IN THE FOURTH DISTRICT COURT
OF APPEAL FLORIDA

CASE NO: 4D19-1499
L.T. No. 2019MM002346AXXX

THE STATE OF FLORIDA,

Appellant,

v.

ROBERT KRAFT,

Appellee.
_____/

_____*UNOPPOSED* MOTION FOR LEAVE TO APPEAL AS AMICUS CURIAE IN SUPPORT OF THE APPELLEE

Pursuant to Florida Rule of Appellate Procedure 9.370, the INDEPENDENCE INSTITUTE moves for leave to appear as amicus curiae in support of the Appellee and states:

1. **Interest of Amicus Curiae**: The Independence Institute is a non-profit national corporation founded in 1985 to further the fundamental precepts of the Declaration of Independence. It is the second-oldest state-level think tank in the United States. We have participated as amici in many criminal law cases that present constitutional issues, including filing amicus briefs to the Supreme Court of the United States in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010). Our work has been cited in United

States Supreme Court decisions, testimony before the United States Congress, and in various law journals, newspapers, and magazines.

2. Harvey J. Sepler is a long-time criminal appellate attorney, having served for more than 30 years in the Appellate Division of the Public Defender's Office in the Eleventh Judicial Circuit (Miami). He is a Fellow in the American Academy of Sciences, a veteran of over 1400 appeals to all levels of court, including the United States Supreme Court and the Florida Supreme Court, and a long-time faculty member at the University of Miami School of Law.

3. **Issues Amicus Curiae Will Address**: The issue before this Court is a) whether an open-ended search warrant is *per se* unlawful when it fails to provide for minimization and/or b) whether the execution of that warrant is unlawful when law enforcement fails to institute minimization procedures. Because the resolution of this issue requires an intimate understanding of federal search and seizure law, as well as the requirements of the Fourth Amendment – both implicit and explicit – the Independence Institute is perfectly positioned to assist the Court in its analysis.

4. A secondary but no less significant aspect of the issue involves how it implicates other contexts in which an invasion of the reasonable expectation of privacy is threatened. Indeed, the preservation of privacy rights in fundamental to all of us and can only be pierced when reasonably tailored and supported by

probable cause. The warrant and ensuing search were conducted in a manner that is inconsistent with federal and state law and notions of common decency.

5. A copy of the proposed amicus brief is attached as **Exhibit A**.

6. **Certificate of Consultation**. The undersigned has consulted with Assistant Solicitor General Jeffrey DeSousa for the Appellant and Derek Shafer and Michael Soyfer for the Appellee and is authorized to represent that there is no objection to the filing of the attached amicus brief.

WHEREFORE, the INDEPENDENCE INSTITUTE respectfully requests that this Court grant its motion for leave to appear as amicus curiae in this proceeding.

Respectfully submitted,

/s/ Harvey J. Sepler

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 12th day of November, 2019, a true and correct copy of the foregoing was furnished by e-mail to the following:

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EXHIBIT A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FOURTH DISTRICT

CASE NO. 4D19-1499

THE STATE OF FLORIDA,

Appellant,

-vs.-

ROBERT KRAFT,

Appellee.

BRIEF OF AMICUS CURIAE OF THE INDEPENDENCE INSTITUTE IN SUPPORT OF APPELLEE ROBERT KRAFT

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

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INTRODUCTION

This amicus brief is filed in support of ROBERT KRAFT. The State of Florida is appealing the granting of a motion to suppress entered by the Honorable Leonard Hanser, County Court in the Fifteenth Judicial Circuit. References to the record are designated as:

(R) = Record on Appeal (including the Transcript of Proceedings)

STATEMENT OF INTEREST

The Independence Institute is a non-profit Colorado corporation founded in 1985 to further the fundamental precepts of the Declaration of Independence. It is the second-oldest state-level think tank in the United States.

