IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

vs.

HUA ZHANG,

Defendant.
_____/

CASE NO. 50-2019-CF-001606

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA

Plaintiff,

vs.

LEI WANG,
Defendant.
_____/

CASE NO. 50-2019-CF-001606

PLAINTIFF'S *EMERGENCY* MOTION TO INTERVENE AND FOR PROTECTIVE ORDER

Intervenor John Doe ("Mr. Doe")[1] respectfully requests that the Court, pursuant to Florida Rules of Criminal Procedures 3.220 (e), (m), and (l), prohibit disclosure to defendants and the public of any video surveillance of John Doe obtained by the government at the Orchids of Asia Day Spa on or about January 20, 2019. The video surveillance of Mr. Doe, obtained by the State in gross violation of his constitutionally protected right to privacy, depicts him disrobed while obtaining a *lawful* massage at the Spa. Accordingly, neither Defendants nor the public have any right or interest in viewing this unlawfully obtained video surveillance, the disclosure of which will cause Mr. Doe needless embarrassment and unwarranted damage to his reputation. John Doe has standing to intervene in this action pursuant to Rule 3.220(m). *Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So. 2d 549, 551-52 (Fla. 1992) ("Even though the Does are not parties named in the state's criminal action against the Willets, the broad language of rule 3.220 permits them to show cause for denying the disclosure of the discovery information at issue in the criminal proceeding.").

Mr. Doe files this motion on an **emergency** basis because the State indicated **today** its intention to immediately release the videos. As a pretext to humiliate Mr. Doe and defendants in this action, the State claims erroneously that it is required to release the videos without delay under the Public Records Act.

PRELIMINARY STATEMENT

The United States Constitution protects individuals' right to privacy and freedom from unreasonable searches. The government is allowed to intrude into private property and secretly record conduct there only where it can show probable cause that specific grave crimes are being

[1] Doe has filed a separate federal action for the violation of his civil rights. *Doe v. Town of Jupiter Police Department et al.*, Case No. 19-cv-80513-DMM.

committed, that additional evidence of those crimes is needed, that no other reasonable means of obtaining that evidence is available, and that any intrusion will be narrowly tailored to avoid excessive invasion of privacy.

On or around January 19, 2019, the State violated Mr. Doe's constitutional rights by voyeuristically spying on and recording Mr. Doe while he was partially undressed and receiving a massage in a private room at a private spa, despite having failed to meet the requirements to secretly record him in such a private setting. By this Motion, Mr. Doe seeks to prevent the dissemination and publication of the video in question. As Mr. Doe did not engage in any illegal conduct and has not been charged with any crime, neither Defendants nor the State of Florida will suffer harm from the requested relief. And the public has no protectable interest in viewing Mr. Doe's private conduct; to the contrary, the public's interest lies squarely in preventing the government from releasing recordings it has obtained through violations of the Constitution. Mr. Doe's Motion should therefore be granted in full.

BACKGROUND

A. The Jupiter Police Investigate Suspected Prostitution.

At some point prior to October 2018, the Martin County Sheriff began an investigation of certain massage parlors run by persons of Asian ancestry. In late October 2018, the Jupiter Police became aware of the Martin County investigation, and also became aware that a particular massage parlor, apparently run by a person of Asian ancestry, was located within the Town of Jupiter. (Probable Cause Affidavit of Detective Andrew Sharp of the Town of Jupiter Police Department, dated February 15, 2019) at 1. That massage parlor, a duly licensed private business, located on private property, was named the Orchids of Asia Day Spa (the "Spa"). *Id.* Shortly thereafter, Sharp and the Jupiter Police commenced "a prostitution investigation" into the Spa, its management, and employees (the "Investigation"). *Id.*

B. The Investigation Uncovers Evidence Of Low-Level Prostitution At The Spa.

The Jupiter Police, through the actions of various officers, began the Investigation through standard, non-invasive techniques. For instance, the Jupiter Police personnel visited an internet forum—rubmaps.com—which allows individuals to discuss their individual experiences at massage parlors. This forum contained posts describing users' experiences at the Spa, including descriptions of massages and low-level sexual acts (*i.e.*, manual genital stimulation) performed on the posters in exchange for money.

