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

STATE OF FLORIDA

v.

Case Nos. 2019MM002346AXXXNB
2019MM002348AXXXNB

ROBERT KRAFT,

Defendant.

DEFENDANT ROBERT KRAFT'S OPPOSITION
TO STATE'S MOTION TO STRIKE MOTION TO SUPPRESS

PRELIMINARY STATEMENT

Defendant Robert Kraft respectfully opposes the State's "Motion to Strike" his pending motion to suppress. As a procedural matter, the State's Motion to Strike is untimely and misplaced. The substance of the State's Motion to Strike, however, is much worse.

The State has now sunk to arguing that Americans have no reasonable expectation of privacy and therefore no standing even to invoke the Fourth Amendment in the event that the police spy on them while they are undressed in private massage rooms—or, for that matter, in health-club locker rooms, doctors' offices, clothing-store dressing rooms, restaurant bathrooms, or countless other intimate settings outside their homes. By the State's latest account, because Americans patronizing private businesses are merely "short term visitor[s]" involved in "commercial transactions," the Fourth Amendment has no application whatsoever if the State surreptitiously interjects the most invasive surveillance into the most sensitive settings to investigate suspected "illegal[ity]" there. Motion to Strike at 5. The State, having offered no more than a perfunctory opposition on the merits of his motion to suppress, now seeks to evade constitutional scrutiny of what it did to Mr. Kraft. To say this is not to caricature the State's submission. Rather, all we are doing is highlighting the bottom line that inexorably (albeit surreally) emerges upon reviewing the State's Motion to Strike.

Let everyone be warned: According to the State of Florida, there can be no expectation of privacy and no Fourth Amendment constraint when people are partially or fully disrobing in private quarters, unless people happen to be doing so in their own homes or as overnight guests. The State's legal position is of course inimical to venerable precedents and principles. Indeed, the State's position should appall anyone who values privacy and constitutional rights. Yet the State's position is part and parcel of the outlandish lengths it went to in spying on Mr. Kraft and

other massage patrons, just to investigate what this Court has aptly termed the "tawdry but fairly unremarkable event" at issue. The State's effort to shed constitutional constraints should be rejected, just as the fruits of its constitutional violations should be suppressed.

ARGUMENT

It bears noting that the State's "Motion to Strike," as filed April 24, 2019, is itself untimely, improper, and unfounded. Mr. Kraft filed his motion to suppress on March 28, followed by his supporting memorandum on April 2, 2019. The State *already filed* its response weeks ago, on April 8, 2019. Any arguments the State wanted to offer against Mr. Kraft's request for suppression belonged in its response, and the State offers no justification for now taking a second bite, weeks later. And the State certainly has no justification for moving to strike the March suppression motion only two days before the April 26 suppression hearing so as to sandbag Mr. Kraft. When litigants misuse a motion to strike in such fashion, Florida courts deny such motions out of hand. *See Boswell v. Boswell*, 877 So. 2d 829, 830 (Fla. 4th DCA 2004) ("[A] motion to strike should rarely be used to challenge the merits of a pleading."); *see also Upland Dev. of Cent. Fla., Inc. v. Bridge*, 910 So. 2d 942, 944–45 (Fla. 5th DCA 2005) ("[A] hearing on a motion to strike a pleading as sham is not for the purpose of trying the issues, but rather serves the purpose of determining whether there are any genuine issues to be tried."). Tellingly, as to the requested striking, the State does not even purport to identify any impropriety in Mr. Kraft moving to suppress, nor does it cite any authority for striking it. As such, the State's Motion to Strike can and should be denied on its face.

