IN THE
UNITED STATES SUPREME COURT

CASE NO: to be assigned

KAI UWE THIER,
PETITIONER,

V.

THE STATE OF FLORIDA,
RESPONDENT.

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA
NO: 4D18-29

PETITION FOR WRIT OF CERTIORARI

Kai Uwe Thier
DC# L47927
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, Fl. 32124

Petitioner, *Pro 'Se*

QUESTIONS PRESENTED

WHETHER PETITIONER IS ENTITLED TO DISCHARGE OR A NEW TRIAL BASED ON A VIOLATION OF INTERNATIONAL TREATIES AS CODIFIED IN THE VIENNA CONVENTION ON CONSULAR ON CONSULAR RELATIONS (VCCR) WHICH RESULTED IN THE PETITIONER GIVING AN INCRIMINATING STATEMENT TO POLICE INVESTIGATORS THAT SUBSEQUENTLY HAD BEEN USED AT TRIAL WHICH HE WOULD NOT HAVE GIVEN IF HE WOULD HAVE BEEN ADVISED BY LAW ENFORCEMENT OF HIS RIGHT TO TALK TO OFFICIALS FROM HIS COUNTRY

The question presented in this petition arose from the proceedings below.

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OPINIONS BELOW

The opinion of the highest State Court to review the merits appears at APPENDIX A to the petition and is unpublished at *Thier v. State*, Case # 4D18-29 (Fla. 4th DCA. 2018).

The opinion of the state's lower tribunal (affirmed by the Fourth District Court of Appeal, Appendix A) to review the merits appears at APPENDIX B to the petition and is unpublished.

STATEMENT OF JURISDICTION

The date of which the highest State Court decided Petitioner's case was on March 29, 2018. A copy of that decision appears at APPENDIX A, from the Fourth District Court of Appeal of Florida.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves violations of the Sixth and Fourteenth Amendment to the United States Constitution and the Vienna Convention on Consular Relations Art. 36 ¶1 (b).

U.S. Const. Amend. 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Article VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Vienna Convention, Apr. 24, 1963, Art. 36 ¶1 (b):

1. With a view to facilitating the exercise of consular functions relating to nationals 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. (Emphasis added).

STATEMENT OF THE FACTS

The Petitioner was charged in the 17th Judicial Circuit Court in and for Broward County, Florida, with two counts of solicitation to commit first degree murder, alleged to have occurred on May 13, 2002, and following jury trial the Petitioner was convicted as charged on August 27, 2003.

On October 3, 2003, the trial court sentenced the Petitioner to consecutive terms of twenty (20) years imprisonment, and the Petitioner appealed the judgment of conviction and sentence to the Fourth District Court of Appeal of Florida, which *per curiam* affirmed on February 16, 2005, Rehearing denied on July 27, 2005. *Thier v. State,* 894 So.2d 258 (Fla. 4th DCA 2005) (Table).

The Petitioner filed a Fla. R. Crim. P. 3.800(a) motion to correct illegal sentence arguing that the consecutive sentences in his case violated double jeopardy due to being the result of a single criminal episode. The trial court denied the motion on November 21, 2006 in summary. The Fourth District Court of Appeal of Florida *per curiam* affirmed on February 21, 2007 the trial court's order, rehearing denied on March 30, 2007 without addressing the merits. *Thier v. State,* 950 So.2d 1253 (Fla. 4th DCA 2007) (Table).

On February 20, 2008, the Petitioner filed a Fla. R. Crim. P. 3.850 motion for postconviction relief, which the trial court denied on August 20, 2010. The Fourth District Court of Appeal of Florida affirmed on March 7, 2012 the trial

court's denial with a written opinion; Rehearing denied on April 18, 2012. *Thier v. State,* 84 So.3d 365 (Fla. 4th DCA 2012). Thereupon the Petitioner sought discretionary review in the Florida Supreme Court, which declined jurisdiction on October 12, 2012. *Thier v. State,* 104 So.3d 1088 (Fla. 2012).

