OA 12-594 017

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 83,464

4DCA CASE NO. 92-0280

STATE OF FLORIDA,

Petitioner,

vs.

JOYCE & EDGARDO MOZO,

Respondents.

ON DISCRETIONARY APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATUTES AND CONSTITUTIONS

MISCELLANEOUS

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PRELIMINARY STATEMENT

The Respondents, Joyce and Edgardo Mozo, were the Defendants in a prosecution in the Criminal Division of the Seventeenth Judicial Circuit in and for Broward County, Florida. On appeal to the Fourth District Court of Appeal, Respondents were the Appellants, the State of Florida was the Appellee.

In this brief, the parties will be referred to as they appear before the Supreme Court of Florida except the Prosecution below, here the Petitioner, shall also be referred to as the "State."

STATEMENT OF THE CASE AND FACTS

The Respondents will adopt the Statement of the Case and Facts as set forth by the Fourth District Court of Appeal in its decision of this case. *Mozo v. State*, 632 So.2d 623, 624-25 (Fla. 4th DCA 1994).

SUMMARY OF THE ARGUMENT

The Respondents, Joyce and Edgardo Mozo, argue that their cordless telephone conversations were "oral communications" protected by Florida's Security of Communications Act because their expectation of privacy in those conversations was reasonable. The reasonableness of that expectation is strengthened by the fact the conversations originated within the Respondents' private residence and the warrantless interception by police, therefore, occurred within their home. Since well-established law and United States Supreme Court interpretations of the Fourth Amendment find a greater

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protection for one's home, the governmental intrusion therein was a violation of Respondents' right to privacy and contrary to statute.

The conclusion of the Fourth District Court of Appeal that the Security of Communications Act does ***not*** protect cordless telephone conversations was also error in light of modern technological advances which have, in the past, been a determinant factor in how constitutional standards are applied. This reasoning must be updated in order to prevent complete deterioration of the safeguards provided in our Constitution.

The district court's application of sections 12 and 23 of the Florida Constitution was an enlightened and correct interpretation of the intent underlying the objectives of Florida voters in enacting specific guarantees to prevent unbridled governmental access to our private lives. In examining section 12, the expectation of privacy was not only reasonable in this case, but the Respondents' expectation within their own home was an expectation readily recognized by society as being legitimate.

Finally, the district court had the authority to consider section 23 protections concurrently with section 12 and did so correctly. Finding no compelling state interest to justify the random interception of Respondents' telephone conversations, the court properly ruled that the constitutional privacy safeguard deemed the police interception improper.

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ARGUMENT

CONVERSATIONS ON CORDLESS TELEPHONES USED WITHIN A PRIVATE RESIDENCE ARE PROTECTED FROM GOVERNMENT INTERCEPTION BY FLORIDA'S SECURITY OF COMMUNICATIONS ACT AND THE CONSTITUTIONAL SAFEGUARD TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE AND THE RIGHT TO PRIVACY

Respondents, Joyce and Edgardo Mozo, urge that conversations on cordless telephones, especially those originating within a private dwelling, are protected by statute unless police can articulate sufficient probable cause for a court order permitting government access to these non-public communications. Despite the district court's holding that Florida's Security of Communications Act does not apply to cordless telephone conversations, Respondents contend that the appellate court misinterpreted the statute. As a result, the warrantless interception of the Respondents' conversations and subsequent disclosure of their content by police was a violation of statute.

Florida's Security of Communications Act provides in pertinent part:

> Except as otherwise specifically provided in this chapter, any person who:
>
> (a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept any wire, oral, or electronic communication;
>
> (b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical or other device to intercept any oral communication...;
>
> (c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection; shall be punished as provided in subsection (4).

§ 934.03(1), Fla. Stat. (1991). Subsection (4) provides that any person who violates section

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934.03(1) is guilty of a felony of the third degree.