The Institute has participated in many constitutional cases, and its amicus briefs in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010) were cited in the opinions of Justices Alito, Breyer, and Stevens (under the name of lead amicus ILEETA, International Law Enforcement Educators and Trainers Association).

The Institute's work on Fourth Amendment issues has included amicus briefing in the United States Supreme Court, congressional testimony, and articles in law journals, newspapers, and magazines.

The Institute's Research Director, David B. Kopel, has been cited in 21 state appellate opinions and 17 federal circuit opinions. He is an adjunct professor of constitutional law at University of Denver, Sturm College of Law.

The Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, is Professor of Law (ret.) at the University of Montana. His scholarship on constitutional issues has been relied on by justices of the U.S. Supreme Court in six cases, and by Justice (then Judge) Gorsuch in *Kerr v. Hickenlooper*, 754 F.3d 1156, 1195 (10th Cir. 2014) (Gorsuch, J., dissenting).

SUMMARY OF THE ARGUMENT

The lower court correctly held that minimization is constitutionally mandated. Minimization is essential to the Fourth Amendment's particularity requirement. It applies to both the issuance of a warrant and to its execution. The Fourth Amendment allows warrants that "particularly describ[es] the place to be searched, and the persons or things to be seized." If government agents are not required to follow minimization standards when they execute warrants, then search warrants written with particularity could be executed as if they were general warrants.

In this case, there was no attempt to include minimization procedures in the affidavit for the warrant; the warrant that was issued lacked any reference to

minimization; and police executed the warrant in a manner that ensnared people who were never targets of the investigation.

The suppression of the video recordings was proper and should be affirmed.

ARGUMENT

The state raises four main arguments for reversal: 1) the minimization requirement has no independent constitutional dimension, such that ignoring the requirement should not result in the suppression of evidence, 2) the execution of the warrant should be evaluated according to a reasonableness standard tailored to the circumstances existing at the time of the execution, 3) the defendant Kraft does not have standing to challenge the search of other people and the suppression of evidence should not be based on alleged constitutional violations that others may have experienced, and 4) even if the search warrant was defective, the officers executed it in good faith.

Respectfully, each of these arguments and their sub-arguments are legally incorrect. Moreover, to sanction this type of search warrant and its open-ended execution invites law enforcement abuse affecting people in all contexts.

Brief Factual Context

The parties have fully briefed the facts of the case (with record citations).[1] The pertinent facts are as follows:

Jupiter police obtained a "sneak and peek" search warrant[2] to monitor and record all of the massages given in four small massage rooms in a private massage parlor over a five-day period. The affidavit for the warrant stated that covert surveillance cameras would be placed "in locations where prostitution is believed to be occurring" (excluding areas such as the kitchen, bathroom, or personal bedrooms). It did not specify precisely where the cameras would be placed and, as such, left the placement to the officers' discretion.

Only visual monitoring and recording would be made; there was apparently no audio component to the cameras. Neither the affidavit nor the

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[1] In accordance with this court's decision in *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522 (Fla. 4th DCA 1996), we do not present a detailed discussion of the facts of the case.

[2] These type of warrants have also been called covert entry search warrants, delayed notice warrants, and surreptitious entry search warrants. D.E. Wilkes, Jr., *"Sneak and Peek Search Warrants and the USA Patriot Act*, Ga. Defender 1 (Sept. 2002), https://digitalcommons.law.uga.edu_fac_pm/100. They were authorized by the Section 213 of the USA Patriot Act which amended 18 U.S.C. § 3103a to enable law enforcement officers to conduct surveillance of suspected terrorist or major federal offenses. Under the Act, federal judges may allow for extensive surveillance; however, the seizure of tangible property is restricted. *Id*. § 3103a (b)(2) ("the warrant prohibits the seizure of tangible property . . . except where the court finds reasonable necessity for the seizure").

order authorizing the search named specific individuals who would be targeted or anything about the manner of executing the warrant.

