No. 4D19-1655

IN THE

Fourth District Court of Appeal of Florida

STATE OF FLORIDA,
Appellant/Cross-Appellee,

v.

MARTIN BROPHY, ET AL.
(DEFENDANTS IN THE INDIAN RIVER COUNTY SHERIFF'S OFFICE INVESTIGATION CASE),
Appellees/Cross-Appellants.

On Appeal from the County Court of the Nineteenth Judicial Circuit in and for Indian River County

INITIAL BRIEF OF APPELLANT

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LIST OF APPELLEES/CROSS-APPELLANTS

As explained in the State's Unopposed Motion for Bifurcated Briefing, this brief addresses the Defendants being prosecuted as a result of the Indian River County Sheriff's Office video surveillance operation. They include:

4D19-1808	Altavilla, Philip Peter
4D19-1751	Beatty, Jonathan Cort
4D19-1759	Bower, Randall Wayne
4D19-1757	Boyette, Steven
4D19-1771	Brophy, Martin
4D19-1799	Brown, Steven Charles
4D19-1745	Bryant, Michael Burnette
4D19-1780	Cohen, Daniel L
4D19-1750	Cohen, Jeremiah Moshe
4D19-1770	Currier, Erich James
4D19-1739	Dasilva, Juan Manuel
4D19-1761	Dawodi, Christopher Ameer
4D19-1778	Dimling, Walter Hirth
4D19-1782	Dunks, Karie
4D19-1805	Friedmann, Christopher C.
4D19-1762	Gillen, Sean Patrick
4D19-1766	Gilligan, Daniel G.
4D19-1712	Gioia, Vito Carlo
4D19-1754	Grimm, Robert
4D19-1773	Hammond, Ron Eric
4D19-1776	Hart, Stanley John
4D19-1764	Hayes II, William G.M.
4D19-1774	Hernandez II, Roberto D.
4D19-1758	Hinshaw, Michael T.
4D19-1741	Keeley, Edward Ivan
4D19-1767	Lagerstorm, Carl Harold
4D19-1744	Leonardi, Joseph
4D19-1746	Lewis, Thomas Rodger
4D19-1747	Lightbody, Kevin Paul
4D19-1807	Morgan, Ted Ray
4D19-1806	Ohlson, Robert D.
4D19-1772	Ryder, James D.

4D19-1781	Sedlak, Peter
4D19-1740	Sexton III, John R.
4D19-1749	Shay, Keith Albert
4D19-1777	Strate, Trent
4D19-1775	Teems, Larry Steve
4D19-1738	Thompson, Charles A.

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INTRODUCTION AND SUMMARY OF ARGUMENT

After the Indian River County Sheriff's Office learned that the operators of a massage parlor were using the business as a front for a brothel—and were potentially engaged in human trafficking—they obtained warrants to conduct non-audio video surveillance inside the East Sea Spa's premises.[1] That operation was a resounding success. Of the 67 massages filmed pursuant to two warrants, 63 (or 94% percent) involved prostitution. Now, however, a county court judge has suppressed the evidence of those crimes because police allegedly failed to "minimize" any Fourth Amendment intrusion. For a series of reasons, that suppression order should be reversed.

I. A. On the merits, the county court erroneously concluded that police violated the Fourth Amendment in executing the warrant. In the totality of the circumstances, however, there was nothing constitutionally unreasonable about this search. First, the text of the Fourth Amendment does not contain an independent minimization requirement, and the statutory minimization requirement applicable to certain audio surveillance should not be imported into the Constitution. Second, even assuming minimization was constitutionally required here, any such requirement was satisfied. Whenever technologically feasible, the detectives stopped recording a

[1] This brief addresses those Defendants whose prostitution offenses were discovered as the result of the investigation conducted by the Sheriff's Office, while a separate brief discusses the Vero Beach Police Department investigation.

spa customer thought to be receiving a legitimate massage. The fact that a very small percentage of customers were nevertheless recorded receiving a non-criminal massage does not render the entirety of the searches illegal.

That is particularly true given the nature of the prostitution ring police were investigating. Based on the information they had at the start of the search, police reasonably anticipated that every massage interaction would involve, at the very least, an offer of prostitution by the spa worker, if not the actual purchase of sexual services by the spa customer. Greater minimization procedures, by contrast, would have furthered no substantial privacy interest, while simultaneously threatening to frustrate the lawful objectives of the search. Defendants have not disputed that police could view 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. And, more often than not, the criminal conduct in question took place at or near the *end* of an illicit massage, making it difficult for law-enforcement officers to predict when such a massage would culminate in the sale of sexual services.

Courts have also recognized that, when dealing with a conspiracy, police must be afforded greater leeway in executing the search. That is especially true when the place to be searched is a business open to the public, meaning the targets of the

search are entitled to fewer privacy protections than persons in a private home. Accordingly, the detectives' execution of the warrants was reasonable.