In sum, the Act prohibits the interception and disclosure of the contents of any private wire, oral, or electronic communication. The Respondents concede that, due to the specific exclusion of cordless telephone communication from the definitions of "wire" and "electronic" communications, their conversations are not protected as either "wire"[1] or "electronic communication."[2] *See Mozo v. State*, 632 So.2d 623, 628 (Fla. 4th DCA 1994).

However, the Respondents' intercepted conversations are protected under the Act as "oral communication." "Oral communication" is defined by section 934.02(2) as:

> [A]ny oral communication ***uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances***

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[1]Section 934.02(1), Florida Statutes (1991), defines "wire communication" as:

> [A]ny aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception including the use of such connection in a switching station furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications or communications affecting intrastate, interstate, or foreign commerce. Such term includes any electronic storage of such communication but ***does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit***. (Emphasis added).

[2]Section 934.02(12), Florida Statutes (1991), defines, in pertinent part, "electronic communication" as:

> [A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects intrastate, interstate, or foreign commerce, but ***does not include***:
>
> (a) ***The radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit***. (Emphasis added).

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> ***justifying such expectation*** and does not mean any public oral communication uttered at a public meeting or any electronic communication. (Emphasis added).

The district court engaged in an exhaustive explanation negating the application of section 934.02(2) to cordless telephone communication. *See generally Mozo*, 632 So.2d at 627-30. In summarizing its analysis of the statute's effect in Respondents' case, the appellate court stated that "the Mozos had neither a subjective nor a reasonable expectation of privacy in these conversations because they took place over a cordless phone." *Id.* at 627. Nonetheless, the lower court's decision discounted the fact that the "seized" conversations originated within Respondents' private residence and, as such, were indeed conducted with the required reasonable expectation of privacy demanded by section 934.02(2). This greater protection for in-home communication comports with well-established principles of law and the federal and state constitutions which guarantee citizens a reasonable expectation of privacy in their own home. *See* U.S. CONST. amend. IV; Art. I, §§ 12 & 23, Fla. Const.; *see also See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (search of private houses presumptively unreasonable if conducted without a warrant).

In this case, the Respondents' expectation of privacy within their house was both subjectively and objectively reasonable and, as such, the intrusion by police upon that expectation was a violation of statute. According to unrefuted authority, the actual "interception" of a communication occurs not where police ultimately hear or record what is said, but where the communication originates. *See United States v. Nelson*, 837 F.2d 1519 (11th Cir.), *cert. denied*, *Waldhart v. United States*, 488 U.S. 829, 109 S.Ct. 82, 102 L.Ed.2d 58 (1988). In *Nelson*, the Eleventh Circuit Court of Appeals ruled on a jurisdiction question

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contingent on the exact location where an "interception" occurs. The federal appellate court held that the "aural acquisition of the content of any ... communication," pursuant to 18 U.S.C. § 2510(4)[3] and section 934.02(3), Florida Statutes,[4] "refers to ***the place where a communication is initially obtained*** regardless of where a communication is ultimately heard." *Nelson*, 837 F.2d at 1527 (emphasis added). In the case at bar, the intercepted communication was obtained where the conversations were conceived—within the Respondents' private dwelling. *See Mozo*, 632 So.2d at 624. The unlawfulness of the interception of Respondents' telephone calls is demonstrated by the fact that the interception, or seizure of communications, occurred ***within*** the Respondents' home without a warrant.[5] *See* Art. I, § 12, Fla. Const. (absent specified exception, search warrant required

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[3]18 U.S.C. § 2510(4) (West Supp. 1994) defines the term "intercept" to mean:

> [T]he aural *or other* acquisition of the contents of any wire, *electronic,* or oral communication through the use of any electronic, mechanical, or other device. [The emphasized portions denote amendments to § 2510(4) under Pub. L. 99-508, § 101(a)(3) (1986)].

