No. 4D19-1499

IN THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

STATE OF FLORIDA,
Appellant,

v.

ROBERT KRAFT,
Appellee.

On Appeal from the County Court of the Fifteenth Judicial Circuit
in and for Palm Beach County
L.T. No. 2019MM002346AXXX

BRIEF OF *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF ROBERT KRAFT

DONNIE MURRELL, ESQ.
FLORIDA BAR NO: 326641
400 Executive Center Drive
Suite 201—Executive Center Plaza
West Palm Beach, FL 33401
Telephone: 561.686.2700
E-Filing: ldmpa@bellsouth.net
Counsel for Amicus Curiae
Due Process Institute

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STATEMENT OF INTEREST

The Due Process Institute is a bipartisan, nonprofit public interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Due Process Institute has already participated as *amicus curiae* before the United States Supreme Court and United States Courts of Appeals in cases presenting important criminal law and related constitutional issues, including *United States v. Haymond*, 139 S. Ct. 2369 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); and *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

This case presents an important issue of critical importance to the Fourth Amendment rights of the citizens of Florida. Because state and federal laws governing electronic surveillance generally do not apply to video-only surveillance, the government has assumed that it can engage in highly intrusive video surveillance without complying with the essential privacy safeguards embodied in those laws. Such unbridled surveillance undermines the intent and purpose of the Fourth Amendment and invades the privacy rights of all Americans. Since, the Supreme Court has made clear that strict Fourth Amendment requirements apply to electronic surveillance even in the absence of legislative action, the federal circuit courts have uniformly required the government to comply with those limitations when it engages in intrusive video surveillance.

This Court must act to protect the basic Fourth Amendment rights of Floridians and do the same.

SUMMARY OF ARGUMENT

In this case, this Court must hold—as every federal circuit court and state court to consider the question has—that intrusive, covert video surveillance is subject to heightened standards and procedures designed to implement Fourth Amendment protections in the face of the constantly expanding use of electronic surveillance techniques by law enforcement. And, it must make clear that where the government fails to faithfully follow these standards and procedures, it will be held to account by the exclusion of the evidence obtained. The Fourth Amendment demands no less under these circumstances.

ARGUMENT

I. THE STRICTURES IMPOSED BY THE LOWER COURT ARE BASED ON ESTABLISHED FOURTH AMENDMENT PRINCIPLES OF REASONABLENESS AND PARTICULARITY AND ARE NECESSARY COMPONENTS OF A VALID VIDEO SURVEILLANCE WARRANT.

The law enforcement conduct at issue in this case demonstrates a disturbing trend whereby police have ignored Fourth Amendment restrictions on electronic surveillance because of a perceived loophole in federal and state statutes. Although 18 U.S.C. §§ 2510–23 and Fla. Stat. §§ 934.01–934.50 generally regulate most forms of surreptitious electronic surveillance of "wire, oral, or electronic communication," courts have construed these statutes *not* to apply to silent video surveillance. *See Allen v. Brown*, 320 F. Supp. 3d 16, 38–39 (D.D.C. Aug. 1, 2018) ("Indeed, *every* federal appeals or district court to have considered the question has concluded that silent video surveillance is not covered by the federal wiretapping statute."). As a result, in cases where audio is not important or can be sought at a later date, the government has sometimes applied for video, non-audio warrants because of a perceived belief that such warrants are easier to secure and subject to fewer hurdles. Importantly, technological progress also made video surveillance technology cheaper and more widely available, making it an attractive option for

much broader number of investigations, including lower-level offenses, and a feasible investigative technique for smaller police departments.

In the absence of statutory protections and in the face of increasingly intrusive police surveillance, the federal circuit courts and several state courts have made clear to law enforcement that the Fourth Amendment nevertheless imposes strict limitations on such intrusive surveillance. *See United States v. Williams*, 124 F.3d 411, 417–20 (3d Cir. 1997); *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994); *United States v. Koyomejian*, 970 F.2d 536, 541–42 (9th Cir. 1992); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1437–39 (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); *United States v. Torres*, 751 F.2d 875, 883–85 (7th Cir. 1984); *Ricks v. State*, 537 A.2d 612, 620–21 (Md. 1988); *People v. Teicher*, 422 N.E.2d 506, 514–15 (N.Y. 1981); *People v. Dezek*, 308 N.W.2d 652, 657 (Mich. 1981).