Jupiter Police personnel requested that the Florida Department of Health (the "DOH") perform an inspection of the Spa, then received information from the DOH investigator, Karen Herzog, as to the identity of the Spa's employees and management. *Id.* at 2. Each of the employees interviewed by Herzog presented Florida Driver's Licenses as well as Florida Massage Therapy Licenses, and allowed Herzog to photograph the same. *Id.*

Over multiple days, the Jupiter Police conducted pretextual traffic stops of Spa patrons, pulling over and interrogating several men after they had left the Spa. *Id.*at 3-5. A number of these men described receiving low-level sexual services—in particular, manual genital stimulation—in addition to massage, and paying for those services. *Id.* When shown photographs of the individuals previously identified as the Spa's employees, a number of these men admitted that particular Spa employees performed massage as well as sexual acts on them and/or had accepted payment in exchange for the same. *Id.* All of these men described receiving towels or napkins from Spa employees with which to clean up after the massage was over. *Id.* The Jupiter Police rifled through the Spa's trash multiple times, and obtained samples from napkins that tested positive for seminal fluid. *Id.* at 3.

The Jupiter Police also obtained a "wage and hour" report from the State of Florida for the Spa's managers, which showed those managers' reports of their own income from the Spa. Ex. A

at 15. Sharp later would describe this report as "evidence that the majority of the income generated by the [Spa] was a result of prostitution crimes and . . . [the managers] were deriving support from the money generated from the prostitution crimes being committed by and through the [Spa]." *Id.* Sharp also "determined that the Comcast cable bill and the Florida Power and Light bill for the [Spa] were being paid by this business," which he claimed provided further evidence that the Spa's president was "deriving support . . . through the crimes of prostitution she is engaging in and perpetuating [*sic*] through her employees." *Id.*

In short, within weeks of commencing its investigation, the Jupiter Police and Sharp had obtained overwhelming evidence that certain masseuses were engaging in low-level prostitution at the Spa, and that the Spa's managers were both participating in those sex acts and deriving support from others' low-level prostitution, and therefore had no basis or need to video record Mr. Doe while he was partially undressed and receiving a massage in a private massage room.

C. <u>The Jupiter Police Install Spy Cameras In The Massage Rooms At The Spa.</u>

Despite the fact that nothing in the Investigation suggested any crime more serious than low-level prostitution was occurring at the Spa, and despite the wealth of evidence already in hand or readily available to prove such crimes, the Jupiter Police elected to seek permission from the court to conduct one of the most highly invasive search tactics known to law enforcement: a "sneak and peak" warrant, authorizing the police to covertly install hidden video cameras inside the Spa's private massage rooms, to spy on those rooms in real time.

On January 18, 2019, the Jupiter Police caused a false "suspicious package" warning to be issued for the Spa, and used that ruse to install hidden cameras inside several of its private massage rooms. Having evacuated the Spa, the Jupiter Police then entered and installed video monitoring equipment in rooms in which clients received massages, as well as the lobby, pursuant to a search warrant. Law enforcement's tactical ruse concealed the execution of the Warrant from the Spa, its

employees, and its customers, none of whom received notice of the issuance of the Warrant or the placement of hidden video cameras on Spa premises.

The Jupiter Police used its hidden cameras to spy on the Spa's massage rooms in real time for approximately five days.

D. The Jupiter Police Illegally Record Mr. Doe.

On or around January 19, 2019, Mr. Doe entered the Spa and received a massage, while partially undressed, in a private massage room. Mr. Doe had a reasonable expectation of privacy when he entered that private room, on private property, to receive treatment from a licensed healthcare practitioner.[2] The Jupiter Police violated that expectation of privacy by recording Mr. Doe while he was undressed and receiving a massage. He did not engage in any sexual or illegal activity, and has not been charged with any crime.

On information and belief, the Jupiter Police shared these recordings with other individuals and organizations pursuing or acting in parallel with the Investigation, including officers employed by the Jupiter Police, Aronberg, and, on information and belief, the Martin County Sherriff and the Martin County DA, who were running a related investigation.