B. Even assuming a constitutional violation, suppression of the videos was not an appropriate remedy for two reasons. First, Defendants' claim of a Fourth Amendment violation was predicated, at best, on alleged harms to the privacy of *other people* who have not been charged with any crime and whose rights are not at issue in this case. But Defendants lack standing to vicariously assert the Fourth Amendment rights of third parties. That alone is fatal to their claims. Second, in no event would Defendants be entitled to total suppression of all video in the case; rather, they would be entitled to suppress only any unlawfully-seized videos, a class which would not include the video evidence of their own prostitution offenses.

II. Finally, Defendants 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

A. Florida's human trafficking and prostitution epidemic.

Recent years have seen a renewed focus on the problem of human trafficking in Florida and elsewhere in the United States. In 2006, the Florida Legislature declared that human trafficking is a "form of modern-day slavery" affecting "young children, teenagers, and adults." Ch. 2006-168, § 1, Laws of Fla. These victims are

"subjected to force, fraud, or coercion for the purpose of sexual exploitation or forced labor." *Id.*

Under state law, an offender is guilty of human trafficking if he or she "transport[s], solicit[s], recruit[s], harbor[s], provid[es], entic[es], maintain[s], or obtain[s] another person for the purpose of exploitation of that person," either for "labor or services" or "commercial sexual activity," and in doing so uses coercion. §§ 787.06(2)(d), (3), Fla. Stat. (2019). While some human traffickers subjugate their victims by keeping them under lock and key, the "most frequently used practices" involve "less obvious techniques": isolating victims from the public and family members, confiscating passports, visas, and other forms of identification, using or threatening violence against victims or their families, telling victims that they will be imprisoned or deported for immigration violations if they contact authorities, and controlling the victims' funds by holding the money ostensibly for safekeeping. Ch. 2006-168, § 1. Debt, whether incurred abroad or in the United States, is one of the "strongest methods of initial control that traffickers possess."[2] Traffickers may agree to transport foreigners to the United States and, only after they arrive, inform them of exorbitant fees they must pay off through sexual labor. [3]

These and other methods explain why it has historically been difficult to

[2] "Human Trafficking in Illicit Massage Businesses," Polaris, at 29 (last visited Oct. 14, 2019), *available at* https://tinyurl.com/y45jyc62.

[3] *Id.*

distinguish between victims of human trafficking and willing sex workers, and why successful human trafficking prosecutions have been few and far between.[4] Indeed, despite various statewide initiatives to combat these practices, Florida remains "the third largest hub for human trafficking in the United States," behind only California and Texas.[5] Nearly 2,000 prostitution arrests were made in Florida in 2018 alone,[6] consistent with nationwide statistics showing that sex labor accounts for roughly two-thirds of all human trafficking violations.[7]

Apart from the obvious elements of forced servitude and assault, sex trafficking victims suffer the increased risk of sexually transmitted infections,

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[4] *See, e.g.*, Fla. H. Rep. Staff Analysis, H.B. 989 (June 27, 2014) ("Trafficked persons are not always recognized or treated as victims by law enforcement and prosecutors. Despite being victims, individuals who are trafficked are often arrested and convicted of prostitution and other related offenses, and may plead guilty not understanding the consequences."); A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report, National Institute of Justice, U.S. Dep't of Justice, at 4 (Apr. 30, 2012) ("Market incentives and fear of reprisals from pimps and traffickers motivate providers of commercial sex who are trafficked to presented themselves as if they participate voluntarily, …"), *available at* https://tinyurl.com/y4c55y28 (hereinafter "National Overview").

[5] "Child Human Trafficking," Florida Dep't of Education, at 1 (last visited Oct. 14, 2019), *available at* https://tinyurl.com/yyahjdav; *see also* Ch. 2019-152, preamble, Laws of Fla. (finding that "Florida is ranked third nationally in human trafficking abuses").

[6] "Arrest Totals and Index Arrests by County, January – December 2018," Florida Dep't of Law Enforcement, at 6 (last visited Oct. 14, 2019), *available at* https://tinyurl.com/y2n7ausy.

[7] "2017 Statistics from the National Human Trafficking Hotline and BeFree Textline," Polaris, at 2 (last visited Oct. 14, 2019), *available at* https://tinyurl.com/y684no8s.

HIV/AIDS, and drug use.[8] Among all prostitutes, regardless of trafficking victimhood, violent crime is endemic. Prostitutes, for example, have mortality rates almost 200 times greater than persons with similar demographic profiles, and 73-92% have been raped while providing commercial sex, with 59% of those victims having been raped at least five times.[9] Together, they experience homicide 17 times more often than the general population.[10] In addition, studies show that up to 80% of women and girls who work as prostitutes "had been coerced or forced to engage in prostitution by pimps or traffickers."[11]

Among the various forms of sex trafficking, illicit massage parlors have become particularly prevalent. Ch. 2019-152, preamble, Laws of Fla. (finding that traffickers "use hotels, motels, public lodging establishments, massage establishments, spas, or property rental sharing sites"). Polaris, a watchdog organization, estimates that there are "more than 9,000 illicit massage parlors currently open for business in America," with revenues reaching $2.5 billion annually.[12] In 2017, Polaris' human trafficking survivor hotline received 774

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[8] Gabriela Paz-Bailey et al., *Prevalence of HIV Among U.S. Female Sex Workers: Systematic Review and Meta-analysis,* 20(10) AIDS Behav. pp. 2318–2331 (Oct. 2016), *available at* https://tinyurl.com/y84rpkcr.