I. MR. KRAFT HAS STANDING AND THE FOURTH AMENDMENT IS IN PLAY

It should go without saying that Mr. Kraft and everyone else in the United States have a reasonable expectation that the government will not secretly spy on them while they undress behind closed doors. But ***not*** in Florida, apparently, at least according to the State's latest

position in this case. In moving to strike, the State contends that Mr. Kraft and other massage patrons have no reasonable expectation of privacy, and nothing to complain about under the Fourth Amendment, if the State places them under covert video surveillance and records them while they are nude receiving private massages in private rooms at a licensed spa. Were that correct, the State would have *carte blanche* to institute such surveillance without regard for the Fourth Amendment across any number of intimate settings where Americans may undress every day outside the home—including restrooms, locker rooms, showers, doctors' offices, dressing rooms, *etc.* Across all those settings, the State could argue, as it does now, that the targets of its surveillance are merely "short term visitor[s]" to "commercial" premises pursuant to some sort of transaction, Motion to Strike at 5; after all, money is almost invariably changing hands when people visit their gyms, physicians, workplaces, department stores, restaurants and the like. Of course, the State's argument that there can be no reasonable expectation of privacy in these circumstances is grossly misconceived.[1]

[1] Equally misconceived is the State's recurring suggestion that the Fourth Amendment and privacy considerations are somehow disabled by suspicions and allegations of criminality. *See* Motion to Strike at 9. Suspicions and allegations of criminality are the starting point, not the ending point, of suppression inquiry; they may justify a search, but they do not obviate the reasonable expectation of privacy in the place searched. *See McDade v. State*, 154 So. 3d 292, 299 (Fla. 2014) ("Privacy expectations do not hinge on the nature of [a] defendant's activities—innocent or criminal. In fact, many Fourth Amendment issues arise precisely because the defendants were engaged in illegal activity on the premises for which they claim privacy interests." (alteration in original) (quoting *United States v. Fields,* 113 F. 3d 313, 321 (2d Cir. 1997))); *United States v. Gray*, 491 F. 3d 138, 169 (4th Cir. 2007) ("Fourth Amendment rights have never hinged on whether a defendant's activities were innocent or criminal. Instead, the 'guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike.'" (quoting *McDonald v. United States,* 335 U.S. 451, 453 (1948)); *Elliotte v. Commonwealth*, 372 S.E.2d 416, 418 (Va. 1988) (The fact "that a person is engaged in criminal conduct within his home does not, standing alone, destroy a homeowner's expectation of privacy." (citing *United States v. Whaley,* 779 F.2d 585, 590 n.8 (11th Cir. 1986))).

Indeed, the ***State itself*** knows how wrong its instant submission is. It specifically defines, by statute, a "[p]lace and time when a person has a reasonable expectation of privacy" as "a place and time when a reasonable person would believe that he or she could fully disrobe in privacy, without being concerned that the person's undressing was being viewed, recorded, or broadcasted by another, including, but not limited to, the interior of a residential dwelling, ***bathroom, changing room, fitting room, dressing room, or tanning booth***." § 810.145, Fla. Stat. (emphasis added). David Aronberg, of all people, should know how wrong the State's instant submission is, having been widely reported and quoted as championing the State's anti-voyeurism statute noted above precisely because "the public's privacy has always been very important to him." *See, e.g.*, Tanya Caldwell, *Bill Aims to Draw Curtain on Voyeurs*, S. Fla. Sun Sentinel (Mar. 19, 2004), https://www.sun-sentinel.com/news/fl-xpm-2004-03-19-0403181190-story.html. For the State's officers now to sacrifice the public's acknowledged right to privacy in service of a misdemeanor prosecution is not only hypocritical but unhinged.

The threshold question for Fourth Amendment purposes is simply whether someone has a subjective expectation of privacy in the area searched and whether society recognizes that expectation as objectively reasonable. *See California v. Greenwood,* 486 U.S. 35, 39–40 (1988); *Katz v. United States*, 389 U.S. 347, 351 (1967). There can be no doubting that such expectation attaches to private massage rooms in licensed massage parlors, where customers strip naked as a matter of course. Again, Florida has specifically acknowledged and vindicated that expectation via its own statute. Especially considering that *Katz* itself recognized a customer's reasonable expectation of privacy in a public phone booth that he was paying to use, on a short-term basis, without staying overnight, *Katz*, 389 U.S. at 352 & 354 n.14, the folly of the State's instant contentions should be readily apparent. *See id.* at 351 ("One who occupies [a public phone

booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.").

