IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO: CF2300781

STATE OF FLORIDA

VS.

VERGILIO AGUILAR MENDEZ,
DEFENDANT.
_____/

STATE'S MOTION TO STRIKE DEFENDANT'S MOTION TO DISMISS COUNT ONE

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and files this motion requesting this Honorable Court to strike the defendant's Motion to Dismiss Count One as legally insufficient. As grounds therefor, the State sets forth the following:

1. On July 25, 2023, the defendant was charged in a two-count Information with Aggravated Manslaughter of an Officer (Count I) and Resisting an Officer With Violence (Count II).

2. On January 29, 2024, the defense filed an unsworn Motion to Dismiss Count One for Lack of Legal Causation. The defense cited Rule 3.190(c)(4), Fla. R. Crim. Proc. as the primary authority for their motion.

3. Rule 3.190(c)(4), however, requires that "the motion [be] sworn to."

4. Courts have repeatedly held that a failure by the State to timely raise the defect of an unsworn or insufficiently sworn motion constitutes a waiver to raise it a later time. *State v. Mayle*, 406 So.2d 108, n.3 (Fla. 5th DCA 1981); *State v. Gomez*, 508 So.2d 784 (Fla. 5th DCA); *Goodmakers v. State*, 450 So.2d 888 (Fla. 2nd DCA 1984); *State v. Pitts*, 56 So.3d 1191, 1192-93

(Fla. 4th DCA 2011); *State v. Dickerson*, 634 So.2d 253 (Fla. 2nd DCA 1994); *State v. Feldman*, 522 So.2d 503 (Fla. 2nd DCA 1988); *State v. Booker*, 529 So.2d 1239 (Fla. 1st DCA 1988).

5. In *State v. Upton*, 392 So.2d 1013, 1015-16 (Fla. 5th DCA 1981), the Fifth District held that a motion to dismiss must be sworn to by a defendant, rather than his or her attorney. In that case, it observed:

> A motion to dismiss under Florida Rules of Criminal Procedure 3.190(c)(4) must specifically allege the facts on which the motion is based and the motion must be sworn to. The motion sub judice was a narrative of "facts by the attorney and much of it consisted of a recitation of his interviews with witnesses and what he believed these witnesses would say. The attorney then swore that the motion was true "to the best of his knowledge." This does not satisfy the requirement of a "sworn motion" as required by the Rule.
> . . .
>
> A motion to dismiss under this rule should be summarily denied when it is not sworn to by the defendant who, by taking the oath, thus subjects himself to the penalties of perjury if his recitation of 'undisputed facts' is false." *Id.* at 1016.

Additional decisions by the Fifth District have similarly held that a trial court errs in granting motions to dismiss where the motion was not sworn to by the defendant. *See State v. Fordham*, 465 So.2d 580 (Fla. 5th DCA 1985); *State v. Bruner*, 526 So.2d 1076 (Fla. 5th DCA 1988).

6. Other Florida appellate courts have also held that (c)(4) motions must be sworn to by the defendant, rather than the defendant's attorney. *State v. Lewis*, 463 So.2d 561, n.1 (Fla. 2nd DCA 1985) (holding that the motion should have been dismissed because the facts were sworn to only by the defendant's attorney); *State v. Aaron*, 409 So.2d 1214 (Fla. 3rd DCA 1982).

7. The defense cites *State v. Betancourt*, 616 So.2d 82 (Fla. 3rd DCA), for the proposition that a defendant is not required to personally execute an affidavit upon which a motion to dismiss is predicated. However, *Betancourt* still held that Rule 3.190(c)(4) required such a motion to be sworn to, at a minimum, by someone with personal knowledge of the facts recited in

the motion and who would be subject to the penalties of perjury if the facts set forth were discovered to be false. This would most often be the defendant, but the court recognized that direct witnesses could be in a position to swear to facts of which they had firsthand knowledge. The court held that it was appropriate under the Rule for the defendant's father to swear to the motion, but only because he was a direct witness to the facts at issue. *See id.* at 83.

8. The defense also cites *State v. Williams*, 10 So.3d 1172 (Fla 3rd DCA 2009), as authority for its claim that an attorney may swear to a (c)(4) motion on behalf of a defendant. However, the *Williams* case did not involve an attorney swearing to a motion to dismiss, so it was not decided on a claim that an attorney-sworn motion was sufficient. The court there considered a motion supported by an affidavit from the victim in the case. It held that the affidavit did not meet the sworn-to requirement and was, thus, fatally deficient as a matter of law. As a result, it should have been summarily denied. *See id.* at 1172-73. Because the case did not involve an attorney swearing to the motion, the fleeting statement that "the motion . . . must be sworn to by the defendant or his attorney" is plain dicta. Even if it was not, the statement would be of no consequence because defense counsel here did not swear to the motion filed in this case.

9. Also, the *Williams* opinion did not address the holding in *State v. Holder*, 400 So.2d 162 (Fla. 3rd DCA 1981), which directly considered the sufficiency of a motion sworn to by an attorney, rather than the defendant himself. The court there held that the motion should have been rejected because the attorney could not have had personal knowledge of the facts set forth therein unless he happened to have been on the scene of the alleged crime. *See id.* at 163. In this case, defense counsel in this case were not witnesses to any of the events giving rise to the charges and, therefore, do not have personal knowledge of the facts set forth in their motion.

10. In conclusion, the defense's motion to dismiss is defective because it is not sworn to by the defendant or a person with firsthand knowledge of the facts of the case as Rule 3.190(c)(4) and its supporting case law require. The State also notes that this deficiency cannot be remedied by an amended motion to dismiss sworn to by defense counsel because they were not present at the time of the alleged offense and, therefore, do not have personal knowledge of the facts.

THEREFORE, the State moves this Honorable Court to enter an Order striking the defendant's Motion to Dismiss Count One for the reasons sets forth herein.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by e-service delivery to ROSEMARIE PEOPLES, OFFICE OF THE PUBLIC DEFENDER, 4010 LEWIS SPEEDWAY, SUITE 1101, ST. AUGUSTINE, FL 32084, on this 2nd day of February, 2024.

R.J. LARIZZA
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