No written monitoring or recording instructions were provided to police. The monitoring detectives were told only that they should look for "illegal activity" during the massages. The officers were to monitor and record *everything* that took place in the massage rooms; if they saw anything illegal, they were to notify other officers and the suspects would be arrested.

For five days, police watched and recorded the events in all of the massage rooms – some of which involved people who admittedly were never suspects and were never tied to illegal activity.

The defendant was one of the individuals arrested. He moved to suppress the recordings, inter alia, on the grounds, of lack of authorization for sneak and peek warrants under Florida state law, the warrant's failure to satisfy the requirements of the Fourth Amendment, and the absence of minimization procedures in the issuance and execution of the search warrant. *See, e.g.*, R. 127. Agreeing that the absence of minimization procedures rendered the issuance of the warrant and the subsequent search unconstitutional, the trial court suppressed the recordings. R. 2092. The state appealed from this order.

I. The Particularity Clause would be rendered meaningless if states could ignore minimization in the issuance or execution of warrants.

The state first argues that under a plain reading of the Fourth Amendment, minimization is not a requirement for the execution of search warrants. According to the state, while probable cause and particularity are constitutional condition precedents for the issuance of a warrant, minimization – which relates to the execution of the warrant − is a court-created requirement that has no constitutional dimension.

Respectfully, this is a short-sighted view. Minimization ensures that the particularity of the warrant is honored in its execution. The protection afforded by particularity in the issuance of the warrant would be meaningless if warrants could be executed in a non-particular way.

Particularity ensures that search warrants are issued for particular subjects, doing particular activities, in particular places. Indeed, the very purpose of the particularity requirement is to prevent general searches – such as the infamous Writs of Assistance that the British government used against American colonists. *See, e.g., Writs of Assistance Case*, Quincy 51 (Mass. 1761). If there were no minimization requirement for the execution of a search warrant, then search warrants could be *de facto* executed as if they were Writs of Assistance.

In this case, police monitored in real time the activities of people they did not suspect at all. And they recorded their activities for later viewing. Because the warrant failed to require minimization, officers were given the discretion to watch and record non-suspects for any length of time they wished.

So far, Florida courts have not addressed the specific role that minimization plays in the search warrant process. Rather, the attention thus far has focused on the particularity requirement at the issuing stage. Florida Statute 933.07(1), for example, authorizes the issuance of search warrants where the affidavit demonstrates probable cause to support it and specifically describes the people and property to be searched. While the statute does not speak to general surveillance warrants as deserving of special consideration, it doesn't suggest that judges are free to issue search warrants that fail to meet the particularity requirement.[3]

II. Minimization instructions help ensure that the search is reasonable

The state also argues that minimization instructions or guidelines are unnecessary as long as the search is ultimately reasonable. Without question,

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[3] Covert video surveillance warrants (like the sneak and peek warrant in this case) are not authorized by Florida statutory law. They don't satisfy the general search warrant statute (Fla. Stat. 933.07), and they don't fall within the state's electronic surveillance statutes (Fla. Stats. 934.03 and 934.07). Thus, while these types of warrants may be authorized in certain circumstances under federal law for federal prosecutions, they are not authorized under Florida state law for state prosecutions (as here).

we expect law enforcement searches to be performed reasonably. But the state misses the point: the execution of the defective warrant is, itself, manifestly unreasonable.

Four police officers with i-Pads monitored the activities in each of the massage rooms for whatever length of time each officer independently saw fit. The only instruction they were given before the searches began was to look for "suspected criminal activity." R. 3119. The determination of what amounted to suspected criminal activity or how long to monitor particular rooms was left to the discretion of each officer. R. 3160, 3164. In one case, an officer watched a woman *who he knew was not a suspect* for eight minutes as she undressed and got under the massage sheet. R. 3155. She was never a suspect and the monitoring and recording of her disrobed body plainly did not further the investigation. This was not at all reasonable.

