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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,726

MICHAEL VASILINDA, an independent Florida television journalist,

Petitioner,

vs.

WILLIAM LOZANO
and
THE STATE OF FLORIDA,

Respondents.

* *

BRIEF OF RESPONDENT STATE OF FLORIDA ON THE MERITS

* *

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PRELIMINARY STATEMENT

The petitioner is an independent television journalist who appeared before the trial court with a motion to modify the trial court's order excluding camera coverage of portions of the trial of State v. William Lozano. The respondents in the trial court were the prosecution and the defendant, William Lozano. In this brief, the parties will be referred to as the petitioner, the state, and the defendant. The symbol "PA" will be used to denote the petitioner's appendix. The symbol "SA" will be used to denote the State's appendix. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The case of State v. William Lozano has a very torturous history, but a recounting of that history is necessary for this Court to understand the importance of the certified question which is before this Court to decide.

By Amended Information filed September 7, 1989, the defendant, William Lozano, was charged in case no. 89-2972 in the Eleventh Judicial Circuit in and for Dade County, Florida, with two counts of manslaughter. On December 7, 1989, after trial by jury in Dade County, the defendant was convicted as charged. On June 25, 1991, the Third District reversed the defendant's convictions and ordered a new trial. One of the grounds for reversal was the trial court's failure to hold an evidentiary hearing on the defendant's motion for change of

venue coupled with the trial court's failure to grant the motion for change of venue in light of the conditions then existing in the community, i.e., fear of riots which would result from an acquittal. Lozano v. State, 584 So.2d 19 (Fla. 3d DCA 1991). (SA. Exhibit "A".)[1]

After remand, the trial judge, the Honorable W. Thomas Spencer, in March of 1992, held a five-day evidentiary hearing on the defendant's motion for change of venue. On April 2, 1992, Judge Spencer granted the motion, and ordered that the trial of the case be transferred to the Ninth Judicial Circuit of Florida (Orlando) and scheduled the trial for October 6, 1992. (SA. Exhibit "A".) On April 14, 1992, the then-Chief Justice, Leander Shaw, entered an order appointing Judge Spencer as a circuit judge of the Ninth Judicial Circuit for the purpose of the case of State v. William Lozano. (SA. Exhibit "A".) However, the clerk of the Eleventh Judicial Circuit did not at that time transmit to the clerk of the Ninth Judicial Circuit a certified copy of the order of removal, or the record and proceeding, or the undertakings of the witnesses and the defendant, or any papers or pleadings in the cause. (SA. Exhibit "A".) At that time no case number was assigned to the case by the clerk of the Ninth Judicial Circuit. (SA. Exhibit "A".)

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[1] These documents were before this Court as part of the State's appendix in State v. Gary, 609 So.2d 1291 (Fla. 1992).

On May 6, 1992, Judge Spencer entered a supplemental order on venue under the Eleventh Circuit's case number. In said order, Judge Spencer found that Orlando was no longer an appropriate venue for the trial. Judge Spencer then held that venue for the trial would be in the Second Judicial Circuit, sitting in Tallahassee, Leon County, Florida. Counsel was given ten (10) days to file written objections at the location. (SA. Exhibit "A".) Again, the clerk of the Eleventh Judicial Circuit did not immediately transmit to the clerk of the Second Judicial Circuit a certified copy of the order of removal, or the record and proceeding, or the undertakings of the witnesses and the defendant, or any papers or pleadings in the case. (SA. Exhibit "A".) Neither did the clerk of the Ninth Judicial Circuit. (SA. Exhibit "A".)

On May 11, 1992, the defendant, again under the Eleventh Circuit case number, filed a motion to disqualify Judge Spencer. (SA. Exhibit "A".) On May 12, 1992, Judge Spencer entered an order denying the motion to disqualify. (SA. Exhibit "A".) On May 18, 1992, the defendant filed a petition for writ of prohibition in the Third District Court of Appeal. (SA. Exhibit "A".) After issuing an order to show cause, and receiving responses from the State and Judge Spencer, as the Respondent, on June 2, 1992, the Third District denied the petition. (SA. Exhibit "A".) On June 11, 1992, the defendant moved for rehearing.

