IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

CASE NO: 18001958CF10A

vs.

JUDGE: SCHERER

NIKOLAS CRUZ,
Defendant.
_____/

OPPOSITION TO STATE'S MOTION TO STRIKE JURY PANEL AND MOTION TO STRIKE THE DEATH PENALTY (D-273)

The Defendant, Nikolas Cruz, by and through his undersigned counsel, and pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9, 12, 16, 17 of the Florida Constitution, and other applicable law, moves this Court to vacate its order striking 243 prospective jurors without giving the parties an opportunity to examine them. As grounds for this motion, Mr. Cruz states as follows:

1. Mr. Cruz is charged with 17 counts of first-degree murder and 17 counts of attempted first-degree murder. The State has filed a notice of intent to seek the death penalty.[1] On October 20, 2021, Mr. Cruz pled guilty to all 34 counts in the Indictment. Because the State has refused to waive the death penalty and sentence Mr. Cruz to 34 consecutive life without the possibility of parole sentences, a sentencing trial is necessary.
2. Trial in this case began on April 4, 2022, and continued on April 5, 6, 11, 12 and 13, 2022. Each day, multiple panels of approximately 60 prospective jurors were brought to the

[1] The initial Notice of Intent was filed on March 13, 2018. On April 16, 2018, the Sate filed an amended Notice of Intent to Seek the Death Penalty. The Defense persists in its position that the subsequent Notice filed by the State without seeking leave of court or demonstrating good cause to amend constitutes a clear violation of Fla. R. Crim P. 3.140(n). *See*DP-20, Motion to Strike State's Improperly Amended Notice of Intent to Seek the Death Penalty, filed Oct. 22, 2019, denied by the Court on Nov. 19, 2019.

courtroom and examined regarding whether a hardship would prevent them from serving on the jury in this case.[2] Those who stated no hardship were asked to complete a Juror Questionnaire; those who demonstrated hardship were excused.

3. On April 5, 2022, the second day of jury selection proceedings, the Court asked the panel as a whole: "Does everyone here believe they can and will follow the law? Please answer out loud." It appeard that one or two members of the venire answered in the negative. When that was called to the attention of the Court, the Court again asked the question and asked the members of the venire to raise their hand if they "cannot and will not follow the law." Ultimately 12 members of the venire raised their hands.

4. *Sua sponte,* the Court advised the 12 members of the venire who indicated they could not and would not follow the law that they were being excused from this case, but would have to report to the jury room for possible service on another case. After holding a brief sidebar, at which both the State and defense objected to the release of these 12 members of the venire, the Court nonetheless excused the jurors to return to the jury room.

5. Once again, after the release of the 12 members of the venire, the parties again expressed their objections to the Court. The Court advised it would retrieve the 12 venirepersons from the jury room and bring them up for questioning by the parties. Ultimately, the clerk was only able to bring back one member of the venire, who then advised of a hardship and was excused.

[2] Because of the estimated length of the trial – four to six months -- hardship considerations included preplanned/prepaid vacations during the trial period, the inability to earn income while serving, health concerns that required frequent medical appointments and the need to care for young children, elderly parents or any other individual. The parties repeatedly expressed the opinion that hardship did not include anything about the case or the prospective jurors' personal views that would affect their ability to serve as jurors in this case; those issues were to be discussed during individual or group general *voir dire*.

6. The Court then advised the parties it would re-summons the 11 prospective jurors who did not return to the courtroom, along with a letter explaining the situation and asking them not to discuss the case with anyone, or do any research about it. The Court advised the 11 individuals would be summonsed to return on April 25, 2022.
7. On April 25, 2022, the parties were advised that there was a "miscommunication," that the 11 prospective jurors did not receive the summons or letter and that they would be returning the following week.
8. Immediately thereafter, the State moved to strike all the panels interviewed thus far, and to start afresh on April 25, 2022.[3] In its written motion, the State claimed that the release of the 11 members of the venire constitutes *per se* reversible error and the striking of the previous panels was necessary to cure that error.
9. The defense objected to the State's motion, arguing that it was not yet ripe because the 11 individuals had not yet been served to return. Having been provided the motion that morning before court commended at 10:30 a.m., the defense asked for additional time to research the issue and present arguments to the Court.
10. As of April 25, 2022, 243 prospective jurors had filled out questionnaires and had been scheduled to return to Court on various dates for individual *voir dire*.
11. The proper course of action to remedy the initial error of prematurely excusing 11 potentially qualified jurors is to bring them back by summons for proper voir dire if they are unable to demonstrate hardship. If those jurors do not respond to the summons then the court can issue a order to show cause.

