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IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs. CASE NO. 4D19-1499

ROBERT KRAFT,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

BRIEF OF AMICUS CURIAE FOR THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE APPELLEE.

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STATEMENT OF IDENTITY AND INTEREST

This case concerns the State's appeal of a trial court's order suppressing surreptitious video recordings of the Appellee. This legal issue could have sweeping implications for the scope of the Fourth Amendment, which would greatly impact criminal defense in this State. The issue amici wishes to address is the importance of suppressing evidence to deter law enforcement from recording as innocent third parties have no meaningful recourse.

The Florida Association of Criminal Defense Lawyers (FACDL) is a statewide organization with 29 chapters and more than 1,300 members, all of whom are active criminal defense practitioners. FACDL is a nonprofit corporation with a purpose of assisting in the fair administration of the state's criminal justice system.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense

lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this matter as it addresses important Fourth Amendment issues that will have an impact on police practices that affect innocent people across the country.

Their participation in this case serves the organization's purpose by assisting the courts in reaching just results in cases involving rights of criminal defendants.

SUMMARY OF THE ARGUMENT

The circuit court correctly concluded that the video recordings should have been suppressed because the State failed to follow minimization requirements.

The Fourth Amendment prohibits the government from unreasonably intruding in citizens' privacy. Here, the government recorded citizens over the course of several days in a day spa, where they had a reasonable expectation of privacy. The circuit court correctly found that the evidence should be suppressed here.

Amici write to emphasize the unprecedented scope of the surveillance, as well as the importance of suppression here to protect the rights of both defendants and uncharged third parties. Traditionally, the remedy for an unconstitutional search would be suppression in a criminal trial. However, because some of the conduct surreptitiously recorded was perfectly legal, not everybody who was recorded has been charged with a crime. Furthermore, those third parties' only recourse would be the possibility of a civil suit, which is costly. Indeed, suppression here is essentially the only way to deter the State from engaging in mass surveillance, knowing that many citizens would have little to no recourse. Any other result would encourage an "ends justify the means" approach that this Court has cautioned against.

Accordingly, Amici request that this Court affirm the county court's order.

ARGUMENT

This Court should affirm the county court's order suppressing surreptitious video recordings and evidence obtained after Mr. Kraft's arrest because the State failed to follow the necessary minimization requirements and third parties have no realistic way of enforcing their rights.

a. The Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution Amendment IV. In general, the remedy for an unconstitutional search is to exclude the product of that search as evidence in a criminal trial. As the United States Supreme Court has explained:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words", valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this

> Court's high regard as a freedom "implicit in 'the concept of ordered liberty.'" At the time that the Court held in Wolf that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions.

Mapp v. Ohio, 367 U.S. 643, 655 (1961).

This exclusionary rule is meant to be prophylactic and deter law enforcement from engaging in conduct that violates the Fourth Amendment:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Herring v. U.S., 555 U.S. 135, 144 (2009).

Even if the government gets a warrant, it must take steps to minimize the surveillance that was authorized:

> Electronic surveillance must be "conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). "The statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations."

U.S. v. De La Cruz Suarez, 601 F. 3d 1202, 1215 (11th Cir. 2010).

For decades, the Legislature and the courts have cautioned against mass surveillance for this very reason. *Hudson v. State*, 368 So. 2d 899, 903 (Fla. 3d DCA 1979)("[T]he intrusions of the privacy of those persons whose communications are intercepted be held to a minimum (consistently with the purposes of the wiretap)."). Here, the circuit court correctly found that the State failed to follow even basic principles of minimization and suppressed the evidence accordingly.

b. Advances in technology.

Although the drafters of the Fourth Amendment could not envision a scenario where the government could surreptitiously record citizens on video in a state of undress, courts have consistently held that, as technology changes, so too does the need to restrict the government's ability to monitor its citizens. *See Tracey v. State*, 152 So. 3d 504, 525 (Fla. 2014)("In the [*United States v. Knotts*, 460 U.S. 276 (1983)] era, high tech tracking such as now occurs was not within the purview of public awareness or general availability."). This is not a new problem: States have dealt with video surveillance, specifically, for about two decades. *See* Lance E. Rothenberg, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 Am. U. L. Rev. 1127, 1150-55 (2000)(discussing Missouri, New Jersey, and Connecticut's approaches to video voyeurism). The circuit court used

the analogy of roadblocks for purposes of minimization procedures, R. 2102 fn 18, and amici respectfully submit that cell-site location information (CSLI) taken from a phone tower, or a device posing as one, is an apt analogy for the content of the recordings here.