On July 27, 1992, while the motion for rehearing was pending in the Third District, before Judge Spencer could be appointed as a Second Circuit judge, the Chief Judge of the Second Judicial Circuit, the Honorable William L. Gary, on July 27, 1992, ex mero motu, entered an order in the Second Judicial Circuit case no. 92-2652, finding that the Second Judicial Circuit's jurisdiction had been invoked improvidently, and transferring the case of State v. William Lozano back to the Ninth Judicial Circuit, in and for Orange County, Florida. Judge Gary found that jurisdiction had vested in the Second Judicial Circuit eo instanti by the order changing venue. Judge Gary held, however, that Judge Spencer had no authority to change the venue from the Ninth Judicial Circuit to the Second Judicial Circuit, without an appropriate motion or the consent of the defendant, and thus the venue order was null and void. (SA. Exhibit "A".)[2]

On August 5, 1992, the Third District denied the defendant's motion for rehearing on the petition for writ of prohibition. (SA. Exhibit "A".). On August 17, 1992, after hearing from all parties concerned, Judge Spencer determined that Tallahassee was still the appropriate place of venue. (SA. Exhibit "A".) However, Judge Spencer in his order stated

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[2] Although Judge Gary's order incorporated part of Judge Spencer's order, Judge Spencer's order had never been officially sent to the clerk of the Second Judicial Circuit, by either the clerk of the Eleventh or Ninth Judicial Circuits. (SA. Exhibit "A".)

that if Judge Gary's order of July 27, 1992, "remained in effect," the trial would be held in Orlando.

In view of Judge Gary's order of July 27, 1992, refusing to accept jurisdiction in this case, on August 20, 1992, the State filed in the First District Court of Appeal, an emergency petition for writ of mandamus and/or certiorari, either to compel Judge Gary, as Chief Judge of the Second Circuit, in and for Leon County, Florida, to vacate his prior order of July 27, 1992, and upon receipt of the proper papers from the clerk of the Eleventh Judicial Circuit, to accept jurisdiction of the case of State v. William Lozano or for such relief from this Court which would nullify the order of Judge Gary. (SA. Exhibit "B".) The State filed a suggestion to the First District to certify that the order of the trial court required immediate resolution by this Court. (SA. Exhibit "C".) One of the issues presented in the emergency petition was the question concerning the point at which jurisdiction vests in a transferee circuit after a change of venue in a criminal case. On September 3, 1992, the First District certified the case to this Court. (SA. Exhibit "D".) On November 19, 1992, this Court granted the State's petition for writ of mandamus and quashed Judge Gary's order, finding that as a successor judge, Judge Gary could not as a successor judge, act as an appellate court and invalidate Judge Spencer's order on venue. State v. Gary, 609 So.2d 1291, 1294 (Fla. 1992).

After this Court's opinion in State v. Gary, supra, Judge Spencer was appointed by Chief Justice Rosemary Barkett as a judge of the Second Judicial Circuit. Trial was scheduled to begin in Tallahassee on March 8, 1993, with as suggested by this Court, 609 So.2d at 1294, a pretrial motion for change of venue to be heard the week before. Prior to trial commencing in Tallahassee, various pretrial motions were filed by both the State and the defendant. The motions were heard in Miami. The motions and orders by Judge Spencer were styled under the Eleventh Judicial Circuit's case number. (SA. Exhibit "E".) Among Judge Spencer's orders were the Pretrial Order I [Juror Privacy] entered on February 19, 1993 (PA. Exhibit "1") and the Order Denying Motion to Vacate Pretrial Order I. (PA. Exhibit "3".)

On February 23, 1993, the clerk of the Eleventh Judicial Circuit transferred the necessary court documents to the clerk of the Second Judicial Circuit. On March 1, 1993, pretrial proceedings began in Tallahassee. On March 5, 1993, the petitioner filed his Motion for Order Modifying Court's "Pretrial Order I to Allow Coverage of Jury Selection Process." (PA. Exhibit "4".) The motion was filed under the Eleventh Judicial Circuit's case number, and not a Second Judicial Circuit case number. Judge Spencer did not rule on petitioner's motion at the time. Instead, on March 5, 1993, after the evidentiary portion of the defendant's motion to change venue from Tallahassee, the State agreed with the

defendant, realizing that Judge Spencer's order of May 2, 1992, transferring the case from Orlando to Tallahassee on the basis of the race of the victims, would violate the defendant's constitutional rights. Judge Spencer, however, disagreed and denied the motion to change venue. On the same day, the State filed an emergency petition for writ of certiorari in the First District Court of Appeal. On March 10, 1993, the First District granted the petition and quashed Judge Spencer's order denying the defendant's motion for change of venue, and voided the May 6, 1992 order, which reinstated the April 2, 1992 order. State v. Lozano, 18 Fla. L. Weekly D712 (Fla. 1st DCA March 10, 1993).

Trial was subsequently rescheduled for Orlando to begin on May 10, 1993. On April 7, 1993, the clerk for the Eleventh Judicial Circuit transferred the necessary documents to the clerk of the Ninth Judicial Circuit in Orlando. The defendant and the State, as well as the petitioner (PA. Appendix "5"), continued to file pretrial motions (SA. Appendix "F"), under the Eleventh Judicial Circuit case number. Hearings were held in Miami, including the May 3, 1993 hearing concerning the petitioner's motion. (PA. Appendix "6".) Judge Spencer issued orders under the Eleventh Judicial case number including the Order Denying the Motion for Order Modifying Court's Pretrial Order I Regarding Media Coverage of Jurors. (PA. Appendix "7".)