The purpose of pre-search written instructions is to limit unbridled officer discretion when conducting the search (in this case, when monitoring and recording). They help officers refine the search to ensure that monitoring practices are standardized, consistent, and lawful. Without prior written minimization instructions, officers are empowered to make their own decisions, including when, if ever, to stop watching innocent people disrobe.

The unreasonableness and dangers of improperly videotaping people in a place where they have a reasonable expectation of privacy are undeniable. *See* Judge Posner's discussion in *United States v. Torres*, 751 F.2d 875, 885 (7th Cir. 1984) ("Television surveillance is identical in its indiscriminate character to wiretapping and bugging"); *accord United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000) (Hidden video surveillance "is one of the most intrusive investigative mechanisms available to law enforcement").[4]

The unreasonableness of videotaping is especially troubling in personal and intimate settings. *See, e.g., United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991) (videotaping in private office); *People v. Dezek* 107 Mich. App. 78, 308 N.W.2d 652, 654-55 (1981) (videotaping in restroom stalls). Special precautions – including minimization – must be taken, particularly where the record contains no suggestion that minimization would compromise the underlying investigation.

Even if the searches had been conducted reasonably, the reasonableness could not cure the defective warrant or make seized evidence admissible. A Writ of Assistance does not become lawful simply because the officer executing

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[4] *See also United States v. Falls*, 34 F.3d 674 (8th Cir, 1994); *United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992); *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986); *People v. Teicher*, 422 N.E. 2d 506 (N.Y. 1981).

it searches a single warehouse in a narrow and reasonable manner. The need for prophylactic procedures, such as minimization, exists independently of whether a particular search turns out to be reasonable.

In this case, police believed that there was criminal activity occurring in the massage parlor – they just didn't know which patrons were committing it, which therapists were involved, in which massage rooms, and at what time. The question then is not simply whether monitoring and recording was, in theory, reasonable; rather, the question is whether the procedures used by the individual officers when monitoring activities were neutral, standardized, consistent, and lawful across police officers.

> A central concern in balancing these competing [reasonableness of a search] considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware v. Prouse*, 440 U.S. 648, 654-655, 99 S.Ct. 1391, 1396-1397, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, [422 U.S. 873 (1975)] at 882, 95 S.Ct. 2579 at 2580. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware v. Prouse*, supra, at 663, 99 S.Ct. at 1401. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-562, 96 S.Ct. 3074, 3083-3085, 49 L.Ed.2d 1116 (1976).

Brown v. Texas, 443 U.S. 47, 51 (1979). *See also Jones v. State*, 800 So. 2d 351 (Fla. 2001); *Jones v. State*, 483 So. 2d 433 (Fla. 1986); *Rinaldo v. State*, 787 So. 2d 208 (Fla. 4th DCA 2001); *Hartsfield v. State*, 629 So. 2d 1020 (Fla. 4th DCA 1993).

The establishment of neutral, written minimization instructions and guidelines would have ensured that monitoring would be consistent for all officers. Each officer's monitoring decision would be the same as the other officers' decisions. Patrons, suspects and non-suspects alike, would have the assurance that their reasonable expectations of privacy in an intimate setting would be protected.

Indeed, the trial court found that the lack of minimization in the warrant itself rendered it defective at inception (issuance) and in its execution. R. 2092, 2098-99.

Other Considerations

In addition to the above, there are several considerations that should not escape attention. First, sneak and peek search warrants are covert *surveillance* warrants, rather than seizure warrants, and they strictly prohibit the seizure of tangible evidence. Tangible evidence is defined as "[e]vidence which consists of something which can be seen or touched, e.g., gun in a homicide trial. In contrast to testimonial evidence, tangible evidence is real evidence." Black,

H.C., *Black's Law Dictionary* 1306 (5th ed., 1979). Video recordings that can be used as substantive evidence at trial qualify as tangible evidence, much like fingerprints, blood, and voice exemplars do.[5]

Indeed, should the state argue that the recordings are not substantive evidence to be used at trial, and if this court reverses the suppression order and remands the case for trial, the prosecution must be precluded from seeking to admit the recordings at trial. The state can't have it both ways.