E. The Jupiter Police Charge Individuals With Misdemeanor Solicitation of Prostitution.

On February 19, 2019, about a month after its illegal surveillance operation finished, law enforcement raided the Spa, executed several other search warrants, and arrested its two managers. A few days later, the Jupiter Police Department filed misdemeanor charges against a number of

[2] *See* Fla. Stat. § 480 ("Massage Practice"); Fla. Stat. § 456.001(4) (defining "Health care practitioners" as including "any person licensed under . . . chapter 480"—*i.e.*, licensed massage therapists); *see also State v. Ngo Lanh Nguyen*, 980 So. 2d 1189, 1190 (Fla. 5th DCA 2008) (massage therapists are health care practitioners, and unlicensed massage therapist could be charged with a third degree felony under Florida Statue Section 465.065 ("Unlicensed practice of a health care profession")).

alleged Spa customers, charging them with solicitation of prostitution. Mr. Doe was not accused of or charged with any crime.

F. <u>There is a Grave Risk that the Illegally-Seized Video Will be Released Absent Immediate Court Action.</u>

Pursuant to Florida's Public Records Law, "all state, county, and municipal records are open for personal inspection and copying by any person." Fla. Stat. § 119.01(1). During an April 12, 2019 hearing in one of the misdemeanor cases arising out of the Spa investigation, *State of Florida v. Robert Kraft*, Case Nos. 2019MM002346AXXXNB and 2019MM002348AXXXNB, attorneys for the State of Florida and for several media outlets took the positions that (1) video recordings of innocent persons who did not engage in illegal activity, taken during the course of the investigation, constitute public records for purposes of the Florida Public Records Law, and (2) there is no protection for these recordings, because none of the Public Records Law's enumerated exemptions apply. As such, the press or any member of the public could demand access to the recordings at any time.

The risk of public access demands is particularly acute in the present case, as certain of the defendants charged with misdemeanor solicitation of prostitution include high profile individuals, and the media has already actively sought to obtain the videos collected by the Jupiter Police at the Spa. *See* (Motion to Intervene by the Media in *State of Florida v. Lei Wang*, Case No. 50-2019-CF-001606-BXXX-MB). There is therefore a grave risk that the video will be made public absent immediate court action.

<u>ARGUMENTS</u>

The Motion should be granted. Neither the Defendants nor the public interest will be harmed by limiting the circulation of a video that depicts purely private conduct, and—most

critically—where those recordings were surreptitiously made in violation of the United States Constitution, and thus should never have been made at all.

I. The State Should Be Prohibited From Disclosing the Video Until The Pending Motions Are Adjudicated

Relying on *Tribune Co. v. Cannella*, 458 So.2d 1075, 1079 (Fla. 1984), the State claims that it cannot delay the release of records "to allow a person to raise a constitutional challenge to the release of the documents." The State's reliance on *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984), is misplaced. Subsequent to *Cannella*, courts have held that "judicial enforcement of the public records is implicitly authorized by section 119.11(1) and (3), Florida Statutes (1989)." *A.J. v. Times Pub. Co.*, 605 So. 2d 160, 162 (Fla. 2d DCA 1992). The *A.J.* court held that the trial court erred in dissolving an injunction obtained by students and a school operator seeking to require the sheriff's office from not imposing an statutory exemption on child abuse records.

Similarly, here, this Court has taken judicial control over the release of the videos in questions. John Doe, and other similarly situated customers of the Spa whom have not been charged with any crime, have a right under the Florida Rules of Criminal Procedure to seek the release of these highly damaging documents. Indeed, the evidence at issue is in effect in control of the Court and subject to numerous motions for protective order and a motion to suppress in this and in parallel proceedings. The State's threatened actions only are an affront on the integrity of this Court but a trampling of the privacy rights of John Doe and those like him who have been charged with no crime but whose rights were violated by a surreptitious, wholly unnecessary recording. *Id.*

"Such privacy concerns may in some circumstances be a proper basis for withholding discovery materials involved in a judicial proceeding from public disclosure. *See Doe*, 612 So.2d at 551; *see also Barron v. Fla. Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988). Individuals seeking to prevent the disclosure of such information based on a claim that the disclosure would violate their right to privacy 'bear the burden of proving that closure is necessary to prevent an imminent threat to their privacy rights.' *Doe*, 612 So.2d at 551.'" Further, "[s]uch a privacy claim by a nonparty may be asserted pursuant to the provision of rule 3.220(m)(1) that '[a]ny person may move for an order denying or regulating disclosure of sensitive matters.'" (Emphasis added.) Under this provision, a nonparty has "standing to challenge the release of the discovery materials." *Doe*, 612 So.2d at 550.

