Filing # 182339964 E-Filed 09/21/2023 01:36:24 PM

IN THE SUPREME COURT OF FLORIDA

Case No. SC2023-0432

L.T. Case Nos. 4D22-1979
062021CA007130AXXXCE

WILLIAM J. MITCHELL,

Petitioner,

v.

DAVID W. RACE

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

September 21, 2023

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PRELIMINARY STATEMENT

Respondent and Defendant David W. Race is referred to as “Race”.

Petitioner and Plaintiff William J. Mitchell is referred to as “Mitchell”.

Citations to the record are R _____.

The Fourth District Court of Appeal, whose opinion is on review, is referred to as the “district court.”

The opinion on review is *Race v. Mitchell*, 357 So. 3d 720 (Fla. 4th DCA 2023).

STATEMENT OF THE CASE AND FACTS

This case is fundamentally about privacy. The issue on review is whether there is personal jurisdiction over Race for 27 undeniable violations of the Florida Security of Communications Act, §§ 934.03(1), 934.02(1), 934.02(3), and 934.10(1) Fla. Stat. (2018-2023).

Mitchell is a Broward County resident and holder of several video game records for the original Donkey Kong and Pac-Man. Mitchell brings suit against Race, who is an Ohio resident and also claims video game records, in the 17th Judicial Circuit in and for Broward County for violations of the Florida Security of Communications Act. Race recorded 27 phone calls with Mitchell while Mitchell was in Florida without Mitchell’s consent and disclosed at least one of the recorded calls to a third party without Mitchell’s consent in

an effort to discredit Mitchell.

The trial court denied Race's motion to dismiss the second amended complaint for lack of personal jurisdiction because Mitchell alleged the commission of a tort in Florida and jurisdiction over Race in Florida does not violate due process. R. 690-691. The Fourth District Court of Appeal reversed the order denying the motion to dismiss and held "Defendant lacks sufficient minimum contacts with Florida to satisfy due process." *Race v. Mitchell,* 357 So. 3d 720, 722 (Fla. 4th DCA 2023).

As set forth herein, the district court erred and the trial court reached the correct result. Race is subject to personal jurisdiction in Broward County per the Florida long arm statute, § 48.193(1)(a)(2) Fla. Stat. (2021-2023), for committing a tortious act in Florida and under the due process clause.

PROCEDURAL HISTORY

Mitchell learned on October 7, 2020 that Race recorded an April 1, 2018 phone call after Race voluntarily provided the recording of that call to Twin Galaxies, a video game media entity, without a subpoena. R. 300, ¶ 18; R. 219-220, ¶ 27-30. Mitchell has faced accusations of cheating on his video game records, including by Twin Galaxies. R. 603-606, ¶ 6, 20; R. 466-468, ¶ 3, 8, 11. Mitchell sued Twin Galaxies in a California state court in Los Angeles for defamation for false claims of cheating and Race is not a party

to that case. R. 606, ¶ 20; R. 219-220, ¶ 27-30; R. 464-476; R. 477-508.

On April 8, 2021, Mitchell filed his initial complaint against Race for interception and disclosure of the April 1, 2018 phone call in violation of the Florida Security of Communications Act, §§ 934.03(1), 934.02(1), 934.02(3), and 934.10(1) Fla. Stat. (2018-2023). R. 199. The Florida Security of Communications Act requires *all parties* to a phone call to give consent before the call can be recorded. §§ 934.03(1)(a)-(e), 934.03(2)(d); 934.02(18), 934.02(3), and 934.10(1) Fla. Stat. (2018-2023).

On July 19, 2021, Race moved to dismiss for lack of personal jurisdiction based upon his two-page affidavit stating that he visited Florida in 2013 and 2017, does not own property in Florida, and previously made alimony payments to his former wife in Florida. R. 130-131. Race responded to the first request for admissions on August 20, 2021 by admitting that he recorded all calls with Mitchell. R. 216-217, ¶ 5-14. Mitchell's first amended complaint alleged 10 recorded phone calls in violation of the Florida Security of Communications Act. R. 236-274. Race moved for a lack of personal jurisdiction and Mitchell responded on January 13, 2022. R. 275-297.

Mitchell filed his second amended complaint on April 11, 2022, which alleged 27 recorded phone calls in violation of the Florida Security of Communications Act. R. 603-641. On May 10, 2022, Race moved to dismiss

the second amended complaint for lack of personal jurisdiction, which is the operative motion for this appeal and is based upon the same 2-page affidavit from Race. R. 118-131. On June 1, 2022, Mitchell filed another declaration and a supplement to the response brief. R. 642-663; R. 692-693.

On June 2, 2022, the trial court held a hearing and denied Race's motion to dismiss and entered the operative order on June 22, 2022. R. 664-689; R. 690-691. The trial court held "the alleged 'interceptions' occurred in Florida where the Plaintiff's statements were made, not in Ohio where the communications were heard/recorded" and "because the Court *(with Defendant's consent)* conducted an expedited hearing solely on the legal issue of whether Defendant committed a tortious act in Florida and *not an evidentiary hearing regarding minimum contacts/due process,* based on such circumstances and the record before the Court, the Court further finds that personal jurisdiction over Defendant in Florida does not violate due process." R. 690-691 (emphasis added). At the hearing, Race essentially conceded that the issue was long-arm jurisdiction under § 48.193(1)(a)(2) Fla. Stat. and did *not* argue due process. R. 667-668; R. 664-689; R. 714.

The district court reversed the order denying the motion to dismiss and held that Race lacked minimum contacts. *Race*, 357 So. 3d at 722-723. Previously, the Fifth District held in *France v. France*, 90 So. 3d 860, 864

(Fla. 5th DCA 2012) that jurisdiction over a North Carolina defendant who recorded phone calls with a Florida resident existed. The Fifth District concluded that this Court's approval of *Koch v. Kimball,* 710 So. 2d 5 (Fla. 2d DCA 1998) – which held jurisdiction under both the long arm statute and due process existed over a Georgia defendant who recorded phone calls with a Florida resident – in footnote 11 of *Acquadro v. Bergeron,* 851 So. 2d 665 (Fla. 2003) meant that jurisdiction existed. North Carolina and Georgia require the consent of one party to a communication to record.

The district court held that Race lacked minimum contacts with Florida and held that *Acquadro's* approval of *Koch* did not control because *Acquadro* involved long arm jurisdiction, not due process. *Race*, 357 So. 3d at 722-723. The district court further held Race owns no property and does no business in Florida, recording calls without all consent is legal in Ohio, and that recording calls without consent is not malum in se such that "it offends traditional notions of fair play and substantial justice to require him to appear in Florida to defend against a lawsuit for an alleged violation of the Florida Security of Communications Act." *Id.* at 722. Furthermore, the district court held "although Defendant knew he was calling into Florida, we note that cell phones have largely displaced land lines and a call to a number in a specific area code does not necessarily mean that the call was received within the

geographical limits of the area code. Personal jurisdiction should not entirely turn on a cell phone's location in Florida when a conversation is legally recorded by a cell phone under the law of the state where the voice communication is received." *Id.* at 723. The district court certified conflict with *France* and denied Mitchell's motion for appellate attorney's fees under § 934.10(1)(d) Fla. Stat. (2018-2023) by separate order. *Id.* at 723; R. 730.

This Court granted discretionary review via conflict jurisdiction of the district court's opinion and the order denying appellate attorney's fees.

FACTS

I. RACE RECORDED 27 PHONE CALLS WITHOUT MITCHELL'S CONSENT

Race does not deny that he recorded the 27 phone calls without Mitchell's consent. R. 216-217, ¶ 5-14; R. 130-131. For example, Race admitted that he knowingly recorded the April 1, 2018 phone call:

> 8. Admit that Race knowingly recorded the telephone call made with Mitchell on or about April 1, 2018.
>
> **Response**: **Admitted. Race's calls were automatically recorded using a smart phone application. Race did not specifically target Mitchell or treat Mitchell differently from anyone else calling Race. Further, Mitchell called Race.**

R. 216, ¶ 8. Race routinely *records all phone calls* via a smart phone app and that he knew Mitchell is a Florida resident. R. 216-219, ¶ 5-14, 24-25.