[4]Section 934.02(3), Florida Statutes (1991), defines the term "intercept" as:

> [T]he aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

[5]Timothy R. Rabel, Comment, *The Electronic and Communications Privacy Act: Discriminatory Treatment for Similar Technology, Cutting the Cord of Privacy*, 23 J. MARSHALL L. REV. 661, 680 (1990) [hereinafter *ECPA: Discriminatory Treatment for Similar Technology*] ("If the ECPA focuses on intent, it should not matter how hard an individual may work in order to intentionally receive or intercept a communication. The interceptor of radio communications is analogous to a burglar. The law punishes a person as a burglar no matter how hard he had to work to enter the house. Since the law does not treat a burglar who broke a window to enter a house any differently from a burglar who entered the house through an open window, the law should not treat an individual living next door to someone who owns and uses a cordless phone, and knows he can listen to his neighbor if he actively

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for search and seizure of evidence within a private home); *see also Hoffa v. United States*, 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966) ("[P]rotections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements"); *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963) (physical trespass need not occur for there to be a search and seizure, private telephone conversations are protected from electronic eavesdropping by the government).

In its opinion, the district court further suggested that it would be inappropriate to make interception of cordless telephone communication a criminal offense "since some types of cordless communications can be so easily intercepted." *Mozo*, 632 So.2d at 629 (*citing* S. Rep. No. 541, 99th Cong., 2d Sess. 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3566). Respondents contend that such reasoning is not only misdirected but dangerous to the concept of a citizen's expectation of privacy under Chapter 934. In light of the state of modern technology, allowing technological advances to dictate what fundamental rights will be preserved for citizens, especially with regard to the detection, observation, and interception of human activity, would eventually lead to the legalization of ***all*** government infringement on private rights. *Mozo*, 632 So.2d at 634-35 ([I]f an "ease of interception" standard were applied there would be virtually no private communications protected from

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and purposely tunes his radio to the right frequency any differently from someone who owns a scanner and purposely tunes his scanner to the right frequency. Both parties are making an effort to intercept a communication and are intending the consequences of their actions, to intercept the communication, just as a burglar intends to enter the house by any means and commit a felony. The culpable state of mind is present, and there are similar acts by both individuals. Therefore, the courts should have the ability under the law to punish both parties equally." (Footnotes omitted)).

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the government's use of advanced technology to intercept private communications);[6] *see also id.* at 634, n.10 (author George Orwell's frightening prediction of society in his book *1984* describes life in a technologically-advanced society with "*big brother* government" watching and listening-in on all citizens' private activity).

Balancing the ease of government intrusion on individual rights and the reasonableness of an expectation of privacy, the United States Supreme Court held that the government's ability to infringe on a right must submit to the private citizen's right to privacy. Ruling on a citizen's right not to have police intercept telephone conversations by monitoring a party line, the Supreme Court stated that although a telephone party line user should realize that their conversations were "obviously vulnerable" to being overheard by third persons, such activity is not excluded from protection of the Federal Communications Act.[7] *Lee v. Florida*, 392 U.S. 378, 381, 381 n.5, 88 S.Ct. 2096, 2098, 2098 n.5, 20 L.Ed.2d 1166 (1968).

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[6]In his concurring opinion, Judge Farmer phrased the question whether technology should dictate statutory protection more appropriately as "what non-wire and non-electronic oral communication is NOT capable of being surreptitiously intercepted by current technology.... [I]f technology is the measure of society's expectations, at the current rate advances threaten to consume not only any mythical statutory privacy rights but the real constitutional ones as well." *Mozo*, 632 So.2d at 636 (Farmer, J., concurring).

[7]The Federal Communications Act, 47 U.S.C. § 605, as applied in *Lee v. Florida*, is a precursor statute to 18 U.S.C. § 2510 (enacted in 1968 with the intention that law enforcement officers' activities regarding wiretapping be governed by the new Crime Control Act). Section 2510 is the federal counterpart to Chapter 934, Florida Statutes. Section 605 provides in pertinent part:

> [N]o person not being authorized by the sender shall intercept any communication and divulge ... the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person....

The State contends that any reasonableness of an expectation of privacy is further diminished by the actual or implied knowledge that such communications are subject to interception as evidenced by the warning notices attached to the instruments. In an analogous case, Judge Anstead of the Fourth District wrote that the court could not agree that "a mere suspicion or implied knowledge that a communication might be recorded makes unreasonable the expectation of privacy in that communication...." *State v. Sells*, 582 So.2d 1244 (Fla. 4th DCA 1991).