II. <u>This Motion for Protective Order Should Be Granted</u>

Various provisions of the Florida Rules of Criminal Procedure permit Courts to restrict disclosures to defendants and the public. For example, pursuant to Florida Rule of Criminal Procedure 3.220(e), the Court may "deny or partially restrict disclosures [of otherwise discoverable information] if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party." Similarly, under Rule 3.220(l), "[o]n a showing of good cause, the court **shall** at any time order that specified disclosures be restricted, deferred, or exempted from discovery, that certain matters not be inquired into, . . . or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or **invasion of privacy**, including prohibiting the taking of a deposition."

As recognized by the Florida Supreme Court, disclosure of discovery to defendants does not extinguish a third parties right to restrict public access to that discovery. The test for whether to restricting public access to documents that have been disclosed to:

> [C]losure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) *to avoid substantial injury to innocent third parties* [e.g. to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) *to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.*

Post-Newsweek Stations, Florida Inc. v. Doe, 612 So. 2d 549, 552 (Fla. 1992) (quoting *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 118 (Fla. 1988))

Mr. Doe will unquestionably be irreparably harmed if the videos improperly recorded at the Spa are distributed or publicized. Publication of nude materials without consent, and of materials gleaned through a violation of the right to privacy has been repeatedly found to constitute irreparable harm. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F. 2d 328, 338 (5th Cir. 1981) (irreparable injury is presumed from violation of the right to privacy under Fourteenth Amendment); *Miranda v. Guerrero*, 2009 WL 1381250, at *7 (S.D. Fla. May 14, 2009) (publication of nude photographs online without consent constituted irreparable injury); *Barrows v. Rozansky*, 111 A.D. 2d 105, 108, 489 N.Y.S. 2d 481, 485 (N.Y. 1985) ("[P]laintiff's motion for a preliminary injunction should be granted, since plaintiff has indicated probable success on the merits, possible irreparable injury through the widespread publication of her nude photographs and a balance of equities in her favor.").

A. Law Enforcement's Video Surveillance of Mr. Doe Violated His Fourth Amendment Rights.

The JPD violated Mr. Doe's Fourth Amendment rights by secretly video-recording him while undressed inside the Spa pursuant to an invalid warrant. Courts recognize that such "sneak and peak" search warrants are so invasive that they must be held to a far stricter standard than run-of-the-mill search warrants, and thus require considerably more than mere probable cause. More specifically, "to 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 (S.D. Fla. Aug. 21, 2007); *see also United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994); *United States v. Koyomejian*, 970 F. 2d 536, 542 (9th Cir. 1992), *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, 252 (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 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985). The applicable requirements under Title III are: "(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 *Falls*, 34 F. 3d at 680).

Here, the surveillance at issue fails the first and fourth prongs of the test, as the Jupiter Police failed to establish necessity for the highly intrusive surveillance tactic it employed and the surveillance was not appropriately tailored to minimize its interception of lawful actions by innocent individuals such as Mr. Doe.