The petitioner, pursuant to Fla.R.App.P. 9.100(d), petitioned the Third District Court of Appeal to review Judge Spencer's orders restricting the television coverage of the voir dire examination and the sitting jurors in State v. Lozano. (SA. Appendix "G".) The State took no position as to the relief requested by the petitioner (SA. Appendix "H"), but moved to transfer the cause to the Fifth District Court of Appeal. (SA. Appendix "I".) The petitioner filed a response in opposition to the motion to transfer. (SA. Appendix "J.") The Third District, on May 5, 1993, granted the State's motion and transferred the cause to the Fifth District. (PA. Appendix "8".)

The petitioner filed a suggestion that the order limiting electronic media access be certified to this Court. (SA. Appendix "K".) The Fifth District issued its opinion on May 6, 1993, in which the Court, although questioning its jurisdiction over the case, denied the petitioner's emergency petition based on an incomplete record. (PA. Appendix "9".) The Fifth District then certified the following question to this Court as a matter of great public importance:

> WHEN THE VENUE OF A CRIMINAL CASE IS CHANGED AND THE CASE TRANSFERRED TO A CIRCUIT COURT IN A DIFFERENT APPELLATE DISTRICT THAN THE ORIGINATING COURT, AND THE CIRCUIT JUDGE WHO ENTERED THE ORDER IS ASSIGNED AS A JUDGE OF THE TRANSFEREE CIRCUIT, IS APPELLATE JURISDICTION FOR INTERLOCUTORY AND FINAL REVIEW VESTED IN THE DISTRICT COURT WHICH HAS

JURISDICTION OVER THE ORIGINATING CIRCUIT COURT OR IS JURISDICTION VESTED IN THE DISTRICT COURT WHICH HAS JURISDICTION OVER THE TRANSFEREE COURT IN WHICH THE TRIAL IS TO BE HELD, AND AT WHAT POINT IN TIME DOES APPELLATE JURISDICTION VEST?

Trial began in Orlando in State v. William Lozano on May 10, 1993. This Court accepted jurisdiction over this cause on May 9, 1993.

POINTS INVOLVED ON APPEAL

I.

1. WHEN VENUE OF A CRIMINAL CASE IS CHANGED, AND THE CASE IS TRANSFERRED TO A CIRCUIT COURT IN A DIFFERENT APPELLATE DISTRICT THAN THE ORIGINATING COURT, AND THE CIRCUIT JUDGE WHO ENTERED THE ORDER IS ASSIGNED AS A JUDGE OF THE TRANSFEREE CIRCUIT, IS APPELLATE JURISDICTION FOR INTERLOCUTORY AND FINAL REVIEW VESTED IN THE DISTRICT COURT WHICH HAS JURISDICTION OVER THE TRANSFEREE COURT IN WHICH THE TRIAL IS TO BE HELD?

2. AT WHICH POINT IN TIME DOES APPELLATE JURISDICTION VEST?

II.

WHETHER THE TRIAL COURT'S ORDER LIMITING ELECTRONIC MEDIA COVERAGE OF JURORS IS CONTRARY TO THE RULE OF THIS COURT IN POST-NEWSWEEK?[3]

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[3] In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979).

SUMMARY OF ARGUMENT

1. The State suggests that this Court determine that when a circuit court orders venue of a criminal case to be transferred, then jurisdiction does not vest in the transferee circuit court until the clerk of the transferor court transmits the necessary documents to the clerk of the transferee court, and trial commences. This distinction is necessary because in criminal cases, problems are occasioned by a change of venue that do not arise in civil cases. The State further submits that, at the point at time in which jurisdiction has vested in the transferee circuit, is also the point when the jurisdiction of the appellate court of that transferee circuit vests.

2. The State suggests that this Court not reach the issue of whether the trial court's order limiting electronic media coverage of jurors is contrary to the rule of this Court in Post-Newsweek, in that the issue will become moot, and it does not raise a question of great public importance or which is likely to recur.

ARGUMENT

I.

1. WHEN VENUE OF A CRIMINAL CASE IS CHANGED, AND THE CASE HAS TRANSFERRED TO A CIRCUIT COURT IN A DIFFERENT APPELLATE DISTRICT THAN THE ORIGINAL COURT, AND THE CIRCUIT COURT WHO ENTERED THE ORDER IS ASSIGNED AS A JUDGE OF THE TRANSFEREE CIRCUIT, APPELLATE JURISDICTION FOR INTERLOCUTORY AND FINAL REVIEW VESTS IN THE DISTRICT COURT WHICH HAS JURISDICTION OVER THE TRANSFEREE COURT IN WHICH THE TRIAL IS TO BE HELD.

2. THE POINT IN TIME IN WHICH APPELLATE JURISDICTION VESTS IS THAT POINT WHERE JURISDICTION HAS EFFECTIVELY VESTED IN THE TRANSFEREE CIRCUIT.