[9] National Overview, *supra*, at 12-13 (citing studies).

[10] *Id.* at 13.

[11] *Id.*

[12] "Human Trafficking in Illicit Massage Businesses," *supra*, at 10.

complaints about illicit massage businesses.[13] Some of the most "prominent hubs" for this type of trafficking—Miami and Tampa—are right here in Florida.[14]

Accordingly, the Legislature has identified human trafficking as a major enforcement priority, deeming it "critical to the health, safety, and welfare of the people of this state to prevent and deter human trafficking networks." Ch. 2019-152, preamble.

B. The Indian River County Sheriff obtains a warrant for video surveillance of the East Sea Spa.

As part of a broader law enforcement effort spanning several Florida counties, the Indian River County Sheriff's Office began investigating the East Sea Spa in 2018 after learning that other law enforcement agencies were actively combating illicit massage businesses within their jurisdictions. J.A. 532-33. The East Sea Spa, located in Sebastian, Florida, aroused suspicion after Sergeant John Finnegan discovered that it had openly posted ads for sexual services on adult-oriented websites like Rubmaps and USA Sex Guide. J.A. 366-67, 544. The sergeant therefore placed the spa under visual surveillance and observed a disproportionate number of men visiting the spa, with many of them "looking around the parking lot as if to see if anyone was watching" before entering the business. J.A. 368. At one

[13] "2017 Statistics from the National Human Trafficking Hotline and BeFree Textline," *supra*, at 2.

[14] "Human Trafficking in Illicit Massages Businesses," *supra*, at 37.

point, a customer later identified as a registered sex offender fled the spa "at a full sprint" upon seeing a uniformed officer in the parking lot. J.A. 368-69.

To confirm that a prostitution ring was being run out of the East Sea Spa, Sergeant Finnegan conducted trash pulls at the location, which revealed tissues testing positive for seminal fluid, and performed traffic stops of two men seen leaving the spa. J.A. 369-70, 564. Both men agreed to speak to police and admitted that, after receiving a massage, they paid an additional fee for a "hand job" from a female masseuse. J.A. 369-70, 552-57.

Moreover, it appeared that the spa's female massage workers lived in the business, a traditional indicator of human trafficking. J.A. 363, 577, 647. Throughout his visual surveillance, Sergeant Finnegan never saw those women leave the building at night and only saw them leave the building on one occasion, to shop at Wal-Mart. J.A. 577-78, 646-47. Whenever a female worker would arrive at the spa, she was transported by an unknown individual. J.A. 646-47. Karen Herzog, an official with the Department of Health, corroborated that the women were living there when, during a routine health inspection, she observed "clothing, suitcases, food, bedding, and other indicators … consistent with someone living in the facility." J.A. 363; *see also* J.A. 675-76. Following her inspection, Ms. Herzog reported the spa to a human trafficking hotline run by the watchdog group Polaris. J.A. 676. And in Sergeant Finnegan's subsequent search warrant affidavit, he explained that "it is very

common for human trafficking victims, especially those forced into prostitution, to live at their places of work." J.A. 363.

All these observations informed Finnegan's application for a warrant authorizing the installation and monitoring of non-audio video cameras in the East Sea Spa for 30 days. J.A. 360-77. He indicated that cameras would "only be placed in locations where prostitution is believed to be occurring," not in "areas expected to be non-criminal in nature, i.e. kitchen, bathroom, personal bedrooms," J.A. 374, and that the monitoring officers would take steps to "minimize" any invasion into privacy. J.A. 374-75.

On December 11, 2018, a circuit judge, in her capacity as a magistrate, approved the covert entry, installation, and monitoring of video surveillance cameras in the East Sea Spa. J.A. 378-79. The judge concluded that there was probable cause that persons at the spa were committing prostitution and deriving support from the proceeds of prostitution, which is a second-degree felony, and authorized monitoring for "a period no longer than 30 days." *Id.* The warrant instructed the detective-monitors to "take steps to minimize the invasion of privacy to any parties not engaged in the unlawful acts set forth in the affidavit." J.A. 379.

In the ensuing 30-day period, Detectives Andrew Dean and Mike Scott[15]

[15] After submitting the warrant affidavit, Sergeant Finnegan was promoted and thereafter was not involved in the surveillance operation. J.A. 540-41. The warrant was executed by his colleagues at the Sheriff's Office. J.A. 598-99.

monitored the video feed for 9 days, recording 43 prostitution events. J.A. 632. Each individual male customer who entered the spa during that period paid for illicit sex acts. J.A. 664. Some of the sexual acts occurred at the beginning of the massage, some occurred in the middle, while most occurred at the end. J.A. 656-57. The monitoring was conducted by the two detectives at an off-site location inaccessible to all but a handful of detectives. J.A. 610-12. When they were not actively monitoring, the cameras were turned off and did not record. J.A. 632.