III. Standing is not a minimization issue; Mr. Kraft can challenge the unconstitutional search in this case.

The state argues that Mr. Kraft lacks standing to challenge privacy violations suffered by other people and, therefore, he cannot complain about the police action in this case. That, respectfully, is a red herring.

The defendant is not seeking to invoke other people's Fourth Amendment protections; he is merely showing this Court how dangerous the failure to minimize can be. As the record demonstrates, innocent, non-suspected people had their rights to privacy trampled on by this widespread search. But even if no one had been harmed, the warrant was defective from inception

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[5] When these types of tangible evidence are obtained in a place where the subject has an objectively reasonable expectation of privacy – such as in a private massage room – they may not be seized in the absence of a proper warrant. As explained in note 3, *infra*, surveillance warrants do not qualify as a proper warrant authorizing their seizure.

and any individual searched pursuant to the defective warrant, including Mr. Kraft, would have standing to challenge the warrant's unconstitutionality.

The trial court explicitly and correctly rejected the notion that the defendant's guilt or innocence plays any role in whether he may challenge the lawfulness of the search. R. 2055. *See also Marron v. United States*, 275 U.S. 74, 76 (1927); *McDade v. State*, 154 So. 3d 292, 299 (Fla. 2014).

Finally, and perhaps most significantly, Florida law holds that a search warrant that is unlawful *ab initio* cannot support a search and any evidence seized as a result of the search is inadmissible. Moreover, an unlawful warrant is not made lawful because purportedly incriminating evidence is seized. *See, e.g., Kraemer v. State*, 60 So. 2d 615, 616 (Fla. 1952); *Richardson v. State*, 291 So. 2d 253, 255 (Fla. 1st DCA), *cert. denied*, 297 So. 2d 29 (Fla. 1974).

In this case, the trial court specifically found that the absence of minimization procedures within the four corners of the search warrant rendered it unlawful. R. 2098. Once unlawful, it remains unlawful (until re-issuance), making the subsequent search and the seizure of evidence unlawful. That being so, the state's standing argument becomes irrelevant – an argument raised in more detail in the Appellee's Answer Brief at 31-34 and footnote 17.

IV. There is no good-faith exception for failing to provide for minimization in a sneak and peek search

The state argues that even if minimization is required for the type of search warrant used in this case, the police acted in good faith when they executed it. After all, the state argues, since the trial court issued the sneak and peak warrant and the minimization requirement is a creature of federal law, aren't the officers permitted to rely on the warrant and, in good faith, execute it?

The plain answer is no. Minimization is not an ambiguous concept; it is an integral part of the particularity requirement that is provided by Florida statutes and the Fourth Amendment. As such, we expect police to be aware of the need to place constitutional parameters around a search to ensure that it accomplishes what the law and the warrant prescribe in the least intrusive manner. When applying for the warrant, police – as officers of the court – must inform the court of the proper minimization procedure that is and will be in place when executing the warrant.

Moreover, if a warrant is insufficient in some way (such as failing to provide for minimization), police have an affirmative obligation to advise the court of this and give the court an opportunity to correct it. Officers are not expected to seize upon a warrant's shortcomings to do something they ordinarily are prohibited from doing.

Besides, the trial court did not make an express finding that the officers acted in good faith. Not only do the facts belie such a finding – had one been made[6] – but it is for the trial court (as finder of fact) to make such a determination. Absent an express finding, the failure to minimize cannot be cured by the officers' purported subjective beliefs.

Finally, as noted in the Answer Brief of Appellee at p. 38, in a related case, the state conceded that the good faith exception does not apply to justify the officers' conduct. *State v. Zhang*, No. 4D19-2024 (Fla. 4th DCA Aug. 14, 2019) at R. at 3207. Unless the state makes an affirmative showing how these two cases differ in a significant way, it should be held to the same positions on this issue.

