No. 4D19-1499

IN THE

Fourth District Court of Appeal of Florida

STATE OF FLORIDA,
Appellant,

v.

ROBERT KRAFT,
Appellee.

On Appeal from the County Court of the Fifteenth Judicial Circuit in and for Palm Beach County
L.T. No. 2019MM002346AXXX

INITIAL BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

On consecutive days in January 2019, Robert Kraft paid for illicit sexual acts at a massage parlor in Jupiter, Florida. Based on video captured by surveillance cameras police installed in the Spa pursuant to a warrant, Mr. Kraft's guilt is a virtual certainty. Indeed, over a 5-day span during which police recorded activity in a massage business suspected of operating as a brothel, police observed overwhelming evidence of felony and misdemeanor prostitution offenses, with 90% of recorded video reflecting criminal misconduct. But a county court judge has now suppressed these videos, citing an alleged failure by police to "minimize" the intrusion—not into Mr. Kraft's own Fourth Amendment rights, but into the rights of certain third parties who have not been charged with any crime. For a number of reasons, this Court should reverse that suppression order.

I. A. On the merits of the Fourth Amendment claim, the county court erroneously concluded that the warrant, which expressly authorized delayed-notice video surveillance, was facially invalid because it neglected to instruct police to take affirmative steps to minimize the recording of innocent Spa goers. That argument fails in light of the constitutional text, settled Supreme Court precedent, and the purpose of the Fourth Amendment's Warrant Clause, which together require only that the warrant be issued by a neutral and detached magistrate, be predicated on a showing of probable cause, and be particularized as to the place to be searched and

items to be seized. This warrant satisfied all three requirements.

Thus, for a constitutional violation to lie, police must have *executed* the warrant in an unreasonable fashion. In the totality of the circumstances, however, police properly engaged in extrinsic limitations on the search by recording for only five days and only in locations where prostitution was most strongly suspected of occurring, and by limiting the number of detectives who could view the video. On balance, more stringent minimization procedures were not required. It is undisputed, for instance, that police could have viewed a person in a state of undress at the start of each massage to assess indicators of crime; and if that were true, little additional intrusion into privacy was occasioned by continuing to watch the massage for the altogether permissible purpose of confirming whether the massage involved the illicit sale of sexual services. Next, as the record before this Court makes clear, the criminal conduct in question typically took place at the *end*, not the *beginning*, of an illicit massage, making it impossible for law-enforcement officers to predict when such a massage would culminate in the sale of sexual services. If anything, more rigid minimization could have frustrated the objectives of the search. And courts have recognized that, when dealing with a conspiracy, police must be afforded greater leeway in executing the search.

Last, though it is of course preferable that no customer be recorded receiving a lawful massage, the recorded acts proved to be overwhelmingly criminal in nature.

Of the 39 massage recordings, only four—or a mere 10%—failed to capture criminal conduct. Notably, the Supreme Court has itself upheld a search even though the majority of intercepted activities were *lawful* in nature. That precedent dictates that the search at issue here was constitutionally reasonable.

B. Even assuming a constitutional violation, suppression of the videos is not an appropriate remedy. With respect to any violation of the Warrant Clause, the good faith exception to the exclusionary rule precludes suppression because, in the absence of settled case law establishing a violation, law enforcement reasonably relied on the magistrate's decision to issue the warrant. And as to any violations during the execution of this search, Mr. Kraft's suppression claims are doubly barred. First, at best, his claim of a Fourth Amendment violation was predicated on alleged harms to the privacy of *other persons* who have not been charged with any crime and whose rights are not at issue in this case. But Mr. Kraft lacks standing to vicariously assert the Fourth Amendment rights of third parties. That alone is fatal to his claims. Second, in no event would Mr. Kraft be entitled to total suppression of all video in the case; rather, he would be entitled to suppress only the unlawfully seized videos, a class which would not include the video evidence of his own prostitution offenses.

II. Finally, Mr. Kraft pressed several additional arguments in the county court in favor of suppression, which the court either expressly rejected or declined to

reach. Suppression is not justified on any of those bases.

STATEMENT OF THE CASE AND FACTS

1. As part of a broader law enforcement effort spanning at least three Florida counties, the Jupiter Police Department began investigating the Orchids of Asia Day Spa in October 2018 after receiving information that the Spa might be offering illicit sexual services to its nearly all-male clientele. Detectives from the Martin County Sheriff's Office, which was running its own investigation of prostitution and human trafficking at illicit massage parlors in their county, alerted Jupiter Detective Andrew Sharp that "there was a similar business in the Town of Jupiter." R. 2105. Orchids of Asia aroused suspicion because its former employee was now managing a Martin County spa believed to be a center of trafficking due to its odd business hours and the fact that its workers were living inside the spa building. R. 2835-36.

Detective Sharp therefore began researching the Orchids of Asia Day Spa by scouring several adult-oriented websites known for advertising illicit sexual services, Rubmaps and USA Sex Guide. R. 2105, 2355. On each, he found advertisements and reviews classifying the Spa as a "rub and tug," a slang term for a massage business that sells sex. R. 2105, 2356. The majority of posts he uncovered on these websites reported that female employees at the Spa would provide customers with a "hand job," a sexual act involving the manual manipulation of the male genitals, in exchange for money. R. 2105.

To gather more information, Jupiter Police started visually surveilling the Spa and found that its patrons were "overwhelmingly (if not exclusively) male." R. 2108, 2111. During a period of several days in November 2018, Detective Sharp observed more than 100 men enter the Spa and remain for 30-60 minutes. R. 2108, 2839. There were "a few" women who entered the Spa, but each exited soon after, leading Detective Sharp to conclude that they had not obtained the services advertised by the Spa. R. 2424, 2839. The Spa kept odd business hours, sometimes not closing until close to midnight. R. 2108. At one point, police tailed the Spa's manager, Lei Wang, as she visited a spa in Martin County known to be an illicit massage parlor. R. 2111.

Detective Sharp next contacted Karen Herzog, an inspector with the Department of Health, and shared his concerns. R. 2108, 2374, 2677. He inquired about the process of conducting annual health inspections and requested that, if Inspector Herzog had not done so already, she perform a routine inspection. R. 2108, 2674-75. Because the Spa was due for its annual inspection, Herzog visited the Spa within the next several days. R. 2665, 2677.

While inside, Inspector Herzog identified Wang as the manager of the Spa and Hua Cao and Shen Mingbi as the female massage workers. R. 2108, 2717-19. Ms. Cao was hesitant to provide her identification but eventually did so. R. 2699-2700, 2719. As Inspector Herzog conducted her investigation, the manager appeared

"nervous" and attempted to conceal suspicious objects. R. 2699, 2704-05. For instance, when Herzog entered a room containing beds, "significant amounts of clothing," a flat iron, and other personal items, Ms. Wang began "trying to cover stuff up with a blanket." R. 2704-05, 2767. Elsewhere she found dressers full of clothing and pill boxes marked for each day of the week. R. 2703, 2772. Inspector Herzog—who is trained to recognize indicators of human trafficking, like the use of a storefront as a "primary domicile" for the business's employees—believed the bedding, clothing, suitcases, and behavior of the employees were red flags. R. 2660-61, 2663. In the wake of her inspection, she therefore called a human trafficking hotline to report that the Spa was engaged in suspicious activity. R. 2787.

Trash pulls from the dumpster outside the Spa, done by police after the health inspection, revealed tissues containing seminal fluid and receipts with the name "Lulu," matching a name seen on Rubmaps.com. R. 2109, 2375-76.

Finally, to confirm that prostitution was occurring there, police conducted traffic stops of four men seen leaving the Spa, referred to in the subsequent warrant affidavit as Subjects A-D. Each man agreed to speak with Detective Sharp and admitted that they paid a fee for the masseuse to manually stimulate their penis to ejaculation at the conclusion of a massage. R. 2109-11, 2386.