In *Sells*, the court held that although a deputy sheriff's superior officer suspected the deputy might record their conversation in the superior's office, the State made a sufficient prima facie case that the recording was a violation of Chapter 934. The court in *Sells* reasoned that:

> To permit recordings where the recorded party may be "suspicious" would completely vitiate the consent [to be recorded] requirement. For instance, a person talking on the telephone with someone else may hear a pinging sound or other unusual noise and may suspect that the sounds could be associated with recording. ***Does that mean he has consented to the recording? We think not.*** In effect such a holding would mean that someone who violates the statute in a clumsy manner would be immune from prosecution as a matter of law. The message would be that one may intercept private communications with impunity as long as one does so in a manner that might suggest the conversation is being intercepted.

582 So.2d at 1245 (emphasis added). Judge Anstead explained the court's basis for finding that implied knowledge that a conversation may be recorded did not abrogate protection under the Security of Communications Act, stating:

> In enacting chapter 934, the legislature intended that each party to a private conversation should enjoy an expectation of privacy in that conversation. *Shevin v. Sunbeam Television Corp.*, 351 So.2d 723 (Fla. 1977). The statute is designed to protect victims of illegal

> interceptions, not those who perpetrate them. *State v. News-Press Pub. Co.*, 338 So.2d 1313 (Fla. 2d DCA 1976). The statute bars recordings of conversations without the consent of the other party. *Shevin*.

Id. Following the court's holding in *Sells* that any implied or actual notice that a conversation may be subject to interception does not diminish the expectation of privacy, the Respondents' expectation of privacy was reasonable and, therefore, their conversations were statutorily protected "oral communications."[8]

The State also argues that a person's ignorance of the technology surrounding cordless telephones cannot support a claim to any expectation of privacy. *United States v. Carr*, 805 F.Supp. 1266 (E.D.N.C. 1992). Respondents may concede the common sense point that failure to acquaint oneself with "the technology ... employed to further ... illegal

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[8]Judge Anstead commented on the effect of the telephone sticker in this case as follows:

> [W]e reject the state's contention that it has demonstrated a lack of privacy by the existence of an FCC sticker on the bottom of the base of the telephone in question. As previously noted, there is absolutely no evidence in the record as to the Mozos' knowledge of the sticker, including whether they saw the sticker and ignored it, whether they read the sticker and concluded that it was meaningless, or whether they read the sticker and concluded that others, including the government, may be listening to their conversations. We can only speculate as to where the phone came from, whether it was in the apartment when the Mozos rented the apartment, whether the phone was a gift to the Mozos and so on.
> In any event, we do not believe knowledge of a sticker that includes the ambiguous notation that "Privacy of communication may not be insured" constitutes a waiver of a person's right to privacy. *See Sells v. State*, 582 So.2d 1244 (Fla. 4th DCA 1991) (The suspicion that one's privacy may be invaded does not waive the right to privacy). Indeed, it is unlikely that anyone would contend that such a sticker on a regular telephone would constitute a waiver.

Mozo, 632 So.2d at 633 n.9.

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activity does not insulate [a person] from responsibility." *Carr*, 805 F.Supp. at 1275. However, the courts in *Lee v. Florida* and *Sells* did not use a standard based on one's ignorance of the vulnerability of a particular communication system in determining the legality of governmental intrusion, but asked whether the phone user had a ***reasonable*** expectation of privacy. Regardless of a person's lack of knowledge of how an electronic instrument operates, the expectation within one's own home cannot be undermined by such a standard without circumventing fundamental privacy rights.

In sum, reasoning that (1) an expectation of privacy in one's own home is reasonable and a right recognized by society; (2) that the interception of communication occurs where the communication originates; (3) actual or implied knowledge that a communication may be intercepted does not waive the expectation of privacy; and (4) no compelling state interest was articulated which might justify overriding the Respondents' right to privacy,[9] the Respondents' expectation of privacy was clearly reasonable, the police intrusion thereon was a violation of Florida's Security of Communications Act as effective to "oral communication," and the Court should so find, aligning itself firmly with that right to privacy.

