IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. 18-1958CF10A

vs.

NIKOLAS CRUZ
Defendant.
_____/

JUDGE: SCHERER

DEFENDANT'S EMERGENCY[1] MOTION FOR PROTECTIVE ORDER TO ENJOIN THE RELEASE OF ANY PORTION OF THE INDEPENDENT REVIEW OF "NC'S" EDUCATION RECORDS (D-11). THIS MOTION SUPERSEDES (D-9).

COMES NOW the Defendant, NIKOLAS CRUZ, by and through the undersigned attorney, and files this Motion for Protective Order, which supersedes Defendant's D-9 motion, pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure, Florida Statutes §§119.011, 119.071, 1002.22(2)(d) and 1002.221(1), the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16, 21, and 22 of the Florida Constitution. As grounds for this Motion, the Defendant states as follows:

I

1. The Defendant is charged with seventeen counts of murder in the first degree and seventeen counts of attempted murder in the first degree. The State has filed its Notice of Intent to Seek the Death Penalty.
2. The School Board of Broward County initiated a review of Defendant's educational history and support services provided by Broward Schools. The review culminated in a

[1] This motion is an emergency because the civil court allowed the Defendant five days to seek additional relief from its July 26, 2018 order releasing a redacted version of the School Board of Broward County's "Independent Review of N.C.'s Educational Records."

report formally titled "Independent Review of "NC's" Educational Records" (hereinafter, "Report") the School Board of Broward County intends to release for public inspection.

3. On June 14, 2018, the Defendant through counsel specifically objected to the release of the "Report."
4. On June 18, 2018, the School Board filed a "Petition for Declaratory Judgment" (hereinafter referred to as "Petition") in the Circuit Civil Division of the Broward County Courts to determine whether any part of the "Report" can be released to the public or whether the information contained in the report should remain confidential.
5. On July 11, 2018,
6. On July 26, 2018, the civil court issued its "Order on Broward County School Board's Petition for Declaratory Judgement". The civil court approved the School Board's proposed redactions with a few exceptions and those exceptions were listed in the order.
7. The civil court the civil court heard arguments from the School Board, counsel representing Nikolas Cruz in the criminal matter and the Miami Herald and Sun Sentinel relating to the "Petition". Nikolas Cruz was not present or represented in the civil proceeding. A preliminary order was entered by the Court on July 12, 2018. The civil court conducted an **in camera** review of the "Report" with suggested redactions by the School Board and reviewed the appropriate statutes concerning privacy of those records. found that the School Board's proposed redactions were consistent with the requirements of the Family Educational Rights and Privacy Act 20 USC § 1323g, the Health Insurance Portability and Accountability Act USC § 1320d, Florida Statutes protecting educational records, student placement records and academic assessment records and material, and confidential exemptions under Florida Statutes §119.07.

8. Importantly, the civil court's order **did not** address the effect the release of the "Report" would have on Mr. Cruz's due process rights or fair trial rights in the criminal case. The civil court stayed the release of the report for five days "to allow Mr. Cruz an opportunity to seek additional relief."

9. The Defendant now seeks a protective order from this Court. It is this Court's responsibility to ensure the Defendant's due process rights to a fair trial. That was not the issue before the civil judge. Judge Henning's ruling was based only on federal and state education laws and Florida's public record law. The civil court's order did not address Defendant's due process rights and whether the release of the report would impact those rights.

10. The release of any portion of the "Report", even with Judge Henning's approved redactions, will significantly impair the Defendant's right to a fair trial before an impartial jury in Broward County.

11. "[T]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 33 (Fla. 1988) quoting *Gannett Co. v. DePasquale,* 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). The purpose of the Public Records Act "is to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach Cnty. Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). However, "where a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield." *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 380 (Fla. 1987); *McCrary*, 520 So.2d at 34-35. There is no First Amendment right of access to discovery information. *See*

McCrary, 520 So.2d at 35, relying on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

12. The media has extensively covered this case and has suggested that a number of "red flags," "warnings" and "cries for help" were overlooked by school administrators and educators. It is essential that this Court take safeguards to ensure that Defendant's educational history and services received while attending Broward Schools is not litigated in the press.

13. This case has received extensive media coverage frustrating the power of this Court to provide a fair trial before an impartial jury in Broward County or anywhere else. The remedies previously relied upon by courts to limit the impact of adverse pretrial coverage— including granting motions to continue or changing venue—are insufficient and antiquated in light of the national attention on this case and the rise of digital media accessible to every potential juror in the State of Florida. Neither the passage of time, nor a change in venue will make the digital publicity covering this case less accessible or contemporary to potential jurors. This Court must act to ensure that the Defendant receives a fair trial in this case.