The Fifth District in its certified question, actually raises three questions:

1. When does appellate jurisdiction vest for interlocutory review when venue of a criminal case is changed, and the case has transferred to a circuit court in a different appellate jurisdiction than the originating court, and the judge who entered the order is assigned as a judge of the transferee circuit?

2. When does appellate jurisdiction vest for final review in such a situation?

3. What point in time does appellate jurisdiction vest?

The most important of those three questions is the last question, because the answer to that question will answer the

other two questions. The question of at what point in time does appellate jurisdiction vest when there is a change of venue in a criminal case is similar to one of the questions initially raised by the State in its emergency petition for mandamus in State v. Gary, supra.

In State v. Gary, supra, the State had argued that Judge Gary's order was without authority because jurisdiction of the case of State v. Lozano had not yet vested in the Second Judicial Circuit, where neither the clerk of the Eleventh Judicial Circuit or the Ninth Judicial Circuit had transferred the appropriate documents pursuant to Fla.R.Crim.P 3.240(f). It was the State's position that jurisdiction, at that time, had remained in the Eleventh Judicial Circuit; and thus appellate jurisdiction was in the Third District Court of Appeal. In fact, at the time of Judge Gary's order, the Third District had before it the defendant's petition for writ of prohibition seeking review of the denial of his motion to disqualify Judge Spencer.

This Court did not specifically address the issue of when jurisdiction vests following a change of venue in a criminal case. Nevertheless, by determining that Judge Gary acted as the successor judge in the Second Judicial Circuit, State v. Gary, supra, 609 So.2d at 1293, this Court must have implicitly rejected the State's position that jurisdiction remained in the Eleventh Judicial Circuit until at least the clerk transferred the appropriate papers. Jurisdiction must

have vested in the transferee court as soon as the order changing venue was rendered. State v. Erber, 560 So.2d 1255, 1256 (Fla. 5th DCA 1990).

The State would request that this Court reconsider the question of when jurisdiction vests in the transferee court after an order changing venue is entered in a criminal case. It is the State's position that, to avoid the "ping-ponging" which occurred in State v. Lozano, or any other case, a bright or definitive line must be drawn as to when jurisdiction vests after a change in venue.

Criminal cases are different from civil cases, and different considerations must be taken into account when there is a change in venue. First, in criminal cases, it is much more difficult to change venue. A defendant has a constitutional right to be tried in the county in which the crime occurred. Art. I, § 16, Fla. Const. Although, under Fla.R.Crim.P. 3.240(a), the State can move for a change of venue, such a motion may be granted only if the State shows that it is virtually impossible to pick a fair and impartial jury in that county. See, e.g., Stone v. State, 378 So.2d 765 (Fla. 1979); North v. State, 65 So.2d 77 (Fla. 1952); Ward v. State, 328 So.2d 260 (Fla. 1st DCA 1976). In civil cases, venue is appropriate in the county where the defendant resides, where the cause of action occurred, or where the property in litigation is located. § 47.011, Fla. Stat. (1991). Although a party can move for a change of venue if they do not believe they will

receive a fair trial, § 47.101, Fla. Stat. (1991); the trial court can also change venue for the convenience of the parties or witnesses. § 47.122, Fla. Stat. (1991).

Secondly, the judge in a criminal case will usually move with the case, that is, he or she will request to be appointed by the Chief Justice of this Court, as a sitting judge in the transferee venue. See, e.g., Card v. State, 497 So.2d 1169, 1173 (Fla. 1986). In civil cases, the judges traditionally do not continue to preside over the case.

Thirdly, when the venue is changed from one circuit to another, the State Attorney, the one whose jurisdiction encompasses the transferee circuit, would become responsible for the prosecution. Fla.R.Crim.P. 3.240(j). Usually, that State Attorney will appoint the original prosecutors as special assistant state attorneys for that cause. In civil cases, there is no such similar problems with the same attorneys continuing to represent the parties.

However, the most important difference between criminal and civil cases, is the reason for changing venue. In criminal cases, the reason for changing venue is focused only on the fairness of the actual jury trial, i.e., the jurors, whereas in civil cases, the focus is very often on the convenience of the parties and witnesses, both pretrial and at trial, with little consideration given as to whether the parties could have received a fair trial in the prior venue.

Thus, the State submits in criminal cases, venue should not vest in the transferee court until the clerk of the transferor court transmits the necessary papers to the clerk of the transferee court, and trial commences, i.e., the prospective jurors are sworn for voir dire in the particular case. See Fla.R.Crim.P. 3.191(c); State ex rel Maines v. Baker, 254 So.2d 207 (Fla. 1971).

