IN THE
SUPREME COURT OF FLORIDA

Case No. 81,726

MICHAEL VASILINDA, etc.

Petitioner

vs.

WILLIAM LOZANO, et al.,

Respondents.

Mike Vasilinda's Initial Brief

and

Petition to Review an Order
Excluding Press from Access
to Criminal Trial

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INTRODUCTION

This case involves access by the electronic media to the criminal trial of William Lozano, a police officer charged with the death of two citizens. The Fifth District Court of Appeal has certified as a question of great public importance, the issue of which appellate court has jurisdiction to hear an emergency petition to review Judge Thomas Spencer's order restricting coverage by the electronic media.

JURISDICTION

This Court has jurisdiction to hear this matter on two separate bases. First, the Court has jurisdiction under Article V, Section 3(b)(4), Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(v), review of a case certified by an appellate court. The Court also has jurisdiction to hear this matter as an original proceeding pursuant to Article V, Section 3(b)(7), Florida Constitution and Fla. R. App. P. 9.100(d), seeking review of an order excluding the press from access to a portion of a criminal trial.

The question certified as a matter of great public importance by the Fifth District Court of Appeal is as follows:

> 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 OF APPEAL 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?

STATEMENT OF THE CASE AND OF THE FACTS

On February 19, 1993, the trial judge signed an order (entitled "Pre-Trial Order I") which limited media access to jurors (Appendix Tab 1). This order, proscribing media access to jurors during voir dire and the trial, was entered at the trial judge's own initiative, without motion of any party and without any evidence or supporting affidavits. The order referenced and attached a portion of a New York Times article regarding jurors in the 1992 Rodney King Trial. This article dealt with the Rodney King jurors and their feelings but had nothing at all to do with media coverage. The order made no reference to anything in the record in this case. The order included a provision which allowed the order to be questioned by media interests "at any time."

Thereafter, the Court conducted a hearing for some media interests and entered an order on February 25, 1993, denying the request that the order be vacated. No evidence or affidavits supported the Court's order. Michael Vasilinda, Petitioner, had no notice of that hearing, did not appear at that hearing, and was not represented at that hearing.

On March 5, 1993, the Petitioner filed a motion requesting that the Court modify its order excluding camera coverage (Appendix Tab 4) and on March 8, 1993, filed a memo and proposed protocol to govern electronic media coverage of jurors (Appendix Tab 5).

The motion was heard by the Court on May 3, 1993,

and denied on that date (Appendix Tabs 6,7). Again, no evidence or affidavits were received by the Court.

The Petitioner did not attack all aspects of the order. The Petitioner's motion to modify and the proposed protocol were presented to the Court as a way to accommodate the trial judge's concern to protect jurors and the public interest in having the greatest possible access to full information about the trial.

The Petitioner suggested that the voir dire proceedings which are to be open to the public and all other media also be open to video and audio coverage with the sole restriction that prospective jurors not be shown on camera until there had been an opportunity for the court to make a particularized inquiry of the type that would satisfy the terms of the Florida Supreme Court standard announced in In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 746 (Fla. 1979):

> The presiding judge may exclude electronic media coverage of a particular participant only upon finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

370 So.2d at 779.

The Court rejected the proposed modification and proposed protocol (Appendix Tab 7). The hearing on

Petitioner's motion was heard by Judge Spencer in Miami and the order was signed in Miami. At the time of the hearing, the court file was also in Miami. The order, crafted by the Judge, was entered under a style which showed that the case was in the Eleventh Judicial Circuit.

Petitioner then sought review in the Third District Court of Appeal. By an opinion filed May 5, 1993 (Appendix Tab 8) that court held that "[b]ecause the case has been transferred to the Ninth Circuit, where the trial will take place, and the trial judge has been assigned by the Supreme Court as a judge of that circuit to dispose of all matters considered by him in said case, we conclude that the proceeding must be transferred to the Fifth District Court of Appeal, which has appellate jurisdiction over Ninth Circuit cases."

The Fifth District Court of Appeal, uncertain of its jurisdiction to hear the issue, has now certified the jurisdictional issue to this Court by an opinion filed May 6, 1993 (Appendix Tab 9). The Fifth District also denied the relief sought, in the event it had jurisdiction, because Mike Vasilinda had not included in his appendix the order of the February 25, 1993 hearing that he had not attended or had notice of, despite the language of Rule 9.200(1)(2) that [n]o proceeding shall be determined because of an incomplete record, until an opportunity to supplement the record has been given."