After installing the cameras in the spa, Detectives Dean and Scott learned that they could not control entirely which video feeds would be recorded. J.A. 620, 628. Instead, they had the option to record none, one, or all of the rooms at the same time. J.A. 680, 691.[16] As a result, if two men were receiving illegal massages in Rooms 1 and 2, and a woman entered Room 3, the detectives could not record both men committing crimes without simultaneously recording the woman's massage. J.A. 680, 691, 693-94. This meant that, on four occasions, a woman was recorded while

[16] There was some confusion on this point during the evidentiary hearing. Lieutenant Anthony Civita, who oversaw the operation but did not engage in monitoring, testified that he believed the cameras would either record nothing or all four rooms at once. J.A. 595, 605. He apparently was mistaken, and the county court credited the understanding of Officer Mike Scott, who had "expertise in electronic equipment" and who explained that the system could record either one room or all four rooms. J.A. 492 & n.1, 680 691. The county court believed that Detective Dean, the other monitor, did not know that the recording system had this capability; but that factual finding appears to have conflated Detective Dean with Lieutenant Civita, who did not engage in monitoring. *Compare* J.A. 492 n.1, *with* J.A. 627.

engaged in what appeared to be lawful activity. J.A. 604, 661-62. Nevertheless, to reduce any intrusion into the privacy of those women the detectives would toggle to video of only the suspected *unlawful* massages, taking the third massage off-screen. J.A. 633, 662, 687. Thus, any such legitimate massages involving women would be recorded but not viewed by the monitors. J.A. 687.

On other occasions, if a woman entered a massage room and there was only one man currently receiving a criminal massage, the detectives would turn off the recording device in the female's massage room and record only the unlawful act. J.A. 686-87, 693-94. And if a woman was the only customer in the business, and she appeared to be receiving a lawful massage, detectives would stop recording altogether. J.A. 604, 622, 690.

When the term of the warrant expired, Detective Dean sought a second warrant to extend the surveillance period by 30 days in order to continue identifying the "organizational structure" of the prostitution ring and to determine the role of an "unknown Asian female" who had recently arrived on scene and had been seen transporting one of the female massage workers to another location. J.A. 395-96. That second warrant was approved on January 11, 2019, J.A. 400-01, and the detectives proceeded to monitor the cameras for an additional four days before terminating the operation. *See* J.A. 661.

All told, monitoring occurred on 13 out of a possible 60 days. J.A. 661. The

detectives recorded a total of 67 massages, 63 of which involved an act of prostitution. J.A. 661-62. Every individual man who entered the massage in that span ultimately paid for illicit sexual services. J.A. 661-62, 664. Up to ten women received a massage at the East Sea Spa during the 13-day surveillance period, with only four being recorded. J.A. 604.[17] All recordings are secured on a server to which Detectives Dean and Scott alone have access. J.A. 611.

Each of the Defendants in this case was identified as having paid for sex on one or more occasions, resulting in their many misdemeanor charges for solicitation of prostitution. *See, e.g.*, J.A. 359. In a parallel prosecution, the owner of the East Sea Spa is facing felony racketeering charges. *State v. Liyan Zhang*, 31-2019-CF-000226-A. Police believe that at least one of the female workers at the East Sea Spa was the victim of human trafficking, J.A. 640-41, although to date no trafficking related charges have been brought as a result of the Indian River County Sheriff's investigation.

C. The county court suppresses the video evidence of Defendants' prostitution offenses.

Before trial, Defendants moved to suppress the video of their prostitution offenses, citing six theories. They contended, *first*, that delayed-notice video

[17] During discovery, one of these videos was inadvertently transmitted to counsel for one of the Defendants. J.A. 499, 610. Women filmed during the operation would generally wear sheets during the massage, J.A. 690, and the woman on this particular video was "partially unclothed." J.A. 499.

surveillance warrants are unauthorized in Florida. J.A. 424-26. *Second*, that the text of the warrants permitted only "monitoring," not "recording." J.A. 478. *Third*, that police failed to "minimize" any intrusion into lawful conduct while executing the search. J.A. 481-88. *Fourth*, that video surveillance was "unnecessary." J.A. 438-42, 479-81. *Fifth*, that the warrants were predicated on "material misrepresentations" in the warrant affidavit. J.A. 426-33. And *sixth*, that Sergeant Finnegan, the warrant affiant, was not involved in the execution of the search. J.A. 541, 584-85.

The State offered several responses to the minimization issue, which formed the crux of the county court's ruling. As a threshold matter, the State contended that Defendants lacked standing to challenge their own searches by invoking the rights of third parties. J.A. 468. Prosecutors observed:

> The defendant in this case makes no claim that *he* was monitored or recorded doing something that was not pertinent to the investigation. Instead, he may argue that *someone else's* legitimate activities were intercepted and he should receive a windfall from the failure of law enforcement to minimize that interception.