14. "[T]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 33 (Fla. 1988) quoting *Gannett Co. v. DePasquale,* 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). The purpose of the Public Records Act "is to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach Cnty. Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). However, "where a defendant's right to a fair

trial conflicts with the public's right of access, it is the right of access which must yield." *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 380 (Fla. 1987); *McCrary*, 520 So.2d at 34-35. There is no First Amendment right of access to discovery information. *See McCrary*, 520 So.2d at 35, relying on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

15. The United States Supreme Court has characterized the right to a fair trial as the most fundamental of all freedoms and one which must be preserved at all costs." *Id.* (citing *Estes v. Texas*, 381 U.S. 532 (1965)). The public's interest and right to transparency through section 119.071(2)(e) is not absolute: "If, as the press urges, chapter 119 was read and applied so as to violate the constitutional separation of powers doctrine or the right to a fair trial, we would be obliged to declare the statute unconstitutional." *McCrary*, 520 So. 2d at 34.

16. "The trial judge is directly and personally responsible for maintaining the dignity and decorum of the courtroom proceedings. The media's interests do not involve issues of fair trial and due process. Rather, the media's interests involve issues of public information, ratings, and financial benefits from coverage of a particular trial. . . . Therefore, the trial judge must be aggressively involved in media management to ensure the constitutionally protected rights of the defendant to a fair trial and the societal right to justice in a properly conducted trial." Hon. Cynthia Stevens Kent (ret.) and Hon. Sharen Wilson, Chapter 4 Media and the Courts, Presiding over a Capital Case: A Benchbook for Judges, http://www.judges.org/capitalcasesresources/bookpdf/Chapter%204%20Media%20and%20the%20Courts.pdf.

17. Criminal cases must be tried in court and not the media; the Supreme Court of Florida equipped trial courts with the ability to limit the disclosure of court records with Florida Rule of Judicial Administration 2.420(c)(9)(A) in situations where:

> (A) confidentiality is required to:
>
> > (i) prevent serious and imminent threat to the fair, impartial, and orderly administration of justice; . . .
> >
> > (iii) protect a compelling governmental interest; . . .
> >
> > (vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;
> >
> > (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law[.]

18. In deciding whether to temporarily restrict public access to discovery material this Court should consider the following:

> (1) A temporary restriction is "necessary to prevent a serious and imminent threat to the administration of justice;
>
> (2) No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and
>
> (3) [A temporary restriction] would be effective in protecting the right of the accused, without being broader than necessary to accomplish this purpose."
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> *Miami Herald Pub Co. v. Lewis*, 426 So.2d 1, 3 (Fla. 1982); *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32, 35 (Fla. 1988) (holding that "the factors set out in *Lewis* are relevant to a finding of cause and should be considered in determining whether public access to a judicial public record should be restricted or deferred.").

19. In *McCrary*, the trial court temporarily prohibited public release of existing discovery materials after finding that the material was "graphically incriminating, containing materials which might not be admissible at trial…" 520 So.2d at 33. The trial court recognized that there was prior prejudicial publicity surrounding the case and that disclosure would further aggravate the prejudicial publicity; it found that the only measure available, until a jury could be selected and sequestered, "was to cut off the prejudicial publicity at its source before the discovery information became known to the press and public. *Id.* at 35.

20. In upholding this decision, the Florida Supreme Court disagreed with the media's position that the court was writing a new public record exemption into chapter 119 without authority: the legislature recognized in 119.07(4) that there are occasions where court files containing public records must be closed to the public and that "under the separation of powers doctrine, it is the responsibility of the judicial branch to ensure that parties receive a fair trial." *Id.* at 34.

21. Similarly, the trial court in *Miami Herald Media Co. v. State,* 218 So.3d 460 (Fla. 3rd DCA 2017), was confronted with a high-profile murder case involving prejudicial pretrial publicity and impactful discovery materials with undetermined admissibility. The Third District Court of Appeals upheld the trial court's decision to temporarily restrict public access to certain discovery materials in order to ensure the defendant's rights to a fair trial. *Id.* at 463. In evaluating the decision, the court cited to the circumstances a court should consider in connection with a motion for a change of venue, which include the following:

    (1) when the publicity occurred in relation to the time of the crime and the trial;

    (2) whether the publicity was made up of factual or inflammatory stories;

    (3) whether the publicity favor the prosecution's side of the story; [and]

(4) the size of the community exposed to the publicity[.]

Id. at 463-4 citing *State v. Knight*, 866 So.2d 1195, 1209 (Fla. 2003).