In criminal cases, once the trial court grants a motion to change venue, "it is required to make an order removing the cause to the court having jurisdiction to try the offense in some other convenient county where a fair and impartial trial can be had." Fla.R.Crim.P. 3.240(d). The clerk of the court must then "enter on the minutes the order of removal and transmit to the court to which the cause is removed a certified copy of the order of removal and of the record and proceedings and of the undertakings of the witnesses and the accused." Fla.R.Crim.P. 3.240(f). Chapter 47, Florida Statutes (1991), which governs venue in civil proceedings, contains a similar provision. Section 47.172, Fla. Stat. (1991), requires that "[o]n a change of venue the clerk of the court in which such action was pending shall transmit all papers filed in said action, a certified copy of all entries of record in the progress docket and a copy of the order of transfer to the court to which the action is transferred..." Thus, the State submits that the first thing which must be done to effectuate the jurisdiction of the transferee court is the transfer of the court documents.

The State recognizes that the Fifth District in State v. Erber, supra, 560 So.2d at 1256, rejected a similar position. The majority in Erber, relying on Ammons v. State, 9 Fla. 530 (1861), held that "upon entry of a proper order for change of venue in a criminal case, jurisdiction over the case vests in the transferee court, and thereafter it would appear that the transferor court is without jurisdiction to enter valid orders in the transferred case." Id. In her dissent, Judge Sharp found this Court's opinion in Swepson v. Call, 13 Fla. 337 (1869), to still be controlling authority. Swepson had held, in a civil case, that jurisdiction in the transferee court is not effective until the clerk of the transferor court transmitted the required papers. 560 So.2d at 1258-1259 (Sharp, J., dissenting).

The State maintains that this Court should follow the better reasoned, dissenting opinion of Judge Sharp in Erber. In Ammons v. State, supra, the defendant moved for a change of venue from Holmes County. The Court granted the motion and ordered that venue be changed to Jackson County. The clerk of Holmes County sent various papers to the clerk in Jackson County, but omitted a copy of the indictment. The defendant was convicted at trial, but a new trial was granted. The defendant again moved for change of venue. The court granted that motion and changed venue to Calhoun County. The court in Jackson County then adjourned. The clerk in Jackson County transmitted the record to Calhoun County, but omitted some of the papers

required by the statute, Thomp. Dig, 525. The defendant was convicted in Calhoun County and challenged his conviction on the ground that Calhoun County did not have jurisdiction in that the papers were not complete. 9 Fla. at 531-539. This Court rejected the defendant's argument, stating that jurisdiction of the case could not be held in abeyance; and thus, when the court in Jackson County adjourned without revoking the order changing venue, the jurisdiction vested eo instanti in the court in Calhoun County. Id. at 539.

Eight years later, in Swepson v. Call, supra, this Court was again confronted with the issue of when jurisdiction vested after an order granting a change of venue. Swepson, was a civil case in which the plaintiff moved to change venue from the Second Circuit. The court granted the motion and ordered that venue be changed to the Third Circuit. The judge in the Third Circuit was absent and the plaintiff requested the judge of the Fourth Circuit enter an injunction. The judge of the Fourth Circuit did, and the defendant appealed, alleging that the case was never effectively transferred from the Second Circuit because the clerk had failed to transmit any papers to the Third Circuit. 13 Fla. at 347-350. This Court after interpreting the applicable statute, Law 1850, Ch. 373, which required, upon removal of the cause, the clerk of transferor court transmit the necessary papers to the transferee court; held that the cause remained pending in the transferring county until removal is effected by compliance with the statute on

transferring the essential papers. Id. at 355. In particular, this Court reasoned:

> It also follows that the court named in the order of transfer cannot take the jurisdiction and hear, try and determine a cause until the removal is effected, and this does not occur until 'the cause,' to wit: the record, pleadings and papers, find a lodgment in the proper clerk's office in the proper circuit. The theory that the jurisdiction of a cause always exists somewhere, and is never in abeyance, is certainly correct, and yet the jurisdiction of the Circuit Court over a cause may be perfect, while the power of the parties and of the judge may be in abeyance by reason of the disqualification of the judge, until the proper steps are effectively taken and the cause removed to some circuit where the judge is qualified to hear it.
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> The judge cannot know that a cause is pending in any county in his circuit except by the evidence of the clerk's endorsement upon the papers. Judgments and decrees can never be entered until after the filing of the pleadings with the clerk. We know of no mode of ascertaining whether a suit is pending anywhere, except by inspecting the records of papers in the proper clerk's office. In the pursuit of such an inquiry, if we find no papers or record in the office showing the existence of a suit, and the clerk informs us that he knows of no such cause, it would be idle to tell us that a suit is pending in that county. In a case like the present, how is the judge to know that a cause has been removed to his circuit, unless the certificate of the order of transfer appears in the record? and how can he know that such an order has been made unless he finds it in the proper office? The order of transfer directs, and the law requires,