Id. (emphases added). Defendants' argument failed because "[a] defendant may not complain about law enforcement's failure to minimize the invasion of another person's privacy." *Id.*

Assuming Defendants had standing, the State argued that the video search was reasonable under the Fourth Amendment because (1) recording took place on only 13 of the authorized 60 days; (2) detectives engaged in "intrinsic" minimization

wherever feasible by stopping the recording function if it appeared a massage would be non-criminal; (3) when the recording system did *not* permit total intrinsic minimization of a seemingly lawful massage, detectives would zoom in on the criminal conduct alone, such that "no monitors watched the non-pertinent activity while it occurred"; (4) of the 67 acts that were recorded, 63—or 94%—were sexual in nature, with only four that were not; and (5) just two detectives monitored the video feed, which was done in a "controlled access room." J.A. 470-71.

After an evidentiary hearing, the county court rejected the bulk of the Defendants' arguments. J.A. 497, 585-87. It nonetheless suppressed the video because "the law enforcement officers in this case did not follow the judges' orders to minimize." J.A. 499. Minimization, the court reasoned, was a "strict requirement under the Fourth Amendment," and yet the detective-monitors had received no "written criteria" to guide them in "deciding when, or if, to minimize." *Id.* This resulted in the "disturbing" fact that "on every occasion an innocent female client occupied a massage room at the same time a male customer was in another room, the detectives intercepted and recorded the female." *Id.*

The court dismissed the detective-monitors' efforts to zoom in on the male customers in that circumstance because, even though the detectives were not actively watching the events in a woman's massage room, the woman was "still being intercepted." *Id.* The county court acknowledged, however, that during the 13 days

of monitoring "every male that entered a massage room to obtain a massage ended up engaging in sexual activity." J.A. 492.

For the "critical error[]" of recording four women engaged in "innocent activity," the county court ruled that "there is no remedy other than to suppress the video recording" in each of the Defendants' cases. J.A. 499.

Following its ruling, the county court certified four questions of great public importance: *First*, whether Defendants had a legitimate expectation of privacy; *second*, whether the magistrate possessed the authority to issue a video surveillance warrant; *third*, whether the warrant complied with the Fourth Amendment;[18] and *fourth*, whether the warrant was executed in compliance with the Fourth Amendment. J.A. 504. The State took an interlocutory appeal, and this Court accepted jurisdiction. *See* Fla. R. App. P. 9.160(b), (e)(2).[19]

STANDARD OF REVIEW

In reviewing a suppression order, this Court defers to the trial court's factual

[18] This third question was not raised by Defendants as a basis to suppress, was not litigated by the parties below, and was not passed upon by the county court. *See* J.A. 498 n.4 (noting that "defendant does not challenge the language in the orders"). It is not at issue in this appeal, *cf. Pirelli Armstrong Tire Corp. v. Jensen*, 777 So. 2d 973 (Fla. 2001) (not reaching certified question of great public importance that was not passed upon by the lower court), though the question has been briefed by the State in *State v. Kraft*, No. 4D19-1499 and *State v. Zhang, et al.*, No. 4D19-2024.

[19] 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 in *Kraft* and *Zhang, et al.*

findings but reviews *de novo* the trial court's application of law to fact. *Wyche v. State*, 987 So. 2d 23, 25 (Fla. 2008).

ARGUMENT

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

To combat a criminal enterprise suspected of human trafficking and prostitution offenses, police monitored video cameras installed in the East Sea Spa for 13 days, a fraction of the time authorized by two search warrants. That operation turned up overwhelming evidence that both the East Sea Spa and its customers were violating the criminal law. Indeed, a full 94% of the massages witnessed by police were criminal in nature, either beginning or ending with an act of prostitution. By subsequently invalidating the video searches, the county court erred. But even if the police overstepped lawful bounds, the incriminating evidence was still admissible for a series of reasons. The suppression order must therefore be reversed.

A. Police properly complied with the Fourth Amendment when executing the warrants.

Heralding the fact that four "innocent female patrons" of the East Sea Spa were recorded, the county court ruled that the *entirety* of the video searches were unconstitutional and should be suppressed. J.A. 499. That was incorrect in light of two considerations. First, minimization is not required by the Warrant Clause, nor is it 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.

1. "[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.

2. Defendants cannot establish, under the particular facts and circumstances of this case, that police executed the warrants in an unreasonable manner.

First, police engaged in both "intrinsic minimization"—the process of screening non-pertinent content as the search takes place—and "extrinsic minimization"—the use of external parameters to limit a search's intrusiveness. *See* Fishman & McKenna, Wiretapping and Eavesdropping §§ 15.4-5 (2018). Most significantly, Detectives Dean and Scott explained that, whenever possible, they stopped recording if a woman was receiving what appeared to be a lawful massage. J.A. 604, 622, 686-87, 693. This was not *always* practical, however, because the recording system was configured so that if two men were purchasing sexual services at the same time a woman was getting a massage, the detectives could not record both crimes unless they simultaneously recorded all four massage rooms. J.A. 680, 691, 693-94. In those instances when the detectives could not cease recording altogether, they would toggle through the video feeds so that the woman's massage was not displayed on screen. J.A. 633, 662, 687.