The lower court in this case—like every federal circuit court and every state court to address the issue of silent video surveillance—has properly interpreted the following as prerequisites to video surveillance:

> (1) there has been a showing that probable cause exists that a particular person is committing, has committed, or is about to commit a crime; (2) the order particularly describes the place to be searched and the things to be seized in accordance with the fourth amendment; (3) the order is sufficiently precise so as to minimize the recording of activities not related to the crimes under investigation; (4) the judge issuing the order finds that normal

> investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or appear to be too dangerous; and (5) the order does not allow the period of interception to be longer than necessary to achieve the objective of the authorization, or in any event no longer than thirty days.

E.g., *Mesa-Rincon*, 911 F.2d at 1437.

These requirements derive directly from the reasonableness and particularity requirements found in the text of the Fourth Amendment itself:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The text imposes two fundamental prerequisites to a lawful government search or seizure: 1) a warrant, authorized by a neutral and detached judicial officer, based upon probable cause, and particularly describing the subjects of the warrant; and 2) an overarching requirement that the search be reasonable. When the search at issue is surreptitious video surveillance, particularity requires that officers minimize interception of non-criminal conduct and reasonableness demands a showing that intrusive video surveillance is necessary under the circumstances.

A. The requirement of minimization implements the Fourth Amendment's particularity requirement and factors into the overall reasonableness of a given search.

A particularized description of the activities sought to be recorded and the crime to which it relates, a durational limit of the surveillance, and minimization are all key elements of the particularity requirement of the Fourth Amendment's Warrant Clause. The United States Supreme Court made this clear in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967)—cases that preceded the passage of the federal wiretapping statute and therefore relied solely on the Fourth Amendment to determine the restrictions applicable to electronic surveillance.

In *Berger*, the Supreme Court held that "the language of New York's [eavesdropping] statute [was] too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and [was], therefore, violative of the Fourth and Fourteenth Amendments." 388 U.S. at 44. At the outset, the Court emphasized that "[t]he need for *particularity* . . . when judicial authorization of a search is sought is especially great in the case of eavesdropping." *Id.* at 56 (emphasis added). Under the Fourth Amendment, particularity requires that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Id.*at 58 (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). The New York statute disregarded that requirement by authorizing "general

warrants" that "le[ft] too much to the discretion of the officer executing the order." *Id.* at 59. Importantly, "the statute's failure to describe with particularity the conversations sought g[a]ve[] the officer a roving commission to 'seize' any and all conversations." *Id.* at 59. The Court therefore feared that "the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation." *Id.* Because it failed to restrict officers' authority to "seize" conversations to only those relevant to the investigation, the "statute lack[ed] . . . particularization" and violated the Fourth Amendment. *See id.* at 55, 58–60.

The Court also distinguished the surveillance in *Berger* from its prior opinion in *Osborn v. United States*, 385 U.S. 323 (1966), wherein it upheld the use of a wire on a confidential informant. *See Berger*, 388 U.S. at 56–57. The *Berger* court was able to distinguish *Osborn* because "the strict precautions" employed in *Osborn* and the "precise and discriminate circumstances" under which the wire was used—*i.e.*, to record a single conversation between the informant and the suspect—satisfied the Fourth Amendment's particularity requirement and "minimized" "the danger of an unlawful search and seizure." *Id* at 57.

Katz further explained how the Fourth Amendment's particularity requirement regulates surreptitious electronic surveillance, and, importantly, established that the "precise limits" of such surveillance must be "established in

advance by a specific court order." *See* 389 U.S. at 356. Although the agents in that case acted "with restraint," the "inescapable fact [was] that this restraint was imposed by the agents themselves, not by a judicial officer." *Id.*at 356. Regardless of the agents' restraint, suppression was warranted because "[t]he government agents . . . ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that [is] . . . a constitutional precondition of the kind of electronic surveillance involved in this case." *Id.* at 359 (alteration in original) (footnote omitted) (quoting *Osborn*, 385 U.S. at 330). Thus, the Fourth Amendment demands judicially imposed limitations on the surveillance, including procedures intended to limit surveillance of activities that are not otherwise the subject of the warrant.

The federal circuit courts have determined, based on a straightforward reading of *Berger*, *Katz*, and the Fourth Amendment, that a facially sufficient video-surveillance warrant must impose three key limitations to comply with the particularity requirement. First, the warrant must state the type of activities the surveillance is expected to capture and the crime to which these activities relate. Second, the surveillance must be no longer than necessary, generally no more than 30 days with the potential for an extension upon a showing of need. *See Torres*, 751 F.2d at 884. The third limitation—minimization—is more nuanced, but no less important.

