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

STATE OF FLORIDA

v.

Case Nos. 2019MM002346AXXXNB
2019MM002348AXXXNB

ROBERT KRAFT,

Defendant.
_____/

MOTION TO SUPPRESS

Pursuant to Florida Rule of Criminal Procedure 3.190(g)(1)(B), (D), and (E), Defendant Robert Kraft respectfully requests that this Court suppress evidence seized in violation of Florida law, as well as his rights under the constitutions of Florida and the United States to be free from unreasonable search and seizure. More specifically, Mr. Kraft seeks to suppress video recordings that are the fruits of an unlawful sneak-and-peek search warrant that the Town of Jupiter Police Department used to spy on Mr. Kraft and others, while they were in the private rooms of a licensed spa (the "Spa"), receiving treatment from licensed masseuses. He also seeks, relatedly, to suppress the fruits of an unlawful traffic stop.

Although the legal defects that infect the recordings are numerous and varied, the governmental overreach that unites them is singular and striking: Florida resorted to the most drastic, invasive, indiscriminate spying conceivable by law enforcement—taking continuous video recordings of private massages in which customers would be stripping naked as a matter of course—in order to prosecute what are at most (according to Florida's own allegations) misdemeanor offenses, as to which (according to Florida's own affidavits and search warrants) a wide array of alternative, benign modes of proof was readily available. Because we do not live in a police state and our government answers to the rule of law, suppression of illegally-obtained

evidence is the correct and essential remedy. In this case, there was nothing approaching the showing of necessity that the Fourth Amendment to the U.S. Constitution requires, and law enforcement had no satisfying justification for going to such extreme, invasive lengths just to investigate run-of-the-mill suspicion of solicitation. Simply put, law enforcement was incapable of establishing necessity because none of this, in fact, was ever necessary.

For reasons that will be elaborated in a forthcoming memorandum of law, the relevant fruits are due to be suppressed because they were obtained in flagrant violation of the laws of Florida and of the United States. Specific grounds for suppression include but are not limited to those set forth below:

1. "Sneak and peek" surveillance should never be resorted to without satisfying constitutional strictures that were blown past in this instance. "[T]o conduct lawful video surveillance, for Fourth Amendment purposes, the government armed with probable cause must also satisfy the requirements of Title III for analogous audio surveillance." *United States v. Batiste*, 2007 WL 2412837, at *7-8 (S.D. Fla. Aug. 21, 2007); *see also, e.g.*, *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994); *United States v. Koyomejian*, 970 F.2d 536, 542 (9th Cir.), *cert. denied*, 113 S. Ct. 617 (1992); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1437 (10th Cir. 1990); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251-52 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 504, 510 (2d Cir. 1986), *cert. denied*, 479 U.S. 827 (1986); *United States v. Torres*, 751 F.2d 875, 884-85 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985). In particular, "(1) the judge issuing the warrant must find 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, . . . (2) the warrant must contain 'a particular description of the type of [activity] sought to be [videotaped] and a statement of the particular offense to which it relates; (3) the

warrant must not allow the period of [surveillance] to be 'longer than is necessary to achieve the objective of the authorization, [ ] or in any event longer than thirty days' (though extensions are possible) . . .; and (4) the warrant must require that the [surveillance] 'be conducted in such a way as to minimize the [videotaping] of [activity] not otherwise subject to [surveillance].'" *Batiste*, 2007 WL 2412837, at *7-8 (quoting *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994)).

2. Here, the established constitutional baseline was not met, starting with the fact that there was no showing of necessity. What is more, the established facts foreclose any serious claim of necessity. Law enforcement plainly did not exhaust less-invasive investigatory techniques or provide an adequate explanation for failing to do so: Among other things, they did *no* undercover work; issued *none* of the traditional pen-traps or subpoenas that logically precede a wiretap, let alone a video surveillance warrant; and attempted to speak with *none* of the Spa's employees or former employees to gather intelligence. Moreover, considering the low-level offenses under investigation, video surveillance was categorically unnecessary and inappropriate for the fundamental reason that the alleged offense is *not* legally serious enough to justify such a maximally invasive investigatory technique. *See Batiste*, 2007 WL 2412837, at *7 ("*[V]ideo surveillance could not be constitutionally conducted . . . for anything but the most serious offenses*, deserving of special extraordinary methods that are narrowly tailored to achieve the compelling government interest involved[.]") (emphasis added); *Carter v. Cnty. of Los Angeles*, 770 F. Supp. 2d 1042, 1050-51 (C.D. Cal. 2011) ("*Secret videotaping should be reserved for those extreme and rare circumstances involving serious transgressions* where it is highly improbable that less odious techniques will be effective.") (emphasis added). Further still, the availability of less invasive investigative techniques is obvious: At the time officers secured this

warrant, they already had ample evidence that solicitation might be occurring at the Spa (based on supposed confessions from some men exiting the spa, identification of women whom police claim to have identified as prostitutes, positive semen tests on items found in the Spa's trash), and an array of routine, reliable means for collecting more. By no stretch of the imagination did law enforcement *need* to resort to secret, indiscriminate, continuous videotaping of private massage parlors in order to build a solicitation case around low-level, consensual sex acts.