On or about December 12, 2013, the Petitioner filed another final Fla. R. Crim. P. 3.850 motion to vacate, set aside, or correct sentence, raising one ground for relief:

> THE DEFENDANT IS ENTITLED TO A NEW TRIAL AND/OR DISCHARGE DUE TO HIS RIGHTS UNDER THE VIENNA CONVENTION BEING VIOLATED WHEN LAW ENFORCEMENT OFFICIALS FAILED TO ADVISE HIM OF HIS RIGHT TO CONTACT THE GERMAN CONSULATE UPON HIS ARREST BEFORE GIVING A STATEMENT TO THE TO POLICE INVESTIGATORS

The trial court accepted the motion and on January 28, 2014, the Honorable Judge Raag Singhal issued an order in accordance with Fla. R. Crim. P. 3.850(f)(6), that it is necessary for the State to respond to the Petitioner's motion within ninety (90) business days from the date of the order. Therewith the trial court indirectly waived any issues of the motion being untimely, insufficient or successive as apparent from the provisions of Fla.R.Crim.P. 3.850(f)(1), (2), (5), and Fla. R. Crim. P. 3.850 (h)(2).

On December 21, 2016, the State filed their Response to the Petitioner's motion to vacate, set aside, or correct sentence. (2-years and 11-months after the trial court ordered 90-days for the State respond).

On February 22, 2017, the Petitioner filed a Petition for Writ of Mandamus to the Fourth District Court of Appeal[1] (Case # 4D17-0596), because he had not received any response to his motion to rule nor had received a copy of the State's response, in fact at the time of filing the Mandamus Petition the Petitioner did not know that the State had filed a response in the court below.

On March 24, 2017 the Honorable Judge Raag Singhal issued an order denying the Petitioner's motion to vacate, set aside or correct sentence by simply incorporating the State's response as reasons for its denial, however, a copy of the State's was not attached to the order.

The Petitioner on April 6, 2017 filed a timely motion for rehearing in the trial court, in which he argued that he is deprived a meaningful opportunity to appeal the trial court's denial because he was never provided the State's response, and Petitioner also demonstrated that the motion is not impermissibly successive.

[1] The Mandamus petition was subsequently dismissed by the Fourth District Court of Appeal as moot due to the lower court's denial of Appellant's motion to vacate, set aside or correct sentence.

Simultaneously the Petitioner filed a motion to strike the allegedly filed State's response as untimely, because it was filed more than two and one half (2 ½) years late.

On October 5, 2017 the State voluntarily filed a response to the Petitioner's motion for rehearing, wherein the State conceded to grant rehearing, to vacate the March 24, 2017 order denying Petitioner's motion to vacate, set aside or correct sentence and to allow the Petitioner an opportunity to file a reply to the State's response from December 21, 2016.

Nevertheless, disregarding the State's concession in their response to grant the motion for rehearing, on November 21, 2017, a different Judge, the Honorable Judge Barbara McCarthy denied the Petitioner' motion for rehearing and motion to strike State's response.

The Petitioner appealed the trial court's denial to the Fourth District Court of Appeal of Florida.

The Petitioner further preserved any and all rights he may be entitled to under state and federal laws and constitutions, unless specifically waived herein, and the Petitioner being a German citizen, and as such subject to international treaties, preserved also any rights and claims he may be entitled to under applicable international treaties, and to pursue such in "International Court of Justice" (I.C.J.) in the future if necessary.

The Petitioner argued in this brief to the Fourth District Court of Appeal that:

> (1) The trial court erred when it denied the Petitioner's motion below as impermissibly successive when the ground raised was never previously raised or ruled on the merits and under the procedural mandates of Fla. R. Crim. P. 3.850 the claim raised by the Petitioner cannot be considered to be successive;
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> (2) The trial court erred by adopting the "*untimely*" state's response in that the Petitioner's motion is procedurally barred when the trial court already waived any procedural bar by issuing a order for the state to file a response instead of making its own independent findings, and when in furtherance international caselaw prohibits any procedural bars to be invoked when the Vienna Convention has been violated;
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> (3) The successor judge erred when she denied Petitioner's motion for rehearing and motion to strike the state's response even after the state conceded to grant the motion and to afford the Petitioner an opportunity to reply to the earlier state's response, when fundamental principles of due process require the trial court to afford the Petitioner a reasonable opportunity to be heard by filing a reply to the state's response; and
>
> (4) The Petitioner is entitled to a new trial based on the violation of the "VCCR" which prejudiced the Petitioner, and because the issue of Petitioner's legal standing of this claim never being addressed on the merits by the trial court.

On March, 29, 2018, the Fourth District Court of Appeal *per curiam* affirmed the trial court's order without providing any written opinion. Therewith the State of Florida avoided at all cost, by using procedural barriers, the failure of the Florida Law Enforcement officials to comply with the Vienna Convention.