Minimization can be conceptually divided into two distinct types: extrinsic and intrinsic. "Extrinsic minimization pertains to the efforts employed by investigators to limit the total number and duration of intercepted [activities]. Intrinsic minimization refers to the techniques used by the monitors to abate the intrusion into the participants' privacy while in the process of intercepting a particular [activity]." *Com. v. Powell*, 171 A.3d 294, 310–11 (Pa. 2017) (citation omitted) (citing *Com. v. Doty*, 498 A.2d 870, 883 (Pa. 1985)). The Fourth Amendment demands both types of minimization because even spatially and temporally limited surveillance has the potential to inadvertently seize irrelevant conduct beyond the scope of the authorizing warrant. *Cf. Berger*, 388 U.S. at 64 (Douglas, J., concurring) ("[E]ven though it is limited in time, it is the greatest of all invasions of privacy.").

Although law enforcement typically has some discretion as to how to effect minimization, *see Scott v. United States*, 436 U.S. 128, 139–43 (1978), Supreme Court precedent requires that the general minimization procedures be approved by a judicial officer in advance and be set forth in the warrant, *see Katz*, 398 U.S. at 356; *Mesa-Rincon*, 911 F.2d at 1437, 1441–42. Courts also expect that officers will refine their minimization techniques over the course of the surveillance as they become more familiar with the specific cues that signal relevant activities. *See Scott*, 436 U.S. at 141.

In general, the ultimate concern is whether the minimization procedures were reasonable given the facts and circumstances of the specific surveillance at issue. *Mesa-Rincon*, 911 F.2d at 1441 (citing *United States v. Apodaca*, 820 F.2d 348, 350 (10th Cir. 1987)). Even though the reasonableness of the minimization efforts is case specific, there are abundant examples in the case law of adequate minimization procedures. For example, the principal case upon which the warrant application in this matter relied involved a warrant that set forth a detailed minimization plan, including specific criteria for temporarily terminating surveillance and procedures for "spot monitoring." *See Mesa-Rincon*, 911 F.2d at 1441–42. Indeed, the court relied on this judicially mandated minimization plan to hold that the warrant in that case satisfied the Fourth Amendment. *Id.* State courts have cited similarly detailed *ex ante* minimization plans in upholding video surveillance warrants under the Fourth Amendment. *Ricks*, 537 A.2d at 621; *Teicher*, 422 N.E. at 514.

Of note, in all of these cases, the warrant required the recording to cease when non-relevant conduct was in view of the camera. In *Ricks* and *Mesa-Rincon*, the plans required short, periodic spot-checking (familiar to any law enforcement agent who has conducted audio or video surveillance) to determine when to begin recording again. *Mesa-Rincon*, 911 F.2d at 1441–42; *Ricks*, 537 A.2d at 621. If video is being continuously recorded, as it was in this case, *see* State's Br. 7,

simply toggling between views or averting one's gaze is insufficient minimization because the camera will still continuously "seize" the innocent activities regardless of whether anyone is looking. *Cf. United States v. Simels*, 2009 WL 1924746, at *3 (E.D.N.Y. July 2, 2009) ("By definition, an agent cannot minimize the *interception* of communications that should not be intercepted by intercepting all communications and sorting them out later.").

Therefore, in addition to a particular description of the activities to be surveilled, a particular description of the crimes to which they relate, and a specific durational limit on the surveillance, a valid video surveillance warrant must also set forth a minimization plan adequate enough to satisfy the Fourth Amendment's particularity requirement. Anything less—like what occurred in this case—fails to impose a meaningful prior judicial restraint on the executing officers' discretion and thereby renders the warrant facially invalid under the Fourth Amendment.

B. The government must establish the necessity of video surveillance to satisfy the Fourth Amendment's reasonableness requirement.[1]

Reasonableness guides the analysis of every search and seizure, whether authorized by a warrant or not. *See Terry v. Ohio*, 392 U.S. 1, 19 (1968). Determining the reasonableness of a search requires balancing "the need to search

[1] A detailed discussion of the probable clause requirement is omitted because it is a clear requirement for any search or seizure under the Fourth Amendment, and this requirement is not disputed in this matter.

against the invasion which the search entails." *Mesa-Rincon*, 911 F.2d at 1442 (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 536–37 (1967)). This test also takes into account the nature of the premises searched, the feasibility of less-intrusive investigative techniques, *see id.* at 1443–44, and the nature of the crime under investigation, *see Torres* at 882–83. *But see Williams*, 124 F.3d at 416–18 (questioning whether it is proper for judges to weigh the seriousness of crimes at issue in the reasonableness analysis).