22. "[E]ach iteration of publicity occurs closer to the ultimate trial of the case." 218 So.3d at 464. The discovery material temporarily withheld from disclosure were inflammatory. *Id.* Its release could cause potential jurors to prejudge guilt, but the court had not yet decided whether they would be admitted during the trial. *Id.* And finally, although Miami-Dade County is home to approximately 2.6 million residents, neither side "provided…evidence relating to the effects of social media." *Id.*

23. In support, the court recognized "[C]ertain types of pretrial publicity have a statistically significant prejudicial effect on juries." *Id.* at 464 citing Margret Tarkington, *Lost in Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity,* 66 U. Fla. L. Rev. 1873, 1917-18 (2014). These include "a confession of the accused (even if retracted)…inadmissible incriminating evidence, and statements regarding the character of the accused." *Id.* "Such information has a cumulative effect: the more of it an individual receives, the more likely she is to adjudge the accused guilty." *Id.*

24. Particularly apposite to this case, the court recognized

> "Extraordinary media interest" today is a far cry from pretrial publicity as it existed [in the past]. Social media and the dissemination of inflammatory images and incidents at the speed of light ("going viral" rather than reaching an audience in a 24-hour news cycle) have grown exponentially. This level of media saturation exposes a larger number of prospective jurors to potentially prejudicial information about more upcoming trials than ever before in history, making it more difficult to select impartial jurors for trial and to maintain their impartiality during trial.
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> *Id.* at 463 (internal citations omitted).

25. Here, the media coverage is overwhelming. It is routinely referred to as one of the deadliest mass shootings in modern American history. The case has reached the front pages of media outlets since the date of incident, covering the facts of the case, how the surviving victims and their families are coping with the trauma and their advocacy on issues related to the case at the state and national level.
26. The "Report" was prepared based upon a review of the Defendant's educational records made available to Collaborative Educational Networks, Inc. Judge Henning's order dated July 26, 2018 redacts a significant amount of the Defendant's private protected educational information pursuant to legislatively created privileges to educational records.
27. Nonetheless, the "Report" in its entirety, including the non-redacted portions on the verge of release, relies on information from the Defendant's educational records citing specific state and federal statutes governing placement of students within the Broward County school system. Because the "Report" solely concerns the Defendant, and the "Report" is solely based on a review of the Defendant's records, the redacted report through its citation to rules and statutes inevitably discloses information about the Defendant. The "Report" wouldn't cite the statutes and rules if they did not pertain to the Defendant.
28. The Defendant has a pending criminal matter and the media's reporting on any information pertaining to Mr. Cruz is unrelenting. If the "Report" is released subject solely to Judge Henning's redactions the media will immediately disseminate the "Report" to the public and concomitantly provide their own conclusions about the Defendant. However, the information the redacted report conveys explicitly and implicitly to the Defendant's potential jurors through its publication is prejudicial, and this court has not yet determined whether any of it will be admissible in trial.

29. Any portion of the "Report" should not be released until the resolution of the Defendant's criminal case in order to ensure that his constitutional rights to due process and a fair trial are not violated.

IV

30. Finally, heightened standards of due process apply because the Defendant is facing a death sentence. *See Mills v. Maryland*, 486 U.S. 367, 376 (1988) (stating "[i]n reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), *Proffitt v. Wainwright*, 685 F. 2d 1227, 1253 (11th Cir. 1982) (stating "[r]eliability in the factfinding aspect of sentencing has been a cornerstone or [the Supreme Court's death penalty] decisions"), and *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (concluding that the same principles apply to guilt determinations). "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (citing cases). "[D]eath is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

31. Releasing the "Independent Review of "NC's" Educational Record", would violate the Defendant'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.

32. If the court finds otherwise, Defense counsel requests that this Court hear oral argument on the disclosure of any portion of the report and school records that the School Board intends to release.

WHEREFORE the Defendant respectfully requests this Honorable Court grant this amended motion for protective order enjoining the release of the any portion of the "Independent Review of "NC's" Education Records prepared Collaborative Educational Network, Inc. based upon their review of the Defendant's school records and request for oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this motion is being filed in good faith and not for purposes of delay.

I 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 J. Satz, at courtdocs@sao17.state.fl.us, Broward County Courthouse, Fort Lauderdale, Florida, 33301. Copies sent to: Attorneys for the School Board of Broward County, Office of the General Counsel, Barbara Myrick, 600 SE Third Avenue, Fort Lauderdale, FL 33301, via email at pleadings@browardschools.com, Eugene K. Pettis, HALICZER, PETTI & SCHWAMM, P.A., One Financial Plaza, Seventh Floor, 100 SE 3rd Avenue, Fort Lauderdale, FL 33394, via email at service@hpslegal.com, this 22nd, day of June 2018.

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