REASONS FOR GRANTING A WRIT OF CERTIORARI

POINT ONE

WHETHER PETITIONER IS ENTITLED TO DISCHARGE OR A NEW TRIAL BASED ON A VIOLATION OF INTERNATIONAL TREATIES AS CODIFIED IN THE VIENNA CONVENTION ON CONSULAR ON CONSULAR RELATIONS (VCCR) WHICH RESULTED IN THE PETITIONER GIVING AN INCRIMINATING STATEMENT TO POLICE INVESTIGATORS THAT SUBSEQUENTLY HAD BEEN USED AT TRIAL WHICH HE WOULD NOT HAVE GIVEN IF HE WOULD HAVE BEEN ADVISED BY LAW ENFORCEMENT OF HIS RIGHT TO TALK TO OFFICIALS FROM HIS COUNTRY

The Petitioner asserts that he should be entitled to relief by means of discharge or a new trial because it is obvious from the face of the record that Petitioner's rights under the VCCR[2] were violated.

The Petitioner had been arrested on May 13, 2002 by the Fort Lauderdale Police Department, and he had been interrogated by Detective William Walker.

During the initial questioning it was immediately established that the Petitioner originates from Germany and that he is a German citizen.

Although, Detective Walker advised the Petitioner of his constitutional rights to remain silent and to have an attorney,[3] however as a foreign national the

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[2] Vienna Convention on Consular Relations Article 36 ¶1 (b).

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Petitioner was unfamiliar with the American legal system and the impact a waiver of those rights could have in later proceedings.

Nevertheless, at no point did detective Walker, or any other Law Enforcement Officer of the arresting agency, inform the Petitioner of his rights to contact and "communicate" with Consular Officials of his country.

The arresting officials were well aware of this right as it is shown from the face of the record, as the Petitioner discovered weeks later upon receiving his discovery, that the German Consulate General was contacted about the Petitioner's arrest. However, the Petitioner himself was never advised of this personal right at the time of his arrest.

Approximately a couple of weeks after his arrest, when now housed in the county-jail, the Petitioner were advised by fellow inmates that he should ask his consular officials for help.

The Petitioner arranged through County Jail Classification Staff a phone call to the Consulate of Germany.

German Consular Officials immediately advised the Petitioner not to talk to any Law Enforcement Officials before consulting with a lawyer and further advised him that he must be provided a lawyer and also an interpreter if needed in the event of him being unable to afford one.

This advice was already too late now, as the Petitioner at the time of arrest, a couple weeks earlier, gave an incriminating statement to Detective Walker and this recorded statement was subsequently introduced as evidence and became a feature of his jury trial.

If the Petitioner would have been advised of his right to communicate with consular officials of his country at the time of his arrest he would have elected to do so, and thereupon would have followed their advice to speak with a lawyer before waiving his *Miranda*-rights and giving a statement.

Therefore, Law Enforcement Officials at the time of Petitioner's arrest violated the "Vienna Convention" Article 36 ¶1 (b), and as such the Petitioner's statement was unlawfully obtained.

The question here arises because treaties are agreements between sovereign nations and violations of these agreements traditionally have been resolved by government officials, not the individual citizens impacted by treaty violations. Under the fundamental principle of *pacta sunt servanda*, which states that "treaties must be observed," (The principle of *pacta sunt servanda* "is considered to be a *jus cogens* norm, a fundamental standard of conduct that cannot be set aside by treaty or acquiescence." William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 293 (1998).)

The United States has consistently invoked the Vienna Convention to protest other nations' failures to provide Americans with access to consular officials[4]. This basic principle also requires, of course, that the United States respect its obligations under the treaty. Reciprocity is the foundation of international law. *See Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (citing *Hilton v. Guyot*, 159 U.S. 113, 228, 40 L. Ed. 95, 16 S. Ct. 139 (1895)). Accordingly, the State Department has intervened and attempted to persuade state authorities to honor the Vienna Convention when state law enforcement officers have neglected or refused to inform detained foreign nationals of their right to contact consular officials. A continued violation of the treaty imperils the rule of law, the stability of consular relations, and the safety of Americans detained abroad.