2. Based on all this information, Detective Sharp sought a warrant authorizing the installation, monitoring, and recording of video cameras in the Spa. A magistrate

judge issued a warrant authorizing that surveillance on January 15, 2019. R. 2115-17. The warrant permitted law enforcement to surreptitiously install hidden video cameras in the Spa "only in locations where prostitution is believed to be occurring" and in the lobby. R. 2117. No cameras were allowed "in areas expected to be non-criminal in nature, i.e., kitchen, bathroom, personal bedrooms." *Id.*

The warrant authorized a search "for no more than five days" for "Evidence of Prostitution in addition to fruits of, and instrumentalities of violation of the law(s), associated with Deriving Support from the Proceeds of Prostitution specifically the Non-audio, video recordings of individuals engaged in acts related to these violations." R. 2116. It required police to notify the Spa of the search within seven days of the operation's termination. R. 2117.

After installing hidden cameras in four of the Spa's massage rooms and in the front lobby, Detectives Sharp, Troy Jenne, and Danielle Hirsch monitored and recorded video over the course of five days. Per the warrant's express instructions, this monitoring was observable only by the detective-monitors. R. 2117, 2506-07, 3102. They monitored solely during business hours, though recording continued around the clock. R. 2117, 2335, 2505. During monitoring, the video feeds appeared on a computer screen. R. 3106-07. To lessen the intrusion into seemingly lawful massages, the detectives toggled between video feeds when it appeared that one feed displayed, or might soon display, criminal conduct but others did not. R. 2971-73

("If we believed that no criminal activity was occurring then they were to not monitor that camera" and "you could select this button and that would bring up this different camera on your view."), 2978, 3107-08, 3145. They also focused on the end of each massage because the sexual conduct typically was a so-called "happy ending." R. 2505. The search warrant did not discuss "minimization," and the detective-monitors did not receive formal written instructions addressing how to minimize.

As a result of this operation, police filmed 25 Spa customers pay for sexual services; 10 more believed to have paid for sex, but whose offenses could not be confirmed because of dim lighting in the massage room; and four customers for whom the recordings did not reveal evidence of a crime. R. 3238. Of those latter four, two were women and two were men. R. 3103-04, 3137. None of those four individuals were recorded naked. R. 3104-05, 3137, 3163.

Robert Kraft was identified as a perpetrator, having paid for sex acts on two occasions, R. 609-11 (describing offenses), 2372, 3005, 3132, resulting in two misdemeanor charges for solicitation of prostitution. R. 2053. In another pending case, Spa employees were charged with felony prostitution offenses, each punishable by up to 15 years in prison. *See State v. Zhang et al.*, 2019CF001606MB. To date, the Spa's massage workers have declined to cooperate with police, and no human trafficking charges have been brought. *See* R. 2859-60.

3. Before trial, Mr. Kraft moved to suppress the video of his prostitution offenses, citing six theories. He contended, *first*, that delayed-notice video surveillance warrants were unauthorized in Florida. R. 240-44. *Second*, that this warrant violated the Fourth Amendment due to an absence of "minimization" instructions and a lack of "necessity" for the video search. R. 244-53. *Third*, that the warrant was predicated on "material misrepresentations" in the warrant affidavit. R. 253-55. *Fourth*, that Inspector Herzog's administrative search was a "pretext" for a law enforcement motive. R. 255-57. *Fifth*, that police failed to comply with the warrant's 10-day return period. R. 257. And *sixth*, that a traffic stop of Mr. Kraft was unlawful. R. 257-58. An evidentiary hearing was held over several days.

4. The county court concluded that the warrant was supported by probable cause, that it was sufficiently particularized, and that video surveillance was otherwise reasonable in the circumstances. R. 2096-97. Nevertheless, it suppressed the video because "the minimization requirement has not been satisfied in at least two respects: first, the search warrant itself is insufficient; and, second, minimization techniques were not sufficiently employed." R. 2097. As to the warrant itself, the court found that the warrant failed to "outline[] the minimization procedures to be followed." R. 2098. Appropriate minimization guidance, it said, would have instructed police not to record video of *any* women receiving massages, since "[a]ll of the assertions of illegal activity in the search warrant suggest or describe only

male genital stimulation." *Id.* Additionally, the court faulted the warrant for omitting instructions for "viewing male spa clients receiving lawful services, or male clients when no probable cause can be established." *Id.* In concluding that minimization instructions were a required component of a valid video surveillance warrant, the county court cited federal cases importing the minimization requirement from the audio wiretapping context, where a federal *statute*—Title III of the Omnibus Crime Control and Safe Streets Act of 1968—explicitly requires minimization. *Id.* at 2095-96. Notably, the parties agreed that no statute, either federal or state, requires minimization of non-audio video surveillance of the kind at issue here.

With respect to the execution of the search, the county court deemed it "unacceptable" that "some totally innocent women and men had their entire lawful time spent in a massage room fully recorded and viewed intermittently by a detective-monitor." R. 2099. It recognized, however, that certain alleged indicators of lawful massages "may not have been known to the detective-monitors at the outset of surveillance." R. 2100. In addition, the county court expressly found that at least some unlawful massages culminating in a "happy ending" took place notwithstanding the presence of such indicators. *Id.*

For example, in the court's view, police should have known to stop recording the video feed when a Spa customer "left on their underwear" because *most* customers who paid for sex removed their undergarments at the start of the massage.

Id. But as the court itself acknowledged, at least "one male started with underwear on but had his underwear later removed" to receive sex. *Id.*; *see* R. 3152. Similarly, the court believed police should have minimized when massage room lights "were not dimmed" at the start of massages. R. 2100. Yet it did not offer any basis for concluding that lights could not be dimmed in the midst of a massage; nor did it dispute that material evidence of prostitution-related offenses—including evidence of payments, sexual advances, or sexual acts themselves—might be captured prior to such dimming.

5. Following its ruling, the county court certified three questions of great public importance: *First*, whether Mr. Kraft had standing to contest the search; *second*, whether the warrant was valid; and *third*, whether the search was properly executed. R. 2175-76. The State took an interlocutory appeal, and this Court accepted jurisdiction. *See* Fla. R. App. P. 9.160(b), (e)(2).[1]

STANDARD OF REVIEW

In reviewing a suppression order, this Court defers to the trial court's factual findings but reviews *de novo* the trial court's application of law to fact. *Wyche v. State*, 987 So. 2d 23, 25 (Fla. 2008).

[1] In prosecutions arising from the same or related trafficking/prostitution investigations throughout South Florida, several other county and circuit judges have suppressed video evidence due to alleged failures to minimize. Those orders are presently on appeal to this Court. *See State v. Freels, et al.*, No. 4D19-1655; *State v. Zhang, et al.*, No. 4D19-2024.

ARGUMENT

I. THE COUNTY COURT ERRONEOUSLY SUPPRESSED THE VIDEO EVIDENCE OF KRAFT'S PROSTITUTION OFFENSES.

To combat a criminal enterprise engaged in, at a minimum, felony prostitution offenses, law enforcement obtained a search warrant to conduct video surveillance over a 5-day period of a location where rampant prostitution was known to be occurring. That search turned up overwhelming evidence that both the Spa and its customers were violating the criminal law. By subsequently invalidating both the warrant and the ensuing search, the county court erred. Even if the police overstepped lawful bounds, however, Mr. Kraft was not entitled to seek suppression of the proof of his purchase of sexual acts for a series of reasons. The suppression order must therefore be reversed.

A. Any Fourth Amendment minimization requirements were satisfied.

Neither theory adopted by the county court to invalidate this search was correct. First, so long as a search warrant is based on probable cause and states with particularity the place to be searched and things to be seized, the warrant need not independently instruct law enforcement to "minimize." Second, minimization is not a freestanding Fourth Amendment requirement for a reasonable search; to the extent that minimization may in some circumstances be required, law enforcement efforts here were constitutionally reasonable.