Mitchell first spoke with Race by phone on February 9, 2018 at 12:11AM, when *Race called into Florida* to speak with Mitchell about

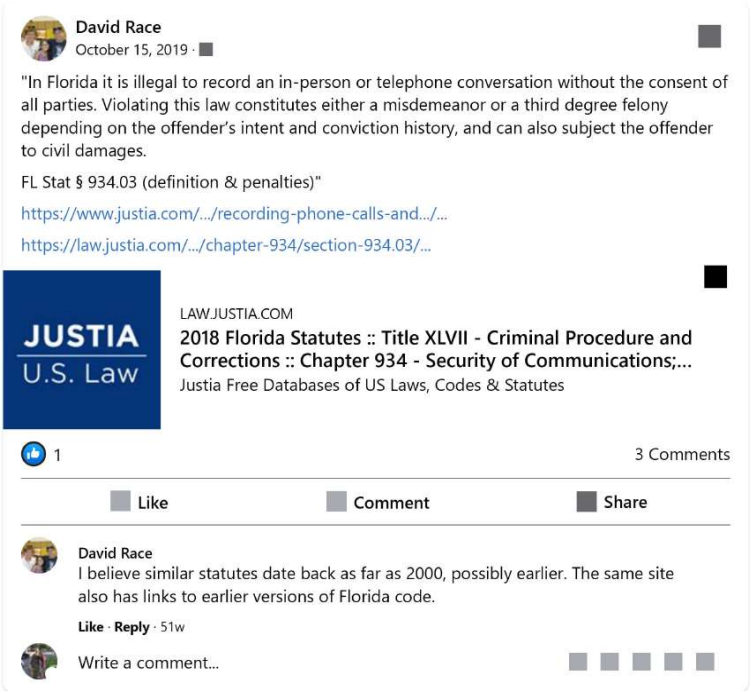
Mitchell's Donkey Kong records. R. 604, ¶ 9; 642-643, ¶ 2. Race admitted that he called Mitchell at 12:11 AM on February 9, 2018. R. 466-467, ¶ 6. On April 1, 2018 at 9:41PM, Mitchell called Race to speak about Donkey Kong and that call lasted 63 minutes. R. 604, ¶ 11; R. 642-643, ¶ 2; R. 646.

Mitchell and Race engaged in 25 more surreptitiously recorded phone calls from April 5, 2018 to September 17, 2019 on: April 5, 2018 at 2:47PM, April 5, 2018 at 3:14PM, April 5, 2018 at 10:03PM, April 8, 2018 at 10:39PM, April 8, 2018 at 11:46PM, April 9, 2018 at 9:25PM, April 9, 2018 at 9:29PM, April 9, 2018 10:45PM, April 19, 2018 at 2:13PM. June 25, 2018 at 12:34PM, July 30, 2018 at 2:15PM, July 30, 2018 at 10:54PM, August 2, 2018 at 11:21PM, January 16, 2019 at 12:18PM, February 6, 2019 at 2:25PM, February 6, 2019 at 3:16PM, February 6, 2019 at 5:05PM, May 22, 2019 at 6:06PM, May 24, 2019 at 2:49PM, May 24, 2019, at 8:18PM, September 12, 2019 at 5:43PM, September 15, 2019 at 4:03PM, September 16, 2019 at 12:42 PM, September 17, 2019 at 7:10PM, and September 17, 2019 at 8:41PM. R. 604-605, ¶ 13; R. 642-643, ¶ 2.

Race called into Florida to Mitchell 7 times, on February 9, 2018 at 12:11AM, April 5, 2018 at 2:47PM, April 9, 2018, at 9:29PM, February 6, 2019, at 5:05PM, May 24, 2019 at 8:18PM, September 12, 2019 at 5:43PM, and September 17, 2019 at 7:10PM. R. 642-643, ¶ 2.

Mitchell was located *in Florida* for the 27 phone calls and had a reasonable expectation of privacy. R. 643, ¶ 3-4; R. 376, 380-381, 387-388, 402. The phone records show that the cell phone towers for the calls were in Broward and Miami-Dade Counties. R. 642-643, ¶ 2-5; R. 645-663. Race recorded all of these calls without Mitchell's knowledge or consent, without notification to Mitchell, and without informing Mitchell after that the calls that were recorded. R. 643, ¶ 5; R. 216-217, ¶ 5-14. Mitchell remembers the calls consisting of only him and Race. R. 300, ¶ 13-16.

On October 15, 2019, Race posted this quote from Justia.com about § 934.03 Fla. Stat. (2018-2023) on Facebook:



R. 218, ¶ 15. He posted in the comment section "I believe similar statutes date back as far as 2000, possibly earlier. The same site also has links to

earlier versions of Florida code." R. 218, ¶ 15.

On February 5, 2020, Mitchell sued Twin Galaxies for defamation and false light for publishing unfounded allegations of cheating against Mitchell in *William J. Mitchell v. Twin Galaxies LLC*, case no. 19STCV12592, in a California state court in Los Angeles ("*Twin Galaxies* case"). R. 606, ¶ 20; R. 219-220, ¶ 27-30; R. 464-476; R. 477-508. Race is not a party to that lawsuit. R. 606, ¶ 20; R. 219-220, ¶ 27-30; R. 464-476; R. 477-508.

On October 7, 2020, Mitchell first learned that Race recorded the April 1, 2018 call when Race attached a 7-page transcript excerpt of that call as an exhibit to his declaration in the *Twin Galaxies* case. R. 300, ¶ 18; R. 497, ¶ 66; R. 376; R. 221-225, ¶ 39-50, ¶ 63-71. Race admits that he *voluntarily* provided the recording of the April 1, 2018 call to Twin Galaxies and its counsel without a subpoena and without Mitchell's consent. R. 219-222, ¶ 27-50. Mitchell learned that Race recorded all calls in Race's response to the first request for admissions. R. 216-217, ¶ 5-14; R. 300-301, ¶ 20.

Race edited the 63-minute April 1, 2018 call to 11 minutes to imply that Mitchell cheated and provided the edited version to Twin Galaxies without Mitchell's consent in violation of §§ 934.03(1)(c) and 934.10(1) Fla. Stat. (2018-2023). R. 497, ¶ 66; R. 221-225, ¶ 39-50, ¶ 63-71; R. 646. The transcript of the April 1, 2018 call attached to Race's October 7, 2020

declaration in the *Twin Galaxies* case contains the language "File name: Telephone *excerpt* from Billy Mitchell – 04182018 – Top Secret – FAKE anonymous 1,062,800 tape to Jace.mp3", which is an admission that this phone call was edited. R. 500-507; R. 634-641 (emphasis added).

Race stated in a declaration in the *Twin Galaxies* case that "I am currently recognized by Twin Galaxies as having the world records on the original arcade classic Pac-Man in the following categories: (1) perfect score (3,333,360) on factory speed; (2) perfect score (3,333,360) on turbo speed; and (3) fastest completion time for a perfect game (3:28:49)- only factory speed recognized." R. 466, ¶ 2.

Race exchanged **46** PDF pages of text messages with Mitchell from February 9, 2018 to April 8, 2021 without disclosing that he recorded calls. The vast majority involve Mitchell's video game records and claims of cheating by Twin Galaxies (referred to as TG) and it's officer Jace Hall against Mitchell. R. 298, ¶ 3; R. 303-349. Race was initially supportive but his attitude changed in 2019 as he began to insinuate that Mitchell's records were not genuine. R. 341-349.

II. RACE RECORDED CALLS WITH OTHER FLORIDA RESIDENTS WITHOUT CONSENT AND COMMUNICATED WITH OTHER FLORIDA RESIDENTS ABOUT MITCHELL

Race exchanged over 8 years of text messages and made several

phone calls with non-party and Miami-Dade resident Chris Arya about Mitchell and Pac-Man more generally. Race recorded phone calls with Ayra without Ayra's consent. Race also texted Ayra without prompting from Ayra several times in 2019 and 2020 about the *Twin Galaxies* case, including Mitchell's video game records and the affidavit submitted by Ayra in that case. Race continued to text Ayra about Mitchell and the *Twin Galaxies* case even when Ayra ignored his texts. R. 552-554, ¶ 4-18; R. 556-578.

Race communicated with non-party and Broward resident Robert Childs via phone calls about Mitchell and the details surrounding Mitchell's videogame records. Race exchanged 36 pages of text messages with Childs from February 2018 to September 2020. Race solicited Childs to mail him hardware from Childs' business in Fort Lauderdale that Race later declared under oath in the *Twin Galaxies* case related to him "working" on behalf of Mitchell. Race recorded multiple phone calls with Childs without consent, at least two of which Race initiated. After Childs severed contact with Race, Race continued to send texts to Childs about Mitchell. R. 511-513, ¶ 1-11; R. 515-550; R. 469, ¶ 14-15.

Race recorded a four-person phone call between him, non-party and Broward resident Neil Hernandez, Childs, and Mitchell without Mitchell's consent. R. 601-602, ¶ 1-8. Race sent a Facebook message to Florida

resident Todd Rogers in October 2020 asking to speak about his eyewitness testimony of Mitchell's video game records. R. 579-580, ¶ 5; R. 584-585.

Race communicated with others, including Mitchell, Mitchell's son Billy Mitchell IV, and Florida residents Childs, Hernandez, Carlos Pineiro, and Steven Kleisath about exonerating Mitchell from allegations of video game cheating. Race described this group as "Team Billy". R. 467-468, ¶ 8, 11; R. 486, ¶ 29. Race stated in the *Twin Galaxies* case that he was "working" for Mitchell when most of the calls occurred from February 2018 to September 2018. R. 467-469, ¶ 8, 11, 14. Race stated in his September 21, 2020 declaration in the *Twin Galaxies* case that from February 3, 2018 to April 12, 2018 he communicated with the others in "Team Billy" who "worked in support of or on behalf of Mr. Mitchell". R. 467-468, ¶ 8, 11. After April 12, 2018, Race "continued on in [his] effort to vindicate Mr. Mitchell" of allegations of cheating. R. 469, ¶ 14. Race later stated that Mitchell's Donkey Kong records were false. R. 465-476; R. 478-508.