SUMMARY OF ARGUMENT

Since this Court has jurisdiction, the procedural issue is not as immediately important to Mike Vasilinda as the opportunity to have review on the merits by an appellate court. The interests of justice are best served by the straightforward method of vesting appellate review in the district court that has jurisdiction over the circuit court that enters the order, particularly where that court styles the case in a circuit over which the district court has jurisdiction. Bouncing from appellate court to appellate court is an expensive and time consuming exercise, wasteful of judicial resources.

The question of whether the electronic media has access to a criminal trial and can cover its participants, including jurors, was answered by this Court fourteen years ago in the affirmative. The order here curbs access to jurors based upon a trial judge's unsupported personal view that this particular trial has such notoriety that the jurors should be protected from normal application of the Florida rules governing camera coverage. No evidence was heard; no findings were made; no standard was applied. This approach leaves no footing for consistency and is directly contrary to this Court's prior decisions and a tradition of openness which extends over many years. Notorious or newsworthy trials have happened before in this state and will again. As this Court said in Post-Newsweek Stations, Florida, 370 So.2d 764, 781

(Fla. 1979), "[a] democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works best when its citizens are informed about its workings."

ARGUMENT

I.

APPELLATE JURISDICTION SHOULD VEST IN THE DISTRICT COURT FOR THE CIRCUIT COURT WHICH ENTERED THE ORDER SOUGHT TO BE REVIEWED.

"[T]he interests of justice require a rule designed to inhibit trial courts from engaging in a 'ping pong game' by transferring a case back and forth, thereby jeopardizing the rights of parties and undermining public confidence in the judicial function." State v. Gary, 609 So.2d 1291 (Fla. 1992). A similar rule is required for appellate courts.

Mike Vasilinda has had his rights under Florida law and the First Amendment to the United States Constitution as a broadcast journalist to cover a criminal trial adjudicated without notice, or a hearing on any evidence. His motion seeking relief was denied by a judge purporting to act as a judge of the Circuit Court of the Eleventh Judicial Circuit in Dade County, Florida. The complicating fact is that the judge holding office as an elected judge of the Eleventh Judicial Circuit had been assigned by the Chief Justice to sit in the Ninth Judicial Circuit and the case had been transferred to Orlando for trial. On May 3, 1993, pre-trial proceedings in the case were held in Dade County where the judge, trial counsel and record resided. His petition seeking review of that order directed to the Third District Court of Appeal

which has jurisdiction over the Eleventh Judicial Circuit, was transferred to the Fifth District Court of Appeal. The Fifth District, uncertain of its jurisdiction, has now certified the jurisdictional issue to this Court. Meanwhile, the trial starts today (May 10, 1993) and Vasilinda's ability to cover it remains curtailed.

The Third District was the appropriate appellate court to hear this matter since the order sought to be reviewed was an order of the Eleventh Judicial Circuit Court. In Raymond, James & Assocs. v. Wieneke, 479 So.2d 752 (Fla. 3d DCA 1985) ("Raymond, James I"), the Third District held: "[W]here . . . review of an order of the Circuit Court of Dade County is sought, the appeal is properly commenced in this court." Id. at 753.

The Third District further held in Raymond, James I, that the prior entry of a transfer order does not alter this fundamental appellate principle, although it does create an issue for the District Court of Appeal regarding the jurisdiction of the Circuit Court because a transfer order divests a Circuit Court of some, but not all, jurisdiction. Id. If the District Court of Appeal concludes that the transfer divested the Circuit Court of jurisdiction to enter the order at issue, then the District Court of Appeal must vacate the Circuit Court's order for lack of jurisdiction. See, e.g., Raymond, James & Assocs. v. Wieneke, 479 So.2d 754 (Fla. 3d DCA 1985) ("Raymond, James II") (vacating

post-transfer order that pertained to the merits of the case); Florida Elections Commission v. Smith, 354 So.2d 965 (Fla. 3d DCA 1978) (same). This allows the transferee Circuit Court to resolve the merits of the matter. If the transfer did not divest the Circuit Court of jurisdiction to enter the order at issue, then the District Court of Appeal must proceed to resolve the merits of the appeal. See, e.g., Ven-Fuel v. Jacksonville Electric Authority, 332 So.2d 81 (Fla. 3d DCA 1975) (ruling on the merits of petition seeking review of post-transfer order allowing the continuation of discovery).

