IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, FOURTH DISTRICT

CASE NO. 4DCA 19-1499, 4D19-1655, 14-2024
L.T. NO. 502019AP000074A, 502019MM002346A, 312019MM000328A

STATE OF FLORIDA

Appellant,

vs.

ROBERT KRAFT

Appellee.

RESPONSE TO STATE'S MOTION FOR EXTENSION OF TIME

The State's initial brief in these consolidated appeals was due by August 15, 2019. The State has now requested an extension of 30 days, after representing that it desires the extension, in part, so that it may have time to determine whether to pursue these appeals. Without opposing that extension, Mr. Kraft wishes simply to note why there should be no further extension and why he would, respectfully, oppose any further extension. Although Mr. Kraft requested a commitment from the State that no further extension would be sought, the State declined to make that commitment. Accordingly, Mr. Kraft wishes to explain for the record why the unopposed 30-day extension should be more than ample for the State under all foreseeable circumstances:

1. Suppression in Mr. Kraft's case was ordered on May 13, 2019, in Mr. Freels's case on May 16, 2019, and in Ms. Wang's case on June 19, 2019. Since this latter date, the State has already had 51 days to determine any basis it may have to challenge the rulings at issue and to arrive at its opening brief here; with the 30-day extension, it will have had nearly 90 days. That amount of time well exceeds what is normally available and should be more than sufficient to

permit the State to evaluate the relevant portions of the records of these appeals and decide whether to pursue the appeal.

2. In contrast to the extended period of time the State is claiming, the core issue for its opening brief is narrow and easily covered. Each relevant appeal involves the same identified failure to minimize as required by the Fourth Amendment—an issue that is discrete, straightforward, and governed by small slivers of record from proceedings below. *See* Amended (as to date of stop only) Order Granting Defendant's Motion to Suppress, No. 19-2346 (Fla. Palm Beach Cnty. Ct. May 14, 2019) at ¶16 ("[T]he Court finds 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."); Order Granting Defendant's Motion to Suppress, No. 19-328 (Fla. Indian River Cnty. Ct. May 16, 2019) at 8 ("The lack of minimization by the law enforcement entrusted to monitor the cameras requires the suppression of the video recording in this case."); Order Granting Defendants' Motion to Suppress, No. 19-1606 (Fla. 15th Cir. Ct. June 19, 2019) at 12 ("because the search warrant does not contain required minimization guidelines, and no minimization techniques were employed in this case, the Defendants' Motion to Suppress is GRANTED"). Considering that the State admitted that it did "not [make] a good-faith effort" to minimize recording pursuant to the search warrant, May 20, 2019 Hr'g. Tr. in *State v. Wang* at 56:8–12, it should be alert to the issue and able to focus whatever legal arguments it would make to overcome its acknowledged failure.

3. In Mr. Kraft's case, the lead police detective's testimony made clear that the Jupiter Police Department made no effort to minimize the recording of massage patrons, as he confirmed that the police "videotaped in this case for five days, 24 hours a day." April 26, 2019 Hr'g. Tr. in *State v. Kraft* at 33:16–18. There was also repeated testimony that both men and women were

recorded while receiving massages during which even the State concedes no illegal activity occurred and that nothing was done to stop the recording of such massages. April 26, 2019 Hr'g. Tr. in *State v. Kraft* at 196:2–9; May 1, 2019 Hr'g. Tr. in *State v. Kraft* at 194:22–195:13; 204:6–18; 205:6–206:5; 207:7–23; 223:5–8; 230:24–233:17; 234:17–236:3; 248:3–249:20. A police detective who participated in the surveillance testified that there were no written guidelines or oral instructions of how to minimize during this surveillance operation so that even watching the monitor was at the police's unbridled discretion. May 1, 2019 Hr'g. Tr. in *State v. Kraft* at 246:21–247:7. This same detective testified, when asked about her knowledge of and experience with minimization, that "I'm familiar with it. I've never worked a case where I had to do the minimization prior to this, but I'm familiar with it. My husband worked undercover and has done that." *Id.* at 227:13–15; *see also id.* at 238:13–239:10.

4. This is unambiguous testimony confirming that minimization did not occur. Although the testimony came from different witnesses, it by no means follows that the State should need multiple months to review what the relevant witnesses testified to about the minimization failures.

5. In subsequent proceedings in the Lei Wang case, the State was even clearer that it failed to meet the minimization requirement. In its response to a statement from the Court that "[i]n my world, if minimization means you turn off the recorder, then you didn't minimize at all" the State's Attorney answered that "[n]o, we didn't minimize at all." May 20, 2019 Hr'g. Tr. in *State v. Wang* at 42:14–17. When trying to distinguish cases cited by Ms. Wang, the State further stated: "The Court already knows that these videos were completely recorded, and there were four [admittedly legal massages] that were completely recorded. Were they minimized properly? No. We all agree that they were not minimized properly." *Id.* at 49:5–9. The State's Attorney

expressed contrition for the State's failure to minimize: "Judge, I'll be the first to tell you, we should've done it differently. We didn't do it differently. We didn't account for that. And to those people, we obviously apologize to. That should not have happened. But the fact remains is—and I'm not minimizing what we did, we're taking full responsibility for it." *Id.* at 51:11–17. There was a further admission that the State did not even make a good-faith effort to minimize the recording of spa patrons: "the State will tell you that even though we would like to think [the police] made a good-faith effort, we know when we didn't stop recording, that that's not a good-faith effort; that we didn't do that." *Id.* at 56:8–12. All of these admissions are contained within 15 transcript pages.

6. By agreeing as to the warrant for certification of the appeal in Mr. Kraft's case to this Court, the State acknowledged that resolution of these appeals is time-sensitive. Indeed, the animating premise of the agreed certification, as accepted by this Court, is that resolution by this Court should not await an intermediate determination by the Circuit Court of the Fifteenth Judicial Circuit; the same applies to Mr. Freels's case with respect to the Circuit Court of the Nineteenth Judicial Circuit. As the parties and courts have recognized, this consolidated appeal stands to inform numerous parallel prosecutions across multiple jurisdictions. The State should retain that sense of urgency, lest multiple criminal defendants, courts and proceedings be left in extended limbo.

7. Finally, further prolonging these consolidated appeals would prejudice Defendants' speedy trial rights under Rule 3.191 of the Rules of Criminal Procedure. By virtue of filing the appeals, the State has tolled the speedy-trial clock to which Defendants are otherwise entitled. *See, e.g.*, Order Granting State's Motion for Stay and Extension of Speedy Trial Pending Final Disposition of Appellate Proceedings, No. 19-2346 (Fla. Palm Beach Cnty. Ct. May 21, 2019).

This tolling should be minimized rather than prolonged, and the State should not be permitted to hold down the pause button longer than one additional month.

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For the foregoing reasons, Mr. Kraft does not oppose the State's motion for an extension of time but would respectfully urge that there be no further extension.

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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, August 9, 2019.

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