Video surveillance is perhaps the *most* intrusive form of electronic surveillance. It "is identical *in its indiscriminate character* to wiretapping and bugging. [However,] [i]t is even more invasive of privacy, just as a strip search is more invasive that a pat-down search . . . ." *Id.* at 1442–43 (alterations in original) (quoting *Torres*, 751 F.2d at 885). Courts frequently describe video surveillance as "Orwellian." *See Falls*, 34 F.3d at 680; *see also Cuevas-Sanchez*, 821 F.2d at 251; *State v. Bonnell*, 856 P.2d 1265, 1269 (Haw. 1993); *Ricks*, 537 A.2d at 616; *Teicher*, 422 N.E.2d at 513. Thus, "the government's showing of necessity must be very high to justify its use" and a lack of necessity renders the search unreasonable under the Fourth Amendment. *Mesa-Rincon* at 1443-45.[2]

[2] In *Torres*, the Seventh Circuit indicated that necessity was grounded in particularity. *See* 751 F.2d at 883. However, the Tenth Circuit's analysis in *Mesa-Rincon*, which relates the requirement to the reasonableness clause, represents a better interpretation of the concept. *See* 911 F.2d at 1442–45.

These factors should guide this Court as it evaluates the lower court's holding that the government's use of video surveillance in this case was necessary and therefore reasonable. Here, officers used the most intrusive form of electronic surveillance in a location where individuals have a legitimate expectation of privacy, and in the context of an investigation into nonviolent offenses for which law enforcement had already successfully employed other less-intrusive investigative techniques. *See* R.3252–58. Moreover, the warrant application failed to explain why alternative investigative techniques would have failed in this particular investigation, instead relying on generalizations about "Asian/Latin [m]assage parlors." R.3259. The Florida Supreme Court has instructed that a mere "boilerplate recitation of the difficulties of gathering usable evidence in bookmaking prosecutions is not a sufficient basis for granting a wiretap order." *Zuppardi v. State*, 367 So. 2d 601, 604 (Fla. 1978). That should apply with special force to warrant applications for video surveillance, which is even more invasive than mere audio surveillance. And, here, it should lead the Court to conclude that the detective who applied for the warrant failed to make a sufficient and particularized showing as to why video surveillance was necessary when normal investigative techniques had worked and others had not even been tried.

II. THE SURVEILLANCE IN THIS CASE REPRESENTS A DISTURBING TREND IN GOVERNMENT SURVEILLANCE ACTIVITIES AND SUPPRESSION IS THE APPROPRIATE AND NECESSARY REMEDY.

The explosion of technological innovation over the course of the last century has routinely frustrated the inherent purpose of the Fourth Amendment. Indeed, the Supreme Court has deemed it "foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo*, 533 U.S. at 33–34. As law enforcement continues to seek out and employ means of surveillance that would have been inconceivable to the Framers, jurists have lamented the steady erosion of Fourth Amendment privacy rights that have accompanied these technological advancements: "Once electronic surveillance . . . is added to the techniques of snooping which this sophisticated age has developed, we face the stark reality that the walls of privacy have broken down and all the tools of the police state are handed over to our bureaucracy on a constitutional platter." *Osborn*, 87 S. Ct. at 444 (Douglas, J. dissenting).

That warning has not gone unheeded. Unwilling to abandon enforcement of the Fourth Amendment in the face of technologies unknown to the Framers, the United States Supreme Court has instead "sought to 'assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment

was adopted.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (alteration in original) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). In so doing, the Supreme Court has "take[n] the long view, from the original meaning of the Fourth Amendment forward," *Kyllo*, 533 U.S. at 40, and focused on the types of "Government encroachment . . . the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent," rather than simply applying a "mechanical interpretation" that would leave citizens "at the mercy of advancing technology." *Carpenter*, 138 S. Ct. at 2214, 2223 (citation omitted).

This Court must confront the unconstrained use of video surveillance and restore foundational Fourth Amendment principles in the face of a technology that threatens to erode the degree of privacy against government that existed at the Founding. While the government can seek to record both video and audio and therefore be subject to the strictures of the federal and state wiretap laws, *see United States v. Koyomejian*, 946 F.2d 1450, 1459 (9th Cir. 1991) (superseded by *en banc* opinion), law enforcement authorities have applied for video-only, non-audio warrants in the belief that they can circumvent the strict procedural requirements of state and federal wiretapping statutes simply by omitting a request to record audio. This case presents the Court with an important opportunity to make clear to law enforcement that no such loophole exists because video

surveillance—though not specifically regulated by the Wiretap Act—is still subject to the strict Fourth Amendment standards of *Berger* and *Katz*.