Aside from these efforts to intrinsically minimize, the detectives took various steps to extrinsically minimize. "[O]ne 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. Here, detectives recorded for only 13 days, despite having 60 days' worth of authorization. J.A. 661.

Additionally, only two detectives monitored the video; they did so in an off-site location not accessible by ordinary members of the Sheriff's Office; and they stored the video on a secure server accessible only by Detectives Dean and Scott. J.A. 610-12; *cf. King*, 569 U.S. at 465 ("This Court has noted often that a statutory or regulatory duty to avoid unwarranted disclosures generally allays ... privacy concerns." (internal quotation marks omitted)).

Second, 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, neither the county court nor Defendants specified precisely what methods of minimization they believed should have been implemented. The county court, for example, faulted police for not promulgating "written criteria" for use in minimization, J.A. 499, but did not offer suggestions on what criteria should be included to render the searches constitutional.

Assuming for the moment that the county court had in mind spot-checking[20] of the video feed, or that police should have discontinued recording and monitoring entirely if certain non-dispositive conditions were present, those measures would have done little to advance privacy interests, and therefore were not mandated by the Fourth Amendment.

Notably, this video surveillance was qualitatively different from the telephone wiretapping considered by federal courts. In the wiretap context, where minimization is statutorily required, 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.

[20] "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.

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 no one 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.

Defendants have never argued otherwise, and have never articulated what new sensitive information police would impermissibly discover by viewing a massage in its entirety. If, as they apparently concede, viewing the first five minutes of a massage was acceptable, it is hard to see 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 frequently 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").

Third, 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 easily could miss the sexual act, exchange of payment, and relevant context—including arguably or potentially exculpatory evidence. Another complicating factor was the uncertainty as to when during a massage the sexual act would occur. Some of the prostitution events began at the start of a massage; others occurred in the middle; while most happened at the end. J.A. 656-57. Consequently, detectives could not simply cease monitoring if no crime occurred at the beginning of a massage, since prostitution most often would occur later on.

In other words, greater 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).

Fourth, as the Supreme Court has explained in the wiretap context, "[t]he type" of conduct or activity that would normally be monitored or recorded by electronic surveillance "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 solicitation of prostitution by a massage worker or customer. That proposition was based on the statements by the men stopped leaving the spa, each of whom admitted to paying for sexual acts at the spa; the internet advertisements indicating that the East Sea Spa was an illicit massage business; and the highly suspicious behavior of the spa's male clientele when entering the building through the parking lot. J.A. 366-67, 368-70, 544, 552-57. Accordingly, there was little known risk that nonstop recording would capture lawful massages.

That suspicion was only bolstered by the detectives' actual experiences monitoring the video feed. Over the course of 13 days, police recorded 67 criminal massages, compared with only four that appeared non-criminal. J.A. 661-62. The detectives therefore operated with the knowledge that 94% of massages would either begin or end in a crime. While not dispositive, this low "percentage of nonpertinent" transactions intercepted "provide[s] assistance" in evaluating the reasonableness of a search. *Scott*, 436 U.S. at 140.

Fifth, courts have consistently held that where police confront "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. Nov. 9, 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.

Sixth, Defendants 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.

Finally, the county court's views regarding the constitutional effect of recording several women were unsound. At the outset, the county court's order appears to have been based in part on a clearly erroneous factual finding. *See, e.g.*,

State v. Williams, 184 So. 3d 1205, 1208 (Fla. 1st DCA 2016) (rejecting trial court's finding of fact because "[t]his factual finding is not supported by the record"). It wrote: "Most disturbing, on every occasion an innocent female client occupied a massage room at the same time a male customer was in another room, the detectives intercepted and recorded the female even though the detectives had the ability to only record the male." J.A. 499. But Detective Scott's unrebutted testimony established that this was not true. As he explained, there were instances when they in fact did stop recording a woman's legitimate massage while still recording a man's unlawful massage. J.A. 692-94. The problem only arose when *two* men were engaged in prostitution while a woman was receiving a massage, at which point the detectives elected to simultaneously record all four rooms, sweeping in the woman's massage. J.A. 693-94. The county court's suggestion that the detectives recorded women even when it was technologically feasible to avoid doing so is simply not supported by the record.

At any rate, the detectives' efforts to avoid recording female spa customers were nowhere mandated by the Fourth Amendment. It may well have seemed less likely to Detectives Dean and Scott—and to the judge—that female patrons would purchase sex acts at the East Sea Spa; but it would not have been *constitutionally unreasonable* for them to occasionally monitor women who chose to patronize a business known to be engaged almost exclusively in the sale of prostitution. To

conclude otherwise, one would necessarily have to rely 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.

In sum, the police in this case obtained facially valid warrants, the execution of which was constitutionally reasonable. The county court erred in finding a Fourth Amendment violation.