The Petitioner's motion was heard in a Dade County courtroom where the trial judge was sitting. The court file, the record in this case, was with the judge and when the judge entered his order, it was styled as an order entered in the Eleventh Judicial Circuit. If Judge Spencer did not have authority to enter the order in question as a judge of the Eleventh Judicial Circuit, his order should have been quashed on that basis alone by the Third District. If he has jurisdiction to act as a judge of the Eleventh Circuit with respect to this case, then the Third District is the appropriate appellate court to determine whether he acted erroneously. Any other approach will leave citizens seeking relief at a loss to determine where an appeal should be filed.

Petitioner concedes that the law in this area is confusing and that case authority can be read to reach contradictory conclusions. The Petitioner suggests a simple

rule which will eliminate confusion to the litigant. That rule is that, where a case is transferred to another venue, all trial court orders styled in the original court will be subject to appeal to the appellate court having jurisdiction over that original court. Further, the rule should allow a trial judge assigned to another circuit who is sitting on a transferred case to order a change of the style of the case to that of the new circuit even if, for reasons of administrative convenience, the judge conducts further hearings in the original venue.

Applying that rule to the Lozano case, the rule should allow Judge Spencer to select the time when a Dade County case, involving Dade County counsel, will be restyled in the Ninth Circuit and, even after the restyling, the judge should be allowed to hold hearings in the Eleventh Circuit so that all counsel and the files do not have to travel back and forth to Orlando during pre-trial.

Under this rule, the party seeking review has only to look at the style of the case. An order with an Eleventh Circuit style is appealed to the Third District and an order styled in the Ninth Circuit is appealed to the Fifth District.

II.

THE TRIAL COURT'S ORDER LIMITING ELECTRONIC MEDIA COVERAGE OF JURORS IS CONTRARY TO THE RULE OF THIS COURT IN POST-NEWSWEEK.

While the issue certified by the District Court pertained to the question of jurisdiction, this Court is

"privileged to review the entire decision and the record." Rupp v. Jackson, 238 So.2d 86, 89 (Fla. 1970). Here, review of the merits is particularly appropriate since the order from which review is sought fails to follow this Court's specific rules governing access to judicial proceedings by the electronic media, an issue the Fifth District avoided in disregard of the appellate rules. See Fla. R. App. P. 9.100(d).[1]

A. Electronic Media Coverage of Jurors May Not Be Summarily Denied.

In its historic decision In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), this Court decided that the electronic media may cover trials as other media does and the Court directly held that members of the jury may be shown in the course of covering criminal and civil trials. The Court weighed the various factors for and against allowing such coverage and determined that the public interest is better served by allowing such

[1] Particularly obnoxious to common sense is the portion of the Fifth District Court of Appeal's opinion which suggests that, if they were to take jurisdiction of the case, they would dismiss it because Petitioner's appendix did not include a trial court order or transcript. The Court's opinion suggests that these documents "may" provide some evidence to support to trial judge's order. This is wrong because, in context of an emergency hearing, such documents are not quickly available and the proper route for the court is to follow the appellate rules (Fla. R. App. P. 9.200(f)(2) or rely on representations of counsel particularly where, as here, opposing counsel have filed responses and do not contest those representations.

coverage.

Specifically, the Court found that assumptions that jurors will be distracted from concentrating on the evidence and the issues to be decided, will fear for their personal safety, will be subjected to influence by members of the public, or will attempt to conform their verdict to community opinion, "unsupported by any evidence." 370 So.2d at 775. Moreover the Court found that the survey evidence it had before it "would appear to refute the assumptions." The Court noted that it was the opinion of an overwhelming number of respondents (90-95%) to the survey of the Florida Conference of Circuit Judges that jurors "were not affected in the performance of their sworn duty in the courtroom." 370 So.2d at 776.

The Court dismissed claims that electronic media coverage of trials unduly invades juror's privacy because "a judicial proceeding subject to certain limited exceptions, is an public event which by its very nature denies certain aspects of privacy." 370 So.2d at 779.[2]

The issue here is not a new one and should be easily disposed of because summary prohibition of electronic media coverage of jurors in criminal cases is not permitted in Florida.

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[2] The United States Supreme Court approved the Florida Supreme Court's electronic media rules in Chandler v. Florida, 449 U.S. 560 (1981).

B. The Trial Judge Did Not Adhere to this Court's Guidelines for Determining When Exclusion is Appropriate

This Court established a clear standard in Post-Newsweek to be applied by trial courts faced with motions to exclude electronic media. This standard has now been used for fourteen years in all kinds of cases with no demonstrated problem. The Court held:

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

370 So.2d at 779.

Judge Spencer's sua sponte order is flatly contrary to the decision in Post-Newsweek and subsequent cases. It violates the standard in these five ways:

1) There is no "particular participant." Judge Spencer entered his order before any jury venue was identified, much less any individual.