1. The JPD Failed to Establish Necessity for this Highly-Invasive Surveillance.

The surveillance conducted by the Jupiter Police at the Spa violated the Fourth Amendment because the police failed to establish the necessity for highly invasive, secret video recording. It is well established that "[t]he showing of necessity needed to justify the use of video surveillance is *higher* than the showing needed to justify other search and seizure methods, including bugging." *Mesa-Rincon*, 911 F. 2d at 1442 (emphasis added). This is so because "[t]he use of a video camera is an extraordinarily intrusive method of searching." *Id.* Indeed, "many other courts have stated that covert video surveillance is a severe intrusion into a person's privacy expectations, which 'provokes an immediate negative visceral reaction' and 'raises the specter of the Orwellian state.'" *United States v. Anderson-Bagshaw*, 509 F. App'x 396, 421 (6th Cir. 2012) (quoting *Cuevas-Sanchez*, 821 F. 2d at 251); *see also Torres*, 751 F. 2d at 882 ("[T]elevision surveillance is exceedingly intrusive . . . and inherently indiscriminate, and [ ] it could be grossly abused—to eliminate personal privacy as understood in modern Western nations."); *Falls*, 34 F.3d at 680 ("It is clear that silent video surveillance . . . results in a very serious, some say Orwellian, invasion of privacy."); *Carter v. Cnty. of Los Angeles*, 770 F. Supp. 2d 1042, 1050-51 (C.D. Cal. 2011) ("Covert video surveillance is not a traditional tool. . . . Outside of a strip search or a body cavity search, a covert video search is the most intrusive method of investigation[.]"). Indeed, the "basic principle articulated" in all of the cases addressing covert video surveillance is that this tool "is

highly intrusive and *justifiable only in rare circumstances*." *Bernhard v. City of Ontario*, 270 F. App'x 518, 520 (9th Cir. 2008) (emphasis added).

The location being searched is also relevant to this necessity requirement, as a person's "expectation of privacy lessens" as he moves "from a private home to a public business." *Mesa-Rincon*, 911 F. 2d at 1443. Here, the locations being searched were *private* rooms, inside a *private* health care facility, in which individuals *disrobed* to receive *private* health care services. *See* Fla. Stat. § 456.001(4) (defining "Health care practitioners" as including "any person licensed under . . . chapter 480", *i.e.*, licensed massage therapists); *Ngo Lanh Nguyen*, 980 So. 2d at 1190 (massage therapists are health care practitioners and unlicensed massage therapist could be charged with a third degree felony under Florida Statue Section 465.065 ("Unlicensed practice of a health care profession")). Thus, Mr. Doe's privacy interest and expectation in the Spa, if not equal to a private residence, "was at least a 'medium' expectation of privacy," which meant that video surveillance "created a high degree of intrusiveness." *Mesa-Rincon*, 911 F. 2d at 1443.

(a) There Was No Necessity Because Officers Failed to Exhaust Less-Invasive Investigative Options.

The Jupiter Police failed to demonstrate the necessity for this highly intrusive search for several reasons, beginning with its failure to show "exhaustion." That is, in seeking a video surveillance the police must explain why other techniques were considered and deemed not worth pursuing, and in doing so justify the court's conclusion that a video warrant is a necessary next step. *Id.* at 1444 ("[W]e require the government to prove exhaustion—either by attempt or explanation of why the method would not work—of all 'reasonable' investigatory methods."). The purpose of this requirement "is to ensure that [such invasive surveillance] is not resorted to in situations in which traditional investigative techniques would suffice to expose the crime." *United States v. Collins*, 300 F. App'x 663, 666 (11th Cir. 2008). And, courts "will find authorization of

video surveillance improper . . . when the government fails to attempt or explain its failure to attempt *all* reasonable alternative investigatory techniques." *Mesa-Rincon*, 911 F. 2d at 1444 (emphasis in original). Here, the JPD failed to perform or attempt a series of investigatory steps that are standard prerequisites to covert video surveillance, and provided no justification for that failure.

For example, they failed to conduct any undercover work. Officers (male and female) easily could have posed as customers and visited the Spa, engaging with and speaking to management and the masseuses directly, and observing firsthand the nature and extent of any prostitution-activities on site.

Similarly, the JPD failed to conduct any of the routine phone work that logically precedes authorization of such a highly-invasive warrant. It appears that the JPD never subpoenaed the Spa's phone or secured a pen-trap on the line. Nor did the JPD make any effort to identify and investigate the phones of the Spa's owner and manager.

The JPD's failure to perform such routine investigatory steps before taking a shortcut to its "sneak and peek" Warrant reveals its constitutional infirmity.

(b) <u>There Was No Necessity for the Warrant Based on the Crimes Being Investigated</u>.