1. The warrant complied with the Warrant Clause.

Issued by a neutral and detached magistrate, the warrant here was particularized as to the place to be searched—allowing cameras to be installed in the Spa "only in locations where prostitution [wa]s believed to be occurring" and in the front lobby, and not in the "kitchen, bathroom, [or] personal bedrooms," R. 2117—and specified the types of conduct police were to record—"[e]vidence of prostitution" and "individuals engaged in acts related to [Deriving Support from the Proceeds of Prostitution]." R. 2116. The county court agreed that the warrant "satisfie[d] the particularity requirement," R. 2097, and further concluded that the warrant was supported by probable cause. R. 2096-97.

The court nevertheless invalidated the warrant for failing to "outline[] the minimization procedures" to reduce any intrusion into innocent, private conduct. R. 2098. That was incorrect. As explained below, that follows from the Warrant Clause's plain text, which makes no mention of a minimization requirement; from the Supreme Court's precedents, which have routinely rejected the addition of atextual conditions on the issuance of warrants; and because the existing probable cause and particularity requirements amply safeguard protected privacy interests. *See Oliver v. United States*, 466 U.S. 170, 181 (1984) (considering "the text of the Fourth Amendment and [] the historical and contemporary understanding of its purposes"). While minimization procedures are required by certain *statutes*

governing audio surveillance, those statutes do not apply to the non-audio video surveillance at issue here. And such statutory minimization procedures, however sound as a matter of social policy, are not *constitutionally* required by the Fourth Amendment. Indeed, those statutes would be superfluous if the procedures they outlined were independently mandated by the Constitution.

A. "Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986). "If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written." *Id.* (citation omitted). That goes for the Fourth Amendment. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-65, 274 (1990) (looking first and foremost to the "text of the Fourth Amendment").

The Fourth Amendment provides: "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." U.S. Const. amend. IV. That text contains "two discrete commands." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 762 (1994). Under the Reasonableness Clause, police must refrain from unreasonable searches and seizures; and, under the Warrant

Clause, a magistrate may issue a warrant only upon finding probable cause and only if the warrant describes with particularity the targets of the search or seizure.

Assessing the constitutional text, the Supreme Court has "interpreted [the Warrant Clause] to require only three things." *Dalia v. United States*, 441 U.S. 238, 255 (1979). Those requirements are:

> First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense. Finally, warrants must particularly describe the things to be seized, as well as the place to be searched.

Id. (quotation marks and citations omitted). In other words, the text of the Warrant Clause is "precise and clear," and therefore "decisive" as to the scope of its requirements. *United States v. Grubbs*, 547 U.S. 90, 97-98 (2006) (quoting *Dalia*, 441 U.S. at 255).

Applying that reasoning here, minimization is not a constitutional requirement for non-audio video surveillance. "[N]othing in the Warrant Clause requires that the warrant itself state that the officers will conduct the search in such a way as to minimize seeing or discovering things not the subject of the warrant." *United States v. Koyomejian*, 970 F.2d 536, 548 (9th Cir. 1992) (Kozinski, J., concurring) (addressing video surveillance). The particularity prong, which most closely resembles the minimization requirement the county court imposed here, is met so long as "[t]he warrant … '[is] specific enough to enable the person conducting the

search reasonably to identify the things authorized to be seized.'" *Id.* (citation omitted).

As a result, while minimization may be a "pretty good idea" and "in particular cases the court might weigh the failure to minimize in determining whether the warrant was properly *executed*," *id.* at 549 (emphasis added), a warrant cannot be deemed invalid simply because it failed to set out minimization instructions. In sum, "nothing in the Warrant Clause … imposes such a requirement." *Id.*; *see also United States v. Batiste*, No. 06-20373-CR, 2007 WL 2412837, at *8 n.9 (S.D. Fla. Aug. 21, 2007) (opining that minimization instructions are "*not* [a matter of] constitutional principle" (emphasis in original)).

To be sure, a number of federal courts have expressed the view that an order authorizing video surveillance should set out instructions for limiting police intrusion into non-criminal activity. *See, e.g.*, *Koyomejian*, 970 F.2d at 542; *United States v. Torres*, 751 F.2d 875, 884 (7th Cir. 1984); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1437 (10th Cir. 1990). But none of those courts explained how this minimization requirement could be justified by the Fourth Amendment's text; instead, they analogized to *statutes* addressing the wiretap (*i.e.*, audio surveillance) context. In that setting, Congress has dictated that "[e]very order and extension thereof shall contain a provision that the authorization to intercept … shall be conducted in such a way as to minimize the interception of communications not

otherwise subject to interception under this chapter." 18 U.S.C. § 2518(5). That legislative judgment is "much more specific than the Constitution requires" and, indeed, "go[es] far beyond anything the Constitution demands." *Torres*, 751 F.2d at 891 (Cudahy, J., concurring in result).

Congress, as a legislative body, of course "remain[s] free to impose additional limitations" above and beyond those contained in the Fourth Amendment. *Kansas v. Cheever*, 571 U.S. 87, 98 n.4 (2013). But video surveillance is subject neither to Title III nor Florida's own, state-law wiretapping analogue, § 934.09, Fla. Stat. (2019); *see Minotty v. Baudo*, 42 So. 3d 824, 832 (Fla. 4th DCA 2010) (holding that Chapter 934 is inapplicable to "silent video surveillance"), and thus is controlled solely by the text of the Warrant Clause, which does not require minimization.

B. Consistent with the constitutional text, the Supreme Court has refused to impose requirements not specified by the Warrant Clause.

In *Dalia v. United States*, for instance, the Court declined to read into the Warrant Clause the additional requirement that a warrant specify the means of its execution. 441 U.S. at 256. After pointing out that the Warrant Clause demands only a magistrate, probable cause, and particularity, *id.* at 255, the Court held that "[n]othing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise

manner in which they are to be executed." *Id.* at 257. "On the contrary," it emphasized, "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant." *Id.*; *see also Grubbs*, 547 U.S. at 97 ("reject[ing] efforts to expand the scope of this provision to embrace unenumerated matters").[2]

C. Finally, existing textual requirements in the Warrant Clause amply safeguard the types of privacy interests animating the county court's concerns. "The purpose of the probable cause requirement of the Fourth Amendment," for instance, "[is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed." *Berger v. State of New York*, 388 U.S. 41, 59 (1967). To satisfy this purpose, a magistrate must find sufficient indications that "would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Florida v. Harris*, 568 U.S. 237, 248 (2013). This inquiry not only demands that searches be conducted only

[2] These holdings comport with the Supreme Court's earlier decision in *Berger v. New York*, 388 U.S. 41, 58-60 (1967), where it invalidated a New York statute authorizing wiretap orders without requiring particularity. The Court wrote: "It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded …' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Id.* at 59. That concern is not present here, however, since the warrant was particularized. And notably, the Supreme Court did not fault the New York statute for failing to require minimization instructions.

upon an acceptable level of suspicion but also guarantees the "detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989). Those protections were present here.

On top of that, by insisting that warrants be particularized, the Fourth Amendment addresses "the evils of the use of the general warrant in England," *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967) (citation omitted)—namely, "exploratory rummaging in a person's belongings." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). As the Supreme Court has observed, "[b]y limiting the authorization to search to the specific areas and things for which there is probable cause to search," the particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

When it comes to video surveillance, particularity serves the very same function. Of particular relevance, the warrant in this case did not authorize a roving surveillance of *all* places where prostitution might occur involving the Spa's employees. It instead allowed the search to occur only on Spa premises and, even then, only in specific locations where prostitution "[wa]s believed to be occurring." R. 2117. For all these reasons, the county court erred in suppressing the video on the

theory that the warrant itself was invalid.

2. To whatever extent minimization is required under the Reasonableness Clause, the execution of the warrant was reasonable in the circumstances.