In *United States v. Superville,* 40 F.Supp.2d 672, at 676-77 (D.Virgin Islands 1999), the federal district court referred as an example to the case of Angel Francisco Breard, who sought a new trial after his murder conviction because Virginia police had not advised him upon arrest of his right to contact the

[4]Most memorably, in 1979, it condemned the Islamic Republic of Iran for preventing U.S. diplomats from communicating with American hostages, in violation of the Vienna Convention. *See* Aceves, *supra* note 2, at 271 (noting that the International Court of Justice later ruled that Iran violated the Vienna Convention). In 1986, the United States explicitly relied on the treaty to visit an American imprisoned in Nicaragua. *See* Andrew Selsky, *Ortega: American Prisoner will be Tried*, AP, Oct. 11, 1986, *available at* 1986 WL 3073140.

Paraguayan consul. Breard eventually asked the Supreme Court to determine whether he had legal standing to raise a Vienna Convention violation as grounds for relief in federal court. *See Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998). Although the Supreme Court held that Breard defaulted on his habeas petition because he failed to raise the treaty violation in state court, it did not question whether Breard had standing to raise the issue in the first place. It observed that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest," and weighted *in dicta* whether Breard was entitled to relief. *See* 523 U.S. at __, 118 S. Ct. at 1355.

Without expressly deciding the standing question, most courts facing the issue have conceded that detained aliens may raise claims under the Vienna Convention. *See United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1096 (S.D. Cal. 1998) (reaching merits of Vienna Convention claim after noting that "several courts have allowed individual claims of violations of the Convention to proceed"); *Villafuerte v. Stewart*, 142 F.3d 1124, 1125-26 (9th Cir. 1998) (ruling, without discussion of standing issue, that habeas corpus petitioner defaulted on his treaty violation claim); *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), *aff'd*, 134 F.3d 615, 619-20 (4th Cir. 1997) (same); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (reaching merits and acknowledging that Canadian

detainee had not "been advised of *his rights under the Convention*") (emphasis added).[5]

In the case at bar, the issue the Petitioner raised, whether the Petitioner has a standing right under the Vienna Convention was never addressed by the merits in the state courts; the only issue addressed by the Florida Attorney General or the State trial court were solely procedurally issues.

Federal agencies arresting a foreign national such as the Petitioner are obliged to observe Vienna Convention Article 36 under the Supremacy Clause of the United States Constitution, which declares that "all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land.*" U.S. CONST. Art. VI, cl. 2 (emphasis added); *see also Whitney v. Robertson*, 124 U.S. 190, 194, 8 S. Ct. 456, 31 L. Ed. 386 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation.").

In recognition of the Supremacy Clause, and the expressed intent of the Vienna Convention,[6] the Justice Department and INS[7] require their agents to

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[5] *But see Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996) (stating in dicta that the Vienna Convention is not "self-executing," or enforceable by individuals, because it confers no "rights of action on private individuals.). Contrary to *Allen*, however, detained aliens have the right to impel receiving states to contact their consuls under the Vienna Convention. Under the centuries-old precept that "where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded," Sir William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND 23, *cited in Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803), the Vienna Convention is a "self-executing" treaty, enforceable by detained aliens.

advise alien detainees of their right to contact consular officials. INS instructs its agents that "every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." *See* 8 C.F.R. 236.1(e) (formerly codified at 8 C.F.R. 242.2(g)); *see also United States v. Calderon-Medina*, 591 F.2d 529, 532 (9th Cir. 1979) (observing that INS regulation "was evidently intended to ensure compliance with the Vienna Convention"). The government thus acknowledges that the right to consular access is meaningless unless the "receiving state" (in this case, the State of Florida) informs detained aliens of their right to consular access under the treaty. *Cf. Miranda v. Arizona*, 384 U.S. 436, 467-68, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) (recognizing warning as "threshold requirement for the intelligent exercise" of constitutional right to legal representation). *Superville, Id.* at 678. The text of the Vienna Convention, the recorded intentions of its drafters, and the prevailing view among federal agencies and courts should be leading this Court to conclude that, as a detained alien, the Petitioner in the case at bar, has standing to seek relief for the alleged violation of Vienna Convention article 36, paragraph 1(b). The Vienna Convention confers on the Petitioner the personal right to contact

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[6] *See* Vienna Convention, Apr. 24, 1963, art. 36, P 1(b), 21 U.S.T. 77, 596 U.N.T.S. 261 ("The said authorities shall inform the person concerned without delay of his rights under this subparagraph.").