B. Alternatively, suppression was an inappropriate remedy.

Assuming police violated the Fourth Amendment in some way, Defendants are still not entitled to the drastic remedy of suppression as to any of the videos. "Suppression of evidence … has always been [a] last resort, not [the] first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Here, for example, Defendants cannot invoke the exclusionary rule to remedy a violation both because they lack 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 Defendants' crimes.

1. Defendants lack standing to vindicate the rights of third parties implicated in an otherwise valid search.

Under settled law, Defendants lack 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. Defendants cannot fairly assert—and indeed, have not tried to assert—that *they* were illegally recorded paying for sex, since even under a more rigid minimization protocol their unquestionably criminal acts would have been captured by surveillance cameras. Instead, they have expressly invoked the rights of third parties who were filmed receiving non-criminal massages, telling the county court that "If there's a woman in there getting an innocent massage, you don't record the crime. *Their privacy* trumps the crime." J.A. 702. But because Defendants were not a party to the searches of those four women, Defendants lack standing to contest any invasion into "[t]heir"—*i.e.*, the women's—privacy." A person cannot challenge his own search by proxy. *See deLay*, 988 F.2d 123, at *2.

To the extent those four female customers have a remedy for the allegedly unlawful invasion of their privacy, they must pursue that remedy, if at all, in a civil suit. *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 with a civil suit for damages under the statute." (citations omitted)). Nor do those

customers stand to gain from an order affording Defendants a windfall. Thus, suppressing the video of Defendants' prostitution offense in the case against them is not a necessary or sufficient way of remedying an alleged constitutional violation suffered by a third party.

2. At any rate, the remedy for a search exceeding the scope of a warrant is suppression of the items seized outside the scope, not total suppression.

A. Even if Defendants 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, Defendants are not entitled to relief because the video of *their* prostitution offenses fell squarely within the terms of the warrant: the videos constitute evidence of "prostitution and person(s) deriving support from the proceeds of prostitution." J.A. 378, 400.

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.").[21]

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

[21] 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) (concluding 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 minimapmization 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*.

remedy for the unlawful seizure of the documents would not be the suppression of the drug evidence as well.

B. In support of total suppression, Defendants invoked several precedents, none of which justify departing from the ordinary parameters of the exclusionary rule. J.A. 487 (citing *United States v. Focarile*, 340 F. Supp. 1033 (D. Md. 1972); *United States v. Cleveland*, 964 F. Supp. 1073 (E.D. La. 1997)).

In *Focarile*, a federal trial judge concluded that the Government's wiretap minimization efforts were reasonable even though law enforcement officers intercepted every call for "12 to 13 days"—with only "50%" of the calls involving illegality—since the officers were investigating "an alleged narcotics conspiracy involving an unknown number of persons and where it was extremely difficult, if not impossible, to determine which calls were 'innocent' in advance of obtaining a reliable pattern." 340 F. Supp. at 1048-50. The trial court nevertheless went on to opine, in *dicta*, that the remedy for a minimization violation is total suppression. The court reasoned that, when it comes to overbroad wiretaps, a "stronger safeguard" is needed because, "[k]nowing that only 'innocent' calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III." *Id.* at 1047.

That *dicta*, in a trial court decision, does not fairly represent the law applicable here. To begin with, though the statutory inquiry at issue in *Focarile* is related to the constitutional inquiry at issue here, the two analyses are not coterminous. That is, Title III's exclusionary rule may well be more expansive—though not less so—than the Fourth Amendment's. Having considered that distinct statutory question, *Focarile* has substantially reduced persuasive value.

Just as significantly, *Focarile*'s maximum-deterrence rationale was rejected by the Supreme Court in *Waller*, where the Court could have held, but did not, that suppressing only the illegally-seized items was an insufficient deterrent since prosecutors would still be able to rely on the properly-seized evidence. By refusing to adopt the "flagrant disregard" standard urged by the defendant in that case, the Supreme Court rebuffed the exact reasoning *Focarile* relied on. *See Waller*, 467 U.S. at 43 n.3. Thus, any persuasive value *Focarile* might otherwise have was extinguished by the Supreme Court's later decision in *Waller*.

In all events, it is one thing to suggest that a defendant may seek to remedy violations of his own rights by suppressing both erroneously- and properly-seized items involving that same defendant; it is another thing entirely to suppress properly-seized items of a defendant in order to remedy violations of some *other person's* rights, as Defendants would have the Court do here. That latter theory cannot survive basic principles of Fourth Amendment standing.

As for *Cleveland*, which similarly declined to suppress wiretap evidence, that opinion acknowledged that even where courts have enforced the remedy of total suppression, they have done so only if the failure to minimize resulted in "violations of 'egregious magnitude.'" 964 F. Supp. at 1095 (citation omitted). A violation does not rise to the level of an "egregious magnitude" where, as here, only 6% of recorded video was non-pertinent to the investigation. *See United States v. Suquet*, 547 F. Supp. 1034, 1046 (N.D. Ill. 1982) ("Nevertheless, the [non-pertinent] category contains only 4% of the total number of completed calls. The Government's failure to justify such a small percentage does not undercut its position."). It is telling that both of the cases Defendants mustered in support of their total-suppression theory declined to suppress the evidence at issue, and that one of those cases explicitly found that total suppression would be appropriate only if "an 'inordinate number of unreasonable interceptions' were shown." *Cleveland*, 964 F. Supp. at 1096 (citation omitted).