Along with finding the warrant defective, the county court faulted police for their "implementation of minimization techniques." R. 2099. It was "unacceptable," the court concluded, "that some totally innocent women and men had their entire lawful time spent in a massage room fully recorded and viewed intermittently." *Id.* That was incorrect in light of two considerations. First, minimization is not categorically required by the Fourth Amendment's Reasonableness Clause. Second, given the totality of the circumstances and difficulties inherent in this type of police surveillance, law enforcement's conduct was reasonable.

A. "[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Maryland v. King*, 569 U.S. 435, 446-47 (2013) (quoting *Schmerber v. California*, 384 U.S. 757, 768 (1966)). "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Id.* at 447 (citation omitted).

"The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 135 S. Ct.

1368, 1371 (2015) (citations omitted). Thus, a court must "assess[], on the one hand, the degree to which [a particular search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 119 (2001) (quotation marks and citation omitted). Some circumstances, the Supreme Court has suggested, may require that police "take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andresen*, 427 U.S. at 482 n.11. In weighing the Fourth Amendment balance, however, the Court has frequently rejected the use of "overly broad categorical approach[es]." *Missouri v. McNeely*, 569 U.S. 141, 158 (2013) (plurality).

The Court has applied that principle in the related wiretap context. In *Scott v. United States*, it considered whether police conducting a wiretap failed to satisfy the statutory obligation to do so "in such a way as to minimize the interception of communications not otherwise subject to interception." 436 U.S. 128, 130 (1978) (quoting 18 U.S.C. § 2518(5) (1976)). Police "made no efforts" to minimize during that wiretap, and 60% of intercepted calls were non-pertinent to the investigation. *Id.* at 132, 135. But that did not end the inquiry. Instead, the Court found that because the "language of the [Fourth] Amendment itself proscribes only 'unreasonable' searches and seizures," whether minimization is required "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting

him at the time." *Id.* at 136-37. Underscoring the "necessarily ad hoc nature of any determination of reasonableness," the Court stressed that "there can be no inflexible rule which will decide every case." *Id.* at 139.

Applying that test, and despite the government's failure to take affirmative steps to minimize the degree of intrusion, the Supreme Court held that the search was reasonable. *Id.* at 141-43. *Scott* thus demonstrates that minimization is not a standalone Fourth Amendment requirement; it is relevant, rather, only to the extent that, in the totality of the circumstances, a failure to minimize would render a particular search constitutionally unreasonable.

B. Mr. Kraft cannot establish, under the unique facts and circumstances of this case, that police executed the search in an unreasonable manner.

First, because the Fourth Amendment test is one of reasonableness, the level of minimization required—if any—is a product of the intrusiveness of the search and the likelihood that minimization will serve some legitimate privacy interest. *See Knights*, 534 U.S. at 119-20. Here, requiring police to conduct spot-checks[3] of the video feed, or to discontinue recording and monitoring entirely if certain non-dispositive conditions were present, would have done little to advance privacy

[3] "Spot-checks" entail listening to, or viewing, a wiretap/video feed only intermittently to determine when relevant communications or conduct is occurring, at which point recording is resumed. This practice increases the risk that relevant, criminal conduct will go undetected by police.

interests, while simultaneously undermining the utility of the surveillance.

Notably, this video surveillance was qualitatively different from the telephone wiretapping considered by federal courts. In the wiretap context, failure to minimize may result in a government agent's undue exposure to additional speech. With each new line of communication that is overheard, potentially addressing different topics of varying sensitivity and new ideas or messages, the degree of intrusion is magnified. Over the course of a single phone call, police may overhear conversations "about moving problems" at minute 1, "about the baby teasing the dog" at minute 15, "about disagreements with relatives" at minute 40, and "narcotics conversations" at minute 50. *United States v. Turner*, 528 F.2d 143, 157 (9th Cir. 1975). A law enforcement officer who listens to a wiretap for an hour may therefore hear thousands of exchanges between multiple individuals, each of which could occasion a unique intrusion into sensitive areas.

The same is not true of the non-audio video surveillance at issue here. Once police briefly observed a customer in a state of undress—which neither Mr. Kraft nor the county court disputed could be done at the start of each massage—no substantial additional intrusion into that customer's privacy resulted from continuing to observe the massage to determine if it would culminate in unlawful sexual activity. That is, having already seen a customer naked or nearly naked, watching him or her in the same state of undress for a longer period resulted in only a *de*

minimis further intrusion into privacy. A massage, unlike a conversation, is highly repetitive; by continuing to monitor the massage, the detectives would see the masseuse move from one muscle group to another, but little beyond than that.

Mr. Kraft has never argued otherwise, and he has never articulated what new sensitive information police would impermissibly discover by viewing a massage in its entirety. If, as he apparently concedes, viewing the first five minutes of a massage was acceptable, it is hard to conceive why viewing the rest of the massage should be deemed constitutionally impermissible—particularly when the evidence sought to be obtained was the so-called "happy ending" that, by definition, takes place at the conclusion of the transaction. *Cf. United States v. Jacobsen*, 466 U.S. 109, 119 (1984) (finding search reasonable because "there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told").

Second, compared with the reduced value of minimization here, a more robust minimization protocol risked jeopardizing the lawful objectives of the surveillance operation. The detective-monitors' task was complicated by two factors, beginning with the short duration of the criminal conduct at issue. If, for example, the detectives engaged in spot-checking on a 5-minute rotation (monitor and record for five minutes, then cease surveillance for five minutes), they could easily miss the sexual act, exchange of payment, and relevant context. Another complicating factor was the

uncertainty as to when during a massage the sexual act would occur. Although police knew the prostitution event typically occurred at the end of the massage, they had no way of determining in advance how long a massage would last, and therefore could not predict when to monitor and record. R. 3145, 3163.

In other words, minimization "may well [have] be[en] impractical," since it was difficult "for the monitoring agent[s] to discern whether any given intercepted [massage] concern[ed] a subject within the scope of the investigation." *See United States v. Mansoori*, 304 F.3d 635, 645 (7th Cir. 2002). If anything, detective-monitors went *beyond* constitutional requirements in their attempt to respect the privacy interests of potentially lawful customers, focusing their attention on video feeds where criminal conduct was likeliest to be occurring, rather than monitoring each of the video feeds indiscriminately. R. 2504-05, 2971-73, 3107-08.

Third, as the Supreme Court has explained in the wiretap context, "[t]he type of use to which the telephone is normally put may also have some bearing on the extent of minimization required." *Scott*, 436 U.S. at 140. Thus, police may be justified in intercepting "every call" on a phone in the residence of a person "who is thought to be the head of a major drug ring" (due to the high likelihood that the bulk of those calls will relate to crime), even if doing the same for a public phone might raise "substantial doubts as to minimization." *Id.* Prior to the search here, police reasonably believed that all, or nearly all, of the massages caught on video would

involve criminal conduct. After all, 100% of the men stopped leaving the Spa before the issuance of the warrant admitted to paying for sex acts at the conclusion of their massages. R. 2109-11. The Rubmaps and USA Sex Guide reviews likewise suggested that the Spa operated almost exclusively as a brothel, not a legitimate massage business. R. 2105-07. Accordingly, there was little known risk that nonstop recording would seize video of lawful massages.

That the Spa was regularly used as a brothel is confirmed by the small percentage of recorded massages that ultimately appeared lawful. Over the course of five days, police recorded 25 criminal massages; 10 more massages that were suspected to be criminal but where the lights were too dim to be sure; and only four massages (a mere 10%) that appeared lawful. R. 3238. While not dispositive, the low "percentage of nonpertinent" transactions intercepted "may provide assistance" in evaluating the reasonableness of a search. *Scott*, 436 U.S. at 140.