[3] The State reported to the Court room on the morning of April 25, 2022, with a 14-page written motion requesting that the Court strike all previous panels. The motion was provided to the defense that morning, but not filed until after it was granted by the Court.

12. Upon presentation of the State's motion and argument, the Court immediately abandoned its established course of action and struck all 243 prospective jurors over the objection of the defense. The Court did so without attempting a single plausible remedy, and without giving the defense sufficient time to respond. Although this Court did indicate it would give the defense an opportunity to "change its mind," the Court did announced it was "starting fresh" when the first panel of the day was brought into the courtroom on April 25, 2022. Based on the Court's actions, the defense is concerned that the Court will not give this motion due consideration and that the Court reversed the plan it put in motion three weeks ago to aid and assist the State.
13. The striking of all of these prospective jurors exponentially compounds the potential error by prematurely excusing them without knowing whether the initial error can be cured. Moreover, notwithstanding the State's contentions, the improper striking of all previous panels violates double jeopardy and due process. Thus, if this Court does not intend to reverse its order striking all previous panels, and further does not intend to make an attempt to return the 11 improperly excused jurors to court, the State must be barred from seeking the death penalty and the proceedings must conclude.
14. A memorandum of law is attached hereto and incorporated herein by this reference.

MEMORANDUM OF LAW

At the outset, the defense agrees with the State that the initial excusal of the 11 prospective jurors was error. In fact, the defense agrees with paragraphs one through 11 of the State's Motion to Strike Jury Panel, which recites the law regarding the rights of both parties to examine prospective jurors and to attempt to rehabilitate them prior to their excusal on a basis other than hardship or extreme inconvenience. This is where the State and defense part ways. The striking of

all previous panels who have reached the second stage of jury selection in this case comes with double jeopardy and due process consequences.

The protections of double jeopardy apply to penalty phase proceedings. *Turner v. State,* 37 So. 3d 212 (Fla. 2010) (applying double jeopardy analysis to penalty phase proceedings where seated juror suffered a seizure during deliberations). Those protections may also be applied prior to the jury being sworn. *See, e.g., Fassi v. State,* 591 So. 2d 977, 980 (Fla. 5th DCA 1991) (noting that defendant's right to obtain chosen jury may be infringed on by the state's bad faith conduct whether selected jury is discharged before or after it is sworn).

The State's reliance on *Koenig v. State,* 497 So. 2d 875 (Fla. 3d DCA 1986), for the contrary proposition, in this particular case, is misplaced. In *Koenig*, the trial court dismissed the jury prior to it being sworn because the defendant, a white police officer charged with manslaughter of a black victim, peremptorily struck four of the five black venirepersons, and the fifth was not likely to be seated on the jury based on his seating location and the number of peremptory challenges remaining. The Third District rejected the defendant's double jeopardy claim because it was unwilling to find the Court's actions in dismissing the unsworn jury were motivated by bad faith. However, the Court did recognize that:

> The right of trial by jury is of but little value to the citizen in a criminal prosecution against him if [the guarantee against double jeopardy] can be violated and the accused left without remedy. If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the state demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is this boasted right?

Id. at 882, quoting *O'Brian v. Commonwealth,* 72 Ky. [9 Bush] 333, 339 (1872), *quoted in Crist v. Bretz,* 437 U.S. 28, 46 (1978) (Powell, J., dissenting). The Court went on to explain that the concern in *O'Brian* "is the imagined bad faith effort by a trial judge …act[ing] out of a desire to

aid the prosecution or harm the defendant. Thus, the Court concluded, "were there evidence that the proceedings were terminated in such bad faith, the argument that double jeopardy should bar further proceedings whether or not the jury was sworn, or the argument that further proceedings would violate the defendant's due process rights might very well succeed." *Koenig*, 497 So. 2d at 882. (Citation omitted).