In short, Defendants are not entitled to the drastic remedy of total suppression, making video of their own crimes admissible at trial.

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

Nor can the county court's suppression order be sustained on any of the alternative theories pressed by Defendants 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 Defendants will continue to advance those arguments on appeal, this section addresses their claims that (A) delayed-notice video surveillance warrants are unauthorized in Florida; (B) these warrants permitted only "monitoring," not "recording"; and (C) video surveillance was "unnecessary" in this case.

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

Defendants' primary submission below was that warrants authorizing delayed-notice video surveillance are unlawful due to an "absence of state authority" in the statutes governing warrant procedure. J.A. 424-26. Defendants offered little support for that sweeping claim. But even if Florida magistrates have no authority to issue this type of warrant, Defendants would not be entitled to suppression because police relied on the warrants 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), the same analysis applies 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 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 Defendants because suppression is unavailable where police relied on a warrant in good faith.

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. At the same time, courts are cognizant that exclusion "exacts a heavy toll" by often letting wrongdoers free in society. *Id.* at 237.

"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 *United States v. Leon*, 468 U.S. 897, 919 (1984)).

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).

Applying the good-faith exception to circumstances that were materially identical to the ones here, 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 warrants, rendering suppression inapposite.

B. Recording, not merely monitoring, was permitted by the warrants.

Next, Defendants contended that only monitoring, and not recording, was authorized by the language of the warrants. J.A. 478. It is true that neither warrant expressly mentioned "recording." But they did not need to. The Florida Supreme Court has instead held that a warrant allowing police to enter a home to conduct a search simultaneously authorizes the taking of photographs and video recordings. *See Davis v. State*, 217 So. 3d 1006, 1015-16 (Fla. 2017) ("Therefore, officers did not violate Davis's constitutional right against improper search and seizure by photographing and videotaping the July 2012 search."). Additionally, the Court has said that where the police have the right to listen to conversations, they also have the power to record. *See State v. Hume*, 512 So. 2d 185, 188 (Fla. 1987).

That makes sense. If police are allowed to undertake the more intrusive activity of entering the premises to *view* a set of conduct, nothing should preclude them from memorializing reliable evidence that will later corroborate their personal observations. Permitting video recording in this circumstance serves the interests not only of law enforcement by allowing prosecutors to present trustworthy evidence of guilt at trial, but also of innocent defendants themselves, for whom video recording may provide valuable exculpatory evidence.[22]

[22] Even in the event recording violated the terms of the warrant, that would result at most in suppression of the videos. The detectives who monitored the

Finally, though not expressly referencing "recording," these warrants contemplated that recording would in fact occur. Each warrant instructed law enforcement officers that "[t]he original of this warrant, together with the original *inventory*[,] shall be returned and filed with the Judge." J.A. 379, 401 (emphasis added). The only conceivable "inventory" of a video search of this kind would be videotapes made during the search, meaning the magistrate would have understood, and thereby implicitly authorized, police to record the events in the spa.

C. The search complied with any necessity requirement.

Last, Defendants 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." J.A. 438-42, 479-81. That theory is unpersuasive.

1. To the extent a showing of necessity is required for a "reasonable" video search under the Fourth Amendment, 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

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surveillance cameras would still be permitted to testify to their recollection of any events they personally witnessed during monitoring.

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, Sergeant Finnegan advised the magistrate of several potential alternatives which reasonably suggested themselves, including the use of undercover officers or interviewing spa employees. J.A. 372-73. Dismissing each option, the detective explained in writing that approaching the female massage workers was unlikely to succeed because "these women are usually not interested in speaking with or cooperating with law enforcement for they fear status issues and/or a loss of income/good standing with those that are controlling them." J.A. 372. In the event this method was tried and failed, police risked the "owners/managers" of the business "becom[ing] aware of our investigation." *Id.* As for undercover officers, Detective Finnegan was unwilling to expose one of his officers to the ethical and safety concerns associated with pretending to seek prostitution. *Id.* The county court

properly rejected Defendants' necessity arguments. J.A. 497-98.[23]

2. Whatever the ultimate merit of their claim, Defendants are not entitled to the extreme remedy of suppression because police relied upon the warrant in good faith. *Supra* 39-41; *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"). While a reviewing court might now decide that one or more of the warrants should have not issued because video surveillance was "unnecessary," the facts remains that police reasonably relied on the magistrate's contrary determination.

CONCLUSION

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

[23] As Defendants themselves pointed out in their pleadings below, the necessity of the extended search period "should be considered separately from the initial warrant." J.A. 488-89. Thus, in the event the Court finds that the first video surveillance warrant was justified by the circumstances but the second was not, the result would be only that the second set of video searches were unlawful. Consequently, only those Defendants whose criminal conduct was captured pursuant to the second warrant could potentially seek suppression.

Respectfully submitted,

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