Fourth, courts have consistently held that where police are investigating "what is thought to be a widespread conspiracy[,] more extensive surveillance may be justified in an attempt to determine the precise scope of the enterprise." *Id.*; *see also United States v. Freese*, No. 8:05CR131, 2005 WL 3005601, at *5 (D. Neb. 2005) ("courts are more tolerant of extensive surveillance in conspiracy cases"). In that scenario, "many more of the conversations will be permissibly intercepted because they will involve one or more of the co-conspirators." *Scott*, 436 U.S. at

140. That principle gave the detective-monitors here greater leeway to record each of the massages because each involved at least one suspected co-conspirator: the Spa employee providing a massage.

Fifth, even though police did not engage in extensive "intrinsic minimization"—the process of screening non-pertinent content as the search takes place—they did engage in "*extrinsic* minimization"—the use of external parameters to limit a search's intrusiveness. *See* Fishman & McKenna, Wiretapping and Eavesdropping §§ 15.4-5 (2018). In that vein, "one of the most obvious ways to minimize is to use the [surveillance] only for a short time." *United States v. Chavez*, 533 F.2d 491, 493 (9th Cir. 1976); *see also United States v. Martin*, 599 F.2d 880, 887 (9th Cir. 1978) (explaining that "[t]he length of time during which a wiretap is used is a crucial factor in determining whether there has been reasonable minimization of communications intercepted"), *overruled on other grounds*, *United States v. De Bright*, 730 F.2d 1255 (9th Cir. 1984). In fact, "restricting the time" of the video monitoring is "thought … to be the, or at least a, principal method of minimizing." *Chavez*, 533 F.2d at 493.

That consideration overwhelmingly supports the State here. Police minimized the scope of the intrusion by conducting the entirety of their video surveillance search in less than five days, R. 2116, 2334, 3236, a fraction of the time previously approved by the courts. *See, e.g.*, *United States v. Scott*, 504 F.2d 194, 196 (D.C.

Cir. 1974) (original wiretap was extended after 20 days; interceptions ceased after 30 days, "not an overly long period for a wiretap in a narcotics conspiracy case"); *United States v. Manfredi*, 488 F.2d 588, 592 n.4 (2d Cir. 1973) (total of 60 days); *Martin*, 599 F.2d at 887 (37 days). And monitoring did not occur around the clock, but was limited instead to the Spa's business hours. *See* R. 2117.

In still another instance of extrinsic minimization, police installed hidden cameras only in the massage rooms and front lobby, R. 2117, 2512, and allowed only assigned detectives to monitor the video feed. R. 2117, 2506-07, 2595.

Sixth, Mr. Kraft possessed, at most, only a diminished expectation of privacy in the massage room of a third-party business. A massage room in a business open to the public is undoubtedly subject to "less protection from video surveillance than an individual's private home." *See United States v. Chen*, 979 F.2d 714, 718 (9th Cir. 1992). Thus, even if police must engage in spot-checking or other more extensive minimization efforts when recording video in the home, those same efforts are unnecessary in the setting at issue here.

Against all this, the county court advanced two arguments in support of its minimization ruling. First, it contended that police should have recognized a pattern that customers who "left on their underwear" tended to receive only lawful massages. R. 2100. At the outset, that argument fails because, as the county court itself noted, at least one customer began a massage wearing underwear and later

disrobed entirely to procure illicit sexual services. *Id.* Thus, the record in this case refutes the county court's determination that the presence of underwear at the commencement of a massage indicated lawfulness. Even if such a pattern existed, that was the sort of *post hoc* reasoning that police could hardly have known when they began their surveillance, and at most would have been grounds for adjusting their minimization procedures after some period of time had passed. *Scott*, 436 U.S. at 141 (explaining that "[d]uring the early stages of surveillance the agents may be forced to intercept *all calls* to establish categories of nonpertinent calls which will not be intercepted thereafter" (emphasis added)).

As a second purported reason to require minimization, the county court observed that two women were caught on camera receiving massages. R. 2098. That reasoning, however, rested on the unfounded assumption that women are incapable of paying for sex. Police are not required to consider unwarranted gender stereotypes when determining how and what to minimize in the video surveillance context, and the county court cited no authority to the contrary. At any rate, in a 5-day surveillance period during which 39 customers received massages, only *two* massages—or 5%—involved women. *See Rodriguez v. State*, 297 So. 2d 15, 21 (Fla. 1974) (the fact that "non-pertinent [videos] were intercepted, or that hindsight shows a better means of meeting the requirement, is irrelevant, …"). Neither woman, or indeed, *any* innocent customer, was filmed nude. R. 3104-05, 3137, 3163.

Consequently, any undue invasion of female customers' privacy was minimal.

In sum, the police in this case obtained a facially valid warrant, and their execution of that warrant was not constitutionally unreasonable. The county court erred in finding a Fourth Amendment violation.

B. Alternatively, suppression was an inappropriate remedy.

Even assuming police violated the Fourth Amendment in some way, video of Mr. Kraft's prostitution offenses should nonetheless be admissible at trial. "Suppression of evidence," after all, "has always been [a] last resort, not [the] first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Here, for instance, Mr. Kraft cannot invoke the exclusionary rule to remedy a violation of the Warrant Clause because police relied on the warrant in good faith. He similarly cannot seek suppression to rectify errors in the execution of the search both because he lacks standing to advance the privacy interests of third parties and because, under established Fourth Amendment principles, a search in excess of a warrant will justify suppression only of the items seized outside the warrant's lawful scope—a category that plainly does not include video of Mr. Kraft's crimes.

1. Police relied on the warrant in good faith, rendering the exclusionary rule inapplicable to any Warrant Clause violation.

While the Fourth Amendment protects the right to be free from unreasonable searches and seizures, "it is silent about how this right is to be enforced." *Davis v.*

United States, 564 U.S. 229, 231 (2011). Recognizing that the text of the Constitution "says nothing about suppressing evidence obtained in violation of this command," the Supreme Court adopted the exclusionary rule—a "judicially created remedy"—to "compel respect for the constitutional guaranty." *Id.* at 236, 238 (citations and quotation marks omitted). This remedy of exclusion is "'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *Id.* at 236 (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)). Its "sole purpose" is instead to "deter future Fourth Amendment violations" by putting police on notice that evidence obtained during an unlawful search or seizure may be inadmissible at trial. *Id.* at 236-37.

Because of the exclusionary rule's "substantial social costs," courts apply it only where doing so will create "appreciable deterrence." *Id.* at 237 (citations and quotation marks omitted). Indeed, suppression "exacts a heavy toll on both the judicial system and society at large" by requiring courts to "ignore reliable, trustworthy evidence bearing on guilt or innocence." *Id.* "[I]ts bottom-line effect," the Supreme Court has noted, "is to suppress the truth and set the criminal loose in the community without punishment." *Id.* The exclusionary rule has therefore "been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Leon*, 468 U.S. 897, 908 (1984).

"When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent'

disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis*, 564 U.S. at 238 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)). Where, on the other hand, law enforcement acted in "good faith," the deterrence rationale "loses much of its force" and so the evidence should be admitted. *Id.* (quoting *Leon*, 468 U.S. at 919).

In *Leon*, the Supreme Court considered whether the exclusionary rule should "bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." 468 U.S. at 905. After police in that case seized large quantities of drugs during the search of a home conducted pursuant to a warrant, the defendant successfully challenged the warrant before trial on the ground that the supporting affidavit submitted to the magistrate was insufficient to establish probable cause. *Id.* at 902-03.

The Supreme Court declined to apply the exclusionary rule to suppress the fruits of the illegal search. It reasoned that the Court had previously "expressed a strong preference for warrants" because a "search warrant 'provides the detached scrutiny of a magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer.'" *Id.* at 913-14 (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)). Where a warrant is later deemed invalid, the fault lies with the *magistrate*, not with the police officers who executed the search. *Id.* at 921. Thus, "[w]hen officers have acted pursuant to a

warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *Id.* at 924.

After *Leon*, "[t]he test for good faith is 'whether a reasonably trained officer would have known that the search was illegal despite the magistrate's authorization.'" *Johnson v. State*, 872 So. 2d 961, 964 (Fla. 4th DCA 2004) (quoting *Leon*, 468 U.S. at 923 n.23).