The Florida Supreme Court first acknowledged that the right to privacy extended to CSLIs in *Tracey*, concluding that "Tracey had a subjective expectation of privacy in the location signals transmitted solely to enable the private and personal use of his cell phone, even on public roads, and that he did not voluntarily convey that information to the service provider for any purpose other than to enable use of his cell phone for its intended purpose." *Tracey*, 152 So. 3d at 525.

Similarly, this Court recognized that:

> Technological advancement often collides with the Fourth Amendment. When balancing these interests, we must "ensure that the 'progress of science' does not erode Fourth Amendment protections. To do so, the Supreme Court appears to "adjust[ ] legal rules to restore the preexisting balance of police power" as technology advances.

State v. Sylvestre, 254 So. 3d 986, 990 (Fla. 4th DCA 2018)(internal citations omitted). In *Sylvestre*, this Court relied on the United States Supreme Court's decision in *Carpenter v. U.S.*, 138 S. Ct. 2206 (2018), which also dealt with CSLI. There, the Supreme Court "decline[d] to grant the state unrestricted access to a wireless carrier's database of physical location information" because "of the

deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection." *Id.* at 2223. Although there was no warrant in *Sylvestre*, this Court's analysis still applies here:

> If a warrant is required for the government to obtain historical cell-site information voluntarily maintained and in the possession of a third party, [] we can discern no reason why a warrant would not be required for the more invasive use of a cell-site simulator. This is especially true when the cell phone is in a private residence, [] or other private locations "beyond public thoroughfares" including "doctor's offices, political headquarters, and other potentially revealing locales."

Sylvestre, 254 So. 3d at 991 (internal citations omitted).

The day spa here certainly qualifies as a "potentially revealing locale." This Court's concerns with CSLI are exacerbated with video surveillance, which is inherently more intrusive than somebody's general location as discerned from a cell phone tower. For example, while a CSLI would reveal the closest cell tower to one's location, the videos here showed people undressing and getting massages. This Court also recently excluded CSLI data in *Ferrari*, concluding that the data was protected by the Fourth Amendment and "the good faith exception to the exclusionary rule does not apply because the State was not relying on binding precedent or clearly applicable statutes in obtaining the data." *Ferrari v. State*, 260 So. 3d 295, 307 (Fla. 4th DCA 2018). Here, the State's failure to follow the longstanding requirement for minimization is dispositive.

c. Florida Laws relating to surreptitious video recordings.

The Legislature has recognized that video is inherently more intrusive than older methods of surveillance, and has created several new crimes in the last decade or so that reflect the newfound possibility of invading someone's privacy using video recording technology, which is consistent with the federal courts' understanding of video technology. *See U.S. v. Torres*, 751 F. 2d 875, 885 (7th Cir. 1984)("Television surveillance is identical in its indiscriminate character to wiretapping and bugging. It is even more invasive of privacy, just as a strip search is more invasive than a pat-down search, but it is not more indiscriminate: […] both devices pick up anything within their electronic reach, however irrelevant to the investigation.").

For example, the Legislature criminalized videotaping customers in a dressing room, which the county court found to be analogous here. § 877.26, Fla. Stat. (2004). There, the Legislature provided that "[i]t is unlawful for any merchant to directly observe or make use of video cameras or other visual surveillance devices to observe or record customers in the merchant's dressing room, fitting room, changing room, or restroom when such room provides a reasonable expectation of privacy." § 877.26(1), Fla. Stat. (2004).[1]

[1] Generally speaking, businesses post signs when they use video or audio surveillance on the premises. *See e.g. State v. Caraballo*, 198 So. 3d 819, 821 (Fla. 2d DCA 2016)("The conversation took place between 9 a.m. and 10 a.m., when the

Similarly, the Legislature criminalized sexual cyberharassment in light of technological advantages, finding that:

> (b) It is becoming a common practice for persons to publish a sexually explicit image of another to Internet websites or to disseminate such an image through electronic means without the depicted person's consent, contrary to the depicted person's reasonable expectation of privacy, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person.
>
> […]
>
> (d) The publication or dissemination of such images through the use of Internet websites or electronic means creates a permanent record of the depicted person's private nudity or private sexually explicit conduct.
>
> (e) The existence of such images on Internet websites or the dissemination of such images without the consent of all parties depicted in the images causes those depicted in such images significant psychological harm.
>
> (f) Safeguarding the psychological well-being and privacy interests of persons depicted in such images is compelling.

§ 784.049(1), Fla. Stat. (2019).

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business was open to the public, and the front door of the store was open. Ms. Caraballo testified that she knew there were video cameras in the store. Further, there is a sign at the front of the store stating, "Notice. This business is under 24–hour video and audio surveillance."). Similarly, many companies announce that customers are being recorded for quality assurance purposes before connecting them to a representative during a telephone call.