that all the papers be transmitted 'to the clerk of the court, to which said cause may be ordered to be transferred, together with a certificate of the order of transfer.' It seems to us that the law requires that the papers be delivered into the possession of the clerk before the case is 'transferred to' the proper court. If a party petition for a transfer of a cause and procure the entry of the proper order, and then neglect or refuse to 'pay all costs' as required by the law referred to, thus suspending all proceedings in that court, the clerk cannot be compelled to transmit the papers. Can it be said, in such case, that any other court has become possessed of the cause, with the power to hear and determine it? or that, even if the costs have been paid, the court to which it may have been ordered to be sent has any power to compel the clerk to transmit the papers or to control the papers or records which have never been so transmitted to its custody? The law in the case points out certain steps to be taken in order to effect a change of the jurisdiction from one circuit to another. Without the statute, there would be no power which the law could recognize to transfer the jurisdiction and confer it upon another court, and until the law is complied with in all essential particulars, the jurisdiction is not affected. We are, therefore, unable to conclude that this cause has been 'removed to' the Circuit Court of Columbia county, or that the judge of the Third Circuit has had any control over the cause, and that the cause is yet properly pending in the Leon Circuit Court. If the prerequisites entitling the party to a removal are not complied with, the judge of the Second Circuit may, on the proper application, revoke the order already made, and make another order to remove the cause to a proper circuit.

Id. at 354-355.

The Swepson Court distinguished Ammons v. State, supra, stating simply that the case depended upon "another and different statute." 13 Fla. at 355. Although, that is no doubt technically correct, the State submits that Ammons is actually distinguishable because the court, after granting the change of venue had adjourned for the term. Thus, because the transferor court had adjourned, and jurisdiction could not be held in abeyance, jurisdiction had to vest immediately in the transferee court. Such was not the case in Swepson, nor is it the case in most situations. The State suggests that this is the only logical way in which Swepson and Ammons can be reconciled. The statute in Ammons, like the statute in Swepson, both required, upon the granting of a change of venue, that the clerk of the transferor court transmit the proper papers to the transferee court.[4]

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[4] The other District Courts of Appeal in reviewing civil cases, have also taken somewhat different views on the point in time jurisdiction vests in the transferee court when a change of venue is ordered. The Fourth District in University Federal Savings and Loan Association v. Lightbourn, 201 So.2d 568, 570 (Fla. 4th DCA 1967), held that transfer of venue entailed the physical transmittal of trial records from one court to the other, and upon that act, the transferor court was divested of further jurisdiction. The Second District in Gunderson v. Powell, 340 So.2d 1252, 1253 (Fla. 2d DCA 1976), followed Swepson, and held that jurisdiction effectively vested in the transferor county when the file was forwarded to the clerk in the transferee county. In Ven-Fuel v. Jacksonville Electric Authority, 332 So.2d 81, 83 (Fla. 3d DCA 1975), the Third District, also citing Swepson, held that jurisdiction cannot remain in limbo from the time of the signing of the order of transfer to the effective assumption of jurisdiction by the transferee court. Thus, jurisdiction remained in the transferor court, until the court file was received and jurisdiction assumed in the transferee court. The Court noted however, that although the transferor court did not lose jurisdiction of the

There is simply no valid reason for requiring that jurisdiction vest immediately upon the entering of the order changing venue in a criminal case, but yet allow the vesting of jurisdiction to be delayed in civil cases until the clerk transmits the necessary papers. If anything, logic and the reasons behind the change of venue require the opposite result.

The State further submits that because of the different problems inherent in a change of venue in a criminal case, that the jurisdiction of the transferee court should not vest until trial actually commences. The State recognizes that the facts of the present case, State v. Lozano, are unique. Normally, a trial court in a criminal case does not enter an order changing venue a year before trial.[5] In most cases, a court will not enter such an order until after the court has attempted to pick a fair and impartial jury, and has failed. See Davis v. State, 461 So.2d 67, 68 n. 1 (Fla. 1984). Thus, all pretrial motions are usually completed before venue is changed, so that all that remains is the trial itself. If some sort of interlocutory appellate review should be required, either an appeal by the State or a petition for writ of prohibition filed by the defendant, or a review of a press order, then it is more

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cause until the jurisdiction was effectively vested in the other court, it could not at the same time transfer a case and rule on any aspect of the merits of the cause, but could rule on procedural matters. See also Florida Elections Commission v. Smith, 354 So.2d 965 (Fla. 3d DCA 1978).

[5] Nor was that the intent of Judge Spencer when he granted the motion in April of 1992. Trial was originally scheduled to begin shortly thereafter.

convenient for all the parties concerned that the appellate review occur in the appellate court with the jurisdiction over the circuit court which entered the order. If jurisdiction of the transferee court vests at an earlier time, then problems begin in determining which appellate court has jurisdiction over the interlocutory appellate proceeding. The answer to that problem, or the certified question, as posed by the Fifth District, then may depend on the purpose for the appellate review.