In its ensuing argument, the State contends that the district court ignored the

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[9]This Court held that a "legitimate, on-going criminal investigation satisfies the compelling state interest test when [the State] demonstrates a clear connection between the illegal activity and the person whose privacy would be invaded." *Shaktman v. State*, 553 So.2d 148, 152 (Fla. 1989).

In the case at bar, the record revealed that police haphazardly intercepted Respondents' telephone calls and ***no criminal investigation was in progress***. The record states that police were in Respondents' neighborhood "using an electronic scanner device to monitor private telephone calls. It is not clear ... why the detectives chose to surveil this particular complex. Their goal was to scan frequencies at random hoping to come across some kind of illegal activity." *Mozo*, 632 So.2d at 624. Clearly, no compelling state interest was articulated in this case.

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mandate of Article I, section 12, of the Florida Constitution when it refused to follow federal court decisions construing the Fourth Amendment.[10] In particular, the court was criticized for not adopting the holding in *United States v. Smith*, 978 F.2d 171 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1620, 123 L.Ed.2d 179 (1992), which examined the issue of interception of cordless telephone communications by a private citizen prior to police involvement. The State misconceives the authority such decisions bear on state courts. The courts of Florida are constitutionally bound to construe search and seizure law in conformity with the United States Supreme Court, not lower federal courts. Art. I, § 12, Fla. Const. The denial of certiorari in *Smith* is a procedural act and ***not*** a Supreme Court interpretation of the Fourth Amendment extending precedent to this Court. *See Bing v. A.G. Edwards & Sons, Inc.*, 498 So.2d 1279 (Fla. 4th DCA 1986) (denial of certiorari without opinion is not review on the merits and cannot be law of the case); *see also Perez v. State*, 620 So.2d 1256 (Fla. 1993) (Florida Supreme Court is bound to follow the United States Supreme Court's interpretations of the Fourth Amendment and to provide no greater protection than those interpretations). In light of the state of the law and the non-binding authority of lower federal court decisions, the district court acted well-within its authority to resolve the section 12 issue differently than that of the federal court.

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[10]Article I, section 12 of the Florida Constitution provides, in pertinent part, that:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

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Notwithstanding its precedential value, even the court in *Smith* recognized that there could be no general rule regarding the cordless telephone privacy issue. *Id.* Advocating a case-by-case analysis of this issue, the court stated that:

> [I]n spite of the fact a defendant uses a cordless phone, ***the circumstances may show that he also has a reasonable expectation of privacy***.... [T]he trial court must be prepared to consider the reasonableness of the privacy expectation in light of all the particular circumstances and the particular phone at issue.

978 F.2d at 180 (emphasis added). Abiding by the court's own position, the *Smith* decision provides no conclusive ruling applicable in the case at bar.

Considering the proper authority under the state Constitution, the district court examined how the United States Supreme Court construed the Fourth Amendment's right to privacy. In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court developed a standard by which the reasonableness of one's expectation of privacy is measured. According to *Katz*, a reasonable expectation of privacy depends upon: 1) the person's subjective expectation of privacy; and 2) whether that expectation is one that society is prepared to recognize as reasonable. *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985).

The State argues that the first prong of the *Katz* test is not met citing court decisions which claim that the ease of interception and widespread use of cordless telephones diminish any reasonable expectation of privacy and, as a result, should not be protected. These previously addressed points, Respondents argue, cannot justify an erosion of constitutionally derived privacy rights. In its analysis of section 12, the district court discerned the meaning of the section 12 term "unreasonable" to the interception of private communication, not a