[7] "INS"-Immigration and Naturalization Service now being called "ICE"- Immigration and Customs Enforcement .

his consul, which gives him standing to complain that the State of Florida through its executive agents (in this case the Fort Lauderdale Police Department) violated his rights under the treaty. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989).

The Petitioner was prejudiced by the violation, because if he would have advised of this right he would have talked to consular officials first before he would have given any statement to the investigating detectives. He was further prejudiced because this same statement was subsequently admitted at trial.

Nevertheless, the language of the Vienna Convention does not require detained aliens to demonstrate prejudice in order to gain relief for the receiving nation's failure to notify them of their right to consular access. *Superville, Id.* at 678. Nevertheless, the few federal courts that have considered this subject have required claimants to show prejudice from violations of the treaty. One justification for this added requirement is that the right to consular access does not "trace its origins to concepts of due process." *See Waldron v. INS*, 17 F.3d 511, 518 (2nd Cir. 1994) (construing INS' consular notification requirement), *cited in Esparza-Ponce*, 7 F. Supp. 2d at 1097 (concluding that defendant's Vienna Convention claim was not entitled to *Miranda* presumption of prejudice). Other courts simply have required claimants to show prejudice from Vienna Convention violations without any discussion. *See Breard*, 118 S. Ct. at 1355 (nothing *in dicta*

that petitioner would have to establish "that the violation of his Vienna Convention rights prejudiced him").

In the case at bar it is clear from the face of the record that the Petitioner was never advised of his rights under the Vienna Convention and as such he has a legal standing to argue this violation.

The Petitioner demonstrated prejudice caused by the violation of his rights under the Vienna Convention.

It is also clear from the face of the record in the instant proceeding that the trial court never addressed the merits whether the Petitioner has an actual standing issue of his rights under the Vienna Convention being violated.

The trial court reasoned on its March 24, 2017 order that the motion is impermissibly successive, however, the motion below raised a ground that had never been previously raised and as such the motion does not meet the procedurally mandated criteria under Fla. R. Crim. P. 3.850 (h)(2) to be denied or dismissed as successive, provides in pertinent part as follows:

> "... a court may dismiss a second or successive motion if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the defendant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure or there was no good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion.

> When a motion is dismissed under this subdivision, a copy of that portion of the files and records necessary to support the court's ruling shall accompany the order denying the motion." Fla. R. Crim. P. 3.850 (h)(2)

In the case at bar, the Petitioner did not previously raised the ground, it was not previously ruled on the merits, and according to international caselaw no procedural default should be invoked, and as such the motion or claim does not constitute an abuse of process. See *LaGrand, Germany v. United States,* I.C.J. 2001. (Doctrine of procedural default violated Article 36 ¶ 2 of the Vienna Convention) (See Appendix "G").

The abuse of process doctrine does not apply where the trial court has not previously ruled on the merits of a post-conviction claim in the case and the movant seeks to raise new claims in a different motion. *See Christopher v. State*, 489 So. 2d 22, 24 (Fla. 1986); see also *Hyacinthe v. State*, 940 So. 2d 1280, 1281 (Fla. 4th DCA 2006).

In *Christopher* the Florida Supreme Court addressed the issue of successive motions in light of the abuse of process doctrine, which led to the subsequent amendment of Fla. R. Crim. P. 3.850 regarding successive motions. However, the Supreme Court made clear that this doctrine will not apply if the asserted grounds were not known and could not have known to the movant at the time the initial motion was filed. See *Christopher,* at 24.

Shortly before filing the underlying motion to vacate, set aside or correct sentence the Petitioner obtained a handbook form the United States Department of State regarding "Consular notification and access", which is being provided to Federal, State, and Local Law Enforcement Agencies to observe the Treaties of the Vienna Convention. The Petitioner found about this notification book from another inmate at the time, and immediately ordered the book from the United States Department of State, which provided him with a copy the book on July 27, 2011. Thus, the Petitioner could not have known about at the time of filing his first motion for postconviction relief, because the law libraries provided by the Florida Department of Corrections do not contain this publication in their library collection according to Florida Administrative Code Ch. 33-501.301(2)(i), which provides in pertinent part:

> "Law library collection: print and digital/non-print publications that include the following information: the Florida Constitution and Florida Statutes; the U.S. Constitution and U.S. Code; Florida court decisions; U.S. Supreme Court, federal circuit court, and federal district court decisions; Florida and federal practice digests; forms manuals; and secondary source materials providing research guidance in the areas of federal habeas corpus, Florida post-conviction and post-sentence remedies, and prisoners rights. Law library collection shall also include current copies of departmental rules and regulations as provided in paragraph (5)(b)."