What is more, this case involves maximally intrusive, covert video surveillance that no American should expect to have intruding into intimate settings and that courts have recognized as raising specters of an "Orwellian state." *United States v. Cuevas-Sanchez,* 821 F.2d 248, 251 (5th Cir. 1987); *United States v. Koyomejian,* 970 F. 2d 536, 551 (9th Cir. 1992) ("[V]ideo surveillance can result in extraordinarily serious intrusions into personal privacy. . . . If such intrusions are ever permissible, they must be justified by an extraordinary showing of need."); *United States v. Mesa-Rincon,* 911 F.2d 1433, 1442 (10th Cir. 1990) ("Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use."); *United States v. Torres,* 751 F.2d 875, 882 (7th Cir. 1984) ("We think it . . . unarguable that television surveillance is exceedingly intrusive . . . ."). The severity of this intrusion gives rise to an even stronger expectation of privacy than may be implicated by less intrusive forms of surveillance. "Persons may create temporary zones of privacy within which they may not reasonably be videotaped . . . even when that zone is a place they do not own or normally control, and in which they might not be able reasonably to challenge a search at some other time or by some other means." *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991) (citing *People v. Dezek*, 107 Mich. App. 78, 308 N.W. 2d 652, 654–55 (1981) (recognizing reasonable expectation of privacy from videotaping in restroom stalls)); *see also Bond v. United States*, 529 U.S. 334, 337–38 (2000) (considering severity of governmental intrusion in determining whether a legitimate expectation of privacy exists); *Jones v. Houston Cmty. Coll.*

Sys., 816 F. Supp. 2d 418, 435–36 (S.D. Tex. 2011) ("A person may have a legitimate expectation of privacy with respect to a particular type of intrusion, even if not to others.").

The State misplaces its reliance on *Minnesota v. Carter*, 525 U.S. 83 (1998), where a police officer spotted drugs being packaged through a ground-floor window. In holding that no reasonable expectation of privacy was implicated there, the Supreme Court emphasized that the defendants "were essentially present for a business transaction" and had no "other purpose" in visiting the apartment, which was "simply a place to do business" for them. *Id.* at 90. The Court's point was not to declare open season for government's prying eyes to roam across "commercial" premises without regard for the Fourth Amendment. Rather, the Court was simply focusing on the purely transactional, "just business" nature of the defendants' presence and their lack of any personal connection to the property. The facts and calculus change profoundly when the State ventures behind closed doors into areas where people are meant to be undressing. If it were otherwise, to cite but one example, men and women disrobing to try on potential clothing purchases in changing rooms at department stores could have no legitimate expectation of privacy against covert video surveillance in the State of Florida. That has never been the law anywhere in the United States, and Florida, in particular, has gone so far as enacting a statute ensuring no one could mistake that to be the law.

As the Ninth Circuit explained in declining to read *Carter* as the State now urges, "We reject the government's broad argument that a court may never consider the severity of the governmental intrusion in determining whether a citizen has a legitimate expectation of privacy. To adopt the government's position would be to ignore a substantial body of Supreme Court and appellate case law, including the recent Supreme Court decision in *Bond v. United States,* 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000)." *U.S. v. Nerber*, 222 F.3d 597, 600 (9th Cir.