III. RACE'S SOCIAL MEDIA AND INTERNET POSTS ABOUT MITCHELL

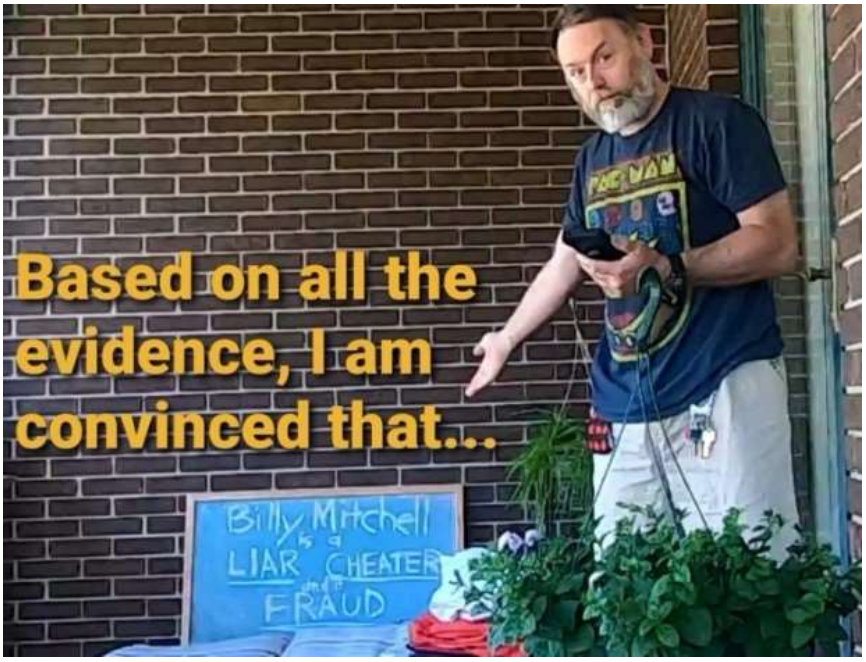
Race made numerous posts to Facebook and Twin Galaxies' website about Mitchell starting in February 2018. R. 301-302, ¶ 26-31; R. 424-463. After Race began by September 2019 to believe that Mitchell's scores were not genuine (R. 448-456), he started a false and negative social media and

internet campaign against Mitchell that is accessible in Florida and included references to a recorded phone call. R. 579, ¶ 3-4; R. 581-583; R. 424-463.

Mitchell filed all of the online and social media posts *that he could find* but Race did *not* produce anything in response to discovery, which is only the tip of the iceberg. R. 301-302, ¶ 26-31; R. 424-463. A few *examples* of these posts are reproduced below. R. 590-591, ¶ 3-4; R. 592-600; R. 424-463. Race, along with Florida resident Steven Kleisath, posted this on Facebook on October 9, 2020 that discussed the April 1, 2018 recorded call:

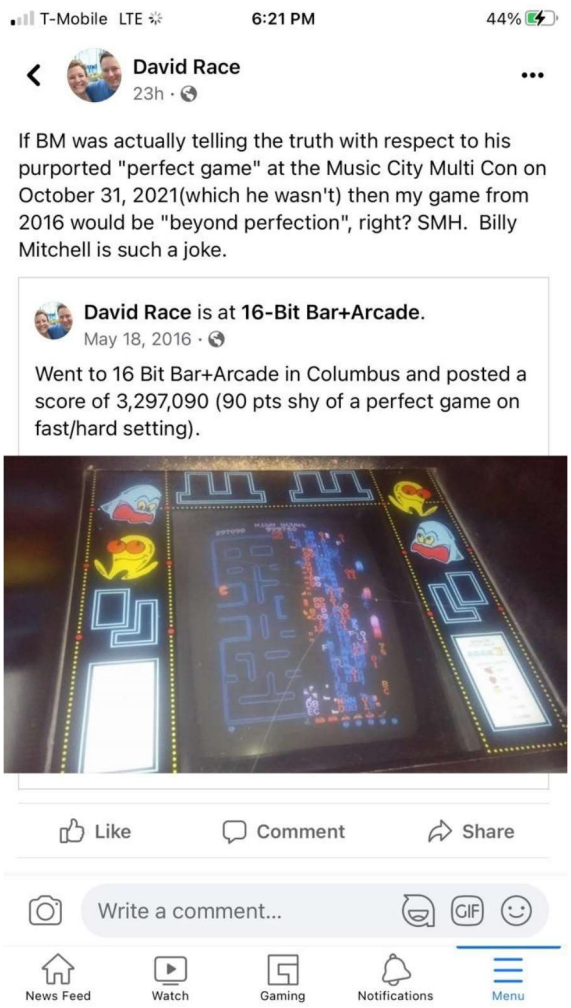
R. 579, ¶ 3-4; R. 581-583.

Race posted this on Facebook on July 4, 2021:



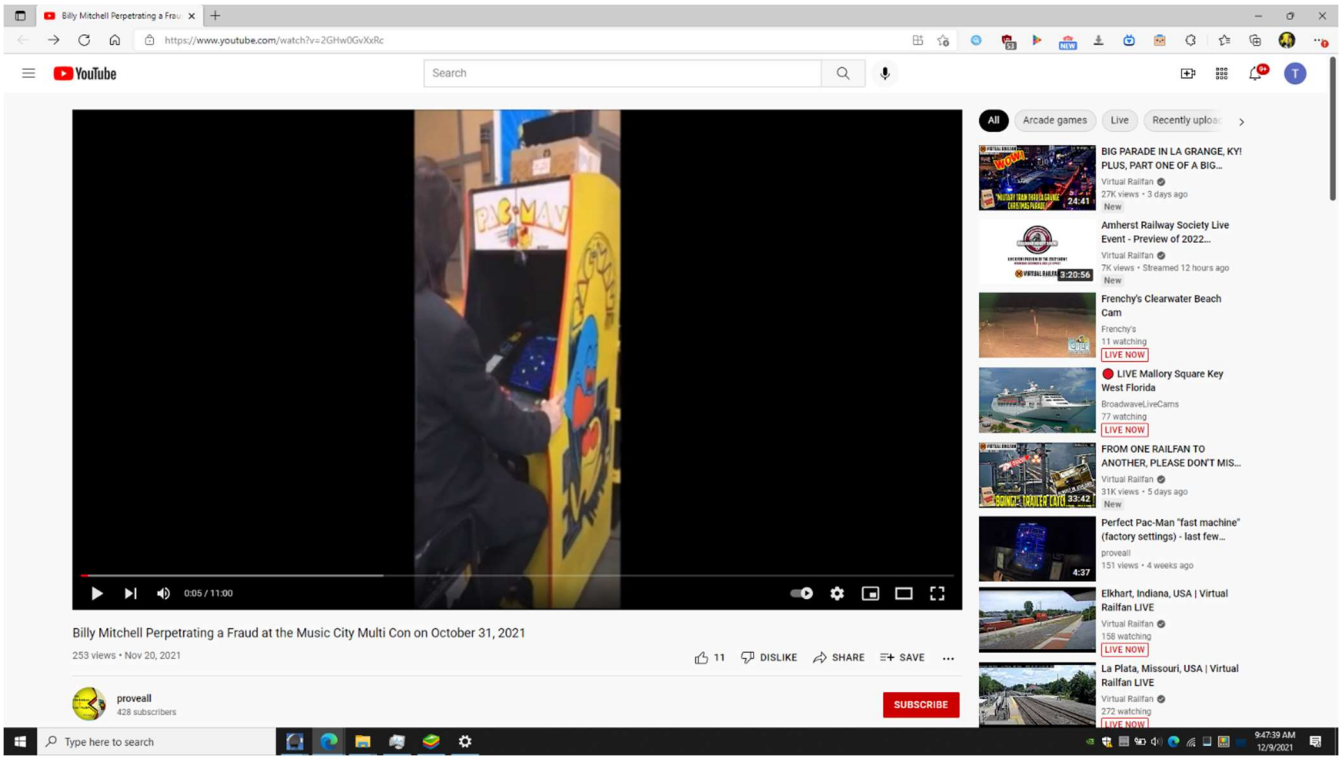
R. 302, ¶ 26-31; R. 425.