The Fourth District, in University Federal Savings and Loan Association of Coral Gables v. Lightbourn, supra, held that it did not have jurisdiction to review an order denying a motion to reopen and vacate a default judgment. The order sought to be reviewed had been entered by the circuit court in Broward County after venue had been changed to Dade County. The Court noted that the Broward county court had no jurisdiction to enter the order, and held that because venue had been transferred to Dade County, it had no appellate jurisdiction over the cause. 201 So.2d at 570. See also Palm Beach County v. Rose, 337 So.2d 985 (Fla. 4th DCA 1976).[6]

The Third District, in Raymond, James & Associates, Inc. v. Wieneke, 479 So.2d 752 (Fla. 3d DCA 1985), viewed its jurisdiction differently. The Court was confronted with reviewing an order of a Dade County circuit court denying a

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[6] It should be noted that in appeals of non-final orders in civil cases, under Fla.R.App.P. 9.130(a)(7), the appellate court which has jurisdiction over the final order in the cause has jurisdiction over the appellate review of the non-final order.

motion to compel arbitration entered after ordering the case transferred to Pinellas County. The Court held that:

> The question of whether this court has jurisdiction to determine the propriety of the action of a circuit court which, as here, is within our territorial jurisdiction, is separate and distinct from the questions (a) whether a circuit court which has determined to transfer the venue of an action may thereafter rule on other aspects of the case and (b) whether the circuit court's post-transfer rulings are substantively correct. The latter questions are quite obviously ones which cannot be addressed by the appellate court until it has made the threshold determination that it has jurisdiction to review the action of the circuit court. Thus, implicit in decisions that approve or disapprove of a circuit court's ruling on other matters after transferring venue, ... is that the circuit court's transfer of venue (although perhaps affecting its right to proceed further in the case) does not affect the appellate court's right to review the post-transfer actions of a circuit court situated with the appellate court's territorial boundaries.
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> 479 So.2d at 753 (citations omitted).

The Third District viewed its appellate authority in such cases, to be one of determining whether the transferor judge acted within his or her jurisdiction when he or she entered the post-transfer order. If the Court found that the transferor judge acted within his or her jurisdiction, the Court would then proceed to review the merits of the order. Id. at 754. See also Gunderson v. Powell, 340 So.2d 1252 (Fla. 2d DCA 1976);

Church of Scientology of California v. Cazares, 401 So.2d 810 (Fla. 2d DCA 1981).

State v. Erber, supra, is the only criminal case which has discussed this issue. In Erber, the Fifth District was asked to review an order dismissing an information which was entered by a judge appointed to sit as a judge of the Fifth Judicial Circuit. Before the judge entered the dismissal order, he granted a motion for change of venue to the Eighth Judicial Circuit. The Fifth Circuit held that it did not have jurisdiction over the appeal, because the venue had been changed to a circuit court within the First District Court of Appeal's jurisdiction. After reviewing the Fourth District's opinion in University Federal Savings and Loan Association of Coral Gables v. Lightbourn, supra, and the Third District's opinion in Raymond, James & Associates, Inc. v. Wieneke, supra, the Fifth District ordered the appeal transferred. The Court held

> Conceptually, it is difficult to separate a judicial order from the act of the judge who entered it or to separate the judicial act of entering an order from the order entered. However, if a distinction is possible, and helpful, or necessary, it would appear that the correct purpose of an appeal is to review the legality of an order entered in a cause pending in a trial court over which the reviewing court has appellate jurisdiction, rather than to review the legality of the act of a trial judge of a court over which the appellate court has reviewing jurisdiction when that trial judge enters an order in a case in a court in which the trial judge does not have jurisdiction to act and over which

> the appellate court does not have review jurisdiction.
>
> 560 So.2d at 1257.

The State submits that although the Third District's view of its appellate jurisdiction may be legally correct, the Fifth District's view is more practical and appropriate for criminal cases. Once a circuit court has ordered that venue be changed, and venue is vested in the transferee court, the transferor court has no jurisdiction to enter any orders. Under the Third District's view, should the transferor court enter an order, then the appellate court within whose jurisdiction the transferor court is located, has jurisdiction to review the lower court's order. However, that jurisdiction is limited to first reviewing the lower court's jurisdiction and if found, then determining the merits of the order.

The problem that occurs with the Third District's view is the needless creation of piecemeal appellate review of an interlocutory order. For example, a circuit judge in Dade County hears a defendant's motion to suppress physical evidence, but before ruling on it grants the defendant's motion to change venue to Broward County. The Dade County judge then enters an order granting the motion to suppress. Under the Third District's view, the State could appeal the order granting the motion to suppress to the Third District. The Third District could rule that the Dade County judge had no jurisdiction to enter its order granting the motion to suppress, and quash the

order. The judge, then pursuant to the change of venue order, is appointed as a judge in Broward County. The judge again grants the motion to suppress. The State again appeals, this time to the Fourth District, which reviews the merits of the order. In such a scenario, there would be two appellate courts reviewing what is essentially the same order. That review would entail using unnecessary judicial resources and would unnecessarily delay the actual trial.