2000). Courts accord in continuing to recognize that people have a legitimate expectation of privacy, particularly against covert video surveillance and other intrusive probes, once they enter secluded private areas such as dressing rooms and bathrooms, regardless of whether those areas are found within commercial or public premises. *See, e.g.*, *Ramirez v. State*, 654 So. 2d 1222, 1223 (Fla. 2d DCA 1995) (recognizing legitimate expectation of privacy "[a]s soon as [defendant] entered the closed toilet stall"); *DeVittorio v. Hall*, 589 F. Supp. 2d 247, 256–57 (S.D.N.Y. 2008) ("[G]iven the fact that the room is used for private functions, such as changing clothes, plaintiffs do have a reasonable expectation of privacy from covert video surveillance while in the locker room."), *aff'd*, 347 F. App'x 650 (2d Cir. 2009); *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1104 (C.D. Cal. 2006) ("Plaintiffs need not have an expectation of total privacy in order to have a reasonable expectation that they will not be recorded surreptitiously while changing clothes in a locker room."); *Bevan v. Smartt*, 316 F. Supp. 2d 1153, 1162 (D. Utah 2004) (recognizing dancers' "reasonable expectation of privacy in the dressing room" of "sexually-oriented" dancing establishment); *Hancock v. Dallas Cty. Cmty. Coll.,* 2004 WL 527170, at *4 (N.D. Tex. Mar. 17, 2004) (recognizing "expectation of privacy while behind the closed door of a public restroom"); *Kroehler v. Scott,* 391 F. Supp. 1114, 1116 (E.D. Pa. 1975) (recognizing reasonable expectation of privacy of persons using toilet stalls in public restrooms); *see also Overview of the Fourth Amendment*, 39 Geo. L.J. Ann. Rev. Crim. Proc. 3, 21 n.14 (2010) (collecting cases holding that "individuals may enjoy an objectively reasonable expectation of privacy in public places under circumstances in which one would reasonably expect temporary freedom from intrusion"). The State's contrary argument "is meritless, indeed borders on the frivolous." *Nelson (Roger) v. City of Chicago*, 1986 WL 8367, at *1 (N.D. Ill. July 23, 1986).

II. MR. KRAFT'S MOTION IS LEGALLY SUFFICIENT AND ACCOUNTS FOR THE ALLEGED CRIME

The State is equally wrong to attach talismanic significance to the "crime of Deriving Support from the Proceeds of Prostitution" and to argue as though that changes the relevant legal analysis, much less renders Mr. Kraft's arguments nugatory. *See* Motion to Strike at 14–15. For one thing, mischaracterizations and falsehoods, including bogus suggestions of human trafficking, infect the warrant and affidavit irrespective of what crime the Jupiter Police Department now purports to have identified as the justification for the sneak-and-peek warrant, as Mr. Kraft has already noted and will further establish at the hearing. As a result, it has become impossible to separate one crime from the other in the way that the State now attempts.

Nor would it make any difference whether the probable cause is framed in terms of "prostitution" or "*deriving support from the proceeds of* prostitution": Florida law does not authorize sneak-and-peek warrants for *any* such crime, and Florida's Legislature has expressly excluded *both* such crimes, which together fall under Section 796, from the set of crimes statutorily eligible for extraordinary, intrusive surveillance of the sort at issue. *See* § 934.07, Fla. Stat. (enumerating offenses for which a wiretap may be authorized).

Finally, because Title III and the Fourth Amendment constrain the means of investigation of one crime no less than the other, the absence of requisite necessity and minimization remains equally glaring and fatal. Notably, the only substantive stab at showing supposed necessity in the affidavit was geared around human trafficking: When Detective Sharp attested that masseuses might be "very reluctant to speak with law enforcement out of fear" and engaging in prostitution "as means to repay a debt for transportation to the United States or to protect themselves and/or their families from abuse," Mem. in Support of Mot. to Suppress, Ex. A (Aff. of A. Sharp), at 9, he was relying upon a theory of human trafficking, not proceeds. If, as the

State now suggests, probable cause was founded on ***proceeds of prostitution***, then there is no articulated reason whatsoever why law enforcement could not have successfully investigated ***that*** without secretly recording patrons disrobing for their massages in private rooms.

CONCLUSION

For the foregoing reasons, as well as those set forth in Mr. Kraft's Motion and Memorandum to Suppress and will be further illuminated at hearing, the Motion to Strike should be denied and the requested suppression should be granted.

Respectfully Submitted,

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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 Assistant State Attorney Elizabeth Neto and Judy Arco, on this day, **April 25, 2019**.

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