2) There is no "finding" based on evidence.

3) There was no evidence of "substantial effect" on a particular individual.

4) There was no showing of "qualitatively different" effect on the effect on members

of the public in general.

5) There was no showing of "qualitatively different" effect from that of other media (including sketch artists and extensive written descriptions and profiles, for instance).

The proper process is for camera coverage to be allowed until all these elements are satisfied. Here, not one of these was satisfied and the trial judge attempts to avoid the individualized inquiry required under this Court's rules.

Several aspects of this rule warrant emphasis. The first is that factual findings are required as a basis for any exclusion order (exclusion may be ordered "only upon a finding that such coverage will have a substantial effect upon a particular individual ...). In State v. Palm Beach Newspapers, Inc., 395 So.2d 544 (Fla. 1981), the Court held that some record basis for the factual findings required by the Post-Newsweek standard is essential and that an exclusion order based on the mere argument of counsel was error. The Court stated, "We need not speculate exactly what areas or items of proof could be developed to aid the court's decision-making responsibility, but the qualitative different standard of our Post-Newsweek decision should be established on the record with competent evidence whenever it is an issue and the opportunity for data gathering is presented." 395 So.2d at 548 (emphasis added). The Court found error in the case before it because witnesses had not been called to

testify.[3] "The entire hearing consisted of a discussion between counsel and the court." 395 So.2d at 546. The entire hearing in the instant case also consisted solely of a discussion between counsel and the court and therefore the order is without any factual basis whatsoever.

The "personal experience" or "instincts" of the trial judge cannot provide the necessary factual basis. "In order to have cameras excluded from a courtroom during trial, a defendant must show prejudice of constitutional dimensions." Jent v. State, 408 So.2d 1024 (Fla. 1981).

In the Post-Newsweek decision itself, the Court rejected arguments that trial judges should have unfettered discretion guided solely by their whims and instincts regarding the impact that cameras have on proceedings. This was done after an extensive study by the Court.

In reviewing the results of the surveys taken during the experimental period of Florida's cameras in the courtroom rules, the Court noted in Post-Newsweek that:

> 1) The ability of the juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all.
>
> 2) The ability of jurors to concentrate on testimony was perceived to be affected not al

[3] The Court did not hold that live testimony must be given in every cameras exclusion hearing. In appropriate cases, the exclusion issue may be determined upon affidavits. In the instant case, counsel offered neither witnesses or affidavits.

all.

3) Jurors perceived that the presence of electronic media made them feel just slightly more responsible for their actions.

4) Presence of electronic media made jurors feel slightly nervous or more attentive.

5) The distracting effect of electronic media was deemed almost not at all for jurors.

6) Jurors felt almost no urge or only a slight urge to see or hear themselves on the media.

7) Jurors felt that the presence of electronic media made the case more important to a slight degree.

8) Jurors perceived witness testimony as more important during the presence of electronic media.

9) There was no significant difference in juror's concern over being harmed as a result of their appearances on electronic media broadcast (including still photography) as opposed to their names appearing in the print media. In each instance the concern ranged on the scale between not at all and slightly.

10) Jurors were made slightly self-conscious, nervous and distracted, but also slightly more attentive.

370 So.2d at 768-69.

Such survey results obviously cannot be deemed conclusive, but the results at least indicate that if a

presumption about juror reaction to electronic media coverage is to be indulged, the presumption should be that jurors will not be substantially impacted by electronic media coverage. The survey results indicate that jurors will make as fair and objective a decision when the electronic media is present as when it is not. In order to overcome this presumption, a party seeking exclusion of coverage of a particular juror must come forward with proof that the presumption is incorrect. In any case a blanket request to ban coverage of all jurors is unwarranted. Maxwell v. State, 443 So.2d 967, 969-70 (Fla. 1983).

The Court articulated the precise standard above as a limitation on the exercise of discretion. Unless the facts before the Court meet that standard, the access of the electronic media may not be limited.

The rule has now worked for fourteen years and has been applied in all the most newsworthy and sensational trials of which Florida has had its full share. There is relatively little case law precisely because the rule works. There is no case known to counsel where any harm has been caused to any trial participant. The rule does, of course, preserve trial court discretion to act in unusual cases but only by following the rule.