In the instant case, the dismissal of 243 jurors after the erroneous dismissal of 11 must be considered a bad faith attempt by the State to strike potentially defense favorable jurors and a bad faith attempt by the Court to aid the prosecution. Once the Court indicated it still intended to bring back the improperly released prospective jurors, the State had no additional reason to make a motion to strike the entire panel; nothing had changed from the previous week to that day that would provide the State a reason to make such a motion now. In fact, upon entering the courtroom to begin jury selection, defense counsel was given a copy of the State's motion and told that the prosecutors had not decided yet whether to file it; defense counsel was advised that they would decide whether to file the motion after hearing from the Court regarding the 11 prospective jurors. Notwithstanding the Court's assurance that the failure to serve the jurors was a miscommunication and that the jurors would be appearing the following week, the State moved *ore tenus* to strike the entire panel, and subsequently filed the motion with the Clerk. In short, the State intended to move to strike the entire penal regardless of the situation with the 11 jurors.

The State's motives are additionally suspect because the same day the 11 jurors were released, April 5, 2022, one of them posted the following comment on a story related to this case posted on Channel 10's Instagram account: "They called me in for this case I couldn't do it. Death penalty thing. Sorry just cantnope."

From this post, it is reasonable to assume that this prospective juror believed there was a law that would have required him to vote for death, which would explain why he advised the Court that he cannot and will not follow the law. Had this juror survived the hardship phase, he would have been informed during individual voir dire that the law in Florida neither compels nor requires a juror to vote for death. After, he may have articulated an ability to set aside his scruples in deference to the Court's instructions. The appropriate remedy was to bring this prospective juror back, along with the other 10 improperly excused prospective jurors, to inquire about the reasons they believed they could not follow the law. By moving to strike the entire panel, the State has

impermissibly targeted a juror who was struck in violation of *Witherspoon*[4] and *Witt*.[5] The State's motion has also eliminated the proper remedy – bring him, and the other 10 prosepctive jurors back for questioning.

The Court's motivation for striking all panels is equally dubious. On the day of the improper dismissal of the 11 jurors, this Court indicated it would simply summons these jurors to return to Court on April 25, 2022, and advise them not to speak about or research the case. When the parties returned to Court on April 25, 2022, the Court initially indicated that there was a "miscommunication" and that the 11 potential jurors would be returning the following week. Minutes later, simply because the State requested it, the Court struck all previous panels of prospective jurors. Nothing had changed between April 5, 2022 and April 25, 2022 except that the return of the jurors was slightly delayed. There is no explanation for the Court's actions except to eliminate the need to correct its earlier error, and to aid the prosecution. Neither of these reasons is sufficient to warrant striking all 243 prospective jurors rather than making a genuine attempt to return the 11 improperly excused prospective jurors. In other words, only reason to strike a panel is when a harm has occurred that is not able to be remedied by any possible means. That is not the case here; the State, the defense and the Court agreed on a remedy.

As the above discussion indicates, there are situations in which Courts should and will entertain double jeopardy claims prior to the swearing in of a petit jury. Moreover, the absence of a bright line rule is justified.

> Eliminating the arbitrary foreclosure of double jeopardy inquiry and permitting meaningful functional evaluation of the effect of mistrial are too important to be

[4] *Witherspoon v. Illinois*, 391U.S. 510 (1968) (sentence of death could not be carried out where jury that recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to death penalty or expressed conscientious or religious scruples against its infliction).

[5] *Wainwright v. Witt*, 469 U.S. 412 (1985) (Proper standard for determining when prospective juror may be excluded for cause because of his views on capital punishment is whether juror's views would prevent or substantially impair performance of his duties as juror in accordance with his instructions and oaths).

> defeated by the perceived significance of the jury-swearing ritual. Indeed, the ritual notion is largely circular because any dramatic impact of swearing the jury may be traceable to the fact that this is the moment at which jeopardy has been deemed to attach. Jeopardy therefore should be deemed to attach as soon as the process of selecting the jury begins.

Schulhofer, *Jeopardy and Mistrials*, 125 U.Pa.L.Rev. 449 (1977).