On October 21, 2021, Race falsely stated on Facebook that Mitchell falsified a perfect Pac-Man game at a conference in Nashville and said "Billy Mitchell is such a joke":



R. 302, ¶ 26-31; R. 446.

Race also posted a video clip on his "proveall" YouTube channel on October 31, 2021 titled "Billy Mitchell Perpetrating a Fraud at the Music City Multi Con on October 31, 2021" about the same Nashville video game score:



This video link includes two pages of written commentary by Race accusing Mitchell of fraud and cheating: https://www.youtube.com/watch?v=2GHw0GvXxRc. R. 580, ¶ 6-7; R. 586-589. After Broward resident Neil Hernandez submitted an affidavit favorable to Mitchell in the *Twin Galaxies* case, Race posted on Facebook on July 21, 2020 that Hernandez's testimony was "COMPLETE B.S." R. 601-602, ¶ 1-8. There are other negative posts and Race continues to post false statements about Mitchell including after this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

Mitchell requests this Court to reverse the district court's March 8, 2023 opinion in *Race v. Mitchell*, affirm the trial court's June 22, 2022 order

denying Race's motion to dismiss for lack of personal jurisdiction, and reverse the district court's denial of appellate attorney's fees. Race recorded 27 phone calls without Mitchell's consent and has a veritable laundry list of contacts with Florida directed at Mitchell dating back to 2018, all of which is more than the contacts in existing case law on jurisdiction for violations of the Florida Security of Communications Act.

The Florida Security of Communications Act, § 934.01(4) Fla. Stat. (2018-2023), exists to protect the privacy of Florida residents. Upholding the district court's opinion will allow out of state defendants to eliminate this protection, even if they have the requisite contacts with Florida and regardless of how many interceptions of a Florida resident's private communications occurred. The district court's opinion fosters a landscape in which tortfeasors are immune simply if they are out of state irrespective of privacy violations and acts directed at Florida and Florida residents. Such a result would necessarily hold that Florida residents are not entitled to privacy protections provided by Florida law *while located in Florida*.

There is personal jurisdiction over Race under § 48.193(1)(a)(2) Fla. Stat. (committing a tortious act in Florida) and under due process. Race committed tortious acts in Florida by recording 27 phone calls without consent. The statutory definition of "intercept" and *State v. Mozo,* 655 So.

2d 1115, 1117 (Fla. 1995) hold that the interceptions occurred in Florida, where Mitchell was located when he spoke with Race.

France v. France holds that phone calls recorded by defendant in North Carolina without consent of the plaintiff who was in Florida is sufficient for jurisdiction. The trial court correctly applied *France* and held there was personal jurisdiction over Race.

France held that this Court's express approval of *Koch v. Kimball* in *Acquadro v. Bergeron* required jurisdiction over a North Carolina defendant who records calls with a Florida plaintiff without consent. *Koch* held there was personal jurisdiction under both the long arm statute and due process over a defendant who recorded calls without consent in Georgia with a Florida resident in Tampa.

The district court erred by holding that jurisdiction over Race does not meet with due process. Race did not devote much attention to due process in the lower courts and effectively conceded at the hearing in the trial court that the long arm statute issue was outcome-determinative. Due process jurisdiction exists under the *Calder v. Jones,* 465 U.S. 783, 790 (1984) effects test because Race knowingly recorded the phone calls and knew that Mitchell is a Florida resident.

Race has minimum contacts with Florida and purposefully availed

himself to Florida. In addition to the 27 recorded calls, Race worked for "Team Billy" in response to allegations of cheating before turning on Mitchell, kept a recorded call secret for 18 months and then disclosed an edited version to imply Mitchell cheated, exchanged 46 pages of texts with Mitchell over 3 years about Mitchell and his video game records, 36 pages of texts with Florida resident Robert Childs over 2½ years about Mitchell and his video game records, 22 pages of texts over 8 years with Florida resident Chris Ayra about games and Mitchell. Race also recorded calls with Florida residents Chris Arya, Robert Childs, and Neil Hernandez without consent, sent text messages to other Florida residents about Mitchell, and engaged an ongoing social media and YouTube campaign that is accessible in Florida and falsely calls Mitchell a liar, fraud, and a cheater.

STANDARD OF REVIEW

The standard of review of a motion to dismiss for lack of personal jurisdiction is de novo. *Wendt v. Horowitz,* 822 So. 2d 1252,1256 (Fla. 2002).

ARGUMENT

Florida courts apply a two-step test to determine whether jurisdiction over a nonresident defendant is proper. First, the complaint must allege sufficient jurisdictional facts to bring the nonresident defendant within the ambit of the long-arm statute, § 48.193 Fla. Stat. Second, there must be

sufficient minimum contacts between the nonresident defendant and Florida to satisfy due process requirements. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502-503 (Fla. 1989).

There is long arm jurisdiction under § 48.193(1)(a)(2) Fla. Stat. (2020-2023) (committing a tortious act in Florida) and under due process. The issue under § 48.193(1)(a)(2) Fla. Stat. (2020-2023) is "whether the tort *as alleged* occurred *in Florida*, and not whether the alleged tort *actually occurred*." *Osi Industries v. Carter,* 834 So. 2d 362, 367-368 (Fla. 5th DCA 2003); *Walter Lorenz Surgical v. Teague,* 721 So. 2d 358, 359 (Fla. 1st DCA 1998).

I. RACE COMMITTED TORTIOUS ACTS IN FLORIDA UNDER § 48.193(1)(a)(2) FLA. STAT.

The 27 phone calls recorded by Race without Mitchell's consent are sufficient for jurisdiction under § 48.193(1)(a)(2) Fla. Stat. (2020-2023) for committing a tortious act in Florida because the interceptions of the calls occurred in Florida.[1] This is far more recorded calls than in the existing cases involving jurisdiction for Florida Security of Communications Act claims.

Mitchell's claims arise directly out of the recorded phone calls since Race admitted that he recorded all phone calls without Mitchell's consent, knowingly recorded the April 1, 2018 phone call, and sent that recording to

[1] Section 48.193(1)(a)(2) Fla. Stat. was formerly codified at § 48.193(1)(b) Fla. Stat. and many cases cited herein refer to § 48.193(1)(b).

Twin Galaxies and its counsel without Mitchell's consent. R. 300-301, ¶ 18-20; R. 216-217, ¶ 6-14; R. 219-222, ¶ 27-50. Race also admitted on Facebook that recording calls in Florida without consent is a violation of § 934.03(3) Fla. Stat. (2018-2023). R. 218, ¶ 15. The recorded phone calls were part of numerous communications between Race and Mitchell, as set forth in the numerous text messages from 2018 to 2020 and the negative social media and internet posts. R. 298-302, ¶ 1-31; R. 304-349; R. 424-463; R. 579-580, ¶ 3-7; R. 581-583; R. 586-589; R. 601-602, ¶ 1-8.

The district court focused on due process, not long arm jurisdiction:

> Unlike the Fifth District in *France*, we do not believe that footnote 11 in *Acquadro* controls our decision in this case. The footnote does not address the issue of minimum contacts under *International Shoe* but focuses on the different proposition that "a telephonic communication into Florida can constitute a tortious act under section 48.193(1)(b)." *Acquadro,* 851 So. 2d at 670 n.11.

Race, 357 So. 3d at 723. This can be interpreted as a recognition by the district court that long arm jurisdiction over Race exists but, since review is de novo, Mitchell would be remiss if he did not address the long arm statute.

A. THE INTERCEPTIONS OCCURRED IN FLORIDA

According to the plain language of the statutes and the relevant case law, the interceptions occurred in Florida. In *Koch v. Kimball,* the Second District held that personal jurisdiction existed under both the long arm statute

[then § 48.193(1)(b)] and due process over a defendant who recorded a single telephone call without the plaintiff's consent in violation of § 934.03 Fla. Stat. The defendant made the recorded phone call from her home in Georgia to the plaintiff, who was at his home in Tampa and the interceptions occurred in Tampa. Georgia is a one-consent state [O.C.G.A. §§ 16-11-62, 16-11-66], meaning the consent of only one party to call is needed to record. *Koch,* 710 So. 2d at 6-8.

This Court approved *Koch* in *Acquadro v. Bergeron* and disapproved another decision from the Second District to the extent that it holds telephonic or electronic communications cannot be the basis for jurisdiction:

> Similarly, the Second District in *Koch* considered whether a tape-recorded telephone call between a nonresident defendant and a Florida resident plaintiff could serve as the basis for personal jurisdiction under section 48.193 (1)(b). The Second District held that the *tortious act occurred in Florida because the interception occurred* ***where the communication was uttered****, and thus the nonresident defendant was subject to personal jurisdiction under section 48.193(1)(b).* ***Thus, we approve the Second District's decision in Koch because like Wendt, the decision held that a telephonic communication into Florida can constitute a tortious act under section 48.193(1)(b).*** Yet, in *Texas Guaranteed Student Loan*, the Second District held that sending debt collection letters and making telephone calls from out of state to a Florida resident is insufficient to establish jurisdiction under section 48.193(1)(b). However the Second District did not consider whether the plaintiff's cause of action arose from the defendant's sending debt letters and making collection calls. Therefore, we disapprove the Second District's decision in *Texas Guaranteed Student Loan* to the extent that the decision holds that telephonic or electronic communications may not serve as

the basis for personal jurisdiction.

Acquadro, 851 So. 2d at 670 n.11 (emphasis added).