Likewise, a prohibition on video voyeurism was criminalized in section 810.145, Florida Statutes. There, law enforcement is specifically exempt, but not without limits. § 810.145, Fla. Stat. (2012). Through these statutes, the Legislature has recognized that video recording is inherently invasive and must be done ethically.

The same privacy concerns apply to the State's dragnet surveillance here. Certainly, an audio recording of a massage being released to the public would be an invasion of privacy. Likewise, law enforcement tracking someone's location via cell phone towers is an invasion of privacy. However, as discussed above, amici contend that video is inherently more intrusive. For example, there would be an intrusion into privacy if law enforcement had only recorded audio in the massage rooms here, but a video of that same exchange would be considerably more embarrassing because video is inherently more revealing.

This Court's opinion in *Parkerson* is instructive. *Parkerson v. State*, 163 So. 3d 683 (Fla. 4th DCA 2015). There, this Court discussed the implications of the video voyeurism statute, section 810.145, Florida Statutes (2010), with respect to private investigators operating for profit. *Id.* at 690. Under those facts, Parkerson did not have standing to enforce the rights of those private investigators for two reasons. *Id.* This Court ruled as it did because he challenged the statute for

overbreadth and the statute did not implicate the First Amendment or profit. *Id.* at 690-91.

This Court's discussion of the merits of the defendant's argument is instructive here:

> The defendant's argument also fails on the merits. Section 810.14(1) requires that the voyeur "secretly" observe another person and that the person being observed is located where there is a "reasonable expectation of privacy." § 810.14(1), Fla. Stat. (2011). These qualifying words exclude the defendant's hypothetical situation where a defendant is charged with voyeurism for observing another person with their knowledge and consent. If a person knows and consents to being observed in a location, such observation is not being done "secretly" and the person being observed has no "reasonable expectation of privacy" in that location.
>
> The defendant's examples similarly do not hold water. Reality television show contestants living in a home continually observed by cameras, and exhibitionists agreeing to a voyeur observing them in their home, are not being observed "secretly," and have no "reasonable expectation of privacy" in the location in which they are being observed, because they know of and have consented to such observations.

Id. at 692. Unlike those hypothetical examples, clients at the day spa here **did** have a reasonable expectation that they would not be filmed in private massage rooms where they received massages from state-licensed massage therapists, nor did they consent to being recorded there.

d. Third parties have no meaningful recourse if this evidence is admitted.

If the owner of the day spa had set up recording equipment in their own establishment as the State did here, they would be guilty of a crime. § 877.26(3), Fla. Stat. (2004). The only realistic consequence for the State, however, is suppression of evidence in a criminal case, which is not feasible for all of the patrons who were recorded. In that sense, this case presents a new perspective on that longstanding principle, in that the State surreptitiously recorded multiple citizens on video over the course of several days, four of whom the States concedes were innocent and another ten of whom the State lacks sufficient evidence to charge with any offense.[2] State's Br. 8.

The county court correctly found that the illegal surreptitious recordings should be suppressed, which is consistent with the deterrent effect intended by the exclusionary rule. However, an underlying issue here is what recourse, if any, those innocent citizens who were not charged with crimes have against the government's intrusion into their privacy, because there is no criminal case in which to suppress the video. To be clear, a citizen's privacy rights are still violated when the State views them getting a private massage, even if no criminal charges follow. For example, Jane Doe is a client who went to the massage parlor at issue

[2] The other patrons were not named in the county court's order, but were discussed on page 7 of its order granting the motion to suppress at issue here. R.2098. This brief will use Jane Doe, one such woman who was recorded, as an example.

with no criminal intent and engaged in no criminal activity; her visit was completely unrelated to Mr. Kraft or any other defendant, none of whom she had ever met. However, her visit was during one of the days covered by the warrant, so her entire massage was recorded, and at least some of it was viewed by law enforcement, without her knowledge or consent. R. 2099-100.

While it is true that she was not charged with any crimes, the fact remains that Ms. Doe has virtually no recourse for the State recording and viewing her private massage. That there were no criminal charges filed as a result of Ms. Doe's legal conduct is probably little consolation for the intrusion into her privacy. Ostensibly, somebody in Ms. Doe's situation might not even be aware she was recorded, in which case the State has no incentive to inform her of the intrusion after the fact. It is for that reason that the defendants must have standing to challenge this search.

Generally speaking, the right to privacy is an individual right and cannot be asserted on behalf of third parties. *Alderman v. U.S.*, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."). "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself,

not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* at 171-72.