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citizen's expectation of privacy.[11] *Mozo*, 632 So.2d at 632. The essence of the court's astute clarification, as applied to this case, means that absent probable cause or, at least, a suspicion of criminal activity,[12] the intrusion by police into the Respondents' private telephone calls was an unreasonable, and illegal, governmental intrusion. *Id.* For this Court to hold otherwise would be to ignore the constitutionally proscribed practice of "unreasonable interception" of private communication, and presumably authorize police to cast an electronic "net" into the airwaves, surreptitiously and broadly intercepting the most private of human expressed thoughts. That should not, nor could it even be countenanced under a Constitution dedicated to the basic right "to be let alone." *See Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

Opposing the district court's finding that Article I, section 23, of the Florida Constitution[13] also protects the Respondents' communications, the State argues that section

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[11]Article I, section 12 of the Florida Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against the ***unreasonable interception of private communications by any means***, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing ... the communication to be intercepted, and the nature of the evidence to be obtained. ... Articles or information obtained in violation of this right shall not be admissible in evidence.... (Emphasis added).

[12]*See infra* n.9; *Mozo*, 632 So.2d at 624.

[13]Article I, section 23, of the Florida Constitution provides:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

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12, not section 23, should be applied in this case. The State surmised that because section 12 provides an "explicit textual foundation" for the security of communications, the protection of section 23 is not implicated. *See In re T.W.*, 551 So.2d 1186 (Fla. 1989). Moreover, the State suggests section 23 is inapplicable because the courts of this state "are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment, and provide no greater protection than those interpretations." *Bernie v. State*, 524 So.2d 988, 990-91 (Fla. 1988). Nevertheless, the State fails to cite a decision of the United States Supreme Court that interprets the Fourth Amendment as it may apply to the cordless telephone privacy issue. Respondents urge that, due to the absence of Supreme Court construction on this issue, the district court properly developed its own construction using well-established constitutional standards as set forth in *Katz* and *Inciarrano*.

The basis for the State's objection to the district court's concurrent application of both section 12 and 23 when analyzing Fourth Amendment issues has been the subject of past judicial determinations. Despite these objections, courts have considered these provisions together because, as Justice Barkett stated:

> There is no bright line between the privacy protections afforded under article I, section 12, and the privacy interests protected by article I, section 23. ***Section 23 comes into play in cases involving electronic surveillance because this aspect of governmental activity infringing on privacy is one that section 23 was particularly designed to check.*** The people have recognized and acted to protect themselves against the dangers inherent in unauthorized use of electronic surveillance. We cannot interpret the conformity amendment as negating, by implication, rights that the voters of this state have designated to be of constitutional stature.

State v. Hume, 512 So.2d 185, 190 (Fla. 1987) (Barkett, J., dissenting) (emphasis added).

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See Shaktman v. State, 529 So.2d 711, 717 n.9 (Fla. 3d DCA 1988) (3rd D.C.A. citing with approval from Justice Barkett's dissent in *Hume*), *aff'd*, 553 So.2d 148 (Fla. 1989). Furthermore, since Florida's right to privacy "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution," *In re T.W.*, 551 So.2d at 1192, a court would be remiss if it did not apply section 23 to situations not adequately covered by the section 12 protections. This more comprehensive treatment under both constitutional provisions becomes even more appropriate since there is no federal counterpart to Florida's section 23.

The district court's treatment of section 23 continued with acknowledgement of this Court's endorsement of the state's expanded privacy interests. *Mozo*, 632 So.2d at 632-33; *see Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985). And, in response to the more expansive protection of section 23, this Court adopted a strict standard of proof the State must meet to overcome these constitutional privacy safeguards. This standard requires proof that the intrusion by police served a compelling state interest and such intrusion on personal privacy was accomplished by the least intrusive means. *Winfield*, 477 So.2d at 547.

Writing for the court in *Mozo*, Judge Anstead wrote that the State failed to satisfy both prongs of the section 23 compelling state interest test. Judge Anstead addressed the State's insufficient showing, stating:

> The facts of this case readily demonstrate the state has fallen far short of satisfying this stringent standard. While the state obviously has a compelling interest in fighting crime, ***the interception of phone conversations, without cause, suspicion, or prior approval, is certainly not the least intrusive means of detecting criminal activity***. How many hundreds or thousands of "innocent" calls would be heard in order to

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> detect a call involving criminal activity? While the government may have the technical ability to listen in, it still possesses no "magic wand" to detect only criminal conversations.