In *Acquadro,* this Court held that a defamatory phone call made into Florida by the plaintiff is sufficient for personal jurisdiction. *Id.* at 670-671. *France v. France* followed *Acquadro* and held that phone calls recorded by a defendant located in North Carolina (a one-consent state, NC Gen Stat § 15A-287) with the plaintiff who was located in Florida without the plaintiff's consent is sufficient for personal jurisdiction. *France,* 90 So. 3d at 864. This Court granted review of *France* but the case was settled before resolution. *France v. France,* 107 So. 3d 404, no. SC12-1370 (Fla. 2012); *France v. France,* 130 So. 3d 692 (Fla. 2013).

Previously, *Wendt v. Horowitz* held that an out-of-state defendant can be subject to personal jurisdiction by making communications into Florida. ("What was implicit in *Execu-Tech* we now make explicit. First, in order to 'commit a tortious act' in Florida, a defendant's physical presence is not required. Second, 'committing a tortious act' in Florida under section 48.193(1)(b) can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida."); *Wendt,* 822 So. 2d at 1258-1260; *Execu-Tech v. Bus. Sys. v. New Oji Paper Co.,* 752 So. 2d 582, 584-586 (Fla. 2000).

Acquadro, France, and *Koch* correctly hold that interceptions occurred in Florida under the statutory definitions of "intercept", "oral communication", and "aural transfer" and under existing precedent from this Court. The statutes demonstrate that the interceptions occurred in Florida where Mitchell was located. The definition of "intercept" is:

> (3) "Intercept" means the *aural or other* ***acquisition*** of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

§ 934.02(3) Fla. Stat. (2018-2023) (emphasis added). The definition of "oral communication" is:

> (2) "Oral communication" means any oral communication ***uttered*** *by a person* exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

§ 934.02(2) Fla. Stat. (2018-2023) (emphasis added). As *Koch* recognized, the definition of aural transfer is:

> (18) "Aural transfer" means a transfer containing the human voice at any point between and including the ***point of origin*** and *the point of reception.*

§ 934.02(18) Fla. Stat. (2018-2023); *Koch,* 710 So. 2d at 4 (emphasis added).

Under these definitions, *France* and *Acquadro's* approval of *Koch* makes perfect sense because this Court held in *State v. Mozo* that "the

actual 'interception' of a communication occurs not where such is ultimately heard or recorded but where the communication originates." *Mozo,* 655 So. 2d at 1117. In other words, the interception of Mitchell's phone calls occurred *in Florida* where Mitchell was located and not in Ohio where Race claims he was located when he recorded the calls. R. 642-643, ¶ 2-5; R. 645-663; R. 376, 380-381, 387-388, 402. The district court cited *Mozo* in the opinion as part of the recitation of the record below but not as part of the holding. *Race,* 357 So. 3d at 722.

Indeed, *Mozo* is consistent with the plain meaning of the statutory definition of "intercept" because a communication cannot be acquired unless it is first made by wire, electronic, or oral means. That is, an "oral communication" must first be "uttered by a person" before it can be intercepted and a person can only utter an oral communication where that person is located. There is nothing in the definition of "intercept" which states that an interception occurs where the recording is made.

Correspondingly, allowing the district court's opinion to stand for the position that a tortious act did not occur and adopting the position advanced by Race will necessarily require a reversal of *Mozo*, which cancels nearly thirty years of precedent and contradicts the statutory definitions of "intercept", "oral communication", and "aural transfer". For a tortious act *not*

to have occurred in Florida would mean that Race intercepted the calls in Ohio, which under *Mozo* and the statutes, he did not. Such a holding will also contravene the stated goal of protecting privacy in § 934.01(4) Fla. Stat. (2018-2023), allow persons outside of Florida to record calls with impunity, and upend search and seizure law by causing confusion in the lower courts and potentially allow for warrantless interception of cell phone calls.

Mozo was a criminal case which approved the suppression of recorded phone calls without consent or warrant. The police used a scanning device to record cordless phone calls made by one of the defendants from their home that implicated both defendants in illegal drug sales. The police were not located in the defendant's home when they recorded the calls and did not obtain a warrant to record the calls. The police then obtained a search warrant for home where the calls were made and found illegal drugs. *Mozo,* 655 So. 2d at 1115-1116.

This Court held that the phone calls were intercepted in the defendants' home where one of the defendants made the calls:

> Here, the "intercepted" conversations originated within the Mozos' home and thus exhibited the required expectation of privacy demanded by section 934.02(2). It is a well-established principle that citizens are guaranteed a reasonable expectation of privacy in their own home.

Id. at 1117. *Koch* followed *Mozo. Koch,* 710 So. 2d at 7 ("The key question

then becomes where the communication was intercepted. Under the Act, the actual "interception" occurs not where the communication is ultimately heard (here, Georgia), but where the communication originates (Tampa). . . . We interpret this language to mean that, for purposes of establishing a tort under the Act, the interception occurs where the words or the communication is uttered, not where it is recorded or heard.").

Indeed, the Fourth District followed *Mozo* in *Hentz v. State,* 62 So. 2d 1184, 1192 (Fla. 4th DCA 2011), in which the court reversed the denial of a motion to suppress *cell phone* conversations recorded by police between one defendant (Menzel) who was at the police station though not under arrest and another defendant (Hentz) who was at his home:

> Moreover, the *Mozo* opinion holds that the interception of an oral communication occurs where the *communication* originates – not where the phone call originates or where the communication was initiated. Here, the communication at issue – Hentz's statements regarding pictures and video on his cell phone – originated in his home where he was sitting during the cell phone conversation with Menzel.

Id. (emphasis in original). Thus, to the extent that *Race v. Mitchell* is construed as holding the interceptions occurred out of Florida, the district court conflicted with it's own prior decision.

B. *KOUNTZE* AND *INTERNET SOLUTIONS*

Race relied below on *Kountze v. Kountze,* 996 So. 2d 246, 248-253

(Fla. 2d DCA 2008), in which the Second District en banc disapproved *Koch* and held that recording a phone call alone is not a tortious act in Florida under the long arm statute. The district court recited the holding in *Kountze* but did not approve or reject it. *Race*, 357 So. 3d at 722-723. *France* considered *Kountze* and concluded that this Court's approval of *Koch* in *Acquadro* required personal jurisdiction. *France,* 90 So. 3d at 864. Under *Acquadro, Kountze's* disapproval of *Koch* was erroneous, especially since *Kountze* cited *Aquadro* but did not mention *Acquadro's* approval of *Koch,* and because *Kountze* contradicts *Mozo. Kountze,* 996 So. 2d at 250-253. *Kountze's* view that an out of state defendant who records a call with someone in Florida does not commit a tortious act under the long arm statute is incorrect since the holding necessarily requires the interception to have occurred outside of Florida, which is the opposite of *Mozo.*

Additionally, the factual situation in *Kountze* is unusual and entirely different from this case since it involved a *single phone call* between two *non-Florida residents* without other contacts to Florida. *Kountze,* 996 So. 2d at 248-249. The plaintiff was a Colorado resident and the defendant, who was his cousin, was a Nebraska resident. Both were board members of a foundation and were at odds over how to run it. The plaintiff's father, who was not a party, owned a home in Collier County. The defendant was in

Nebraska and called the plaintiff at his father's house and left a voicemail. The plaintiff called back and the defendant recorded the call, which was the only call between them all year. The foundation did not have an office in Florida, had two meetings of less than a day in Collier County and the defendant stayed a week for vacation at the time of the meetings. There was no other basis for jurisdiction over the defendant. *Id.*

Kountze rejected *Koch* because it was based on the interception occurring in Florida and held "it is this reasoning that we now reject. The cases we relied upon in *Koch* did not address a jurisdictional issue, but rather involved statutory interpretation of the term "interception." The theory that a recording in a distant location is an "interception" inside Florida may be appropriate for some legal purposes, but we conclude it is insufficient, *standing alone*, to support a claim that a person in a distant state or country committed a tortious act within Florida as required to support long-arm jurisdiction under section 48.193(1)(b)." *Id.* at 250 (emphasis added). This holding is limited to long arm jurisdiction. *Id.* at 248-249, 250.

Kountze went on to hold that "while Florida clearly has an interest in protecting the privacy of telephone conversations of Florida residents while they are in Florida, the extraterritorial application of a statute is a separate, complex issue we do not address" and "we accordingly recede from our

decision in *Koch* to the extent we held that an extraterritorial violation of the Florida Security of Communications Act was sufficient, standing alone, to support personal jurisdiction over a foreign defendant under section 48.193(1)(b)." *Id.* at 251, 253.