3. Nor did the warrant hew to adequate minimization procedures. The purpose of the "minimization requirement is to avoid the recording of activity by persons with no connection to the crime under investigation who happen to enter an area covered by a camera." *Mesa-Rincon*, 911 F.2d at 1441. Notably, this warrant contained *no* instructions for the video monitors to guide them as to when to stop recording, instead authorizing them to record *everything* that occurred while the cameras were on. As a result, the police recorded lawful massages, including of spa customers who engaged in no sexual activity whatsoever. That is inimical to the Fourth Amendment and any regard for personal privacy.

4. For the same reasons that the warrant fails to pass muster under the Fourth Amendment of the United States Constitution, it also fails to meet the requirements of Article I, Section 12 of the Florida Constitution. *See* Art I, § 12, Fla. Const. ("This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."). If anything, this Court is free to "provid[e] [Florida's] citizens with a higher standard of protection from government intrusion." *See Jardines v. State*, 73 So. 3d 34, 59 (Fla. 2011), *aff'd sub nom. Fla. v. Jardines*, 569 U.S. 1 (2013).

5. Florida law goes even further than federal law in categorically foreclosing use of such an invasive search warrant to target such a mundane offense. Specifically, Florida law

reserves audio wiretapping (a *less* invasive technique) for "certain major types of offenses and specific categories of crime," Fla Stat. § 934.01, among which *prostitution* is *not* included. *See* Fla. Stat. § 934.07 (listing offenses subject to wiretapping, including "murder, kidnapping" and more, but *not* any prostitution offenses under Fla. Stat. § 796.); *see also Batiste*, 2007 WL 2412837, at *7; *Carter*, 770 F. Supp. 2d at 1050-51. Especially in light of the constitutional sensitivities and strictures in play, the considered judgment of the Florida Legislature ***not*** to authorize wiretapping to investigate prostitution should not be taken as authorizing ***much worse*** invasions associated with surreptitious ***video*** recordings to investigate prostitution.

6. Perhaps worst of all, issuance of the warrant was predicated on the affiant's misstatements of fact and material omissions regarding various aspects of this investigation. Available evidence indicates that the affiant deliberately misrepresented critical points. For example, the traffic stops discussed in the affidavit did *not* occur as described—and those stops themselves were unlawful because, contrary to the affiant's claims, they were pretextual encounters, unsupported by reasonable suspicion that the drivers had committed any traffic offense. Similarly, the affiant's description of statements made by a health inspector, Ms. Herzog (whom the affiant admits he directed to conduct an inspection of the Spa, making her an agent of the police and rendering her pretextual search illegal)[1] regarding the state of affairs inside the Spa directly contradict what Ms. Herzog reported regarding her inspection—via a

[1] *See, e.g.*, *United States v. Rahman*, 805 F.3d 822, 827 (7th Cir. 2015) (search of property not justified as administrative search to find origin and cause of fire, even with consent, because primary purpose was to conduct arson investigation); *Jacob v. Twp. of West Bloomfield*, 531 F.3d 385, 390 (6th Cir. 2008) (land ordinance enforcement officer's inspection of property not justified as administrative search because primary purpose was investigation of criminal violations); *United States v. Johnson*, 994 F.2d 740, 743 (10th Cir. 1993) (federal agent's search of taxidermy shop not justified as administrative search because administrative inspection was pretext for criminal investigation).

report that she signed and affirmed was "true and correct to the best of her knowledge." The Defendant will be able to prove up at a hearing these and several other critical misrepresentations made by the affiant.

7. Beyond outright misrepresentations, law enforcement in this case has been trading off innuendo about "human trafficking."[2] Although the affiant did not seek (or receive) a probable cause finding regarding any human trafficking crimes under Florida law, he nonetheless included several purported facts that seemed to *suggest* that such crimes were being committed at the Spa. Notably, those "facts" were false, and any suggestion of human trafficking being suspected was unfounded and irresponsible. Indeed, law enforcement peddled these falsehoods to try and manufacture a patina of necessity here, where none exists. That law enforcement has since backed away—wisely—from any fiction that this case involved human trafficking by no means excuses its earlier insinuations.

8. Finally, the search warrant is invalid because law enforcement failed to comply with even the most modest protections, as expressly specified therein. In particular, its 10-day return period was violated. Moreover, copies were due to be delivered to the Spa's owner but never were. Such failures of compliance should be fatal in and of themselves.

[2] For example, in Chief Daniel Kerr's initial address to the media about the Investigation, made on the day Mr. Kraft was charged, he claimed, "*Obviously our concern in this investigation center around our, the possibility of victims of human-trafficking*, the appearance, maybe, of that." Palm Beach County State Attorney David Aronberg's first opening remarks to the public about this Investigation went even further, making it seem as if this entire investigation was driven by evidence of human trafficking, when of course it was not.

CONCLUSION

For these and other reasons, all of which will be expanded upon in a subsequently-filed memorandum of law in support of this Motion, the Court should grant the Motion and suppress the illegally seized videos, along with the traffic stops and any illicit fruits.

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, **March 28, 2019**.

By: /s/ *Jack Goldberger*

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