The good-faith exception applies here. At the time of these massages, no judicial or statutory authority in Florida dictated that minimization was a constitutional prerequisite to a valid warrant; as Mr. Kraft has himself observed, there was a "dearth of Florida cases offering guidance" on the topic. Resp. to St.'s Memo. Supporting Discretionary Jur., No. 4D19-1499, at 1 (filed June 11, 2019). A reasonably well-trained officer therefore would not have known that the magistrate erred in issuing a warrant without more specific minimization instructions.

2. Any failure to minimize while executing the warrant requires suppression only of video seized outside the scope of the warrant.

Assuming *arguendo* that an error occurred in the detectives' execution of the warrant, suppressing the video of Mr. Kraft's massage would still be an inappropriate remedy. That is so for two reasons.

A. Under settled law, Mr. Kraft lacks standing to vindicate the Fourth Amendment rights of third parties. An individual's "capacity to claim the protection

of the Fourth Amendment" turns on having a "legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Thus, "the inquiry is whether the *defendant's* rights were violated by the allegedly illegal search or seizure." *State v. Suco*, 521 So. 2d 1100, 1102 (Fla. 1988) (emphasis added); *see also Jones v. State*, 648 So. 2d 669, 675 (Fla. 1994) ("Under this analysis, a defendant has 'standing' to challenge a search or seizure if the defendant's Fourth Amendment rights were infringed by the challenged search or seizure."). In other words, "Fourth Amendment rights are personal rights" which "may not be vicariously asserted." *Brown v. United States*, 411 U.S. 223, 230 (1973).

It follows, therefore, that suppression of video surveillance "can be successfully urged only by those whose rights were violated by the search itself," *Alderman v. United States*, 394 U.S. 165, 171-72 (1969), in turn requiring that the defendant "be either a party to the [impermissibly-seized video] or one whose premises served as the site of the surveillance which resulted in the interception." *Mozo v. State*, 632 So. 2d 623, 625 (Fla. 4th DCA 1994). Accordingly, federal courts have held that a defendant has "standing to challenge minimization *only* as to their own calls." *United States v. deLay*, 988 F.2d 123, at *2 (9th Cir. 1993) (unpublished) (emphasis added; citation omitted); *see also United States v. Willis*, 890 F.2d 1099, 1101 n.3 (10th Cir. 1989) (noting, in dicta, that "we see a potential standing problem were appellant to base his appeal on the minimization efforts of the agents for

telephone calls in which he was not involved").

That forecloses application of the exclusionary rule here. Mr. Kraft cannot assert that *he* was illegally recorded paying for sex, since even under a more rigid minimization protocol his conduct would have been captured by surveillance cameras. That is, the very steps the county court determined should have been taken but were not—ceasing recording when either a woman entered a massage room or when a male customer left on his underwear, R. 2098-99—would not have prevented police from recording Mr. Kraft's conduct. It must therefore be his contention that certain *other* people—those who received lawful massages—were the targets of an illegal search. But because Mr. Kraft was not a party to those searches, he lacks standing to contest their legitimacy and, consequently, the ability to challenge his own search by proxy. *See deLay*, 988 F.2d 123, at *2.

To the extent *other* Spa customers have a remedy for the alleged invasion of their own privacy, they are already pursuing that remedy in a civil suit[4] in federal court. *See United States v. Anderson*, 39 F.3d 331, 342 (D.C. Cir. 1994), *vacated en banc on other grounds* (Feb. 9, 1995) ("Even if the minimization requirement was violated, moreover, we have indicated that 'suppression' might not be an 'appropriate remedy,' and have suggested, although in *dicta*, that the only remedy might be the suppression of the nonrelevant calls, leaving the aggrieved individuals

[4] *Doe v. Town of Jupiter, et al.*, No. 19-cv-80513-DMM (S.D. Fla.).

with a civil suit for damages under the statute." (citations omitted)). Nor do those customers stand to gain from an order affording Mr. Kraft a windfall. Thus, suppressing the video of Mr. Kraft's prostitution offense in the case against him is not a necessary or sufficient way of remedying alleged constitutional violations suffered by third parties.

B. Even if Mr. Kraft could invoke the Fourth Amendment rights of others, "[o]nly the evidence seized while the police are acting outside of the boundaries of the warrant is subject to suppression." *United States v. Hendrixson*, 234 F.3d 494, 497 (11th Cir. 2000); *United States v. Squillacote*, 221 F.3d 542, 556 (4th Cir. 2000) ("[A]s a general rule, … only the improperly-seized evidence will be suppressed; the properly-seized evidence remains admissible."). Under this straightforward rule of severability, Mr. Kraft is not entitled to relief because the video of *his* prostitution offenses fell squarely within the terms of the warrant: the evidence against him is a "video recording[] of individuals engaged in [prostitution]," R. 2116, and was therefore covered by the warrant's particularity clause.

Although some federal courts have applied purported exceptions to this general rule, in *Waller v. Georgia*, 467 U.S. 39 (1984), the Supreme Court rejected a defendant's contention that "police so 'flagrant[ly] disregard[ed]' the scope of the warrants in conducting the seizures at issue [] that they turned the warrants into impermissible general warrants," thereby requiring suppression of even those items

lawfully seized when the scope of the warrant. *Id.* at 43 n.3. The Court reasoned that the police officers who executed the search did not "exceed[] the scope of the warrant in the places searched" and instead merely "unlawfully seized and took away items unconnected to the prosecution." *Id.* "In these circumstances," it wrote, "there is certainly no requirement that lawfully seized evidence be suppressed as well." *Id.*; *cf. Andresen*, 427 U.S. at 482 n.11 (approving procedure whereby, rather than requiring blanket suppression, the government is permitted to return to defendant any items seized outside the scope of the warrant).

Subsequent courts have understood *Waller* as an outright rejection of the so-called flagrant disregard exception, *see, e.g.*, *Klingenstein v. State*, 624 A.2d 532, 537 (Md. 1993) ("We are not persuaded to overlay the exclusionary rule of the Fourth Amendment with the 'flagrant disregard' concept. The Supreme Court has not seen fit to do so and neither do we."), or have rejected total suppression on their own terms. *See United States v. Willey*, 57 F.3d 1374, 1390 n.31 (5th Cir. 1995); *United States v. Buckley*, 4 F.3d 552, 557-58 (7th Cir. 1993).

Along the same lines, in the related context of Title III wiretapping, several courts have interpreted 18 U.S.C. § 2518(10)(a)—which creates a statutory suppression remedy for wiretapping violations—to compel suppression of only those conversations recorded outside the scope of the authorization order. *See, e.g.*, *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972) ("Clearly Congress did

not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations."); *United States v. Principie*, 531 F.2d 1132, 1141 (2d Cir. 1976) ("In the unique circumstances of this case, we conclude that only those conversations which were seized in violation of the time limitation in the order had to be suppressed."); *United States v. Gaytan*, 74 F.3d 545, 554 (5th Cir. 1996) ("The exclusionary rule does not require the exclusion of those conversations that were properly intercepted as well.").[5]

This Court should adopt that view here, a position supported not only by the "great weight of authority," *State v. Monsrud*, 337 N.W.2d 652, 660-61 (Minn. 1983) (state wiretapping), but by common sense. If, for instance, police obtained a warrant to search a house for physical evidence of "drug offenses," and in executing the warrant seized not only cocaine but also unrelated business documents, the remedy for the unlawful seizure of the documents would not be the suppression of

[5] Ten years before *Waller*, the Florida Supreme Court applied a "blatantly ignored" standard to blanket suppression of wiretaps where law enforcement failed to minimize. *See Rodriguez v. State*, 297 So. 2d 15, 21 (Fla. 1974) (holding that "where the procedural requirements to minimize interception are blatently ignored, … the entire wiretap evidence must be suppressed; where violations of the minimization requirements occur [d]espite efforts to meet the minimization requirements, however, only the unauthorized interceptions need be suppressed"); *see also State v. Aurilio*, 366 So. 2d 71, 74 (Fla. 4th DCA 1978). That decision is not controlling here both because it addressed Florida's statutory wiretap scheme—rather than the Fourth Amendment—and because, at any rate, it was superseded by *Waller*.

the drug evidence as well.