Only suppression of all videos from the Jupiter Police Department's non-stop surveillance in this case will ensure that, going forward, law enforcement in Florida takes the commands of the Fourth Amendment more seriously when conducting this type of highly intrusive surveillance. The officers here cited numerous federal cases regarding the Fourth Amendment restrictions in their warrant application, R.3259–60, but failed to even follow those cases by failing to articulate and train monitoring officers on an intrinsic minimization plan.

In contrast to the officers here, the officers in *Mesa-Rincon* had no binding precedent on which to rely yet erred on the side of caution and employed the safeguards required by other federal circuits and the wiretapping statutes. *Mesa-Rincon*, 911 F.2d at 1441–42. Even a cursory reading of *Mesa-Rincon* would have informed any reasonably trained officer that an intrinsic minimization plan was a clear requirement for a valid warrant in a case such as this. *See United States v. Leon*, 468 U.S. 897, 922 n.23 (1984); *Johnson v. State*, 872 So.2d 961, 964 (Fla. 4th DCA 2004). *Leon* recognizes that "depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923. The lack

of any real minimization plan in this warrant is a glaring failure to comply with the particularity requirement in the case of electronic surveillance. *See Katz*, 389 U.S. at 356; *Berger*, 388 U.S. at 58–59. Unlike warrants deemed acceptable by federal courts, the warrant here "left entirely to the discretion of the officer[s]" when to stop recording (or not), *see Berger*, 388 U.S. at 58–59. Any reasonably well-trained officer would therefore have known that the warrant in this case was facially deficient had he or she been familiar with even one of the many cases the officers cited in their own warrant application.

The application of the exclusionary rule in the face of the good faith exception depends on a balancing of the deterrent effect of suppression against the costs. *See Herring v. United States*, 555 U.S. 135, 141–42 (2009). The Supreme Court has made clear that suppression is especially warranted "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* at 144. The Jupiter Police Department's conduct here was, at the very least, grossly negligent insofar as there was no minimization plan in the warrant, R.3262–64, officers did not receive any minimization guidelines, R.2099, and the Jupiter Police Department simply recorded non-stop for five days without any effort to minimize the recording of innocent patrons or irrelevant portions of "suspicious" massages, R.2099–2100; State's Br. 7. In addition, as indicated by recent orders suppressing videos in criminal cases in multiple courts

across Florida, the negligence appears to be systemic and recurring. Thus, the societal interest in deterring reckless use of electronic surveillance (as happened in this case) is very high. By contrast, the costs of suppression are relatively low in the context of a prosecution of nonviolent offenses.

Electronic surveillance is a uniquely intrusive form of government invasion into individual privacy. Courts and legislatures alike have recognized this and repeatedly explained standards and procedures that must be satisfied before the government can use these methods. Failure to comply with these measures must be of consequence. If this Court does not affirm the suppression of the evidence by the lower court, it will only embolden the government in its efforts to evade the sacred privacy protections of the Fourth Amendment. This Court must continue to ensure the vitality of the Fourth Amendment for the sake of Floridians.

CONCLUSION

For the above-stated reasons, amicus urges this Court to embrace the same requirements imposed by every court that has addressed the issue of silent video surveillance: 1) probable cause; 2) necessity; 3) a particular description of the activities to be recorded and the crime to which they relate; 4) specific durational limits; and 5) specific minimization requirements. In applying those requirements to this case, the Court should hold that the non-stop video recording clearly

violated the minimization requirement and affirm the lower court's order suppressing the videos of Mr. Kraft.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email to the following parties on this 12th day of November, 2019.

Counsel for Appellant

OFFICE OF THE ATTORNEY GENERAL
Ashley Moody
Jeffrey Desousa
PL-01 The Capitol
Tallahassee, FL 32399
Tel: 850.414.3300
Fax: 850.410.2672
Amit.agarwal@myfloridalegal.com
Edward.wenger@myfloridalegal.com
Jeffrey.desousa@myfloridalegal.com
Jennifer.bruce@myfloridalegal.com

Counsel for Appellee

Frank A. Shepherd, Esq.
Gray Robinson P.A.
333 S.E. Second Avenue, Suite 3200
Miami, FL 33131
Frank.Shepherd@Gray-Robinson.com
Tel: 305.416.6880

William A. Burck, Esq.
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street NW, Suite 900
Washington, DC 20005
Tel:202.538.8000
WilliamBruck@QuinnEmanuel.com

Alex Sprio, Esq.
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Tel.212.849.7000
AlexSpiro@QuinnEmanuel.com

/s Donnie Murrell

DONNIE MURRELL, ESQUIRE