632 So.2d at 633 n.9 (emphasis added). This approach not only demonstrates that the broader privacy interests of section 23, e.g., least intrusive means of detecting criminal activity, are irrefutably implicated, and that the police in this case clearly violated those interests.

In its closing remarks, the State quotes this Court from *Dorsey v. State* holding that pocket pager radio signals were legally intercepted by police as analogized to communications "between two radio transceivers." 402 So.2d 1178 (Fla. 1981). This Court noted further that "statutes must be construed to avoid absurd results." *Id.* at 1183 (*quoting Realty Bond & Share Co. v. Englar*, 104 Fla. 329, 143 So. 152 (1932)). The opinion continued by asserting that implementation of statutory restrictions would be nearly impossible as "the broadcast nature of such messages ... are open to any members of the public who wish to take the simple step of listening to them." *Id.* at 1184. As these references demonstrate, in *Dorsey* this Court applied the "ease of interception" standard, the "ease" of which would have made proscribing such conduct an "absurd result." Interestingly, in finding no statutory protection in *Dorsey*, this Court avoided issues similar to those raised in the present case as evidenced in the Court's comment that "[w]e do not reach any hypothetical questions involving more sophisticated methods of intercepting communications which in fact engender a reasonable expectation of privacy...." *Id.* at 1184 n.4. If this Court were to use the outdated "ease of interception" standard in the present case, in light of recent technological

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advances in the field of electronic eavesdropping,[14] it would produce an absurd result, not as the enforcement nightmare alluded to in *Dorsey*, but as permitting the government's ability to intrude on privacy to dictate when the right to privacy exists.

In closing, the decision of the Fourth District Court of Appeal should be affirmed as a prudent, and prospective, ruling on the privacy rights of the citizens of Florida, at least as it relates to this fact-specific case. The Respondents' argument that their cordless telephone conversations are "oral communications" merits approval of this Court as to find otherwise would be condoning non-judicially supervised governmental intrusion on the sanctity of the home. Moreover, a contrary ruling would affect more than the in-home privacy rights argued herein and raise a question of reasonableness of a privacy expectation with regard to any type or manner of communication. For instance, the privilege of an attorney/client, psychotherapist/patient, etc., communication conducted via cordless phone would be waived as there could be no expectation that their conversation was confidential.[15] Additionally, if the Court adopts the flawed reasoning that the statutes do not protect cordless phones, the very near future will find all forms of electronic communication easily intercepted and, therefore, not able to withstand the *big brother*-type attacks now advocated by the State.

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[14]*See ECPA: Discriminatory Treatment for Similar Technology, supra* note 5 at 666 n.26, 672-77 (Outlines the explosive growth of cordless and cellular phone use since the first commercial cellular service began on October 13, 1983. Notably, the first cellular service occurred after the *Dorsey* decision. The article also mentions the fact that cordless and cellular phone communications are becoming increasingly susceptible to interception and that, as cordless phone are not protected, cellular phone communications are, thereby, creating the discrimination among communication methods.)

[15]*See id.* at 663 n.10.

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Concerning the constitutional protections afforded the Respondents' cordless telephone conversations, the district court acted well-within its authority to consider and rule on the applicability of sections 12 and 23 of the Florida Constitution in this case. In so ruling, the court insightfully and correctly found the Respondents' expectation of privacy a viable circumstance implicating the safeguards of section 12. Furthermore, the court's discerning examination of facts led to the conclusion that the State failed to demonstrate a compelling state interest that could justify the random, and judicially unsupervised, police intrusion into privacy interests guaranteed by section 23.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited herein, Respondents, Joyce and Edgardo Mozo, respectfully requests this Honorable Court to AFFIRM the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this RESPONDENTS' ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Ms. Joan Fowler, Esq., and Ms. Carol Cobourn Asbury, Esq., Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299, this 30th day of August 1994.

J. DAVID BOGENSCHUTZ, Esquire
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