327-355). At the hearing, the State, and DOC, maintained the position that the requests were unduly burdensome, and would not lead to admissible evidence. (R333-335). On May, 2, 2006, the trial court denied Lightbourne's demands for additional public records. (R482-483).

STANDARD OF REVIEW

The standard of review for public records requests is an abuse of discretion. *State v. Coney*, 840 So. 2d 120, 137 (Fla. 2003) (explaining that a circuit court's ruling on a public records request filed pursuant to a rule 3.850 motion will be sustained on review absent an abuse of discretion. Further, "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." *quoting White v. State*, 817 So. 2d 799, 806 (Fla.), *cert. denied*, 154 L. Ed. 2d 638, 123 S. Ct. 699 (2002)).

THE TRIAL COURT SHOULD BE AFFIRMED

The trial court did not abuse its discretion in denying the public records demands. Lightbourne is attempting to obtain records relating to lethal injection, ostensibly to prosecute a claim that lethal injection is cruel and unusual punishment. However, this Court has repeatedly and explicitly rejected this claim. *See, Hill v. State,* 921 So. 2d 579, 583-83 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1113-14 (Fla. 2006); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla.), *cert. denied*, 530 U.S. 1255 (2000); *Sims v. State*, 754 So. 2d 657, 663-70 (Fla.) *cert. denied*, 528 U.S. 1183 (2000). Because the lethal injection claim has been repeatedly rejected, and because there is no basis for an evidentiary hearing on that claim, the collateral proceeding trial court did not abuse its discretion in denying Lightbourne's public records requests.

For example, in *Mills v. State*, this Court held:

> "The trial court did not abuse its discretion in denying a request for further production of public records where the record supports the trial court's finding that the demands are overly broad, of

> questionable relevance, and unlikely to lead to discoverable evidence."

Mills v. State, 786 So. 2d 547, 552 (Fla. 2001). Moreover, this Court has made it plain that Rule 3.852 "is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief." *Glock v. Moore*, 776 So. 2d 243, 253 (Fla. 2001) (quoting *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000)). Lightbourne's lethal injection claim is not a colorable claim, as the trial court correctly found.

Furthermore, in *Moore v. State*, this Court stated:

> "A trial court has discretion to review public records requests that are overly broad, of questionable relevance, and unlikely to lead to discoverable evidence".

Moore v. State, 820 So. 2d 199, 204 (Fla. 2002). Nothing has changed since *Sims* upheld the constitutionality of lethal injection, and this Court's recent denials of relief in *Hill, Rutherford,* and *Rolling* demonstrate that there is no basis for further proceedings. Any result contrary to that reached by the Circuit Court would have been an abuse of discretion -- the Circuit Court should be affirmed in all respects.[7]

[7] Lightbourne asserts that the State and DOC objected to the requests as "being overly broad, unduly burdensome, and irrelevant." *Initial Brief*, at 58. The State and DOC **also** objected on the grounds that the additional public records would not lead to the discovery of admissible evidence which the

To the extent that Lightbourne argues that the lower court abused its discretion in finding that "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," *Initial Brief,* at 59, that finding is consistent with this Court's affirmance of denials of relief without a hearing in *Rolling v. State*, 31 Fla. L. Weekly S667 (Fla. Oct. 18, 2006); *cert. denied*, *Rolling v. Florida*, 2006 U.S. LEXIS 8002 (U.S. Oct. 25, 2006); *Rutherford v. Crist*, 31 Fla. L. Weekly S669 (Fla. Oct. 17, 2006); and *Hill v. State*, 921 So. 2d 579 (Fla.), *cert. denied, Hill v. Florida,* 126 S.Ct. 1441 (2006). There is no abuse of discretion and no basis for relief.

In his brief, Lightbourne argues that:

> "new evidence suggests that lethal injection may cause extreme painful and tortuous death such as would violate the Eighth Amendment. Since this research [the *Lancet* article referred to earlier in the brief] 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."

Initial Brief, at 60. However, in *Rutherford*, this Court rejected this very claim:

> We recently rejected this claim in *Hill v. State*, 921 So. 2d 579, 2006 Fla. LEXIS 8, 31 Fla. L. Weekly S 31, S31-32 (Fla. 2006). There, we concluded that this study did not require the Court to reconsider its holding in *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000), that "the procedures for administering the

> lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." *Hill*, 921 So. 2d 5 at 82-83, 2006 Fla. LEXIS 8 at 5, 31 Fla. L. Weekly at S 31. This Court reasoned:

Rutherford v. State, 926 So. 2d 1100, 1113-1114 (Fla. 2006). *See also, Rolling, supra.*

In any event, *Rolling*, *Rutherford* and *Hill* all stand for the proposition that an evidentiary hearing is not necessary on a "lethal injection claim." Because that is so, the demand for public records is moot, and there is no basis for relief. There is no scenario under which revisiting the lethal injection issue would be appropriate under the precedent of this Court. The lower court should be affirmed.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee submits that the denial of post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Suzanne Myers Keffer, Assistant**, CCRC – Middle and **Anna-Liisa Joseloff**, Staff Attorney, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida 33301 on this ____ day of November, 2006.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
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