Furthermore, it would be fundamentally unfair to punish the Petitioner now for his appellate attorney's failure to raise this claim on direct appeal, when the Petitioner did not find out about this issue until July 27, 2011 when he received the book "Consular notification and access" from the United States Department of State, and as such the filing of Petitioner's underlying Fla.R.Crim.P. 3.850 motion for postconviction relief on December 12, 2013 was filed within the procedural 2-year time limitation for newly discovered evidence.

Therefore, the Petitioner cannot be charged with constructive knowledge regarding this information, when neither trial counsel, nor anyone else advised the Petitioner previously of his rights under the Vienna Convention. See also *Bailey v. State,* 768 So.2d 508 (Fla. 2nd DCA 2000)(Petitioner could not be charged with constructive knowledge of reports...").

In accordance with Fla. R. Crim. P. 3.850 (f) (*Procedure; Evidentiary Hearing; Disposition*) the Disposition of the motion shall be in accordance with the procedures set forth in Fla.R.Crim.P. 3.850 (f) (1) – (6), which are intended to result in a single, final, appealable order that disposes of all claims raised in the motion.

Based thereon, by the time the Honorable Judge Singhal issued his order for the State to file a response it must be assumed that Judge Singhal had already, in accordance with the procedural mandates, determined that the motion was timely

and legally sufficient, and that the motion, files, and records in the case do not conclusively show that the defendant is entitled to no relief, which one should be safe to assume that Judge Singhal also determined whether the claim is procedurally barred, as can be expected that Judge Singhal acted in accordance with Canon 3.B.(2), Code of Judicial Conduct, by being faithful to the law and maintaining professional competence in it.

Based thereon, the issue of any procedurally technicalities was already determined by Judge Singhal the moment he issued the order for the State to respond.

Nevertheless, Judge Singhal erred by simply adopting and incorporating the State's response in his order and blindly relying on it instead of making his own independent findings.

The trial court failed to state its independent findings in its order; instead it merely adopted the state's response for its reasoning, a practice that has been disapproved by the Florida appellate courts.

Finally, the Petitioner was denied any opportunity to reply to the State's response, due to not being aware of a State's response ever being filed until Petitioner received the order denying postconviction relief.

Under article I § 9 of the Florida Constitution and Fourteenth Amendment to the United States Constitution, rights to be heard and fundamental fairness aspects of the due process of law clauses, that it is the essence of due process that fair notice and a reasonable opportunity to be heard must be given to the interested parties before judgment is entered; e.g., a law that hears before it condemns, proceeds upon proper inquiry, and renders judgment only after proper consideration of the issues by the adversarial parties. *Skull v. State,* 569 So.2d 1251 (Fla. 1990); *Boddie v. Conneticut,* 91 S. Ct. 780 (1971); *Luckey v. State*, 979 So.2d 353 (Fla. 5th DCA 2008). In order for it all to be truly adversarial, the Petitioner needs to be able to have an opportunity to meaningfully reply to the State's response if the thinks it is needed, that is his only opportunity to be able to be heard and to be truly adversarial, and would all easily best to assist the court in providing appropriate due process under *Boddie v. Conneticut* criteria in reaching a just and proper decision; see *Salow v. State,* 766 So.2d 1272 (Fla. 5th DCA 2000); *Reagan v. McDonough,* 958 So.2d 1148 (Fla. 4th DCA 2007); *Sheppard v. State,* 891 So.2d 1157 (Fla. 4th DCA 2005); and that would all be the very essence of due process that can be characterized as being all due. *Boddie,* and *Skull, supra.*

Hence, the trial court denied the Petitioner due process by not being able to be heard by means of a reply to the December 21, 2016 State's response.

Because the state trial court failed to address the actual merits of the issue itself, it merely addressed procedural issues, and only by incorporating the State's response, the issue should be reviewed upon the merits by this court.

CONCLUSION

WHEREFORE, based the foregoing facts, argument, and cited authorities, the Petitioner prays that this court will grant certiorari or any other relief as this Honorable Court deems appropriate.

Respectfully submitted,

Date: 6-26-2018

Kai Uwe Thier, DC# L47927
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, Fl. 32124