In contrast to *Kountze,* where the plaintiff was not a Florida resident and only 1 phone call occurred, Mitchell resides in Florida and was located in Florida for the 27 phone calls recorded by Race. R. 642-643, ¶ 2-5; R. 645-663; R. 376, 380-381, 387-388. The only contact to Florida in *Kountze* was the single phone call whereas Race exchanged numerous text messages with Mitchell and other Florida residents about Mitchell and his videogame records, recorded calls with other Florida residents without consent, and made and continues to make numerous YouTube and social media posts that directly and falsely attack Mitchell and which are viewable in Florida. R. 215-225, ¶ 6-15, 24-25, 33-49, 51, 57, 60, 68-71; R. 603-641; R. 216-218, ¶ 5-15; R. 642-643, ¶ 2-5; R. 301-302, ¶ 26-31; R. 304-349; R. 424-463; R. 552-554, ¶ 4-18; R. 571-578; R. 511-550, ¶ 1-11; R. 469, ¶ 14-15; R. 579-580, ¶ 3-7; R. 581-583; R. 586-589; R. 601-602, ¶ 1-8. While *Kountze* is not a correct statement of law under *Acquadro* or *Mozo,* the facts are so different that, even if *Kountze* is harmonized, the 27 recorded calls plus other contacts are sufficient for committing a tortious act in Florida.

Race also argued below that *Internet Solutions Corp. v. Marshall,* 39 So. 3d 1201, 1209, 1214-1216 (Fla. 2010) means that *Kountze* is controlling rather than *Acquadro* or *France* because *Kountze* was discussed in *Internet Solutions.* The district court did not address or accept this view but Mitchell anticipates it will be raised in the answer brief. *Race,* 357 So. 3d at 722-723. The discussion of *Kountze* in *Internet Solutions* was part of a recitation of several other cases involving jurisdiction via communications and via internet postings. *Id.* at 1207-1214. As *France* observed, *Internet Solutions* was not an acceptance of *Kountze* or a rejection of *Koch:*

> Like *Koch*, the *Kountze* case was referenced in a subsequent Florida Supreme Court case. *See Internet Solutions Corp. v. Marshall,* 39 So. 3d 1201, 1209 (Fla. 2010). However, in its discussion of *Kountze*, the court neither approved nor disapproved the *Kountze* decision.

France, 90 So. 3d at 864 n.3. Likewise, *Internet Solutions* did not overrule *Acquadro, Koch,* or *France,* because this Court does not overrule itself *sub silentio*, meaning that *Acquadro's* approval of *Koch* controls. *Arsali v. Chase Home Finance,* 121 So. 3d 511, 516 (Fla. 2013); *Puryear v. State*, 810 So. 2d 901, 905-906 (Fla. 2002).

In fact, *Internet Solutions* supports personal jurisdiction over Race. This Court considered defamatory statements made on the internet outside of Florida. This Court held "the tort of defamation is committed in the place

where the defamatory material is published" and "a nonresident defendant commits the tortious act of defamation in Florida for purposes of Florida's long-arm statute when the nonresident makes allegedly defamatory statements about a Florida resident by posting those statements on a website, provided that the website posts containing the statements are accessible in Florida and accessed in Florida." *Id.* at 1214, 1216. *Internet Solutions* also held "when the posting is then accessed by a third party in Florida, the material has been 'published' in Florida and the poster has communicated the material 'into' Florida, thereby committing the tortious act of defamation within Florida. *This interpretation is consistent with the approach taken regarding other forms of communication." Id.* at 1215 (emphasis added). *Internet Solutions* is another instance of jurisdiction over an out-of-state defendant involving communications in Florida. *Id.; Gubarev v. Buzzfeed,* 253 F. Supp. 3d 1149, 1154-1157 (S.D. Fla. 2017).

II. THERE IS JURISDICTION UNDER THE DUE PROCESS CLAUSE

Jurisdiction under the due process clause is proper under both the *Calder v. Jones,* 465 U.S. 783, 790 (1984) effects test and the traditional minimum contacts test, though meeting either test is sufficient. *Louis Vuitton Malletier v. Mosseri,* 736 F.3d 1339, 1336 (11th Cir. 2013). "In intentional tort cases, there are two applicable tests for determining whether purposeful

availment occurred. First, we may apply the "effects test," which the Supreme Court articulated in *Calder v. Jones,* 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) (involving libel claims) . . . . We may also apply a traditional purposeful availment analysis." *Id.* The district court did not address the *Calder* effects test, which is alone grounds for reversal. *Race,* 357 So. 3d at 722-723.

Race did not dedicate much to due process in the trial court or district court, relying only on his short affidavit stating that he visited Florida twice. R. 118-131; R. 44-45. Race did not argue due process at the June 2, 2022 hearing (R. 664-689) and acknowledged at the beginning of the hearing that the issue of long arm jurisdiction was dispositive. R. 667-668; R. 714.

A. THE *CALDER v. JONES* EFFECTS TEST

Race knows Mitchell is a Florida resident, intentionally recorded 27 phone calls with Mitchell, and intentionally disclosed the recording of the April 1, 2018 call to Twin Galaxies after publishing on Facebook that it is a violation of Florida law to record calls without consent. Race exchanged numerous text messages with Mitchell and other Florida residents about Mitchell and his video game records, recorded calls with other Florida residents without consent, and created an ongoing internet and social media campaign against Mitchell. R. 215-225, ¶ 5-15, 24-25, 33-49, 51, 57, 60, 68-

71; R. 603-641; R. 642-643, ¶ 2-5; R. 301-302, ¶ 26-31; R. 304-349; R. 424-463; R. 552-554, ¶ 4-18; R. 571-578; R. 511-550, ¶ 1-11; R. 469, ¶ 14-15; R. 579-580, ¶ 3-7; R. 581-583; R. 586-589; R. 601-602, ¶ 1-8.

Mitchell's claims arise from the recorded calls, which *Koch* held is sufficient under the *Calder v. Jones* effects test:

> Having found sufficient jurisdictional facts to bring the action within the long arm statute, we turn to whether there were sufficient minimum contacts to satisfy due process. The question is whether appellant "should reasonably have anticipated being haled into court" in Florida. In *Calder v. Jones,* 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984), the court stated that where the nonresident defendant commits intentional and tortious acts that were expressly aimed at the forum state, with the knowledge that the acts would have a devastating impact on the forum state and that the brunt of the acts would be felt in that state, that nonresident defendant must have reasonably anticipated being haled into court there. We believe that the same analysis applies here. Since appellee alleged that appellant committed the intentional tort of violation of the Florida Security of Communications Act by expressly calling Florida with the knowledge that the only impact of her action would be in Florida, we conclude that appellant's actions were not the random, fortuitous or attenuated actions that courts seek to avoid pinning jurisdiction upon.

Koch, 710 So. 2d at 6-8; *Osi Industries,* 834 So. 2d at 367-368 (following *Koch* and holding due process met where plaintiff alleged misrepresentations relating an equity percentage made by defendant from Illinois to plaintiff in Florida); *Calder,* 465 U.S. at 790. Thus, the district court erred by holding that this Court's approval of *Koch* in *Acquadro* only applied

to long arm jurisdiction and not due process. *Race*, 357 So. 3d at 722-723.

In *Calder,* there was jurisdiction over a Florida newspaper and two of its employees in a California state court for an allegedly libelous article about the plaintiff. In affirming jurisdiction, the Court noted that the nonresident employees' article was not "untargeted negligence," but rather an "intentional and allegedly tortious act" expressly aimed at the plaintiff in the forum state because the defendants knew their article would have a potentially devastating impact on the California plaintiff. The Court concluded that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California. *Calder,* 465 U.S. at 790; *Licciardello v. Lovelady,* 544 F.3d 1280, 1285-1286 (11th Cir. 2008); *Allerton v. Dept. of Insurance,* 635 So. 2d 36, 39-40 (Fla. 1st DCA 1994).

Likewise, in *Keeton v. Hustler Magazine,* 465 U.S. 770, 776-777 (1984), the Court emphasized that states have a special interest in exercising jurisdiction over those who commit intentional torts causing injury to their residents. The Court affirmed jurisdiction over a nonresident defendant magazine alleged to have intentionally libeled the plaintiff in the forum. *Id.*

A similar example is *Licciardello,* where the Eleventh Circuit held there was due process under *Calder v. Jones* for misappropriation of name and

likeness under § 540.08 Fla. Stat. and trademark infringement based on a website by out-of-state defendant and a *single act* can be enough*:*

> Therefore, in order to determine whether the due process clause permits the exercise of personal jurisdiction over Lovelady, we must assess whether he has purposefully established such constitutionally significant contact with the state of Florida that he could have reasonably anticipated that he might be sued here in connection with those activities. . . . The Court has made clear, however, that "[s]o long as it creates a 'substantial connection' with the forum, ***even a single act can support jurisdiction*** *. . . . Intentional torts are such acts, and may support the exercise of personal jurisdiction over the nonresident defendant who has no other contacts with the forum. . . .* In this case, Lovelady is alleged to have committed an intentional tort against Carman -- using his trademarked name and his picture on a website accessible in Florida in a manner to imply Carman's endorsement of Lovelady and his products. The use was not negligent, but intentional. The purpose was to make money from Carman's implied endorsement. The unauthorized use of Carman's mark, therefore, individually targeted Carman in order to misappropriate his name and reputation for commercial gain. *These allegations satisfy the Calder effects test for personal jurisdiction -- the commission of an intentional tort, expressly aimed at a specific individual in the forum whose effects were suffered in the forum.* The Constitution is not offended by the exercise of Florida's long-arm statute to effect personal jurisdiction over Lovelady because his intentional conduct in his state of residence was calculated to cause injury to Carman in Florida. Lovelady cannot now claim surprise at being haled into court here.