In short, Mr. Kraft is not entitled to the drastic remedy of total suppression, making video of his own crimes admissible at trial.

II. KRAFT'S REMAINING ARGUMENTS IN FAVOR OF SUPPRESSION LIKEWISE LACK MERIT.

The county court's suppression order cannot be sustained on any of the alternative theories pressed by Mr. Kraft below. *Cf. Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) ("Under the tipsy coachman doctrine, where the trial court 'reaches the right result, but for the wrong reasons,' an appellate court can affirm the decision only if 'there is any theory or principle of law in the record which would support the ruling.'" (quoting *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999)) (emphasis omitted)). Assuming Mr. Kraft will continue to advance those arguments on appeal, this section addresses his claims that (A) delayed-notice video surveillance warrants are unauthorized in Florida; (B) video surveillance was "unnecessary" in this case; and (C) Inspector Herzog's administrative search of the Spa was an impermissible pretext search.

A. Florida magistrate judges possess the authority to issue delayed-notice video surveillance warrants.

To begin with, Mr. Kraft argued below that warrants authorizing delayed-notice video surveillance are unlawful due to a lack of "affirmative authorization" in the statutes governing warrant procedure. R. 242. Finding support in neither

Florida nor federal law, that sweeping claim was properly rejected by the county court. *See* R. 2095-96. But even if Florida magistrates have no authority to issue this type of warrant, Mr. Kraft would not be entitled to suppression because police relied on the warrant in good faith.

1. For three reasons, delayed-notice video surveillance warrants are permissible under Florida law. *First*, the state statute governing the issuance of search warrants grants magistrate judges broad authority to approve searches of property. That law states: "Upon proper affidavits being made, a search warrant may be issued under the provisions of this chapter … [w]hen any property shall have been used … [a]s a means to commit any crime; …" § 933.02(2)(a), Fla. Stat. (2018). Under that plain text, the magistrate could sanction video surveillance of the Spa because there was probable cause to believe the Spa premises were the center of a prostitution ring.

Section 933.02(2)(a) mirrors the federal rule of criminal procedure governing search warrants, which permits warrants to search for and seize "property designed for use, intended for use, or used in committing a crime." Fed. R. Crim. P. 41(c)(3). Interpreting that language, the Supreme Court has held that the rule "is sufficiently flexible to include within its scope electronic intrusions authorized upon a finding of probable cause." *United States v. New York Tel. Co.*, 434 U.S. 159, 169 (1977). It therefore held that pen registers, a form of electronic surveillance, fell within Rule

41's ambit. *Id.* at 169-70. Based on that precedent, and the rule's plain text, the federal courts of appeals have uniformly concluded that delayed-notice video surveillance warrants are permitted by Rule 41. *See, e.g.*, *Koyomejian*, 970 F.2d at 542; *Mesa-Rincon*, 911 F.2d at 1436; *United States v. Biasucci*, 786 F.2d 504, 507-512 (2d Cir. 1986). Given the textual similarities between Rule 41 and Section 933.02(2)(a) those federal precedents are persuasive authority here.

Second, "[i]t is well established that law officers constitutionally may break and enter to execute a search warrant where such entry is the only means by which the warrant effectively may be executed." *Dalia*, 441 U.S. at 247 (citing cases). The Supreme Court has therefore approved "covert entry performed for the purpose of installing otherwise legal electronic bugging equipment," so long as the search otherwise complies with constitutional notice requirements. *Id.* at 248.

Third, nothing in Florida statutory law requires that police immediately notify a suspect that they are conducting video surveillance. It has always been the case that "[a] court of general jurisdiction has inherent power to issue a search warrant within the limits set forth in the Fourth Amendment." *United States v. Falls*, 34 F.3d 674, 678 (8th Cir. 1994). In the absence of some statute or rule restraining judicial authority, this includes the "inherent power to issue warrants authorizing silent video surveillance." *Id.*; *see also Torres*, 751 F.2d at 878 (upholding video surveillance warrant because "courts retain their traditional powers" unless and until the

legislature chooses to "limit the[ir] authority").

Florida statutory law governing warrants requires that every warrant be "serve[d]" on the "person named in the warrant," but does not demand that service occur simultaneously with the search. § 933.11, Fla. Stat. (2019). As a result, a magistrate has the power to issue a delayed-notice warrant while remaining in "strict compliance" with the warrant statutes. *State v. Tolmie*, 421 So. 2d 1087, 1088 (Fla. 4th DCA 1982). To hold otherwise would vitiate the purpose of covert video surveillance, an investigative technique this Court has called a "valuable tool in fighting crime." *Baudo*, 42 So. 3d at 832.

2. Should this Court disagree that a Florida magistrate has authority to issue covert video surveillance warrants, that ruling is still of no use to Mr. Kraft because, as discussed above, *supra* at 30-33, suppression is unavailable where police relied on a warrant in good faith. Applying the good-faith exception to materially identical circumstances, the Fifth District found the exclusionary rule inapplicable in *State v. Geiss*, 70 So. 3d 642 (Fla. 5th DCA 2011) (Lawson, J.). The warrant in *Geiss*, which permitted a search of a DUI suspect's blood, was later invalidated because blood is not "property" "used to commit a crime" within the meaning of Section 933.02(2)(a). *Id.* at 650. Turning to the remedy question, however, the district court held that the blood test results "should not have been suppressed" because law enforcement "acted in objectively reasonable reliance on an invalid warrant." *Id.* at 650-51. The

test, the court wrote, is whether "a reasonably trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 650 (quoting *Leon*, 468 U.S. at 923 n.23).

No court has held that covert video surveillance is unlawful under a statutory scheme similar to the one in place in Florida. Accordingly, law enforcement officers reasonably relied on the magistrate's warrant, rendering suppression inapposite.

B. The search complied with any necessity requirement.

Mr. Kraft next attacked the warrant's validity on the basis that before any video surveillance order may issue, a magistrate must find "necessity" for the surveillance, meaning that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." R. 245 (citation and quotation marks omitted), 246-51.

1. For the same reasons set out in Part I.A.1, the Warrant Clause contains no necessity requirement. Even if a showing of necessity were required, however, the warrant here cleared that hurdle. Courts applying the necessity test in the wiretap context—where necessity is *statutorily* required—hold that it entails a comparatively low showing, intended merely to "ensure that wiretap authorization procedures were not to be routinely employed as the *initial step* in criminal investigation." *Hudson v. State*, 368 So. 2d 899, 902 (Fla. 3d DCA 1979) (emphasis added). To satisfy that standard, "it is not necessary to show a comprehensive

exhaustion of all possible techniques"; rather, it suffices that the affidavit "explains the prospective or retrospective failure of several investigative techniques that reasonably suggest themselves." *Id.* at 902-03 (citations omitted). So long as video surveillance "appears the most reasonable investigative technique under the circumstances to secure other and conclusive evidence of criminal involvement," its use is permissible. *Daniels v. State*, 381 So. 2d 707, 711 (Fla. 1st DCA 1979).

In support of the warrant, Detective Sharp advised the magistrate of several potential alternatives which reasonably suggested themselves, including the use of undercover officers and interviewing female Spa workers. R. 2111-12. Dismissing each option, the detective explained in writing that asking an undercover to infiltrate the Spa would risk the health and safety of that person since the officer would likely be required to strip naked or permit the sex worker to "touch his genitals," whereas approaching a sex worker would likely fail because trafficked women "are usually not interested in speaking with or cooperating with law enforcement for they fear status issues and/or loss of income." R. 2112. Any failed attempt to do so, the detective predicted, could result in the "owners/managers of the massage parlor [] becom[ing] aware of our investigation." *Id.*

Crediting these considerations, the county court correctly found that "the risk of alerting the Spa" to the ongoing criminal investigation via other investigative measures satisfied any arguable necessity requirement. R. 2097.