Irrespective of whether double jeopardy should bar "retrial" in this case, due process certainly does. In *State v. Goodman*, the defendant, an African–American male, was on trial for battery of a law enforcement officer and other charges. The State attempted to exercise a peremptory challenge against an African–American juror, but the trial judge disallowed the challenge after a *Neil* hearing was held.[6] After the jury was selected, but before they were sworn, the State "nolle prossed" the case. Only 30 minutes later, the state refiled the charges. Goodman moved to dismiss, alleging that the state's decision to dismiss and refile the charges was for the purpose of avoiding the jury selected in the prior trial, in violation of defendant's due process rights and the prohibition against double jeopardy. Although declining to find the prosecutor's actions constituted "bad faith," the trial court granted Goodman's motion and the State of Florida appealed. 696 So. 2d 940 (Fla. 4th DCA 1997).

The basis of the State's appeal was that it was error for the trial court to grant Goodman's motions in the absence of a finding of bad faith. The Fourth District, however disagreed with the State that a finding of bad faith was necessary to support the trial court's dismissal.

> It is clear to us that the trial court found that the nol pros was done solely to avoid the jury just selected, and that the jury just selected included a member whom the state had sought to excuse peremptorily in violation of the rule against invidious racial discrimination in the exercise of peremptory challenges. We conclude that it is a denial of due process for the state to nol pros in order to avoid having a jury so constituted.
>
> We strongly disapprove of the state's improper use of peremptory challenges to strike a prospective juror on account of the juror's race. Equally, however, we

[6] *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

> condemn the state's petulant refusal to try its case to a jury containing a member whom it had improperly sought to strike. Just as the state may not use its discretion to peremptorily strike prospective jurors because of their race, so also it may not use its discretion to nol pros to achieve the same end. While the trial court may not have found in this effort bad faith by the prosecutor, we have no trouble in finding a violation of due process. Allowing the state to proceed in this way would have the intolerable effect of permitting the state to avoid the *Neil–Slappy* holdings by simply nol prossing when its invidiously discriminatory purpose is found out.

Goodman, 696 So. 2d at 942-43.

The dismissal of 254 unsworn potential jurors in this case is no less egregious and no less a due process violation warranting preclusion of the death penalty.[7] Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause, *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. *Id*., citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968). It is fundamentally unfair to allow the State to persist in its quest for a death verdict after requesting that the proceedings be terminated and restarted, simply to avoid the consequence of a potentially erroneous ruling. Moreover, judicial economy cannot take precedence over a defendant's due process rights, especially in a capital case. If the State of Florida was truly concerned about judicial economy they would have accepted Mr. Cruz's offer to plead to all counts within twenty-fours hours of the tragedy. Such offer was made 1,534 days ago. The suggestion that the Broward State Attorney's Office has any concern for judicial economy is apocryphal at best. The public funds that have been expended in this case, including bringing back retired prosecutors at an hourly rate, is astronomical. The granting of the state's motion not only violates Mr. Cruz's constitutional rights, it benefits the state's relentless effort to kill Mr. Cruz, and inures to the financial benefit of

[7] This number represents the 243 prospective jurors who have completed questionnaires, along with the 11 improperly released prospective jurors.

the state attorney's who are being compensated hourly rate by the citizens of State of Florida. As the State argued in its motion to strike the panel, picking a jury in a death penalty case is time consuming and highly scrutinized on appeal. *Darden v. Wainwright*, 477 U.S. 168 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985). The U.S. Supreme Court has "consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness." *Monge v. California*, 524 U.S. 721 (1998).

This Court should not have deviated from its initial course of action to cure its previous error; the only proper remedy is to summons the 11 improperly excused jurors to return to court to determine whether they have a hardship, and if not, whether they are otherwise qualified to sit on the jury in this case.

The granting of the State's motion violates Mr. Cruz's rights to due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Florida Constitution, a fair trial in the appropriate venue, Broward County, Florida guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 16 and 22 of the Florida Constitution, privacy guaranteed by the Fourth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Section 23 of the Florida Constitution, equal protection or basic rights guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Florida Constitution, and to be free from cruel and unusual punishment or excessive punishment as guaranteed by the Eighth and Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Florida Constitution.

WHEREFORE, the defendant, Mr. Cruz, respectfully requests that this Court enter an order barring re-trial in this sentencing phase and sentence Mr. Cruz to 34 consecutive terms of life without the possibility of parole.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Michael Satz, at courtdocs@sao17.state.fl.us, Broward County Courthouse, Fort Lauderdale, Florida, this April 27, 2022.

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