Licciardello, 544 F.3d at 1284-1285, 1287-1288 (emphasis added); *Gubarev,* 253 F. Supp. 3d at 1160-1161.

B. MINIMUM CONTACTS AND PURPOSEFUL AVAILMENT

Race has sufficient minimum contacts with Florida via specific

jurisdiction. “The Constitution prohibits the exercise of personal jurisdiction over a nonresident defendant unless his contact with the state is such that he has "fair warning" that he may be subject to suit there. This "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities. In this way, the defendant could have reasonably anticipated being sued in the forum's courts in connection with his activities there.” *Licciardello,* 544 F.3d at 1284.

“Under the minimum contacts test for purposeful availment, we assess the nonresident defendant's contacts with the forum state and ask whether those contacts: (1) are related to the plaintiff's cause of action; (2) involve some act by which the defendant purposefully availed himself of the privileges of doing business within the forum; and (3) are such that the defendant should reasonably anticipate being haled into court in the forum. In performing this analysis, we identify all contacts between a nonresident defendant and a forum state and ask whether, individually or collectively, those contacts satisfy these criteria.” *Louis Vuitton,* 736 F.3d at 1357; *Spectra Chrome v. Happy Jack's Reflections in Chrome,* no. 8:11-cv-23-T-23MAP 2011 U.S. Dist. LEXIS 41511, *7, 2011 WL 1337508 (M.D. Fla. April 7, 2011) (social media posts were contacts); *Achievers Unlimited v. Nutri*

Herb, 710 So. 2d 716, 719 (Fla. 4th DCA 1998).

Race's contacts are related to the cause of action because Mitchell's claims are based on the 27 phone calls. R. 603-641; R. 216-218, ¶ 5-15; R. 642-643, ¶ 2-5. Race's other contacts with Florida arise out of and are related to his relationship with Mitchell and Mitchell's video game records, which was the subject of the recorded phone calls and why Race was involved with Mitchell in the first place.

In *Ford Motor Company v. Montana Eighth Judicial District Court,* 141 S.Ct. 1017, 1026 (2021), the Supreme Court examined the meaning of "arise out of or relate" in response to an argument that "the needed link must be causal in nature", i.e. that jurisdiction exists "only if the defendant's forum conduct *gave rise* to the plaintiff 's claims." *Id.* (emphasis in original). The Court *rejected* this position and held that minimum contacts for specific jurisdiction can exist when the defendant's contacts with the forum do *not* directly cause the plaintiff's claim. *Id.* ("But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation – *i.e.,* proof that the plaintiff 's claim came about because of the defendant's in-state conduct."); *Regueiro v. American Airlines*, no. 19-23965-cv-JEM, 2022 WL 2352414, *2 (S.D. Fla. June 30, 2022); *Hicks v. Bombardier Recreational Prod.,* no. 22-cv-61176-RAR, 2023 WL 4763194, *6-7 (S.D. Fla. July 26,

2023).

Thus, this Court is not limited to just the 27 phone calls and should consider the October 9, 2020 Facebook post about the April 1, 2018 phone call, October 15, 2019 Facebook post acknowledging that his actions were illegal, 46 pages of texts with Mitchell over 3 years about Mitchell and his video game records, 36 pages of texts with Florida resident Robert Childs over 2 ½ years about Mitchell and his video game records, 22 pages of texts with Florida resident Chris Ayra about games and Mitchell over 8 years, unconsented to recording of phone calls with Florida residents Chris Ayra, Neil Hernandez, and Robert Childs, work for "Team Billy" set forth in his declarations, and social media and YouTube posts attacking Mitchell and other contacts. R. 603-641; R. 216-218, ¶ 5-15; R. 642-643, ¶ 2-5; R. 301-302, ¶ 26-31; R. 304-349; R. 424-463; R. 552-554, ¶ 4-18; R. 571-578; R. 511-550, ¶ 1-11; R. 469, ¶ 14-15; R. 579-580, ¶ 3-7; R. 581-583; R. 586-589; R. 601-602, ¶ 1-8; R. 215-225, ¶ 6-15, 24-25, 33-49, 51, 57, 60, 68-71. Race's contacts defy his short affidavit denying connection to Florida (R. 130-131) and the district court erred by not considering these contacts.

For similar reasons, Race's contacts show purposeful availment to Florida. "The defendant, we have said, must take some act by which [it] purposefully avails itself of the privilege of conducting activities within the

forum State. The contacts must be the defendant's own choice and not random, isolated, or fortuitous." *Ford*, 141 S. Ct. at 1024-1025. *Koch* already held that recording calls without consent is purposeful availment. *Koch,* 710 So. 2d at 7.

Race admitted that he knows Mitchell is a Florida resident, recorded 27 calls with Mitchell at his 954 (Broward) area code number without consent, and exchanged 46 pages of text messages with Mitchell. R. 219, ¶ 24-25; R. 642-643, ¶ 2-5; R. 300-349; R. 467-468, ¶ 8, 11; R. 486, ¶ 29. These acts plus the recorded calls of other Florida residents without consent, texts with other Florida residents, and internet and social media postings attacking Mitchell all show that Race purposefully availed himself to Florida. R. 298-302, ¶ 1-31; R. 304-349; R. 424-463; R. 579-580, ¶ 3-7; R. 581-589; R. 601-602, ¶ 1-8; R. 511-513, ¶ 1-11; R. 514-551; R. 467-468, ¶ 8, 11; R. 486, ¶ 29. Stated differently, Mitchell's video game records were not Race's records and Race went out of his way to become involved, first in a supposed supportive role then later in a deliberately adversarial role.

The district court also incorrectly opined "although Defendant knew he was calling into Florida, we note that cell phones have largely displaced land lines and a call to a number in a specific area code does not necessarily mean that the call was received within the geographical limits of the area

code." *Race,* 357 So. 3d at 373. This view, which was not raised below, is *not* supported by the record since, as the district court recognized, Race knew that Mitchell is a Florida resident and later posted portions of Ch. 934 Fla. Stat. on Facebook. R. 218-219, ¶ 15, 24-25. Mitchell was located in Florida for the 27 recorded calls and his cell phone towers for the calls were in Broward and Miami-Dade Counties. R. 642-643, ¶ 2-5; R. 645-663; R. 376, 380-381, 387-388, 402. Thus, there is no basis for this inference.

C. JURISDICTION MEETS WITH FAIR PLAY AND SUBSTANTIAL JUSTICE

Exercise of jurisdiction over Race meets with fair play and substantial justice because a Florida resident is entitled to the protection of Florida law while in Florida. Relevant factors include the burden on the defendant, the forum's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief and the judicial system's interest in resolving the dispute. *Licciardello,* 544 F.3d at 1288. *Licciardello,* for example, holds that jurisdiction in this case meets with fair play and substantial justice because of misconduct directed at Florida:

> In this case, the Florida plaintiff, injured by the intentional misconduct of a nonresident expressly aimed at the Florida plaintiff, is not required to travel to the nonresident's state of residence to obtain a remedy. The Supreme Court in *Calder* made clear that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." Additionally,

> Florida has a very strong interest in affording its residents a forum to obtain relief from intentional misconduct of nonresidents causing injury in Florida. The Constitution is not offended by Florida's assertion of its jurisdiction over such nonresident tortfeasors.

Id.; Allerton, 635 So. 2d at 40.

The district court erred by not addressing the burden on Race, Florida's interest in adjudicating the dispute, Mitchell's interest in obtaining convenient and effective relief, and the Florida judicial system's interest in resolving this dispute. *Race*, 357 So. 3d at 722-723.

Florida has a demonstrable interest in protecting its citizens, especially in a privacy violation under the Florida Security of Communications Act that occurred in Florida under *Mozo.* Mitchell has a self-evident interest in obtaining convenient and effective relief in his home county and where the interception occurred. The Florida judicial system also has an interest in resolving a dispute involving a Florida resident who was injured here. *Licciardello,* 544 F.3d at 1288; *Allerton,* 635 So. 2d at 40.

Instead, the district court held that fair play and substantial justice does not exist because it believed that recording phone calls without Mitchell's consent is legal under Ohio law. As a threshold matter, this is incorrect because it assumes without determination from the trial court that Ohio law applies. The trial court (and the district court) did *not* conduct a choice of law

analysis. R. 51-71; R. 118-129; R. 275-296; *Bishop v. Florida Specialty Paint Co.,* 389 So. 2d 999, 1000-1001 (Fla. 1980) (choice of law factors are "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue."); *Race*, 357 So. 3d at 722-723.