2. Whatever the ultimate merits of these arguments, Mr. Kraft is not entitled to the extreme remedy of suppression because, as explained above, police relied upon the warrant in good faith. *Supra* at 30-33; *see also United States v. Jackson*, No. 3:14–CR–1, 2015 WL 2236400, at *11 (M.D. Ga. May 12, 2015) (invoking good-faith exception so that "even if the affidavits are lacking in establishing necessity, the exclusionary rule should not be applied in this case").

C. Inspector Herzog's search of the spa was a valid administrative search.

Finally, Mr. Kraft alleged that the health inspector's administrative search of the Spa was an unlawful "pretext" for a "purely criminal investigation." R. 255-56. That argument suffers a range of difficulties, including Mr. Kraft's lack of standing to assert the rights of third parties; the validity of the search based on several legitimate administrative interests; and the fact that, even if the administrative search were illegal, there were no fruits to suppress in his case.

1. As an initial matter, Mr. Kraft lacked standing to contest Inspector Herzog's routine health inspection. As explained above, "Fourth Amendment rights are personal rights" which "may not be vicariously asserted," *Brown*, 411 U.S. at 230, and a defendant may assert those rights only if he has a "legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143. Before Mr. Kraft could contest the validity of the administrative search, he must therefore have possessed a reasonable expectation of privacy in the Spa—and possessed it *at the time of* the

allegedly invalid search.

Mr. Kraft cannot satisfy that requirement. Indeed, he has not contended that he was present in the Spa during the routine health inspection; that he possessed an ownership or possessory interest in the Spa; or that he exhibited any other connection to the Spa beyond twice being a customer there *after* that inspection was done. His expectation of privacy in the Spa extended, at most, only to those massage rooms where he was physically present, and only during those times when he was there. *See United States v. Santiago*, 950 F.Supp. 590, 598 (S.D.N.Y. 1996) (finding that passenger in a taxicab has a reasonable expectation of privacy "for the duration of the ride"). That rules out Mr. Kraft's attempted Fourth Amendment challenge to the health inspection, which occurred well before his illicit patronage of the Spa.

2. If this Court nevertheless considers the merits of the administrative search, it should uphold it. Warrantless searches of commercial establishments "do not offend the Fourth Amendment if they are necessary in order to monitor closely regulated businesses for the purpose of learning whether a particular business is conforming to the statute regulating that business." *Bruce v. Beary*, 498 F.3d 1232, 1239 (11th Cir. 2007) (citing *New York v. Burger*, 482 U.S. 691, 702-03 (1987)). Administrative searches are reasonable so long as three criteria are met. First, there must be a "substantial government interest" that informs the regulatory scheme. *Burger*, 482 U.S. at 702 (quotation marks omitted). Second, the warrantless

inspection must be "necessary to further the regulatory scheme." *Id.* (alterations omitted). And third, the inspection program, in terms of the certainty and regularity of its application, must provide a "constitutionally adequate substitute for a warrant." *Id.* at 703. The search here fell comfortably within this "well-established exception to the warrant requirement." *Id.* at 712.

Though acknowledging the validity of the administrative search doctrine, R. 255, Mr. Kraft contended that this search was unlawful because the Health Department's involvement was a pretext for an impermissible law enforcement motive. Crucially, however, courts considering the allegedly pretextual nature of an administrative search will find the search invalid only if "the inspection was performed '*solely* to gather evidence of criminal activity.'" *Ruttenberg v. Jones*, 283 F. App'x 121, 133 (4th Cir. 2008) (citations omitted; emphasis added). Given that a valid administrative search "may encompass both an administrative and a criminal law enforcement purpose," a regulatory inspection "does not contravene the Fourth Amendment simply 'because it is accompanied by some suspicion of wrongdoing.'" *Id.* (citations omitted). Indeed, "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect." *Burger*, 482 U.S. at 716.

In *United States v. Villamonte-Marquez*, for example, the Supreme Court approved an administrative search prompted by an informant's tip that a vessel was

carrying marijuana, noting that there was "little logic in sanctioning … examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers." 462 U.S. 579, 584 n.3 (1983). That was true even though the Customs officers who boarded the vessel to review the ship's documentation were "accompanied by a Louisiana State Policeman." *Id.*; *see also Crosby v. Paulk*, 187 F.3d 1339, 1348 (11th Cir. 1999) (as part of an ongoing criminal investigation into underage drinking and other alcohol violations, officers conducted valid administrative inspection of a nightclub); *Beary*, 498 F.3d at 1242 (search of auto body shop motivated by tip that it contained stolen cars or car parts).

The routine health inspection here was not animated "solely" by the prospect of uncovering criminal wrongdoing; rather, it was equally related to two traditional purposes of administrative searches in the massage licensing context. *First*, rules issued by the Florida Board of Massage Therapy—which is authorized by the Legislature to regulate spa businesses, §§ 480.035(1), (7), Fla. Stat. (2018)—bar "[s]exual activity by any person or persons in any massage establishment" and direct that "[n]o licensed massage therapist shall use the therapist-client relationship to engage in sexual activity with any client or to make arrangements to engage in sexual activity with any client." *See* Fla. Bd. of Massage Therapy Reg. 64B7-26.010(1), (3); *cf.* § 480.0485, Fla. Stat. (2018) ("Sexual misconduct in the practice of massage therapy is prohibited."). Based on Detective Sharp's representations to Inspector

Herzog, the Health Department had reason to believe that violations of these regulations were occurring, which would constitute grounds for revoking or suspending the Spa's license to operate. *See* § 480.046(1)(e), Fla. Stat. (2018); § 456.072(2), Fla. Stat. (2018).

Second, the same information gave rise to obvious health and safety concerns about the cleanliness of the Spa and well-being of any law-abiding customers. The Board of Massage Therapy and the Health Department are responsible for ensuring that each spa facility meets "safety and sanitary requirements," § 480.043(3), Fla. Stat. (2018); *see also* § 480.046(1)(n) (providing for discipline or license denial for "[f]ailing to keep the equipment and premises of the massage establishment in a clean and sanitary condition"), and Inspector Herzog's actions came within the scope of that lawful duty.

3. On a more basic level, Mr. Kraft has not shown that the warrant itself was a fruit of the administrative search. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (holding that a Fourth Amendment violation requires suppression only of the "fruit of the poisonous tree"). When a magistrate's finding of probable cause is predicated, in part, upon facts later deemed to be the fruits of an unlawful search, the warrant will nonetheless be upheld if, "after striking from it all evidence found by the [] court to either be untruthful or illegally obtained," the warrant affidavit "still contained sufficient information to support probable cause." *United*

States v. Dessesaure, 429 F.3d 359, 368 (1st Cir. 2005).

At most, the administrative search revealed that there were several beds, clothing, and other personal items in the Spa, R. 2108, none of which was necessary to the magistrate's finding of probable cause. Cleansing the warrant affidavit of those details, the finding of probable cause for the covert video search was still ably supported by the statements of Subjects A-D, each of whom confessed to patronizing the Spa for prostitution, R. 2109-11; the adult website reviews reporting that the Spa was a "rub and tug" business where people paid for sex, R. 2105-07; the trash pulls finding napkins covered in seminal fluid, R. 2109; and Lei Wang's contacts with another illicit massage parlor. R. 2111; *see also* R. 2105.

Because the warrant in this case would have issued even absent the fruits of the administrative search, the warrant was valid.

CONCLUSION

This Court should reverse the county court's order suppressing the video evidence of Mr. Kraft's prostitution offenses.

Respectfully submitted,

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