This principle is largely derived from co-defendants. *See Alderman v. United States,* 394 U.S. 165, 171-72 (1969)(Discussing that "[c]oconspirators and codefendants have been accorded no special standing" to have evidence excluded.). Explaining its reasoning, the United States Supreme Court emphasized that "there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a **party who cannot claim this predicate for exclusion**." *Id.* at 174 (emphasis added). Anybody recorded here could claim this predicate, *see id.* at 176, although it would not be realistic for the individuals who have not been charged.

The law recognizes that those who are harmed may not always be able to meaningfully advocate for their own interests. As discussed below, public policy considerations support standing here because uncharged parties cannot meaningfully advocate for their own interests. For example, the United States Supreme Court recognized a third-party standing exception in the context of excluded jurors:

> While third-party standing is a limited exception, the *Powers* [*v. Ohio*, 499 U.S. 400 (1991)] Court recognized that a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a

> concrete injury, that he has a close relation to the third party, and that there exists some hindrance to the third party's ability to protect its own interests

Georgia v. McCollum, 505 U.S. 42, 56 (1992).

Third-party standing is not the issue here because Mr. Kraft has standing, *see* Answer Brief at 30-34, but the Supreme Court's analysis is instructive. Mr. Kraft has certainly suffered an injury, in that he was surreptitiously recorded by the government when he had a reasonable expectation of privacy, as were the third parties. The close relation is more attenuated, in that the third parties were patrons at the same establishment subjected to the same surveillance, but did not necessarily know Mr. Kraft. However, for purposes of the Fourth Amendment, being surreptitiously recorded by the government without minimization is enough of a connection and standing is not the issue here. Most importantly, these third parties are almost entirely hindered from protecting their own interests, because they might not even know they were recorded. Furthermore, because the third parties do not have criminal cases, their normal recourse, suppression, is off the table and they are left only with the possibility of a costly civil suit against the government. The United States Supreme Court noted that "there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation" and the same financial barriers exist to uncharged patrons here. *Powers*, 499 U.S. at 415. Furthermore, even if

such a civil suit was successful, it is unlikely that it would deter the State from engaging in such conduct in the future in criminal cases: suppression is the only meaningful deterrent.

The New Jersey Supreme Court recognized the danger of this approach in the context of a wiretap, noting that:

> Many of the parties to non-incriminating conversations are innocent callers who are not themselves defendants; they cannot bring a pretrial motion to suppress for failure to minimize. Indeed, they may never know their call was tapped. The only persons left to challenge the State's minimization are the defendants themselves, and many of them were party only to incriminating conversations. If they do not have standing to raise the minimization issue, few persons will be left to raise it. Consequently, the minimization procedures employed by the State would completely escape judicial scrutiny in many cases.

State v. Catania, 427 A. 2d 537, 541 (N.J. 1981).

This Court should conclude that Mr. Kraft has standing because to hold otherwise would encourage the State to record and view legal activity with the knowledge that uncharged citizens would be none the wiser and would have no meaningful recourse unless charged with a crime. A citizen would have no practical recourse for such an intrusion if they are not charged with a crime, but, even if they were, their most likely recourse would be suppression of evidence in a criminal case. Because of that, anyone not charged with a crime only has the possibility of a civil suit as a remedy, which, as discussed in *Powers*, may not be

feasible. Furthermore, a contrary approach would give the government a perverse incentive to err on the side of mass surveillance, knowing it could not be easily challenged. "Such an 'ends justifies the means' approach to the Fourth Amendment is simply not what the Founders intended when they embodied a barrier at the door of the home in the Fourth Amendment." *State v. Rabb*, 930 So. 2d 1175, 1190-91 (Fla. 4th DCA 2006).

This is not to suggest that the State could never investigate crimes with video surveillance, if proper minimization techniques were followed. Indeed, the county court's order notes that there was probable cause to conduct the search: the issue was that the warrant was executed without minimization. R.2096–101. Here, for example, any guidelines as to recording female patrons, who were not suspected of criminal activity, would demonstrate that the warrant and the officers attempted to minimize the video surveillance. Instead, the JPD here thought the Fourth Amendment gave it *carte blanche* authority to record and view citizens in an intimate setting, knowing that at least some of the patrons recorded were not engaging in criminal activity.

In conclusion, although uncharged third parties may have the possibility of a civil suit against the State, suppression in criminal cases such as Mr. Kraft's is a more feasible remedy with a stronger deterrent effect on misconduct by the State. Allowing video evidence here, with no attempt to minimize, would encourage the

State to adopt the very "ends justify the means" approach that this Court cautioned against in *Rabb*. This Court should affirm the circuit court's order.

CONCLUSION

The county court correctly found that the State failed to comply with the minimization requirement and that the evidence must be suppressed to protect the rights of third parties. This Court should affirm the county court's order.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic service through the Florida e-filing Portal to counsel of record on November 12, 2019. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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