In summary, the State suggests that this Court hold that when a circuit court orders venue of a criminal case to be transferred, then jurisdiction vests in the transferee circuit court when the clerk of the transferor court transmits the necessary documents to the clerk of the transferee court, and trial commences. The State further submits that, the point in time at which jurisdiction has vested in the transferee circuit, is when the appellate jurisdiction of the appellate court of that transferee circuit also vests.[7]

Finally, as to the specific certified questions posed by the Fifth District in this case, the State submits that if the questions are answered under the present state of the law, then under the Third District's views, appellate review of that order was appropriately in the Fifth District. Judge Spencer had been appointed as a judge of the Ninth Judicial Circuit to preside over State v. Lozano, at the time he entered his order

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[7] Thus, the order appointing the judge of the transferor circuit as a judge of the transferee circuit would have no effect on the point in time in which appellate jurisdiction vests.

concerning the media. The failure of the parties and the judge to title their pleadings and orders in the Ninth Judicial Circuit, instead of the Eleventh Judicial Circuit, had no affect on the jurisdiction of the appellate court. Under the Fifth District's view, appellate jurisdiction vested in the Fifth District for purpose of interlocutory review in this case when the First District in State v. Lozano, supra, reversed Judge Spencer's order denying the defendant's motion for change of venue, and vacated the order changing venue from Orlando to Tallahassee, which had the effect of returning the venue back to Orlando.

However, if the certified questions are answered under the manner proposed by the State, then appellate jurisdiction would have remained in the Third District. Venue would not have vested, nor would Judge Spencer's appointment as a judge of the Ninth Judicial Circuit have become effective, because trial had not yet commenced. Finally, under any view, in this case, as in any case, the appellate jurisdiction for final review vests when trial commences in the circuit court. See, e.g., Cole v. State, 280 So.2d 44 (Fla. 4th DCA 1973); Resnick v. State, 274 So.2d 589 (Fla. 2d DCA 1973).

II.

THIS COURT SHOULD NOT REACH THE ISSUE OF WHETHER THE TRIAL COURT'S ORDER LIMITING ELECTRONIC MEDIA COVERAGE OF JURORS IS CONTRARY TO THE RULE OF THIS COURT IN POST-NEWSWEEK.

The State recognizes that once this Court has jurisdiction over a case, it may, if it finds it necessary to do so, consider any item that may affect the case. Trushin v. State, 425 So.2d 1126, 1129-1130 (Fla. 1983). The State suggests, however, that this Court should not consider the issue of the trial court's order limiting electronic media coverage because the issue will be effectively moot. State v. Burgess, 326 So.2d 441 (Fla. 1976).

"A case becomes moot for purposes of appeal, where, by a change of circumstances prior to the appellate decision, an intervening event makes it impossible for the court to grant a party any effectual relief." Montgomery v. Department of Health and Rehabilitative Services, 468 So.2d 1014, 1016 (Fla. 1st DCA 1985). In this case, the trial of William Lozano will be over before this Court can render a decision. There will be nothing for the electronic media to televise. The only issue that may be subject to review is that portion of the February 19, 1993 order, precluding the press from publicly identifying a juror without their permission for six (6) months after the trial. (PA. Exhibit "1".) However, events after trial may make that issue moot.

The State recognizes that mootness will not destroy this Court's jurisdiction when the questions raised are of great public importance or are likely to recur. In Re T.W., 551 So.2d 1186, 1189 (Fla. 1989); Holly v. Auld, 450 So.2d 217, 218 (Fla. 1984). The State suggests that the Lozano case was unusual because of the facts involved, i.e., an Hispanic police officer charged with manslaughter for the deaths of two Afro-American men, coupled with the civil disturbances and publicity that attended the case. (PA. Exhibit "3".) The manner in which the media order was entered in this case is not likely to be repeated again. Thus, it is not necessary for this Court to review the order. However, if this Court does reach the issues raised in the media order, the State, as it did in the courts below, takes no position on the merits of this issue.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State submits that this Court should answer the certified questions proposed by the Fifth District, and in so doing recognize the problems inherent in changing venue in criminal cases, and how those problems affect the litigants, the trial courts, and the appellate courts. The State takes no position as to the propriety of the Fifth District Court of Appeal's decision on the merits of the media's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing was forwarded to Talbot D'Alemberte, Esquire, Donald M. Middlebrooks, Esquire, Thomas R. Julin, Esquire, Steel, Hector & Davis, 200 South Biscayne Boulevard,

40th Floor, Miami, Florida 33131-2398, and Roy Black, Esquire, Black & Furci, 201 South Biscayne Boulevard, Suite 1300, Miami, Florida 33131, on this the 28th day of May, 1993.

Penny H. Brill

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