Just after the trial court verbally denied the motion to dismiss at the June 2, 2022 hearing, Race's counsel stated that choice of law is still an issue. R. 66-69. Thus, the district court's ruling on Ohio law was premature because the trial court did not decide choice of law. *Sierra v. Public Health Trust of Dade County,* 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995)**;** *Thane v. Rose Acceptance,* 315 So. 3d 760, 761 (Fla. 4th DCA 2021); *Mendelson v. Great Western Bank,* 712 So. 2d 1194, 1197 (Fla. 2d DCA 1998).[2]

[2] If choice of law is to be considered, Florida courts have not addressed the specific issue but the California Supreme Court held in *Kearney v. Salomon Smith Barney*, 39 Cal.4th 95, 115-128, 137 P.3d 914, 927-937 (Cal. 2006), that California law rather than Georgia law applied to recording phone calls to and from California. California is an all-consent state and the plaintiffs were California residents that sued their investment advisor who was located in Atlanta and recorded calls without consent. *Id.* ("A person who secretly and intentionally records such a conversation from outside the state effectively acts within California in the same way a person effectively acts

The district court also erred because, if even Ohio law applies, Ohio law does not provide that all telephone calls can be recorded upon single consent. Rather, Ohio law does not allow for the recording of phone calls even if one party consents that are done "for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act." Ohio Rev. Code § 2933.52(B)(4). Ohio law also does not allow for disclosure of unlawfully intercepted phone calls to third parties such as Twin Galaxies nor publication in the court record. Ohio Rev. Code § 2933.52(A)(3); *Nix v. O'Malley,* 160 F.3d 343, 347-353 (6th Cir. 1998).

Race did not record the calls out of the kindness of his heart. Rather, he claims three Pac-Man records [R. 272, ¶ 4], meaning he has a direct interest in Mitchell's records being declared invalid. He pretended to be a supporter of Mitchell when he recorded the 27 calls. R. 298-302; R. 303-349; R. 465-476; R. 478-508; R. 216-225, ¶ 5-14, 39-50, 63-71. He *secretly* kept the April 1, 2018 recording for *18 months* and then turned on Mitchell and

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within the state by, for example, intentionally shooting a person in California from across the California – Nevada border. . . . If businesses could maintain a regular practice of secretly recording all telephone conversations with their California clients or customers in which the business employee is located outside of California, that practice would represent a significant inroad into the privacy interest that the statute was intended to protect.").

provided an edited 11 minute excerpt of that 63 minute call to Twin Galaxies in violation of §§ 934.03(1)(c) and 934.10(1) Fla. Stat. (2018-2023) without Mitchell's consent and to discredit Mitchell by trying to make it look like he cheated. R. 216-225, ¶ 5-14, 39-50, 63-71; R. 53-60; R. 376.

The district court also incorrectly relied on *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) for the position § 934.03 Fla. Stat does not apply because Ohio is a one-consent state. *Campbell* is inapplicable because it held that unrelated conduct to an insurance bad faith case, i.e. other bad faith acts to other insureds but not the plaintiff, could not be used to justify at $145 million punitive damages award, none of which is at issue here. *Campbell,* 538 U.S. at 418-424. That is, *Campbell* involved a situation where a single bad faith plaintiff in Utah recovered an enormous judgment based upon other out of state instances of bad faith by the insurer to non-parties. *Id.* This is not a bad faith case involving excessive punitive damages nor is Mitchell seeking damages for harm to non-parties. Race's conduct is, per above, not legal in Ohio because it was done for an injurious result. R. 216-225, ¶ 5-14, 39-50, 63-71; R. 53-60; R. 298-349, 376, 465-508.

Also, the inquiry at this stage is whether the tort as alleged occurred in Florida, and not whether the tort actually occurred. *Osi Industries,* 834 So. 2d at 367-368; *France,* 90 So. 3d at 863-864. The interceptions occurred in

Florida where a Florida resident is protected from violations of privacy under the Florida Security of Communications Act, unlike the conduct in *Campbell* that occurred in states other than Utah. § 934.01(4) Fla. Stat. (2018-2023). *France* considered *Campbell* in the context of § 934.10(1)(c) Fla. Stat. (2018-2023), which authorizes punitive damages for a plaintiff, but still held jurisdiction exists. *France,* 90 So. 3d at 863-864. Race also engaged in substantial acts and contacts directed at Florida discussed *infra,* with more recorded calls and greater contacts than *France, Koch,* or *Kountze.*

Upholding the district court's opinion and Race's arguments is, for all intents and purposes, a holding that the Florida Security of Communications Act can *never* apply to an out of state defendant who directs his conduct into Florida, even though the trial and district courts did not apply the effects doctrine test for extraterritoriality. *E.g., State v. Stepansky,* 761 So. 2d 1027, 1035-1036 (Fla. 2000) ("Accordingly, we conclude that Florida's sovereign authority includes the ability to exercise criminal jurisdiction over acts committed outside the territorial limits of the State under the effects doctrine as long as the exercise of jurisdiction does not conflict with federal law and the exercise of jurisdiction is a reasonable application of the effects

doctrine."); *Black v. State,* 819 So. 2d 208, 210-213 (Fla. 1st DCA 2002).[3]

Indeed, applying the all-consent requirement in Florida law to the 27 calls is neither invalid nor contradicts fair play and substantial justice and furthers Florida's goals of protecting its citizens from privacy violations. § 934.01(4) Fla. Stat. (2018-2023). The U.S. Supreme Court recently confirmed in *National Pork Producers Council v. Ross,* 143 S. Ct. 1142, 1150-1156 (2023) that a state can regulate conduct by out of state actors that produces detrimental effects in the state. The case involved a challenge by industry groups of pork producers against a California law the prevents the sale of pork that comes from breeding pigs that are confined in a cruel manner. *Id.* at 1150. The plaintiff brought a constitutional challenge because, inter alia, compliance costs will be borne by out-of-state firms and argued that the law violates the dormant commerce clause and rules against extraterritorial application of state laws. *Id.* at 1151-1154.

In rejecting the plaintiffs' arguments, the Court per Justice Gorsuch held there is nothing improper when state law controls out of state conduct:

> Consider, too, the strange places petitioners' alternative interpretation could lead. In our interconnected national marketplace, *many (maybe most) state laws have the "practical effect of controlling" extraterritorial behavior*. State income tax laws lead some individuals and companies to relocate to other

[3] Even *Kountze* held that "the extraterritorial application of a statute is a separate, complex issue we do not address." *Kountze,* 996 So. 2d at 251.

> jurisdictions. Environmental laws often prove decisive when businesses choose where to manufacture their goods. Add to the extraterritorial-effects list all manner of "libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws," and plenty else besides.

Id. at 1156 (emphasis added). The Court further held:

> Nor, we have held, should anyone think one State may prosecute the citizen of another State for acts committed "outside [the first State's] jurisdiction" *that are not "intended to produce [or that do not] produc[e] detrimental effects within it."*

Id. at 1156 (emphasis added).

The language "not intended to produce [or that do not] produce detrimental effects within it" is key and is the difference-maker in this case. Race admitted that he knowingly recorded calls with Mitchell, Mitchell is a Florida resident, and posted that Florida is an all-consent state on Facebook. R. 215-219, ¶ 5-15, 24-25. There is nothing incorrect about jurisdiction over Race since his conduct produced detrimental effects to Mitchell in Florida.

The district court also incorrectly held that a violation of § 934.10 Fla. Stat. is not malum in se because some states are one-consent states. The malum in se holding – which was not raised in the trial court – is incorrect because § 934.10(1)(a)–(c) Fla. Stat. (2018-2023) allows punitive damages, attorney's fees for the *plaintiff only,* and "actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." R. 25-47, 157-194, 706-724. The

Florida Legislature deemed an unconsented recording to be of such importance as a violation of privacy that it expressly allowed for punitive damages (uncommon in Florida statutes), fees, and statutory damages and it is the province of the Legislature to decide whether a privacy violation is malum in se. §§ 934.01(4), 934.10(1)(a)–(c) Fla. Stat. (2018-2023).

III. THE DISTRICT COURT ERRED BY NOT AWARDING APPELLATE ATTORNEY'S FEES

The district court erred by denying Mitchell's motion for appellate attorney's fees because there is jurisdiction and § 934.10(1)(d) Fla. Stat. (2018-2023) allows a prevailing plaintiff to recover attorney's fees. Mitchell will move for appellate attorney's fees in this case by separate motion.

CONCLUSION

For the foregoing reasons, Mitchell respectfully requests this Court to reverse the district court's March 8, 2023 opinion, affirm the trial court's June 22, 2022 order denying Race's motion to dismiss for lack of personal jurisdiction, and reverse the district court's March 8, 2023 order denying appellate attorney's fees.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Arial, 14 Point Font, in compliance with Rule 9.045 of the Florida Rules of Appellate Procedure. I further certify that this brief complies with the word count limit requirement of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served through E-Service via the Florida Courts e-Portal filing system to James Toscano, Esq. James.Toscano@lowndes-law.com and Rebecca Rhoden, Esq. Rebecca.Rhoden@lowndes-law.com, Lowndes, Drosdick, Doster, Kantor & Reed, 215 North Eola Drive PO Box 2809, Orlando, FL 32802-4600 on this 21st day of September 2023.

/s/ James A. Stepan
_____
James A. Stepan