The nature of the crimes being investigated further undermines the video-recording's necessity. As a threshold matter, the relatively minor crimes associated with alleged "happy ending" massages are simply *not* serious enough to justify this incredibly invasive investigatory technique. *See Anderson-Bagshaw*, 509 F. App'x at 421; *Cuevas-Sanchez*, 821 F. 2d at 251; *Falls*, 34 F.3d at 680. As one Florida judge has observed, given its incredibly invasive nature, "video surveillance [sh]ould not be conducted . . . for anything but the *most serious offenses*, deserving of special extraordinary methods that are narrowly tailored to achieve the compelling government

interest involved[.]" *Batiste*, 2007 WL 2412837, at *8 n.9; *see also Bernhard*, 270 F. App'x at 520 (the "basic principle articulated" in every case addressing covert video surveillance is that this tool "is highly intrusive and *justifiable only in rare circumstances*") (emphasis added). Here, the low-level prostitution-related offenses for which probable cause was purportedly established are *not* among "the most serious offenses" under Florida law.

In addition, and as described above, when the JPD applied for the warrant it already had ample evidence that certain masseuses were engaged in low-level prostitution at the Spa, including its managers, such as confessions from johns, identification of the Spa employees providing sexual services, positive sperm-tests from the Spa's trash bags, and more. Further, and as described above, the JPD had a host of less-intrusive investigatory techniques at its disposal to gather more evidence for such crimes, which officers inexplicably failed to pursue. The JPD simply did not need secret video surveillance to build a prostitution case here.

2. The Surveillance Fails to Meet Minimization Requirements

Finally, the video surveillance was unlawful because its scope was not adequately minimized and particularized, so as to avoid the recording of innocent persons and innocent activities. 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. Here, minimization plainly did not occur, as demonstrated by the recording of Mr. Doe's massage, which did not involve any sexual or illegal activity of any kind.

III. The Defendants Will Not Be Harmed By Grant Of The Motion.

The Defendants will suffer no prejudice or damage from the grant of the Motion, let alone damage sufficient to outweigh the substantial guaranteed harm to Mr. Doe. As noted above, Mr. Doe has not been accused of any illegal activity and has not been charged with a crime. And, as

further described above, the Defendants have ample other evidence with which to convict Spa employees and johns—being unable to use video of Mr. Doe in no way alters that fact.

IV. The State Will Not Be Harmed By Grant Of The Motion.

The State has admitted that it "does not consider the video recordings of patrons who received lawful massages to be material and relevant to the guilt or punishment of the Defendant or evidence that could be used to impeach a material government witness.

V. The Public Interest Will Not Be Harmed By Grant Of The Motion

The public interest will not be harmed from maintaining the confidentiality of the video recordings while this case proceeds. The Supreme Court has recognized that the right of public access to Court records is not unlimited. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("It is uncontested, however, that the right to inspect and copy judicial records is not absolute."). And the gravamen of this case is that these videos were obtained illegally, in violation of Mr. Doe's constitutional rights. If Mr. Doe is correct, then neither the government nor the public has *any* right to access them. *See In re Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 856 (9th Cir. 1997) (ordering return of computers and electronic storage devices which had been seized pursuant to an invalid warrant); *United States v. Wey*, 256 F. Supp. 3d 355, 404 (S.D.N.Y. 2017) (noting that the failure to return original documents seized in excess of scope of warrant was a potential constitutional violation while holding that warrants were wholly invalid); *see also United States v. Matias*, 836 F. 2d 744, 747 (2d Cir. 1988) ("[W]hen items outside the scope of a valid warrant are seized, the normal remedy is suppression and return of those items[.]"); *In Matter of Search of Info. Associated with Facebook Account Identified by Username Aaron.Alexis that is Stored at Premises Controlled by Facebook, Inc.*, 21 F. Supp. 3d 1, 9 (D.D.C. 2013) (narrowing the scope of a warrant application on the basis that "some safeguards must be put in place to prevent the government from collecting and keeping indefinitely

information to which it has no right."). Furthermore, assuming arguendo that Mr. Doe does not prevail in the underlying action, these videos may ultimately become available to the public, which will limit any harm to the public due to a short and reasonable delay.

In fact, the public's interest favors *granting* the Motion, as the public has an interest in preventing the government from releasing recordings it has obtained through violations of the Constitution.

CONCLUSION

The Court should all John Doe to intervene and should enter a protective order immediately prohibiting the State from disclosing the videos until the motions for protective order have been adjudicated by this Court.

Dated: April 17, 2019

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