[6] Permitting officers to benefit – even unwittingly – by executing a warrant they reasonably should know is defective doesn't further the deterrent purposes of the Fourth Amendment.

V. Permitting law enforcement to avoid the minimization requirement opens the door to a wide range of violations in personal privacy

This is a significant matter that reaches far beyond massage parlors and alleged misdemeanor offenses. If police are allowed to obtain search warrants that lack the particularity that the constitution ordinarily requires and then to execute those warrants without any established means to minimize their effects on people being monitored, the guarantees of the Fourth Amendment become substantially marginalized.

Suppose, for example, police believe that one or more doctors in a private medical office are selling sample drugs "under the table." They have a reasonable belief, based on prior investigation, that transactions are taking place in examination rooms during business hours. They just don't know which doctors are selling the drugs, which patients are purchasing them and when those transactions are taking place.

Police obtain a sneak and peek surveillance warrant and covertly install surveillance cameras in four examination rooms hoping to spot an illegal transaction. This is similar to the facts in this case.

Police then monitor and record all of the examinations. They don't know beforehand at what point in the examination the transaction might occur so they have to watch it in its entirety. Some of these examinations entail patients disrobing and remaining in compromising positions.

It can hardly be disputed that patients have a reasonable expectation of privacy in medical examination rooms. If search warrants are to be issued and executed to allow for monitoring and recording while patients disrobe, the warrants must be particular and minimized to avoid unnecessarily infringing on the expectations of privacy. *See United States v. Johnson*, 2011 WL 13142510, *6-7 (W.D. Wash. June 21, 2011) (covert audio recording of private doctor-patient conversations must comply with all of the requirements of the wiretap statute). Minimization would ensure that once police determined that the doctor-patient relationship did not involve illegal drug sales, they would stop monitoring the exam and they would not retain the video or audio records of the patient's treatment. Anything else would be an unwarranted invasion of the doctor-patient relationship and the patients' reasonable expectation of privacy.

Yet, that is precisely what we have here. Based on prior investigation (which has not been challenged by this appeal), police covertly installed video cameras in massage rooms and monitored and recorded events, even though they did not have a particularized suspicion for the issuance of the warrant or a method of limiting and terminating surveillance for its execution once they determined that the patron was not engaged in criminal activity.[7]

[7] Even though this case does not involve audio surveillance and thus does not fall within Title III, Judge Posner's observations concerning the significance of particularity and minimization in electronic surveillance are persuasive:

CONCLUSION

Because the lack of minimization procedures in the issuance and execution of a sneak and peek search warrant turns an arguably specific warrant into a general one, this Court should affirm the order suppressing the recordings.

Respectfully submitted,

Harvey J. Sepler
HARVEY J. SEPLER

> A warrant for video surveillance that complies with those provisions that Congress put into Title III in order to implement the Fourth Amendment ought to satisfy the Fourth Amendment's requirement of particularity as applied to such surveillance. . . . But because television surveillance is potentially so menacing to personal privacy, we want to make clear that our view that a warrant for television surveillance that did not satisfy the four provisions of Title III that implement the Fourth Amendment's requirement of particularity [and minimization, another requirement of Title III] would violate the Fourth Amendment. Invoking our common law power to interpret the Constitution in a novel context, we borrow the warrant procedure of Title III, a careful legislative attempt to solve a very similar problem, and hold that it provides the measure of the government's constitutional obligation of particular description in using television surveillance to investigate crime.

United States v. Torres, 751 F.2d 875, 884-85 (7th Cir. 1984).

CERTIFICATE OF FONT SIZE

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Clerk of Court using the Florida Courts E-Filing Portal and served via E-Service to counsel of record, on this day, November 12, 2019.

Harvey J. Sepler
HARVEY J. SEPLER