In State v. Green, 395 So.2d 532 (Fla. 1981), the Court upheld a decision reversing the conviction of a defendant whose motion to exclude electronic media had been

denied without an evidentiary hearing. On remand, Judge Arthur Snyder listened to considerable testimony regarding the impact that electronic media would have on a particular trial participant. His opinion in State v. Green, 7 Med.L.Reptr. 1884 (Fla. 11th Cir. 1981), provides an excellent example of how the Post-Newsweek test should be applied. Judge Snyder weighed the testimony of three expert psychiatrists who opined that the defendant's oriental background had created a peculiar sensitivity to the presence of electronic media -- a sensitivity she did not have to the presence of the news media generally. Judge Snyder held the psychiatrists' testimony showed that the defendant's mental condition was "fragile at best" and that there was an "extreme likelihood" that the presence of the electronic media would cause her to become incompetent. Thus, the factual record supported Judge Snyder's determination that cameras would have a substantial effect upon the defendant qualitatively different from the effect that other types of media would have on the defendant and qualitatively different from the effect that cameras have on members of the public in general. Judge Snyder's order was not appealed.

Another order by Judge Snyder, Florida v. Garcia, 12 Med.L.Rep. 1750 (11th Cir. Dade County 1986) was in a very similar case to this one. A police officer was on trial (defended also by Roy Black) and Judge Snyder denied a defense motion to exclude the press and public, stated:

> Cameras may be excluded from portions of a criminal proceeding only on a finding that "such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media."
>
> . . .
>
> This Court has routinely heard prosecutions in which police officers were defendants. In no such case has the presence of the electronic media had a negative effect on the police officer's ability to conduct a defense, let alone a prejudicial effect of "constitutional dimension." . . .

12 Med.L Rep. at 1752.

The order of the respondent stands in sharp contrast to the Green decision. Judge Spencer did not require the presentation of any proof but rather based his order on his own intuition.[4]

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[4] Judge Spencer's order is very much like the order of Judge Ralph Person which was reviewed by the Third District in Case Number 83-303. The full text of the opinion handed down on February 10, 1983 is as follows:

> The emergency petition of Post-Newsweek Stations, Florida, Inc. to review the trial court's order which prohibits the media "from filming, photographing or sketching jurors either in or out of the courtroom during the course of the trial" is granted in part and denied in part. The petition is granted insofar as the order under review pertains to trial proceedings occurring after the jury has been selected and sworn. The petition is denied in respect to the voir dire and selection of the jury proceeding, during which the defendant shall be afforded the opportunity to make a proper evidentiary

The second aspect of the Post-Newsweek test which warrants emphasis is that it focuses on the effect of electronic media on each trial participant. The test does not allow the grouping or classification of individuals and therefore ensures that any order limiting electronic media coverage will not be overly broad.[5] If a trial judge has a factual basis for believing that a particular potential juror will be so sensitive to electronic media coverage that he or she will not render an objective and fair verdict, that

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> showing, now lacking, in support of his motion to prohibit such filming, photographing and sketching of jurors during the trial proceedings occurring after the jury has been selected and sworn. Should such a showing be made in respect to the jurors or any of the, the trial court may reinstate its order in respect to the trial in chief.

[5] In its Green decision, the Court provided, however, these examples of types of participants who generally should be excluded from electronic media coverage:

(1) Witnesses who are undercover officers or confidential informants;
(2) Witnesses who, because of their prior testimony, have new identities;
(3) Witnesses who are presently incarcerated and have real fears of reprisal upon return to prison environment;
(4) Rape victims;
(5) Witnesses in child custody proceedings.

The Court noted in Green that the list is not intended to be all-inclusive, but a clear pattern can be ascertained from these examples: cameras may be excluded when their presence represents a peculiar threat to that individual of harm from potential viewers of the telecast.

individual should be stricken from the venire[6] or a special order entered restricting coverage of that "particular," "individual" juror. If a juror's sensitivity to electronic media is discovered after the juror is impaneled, then an order limiting coverage of that particular juror may be entered. No basis exists for treating all jurors as single-minded trial participants with special problems which relate to electronic coverage and nothing in this record supports the trial judge's order.

C. The Trial Court's Order Disserves the Public Interest in a Wholly Open Criminal Justice System.

Electronic media coverage of a trial serves a wide variety of societal values such as inspiring public confidence in the judicial system, educating the public, and improving the performance of trial participants. None of those values may be as well served, however, when that coverage omits the jury. At the heart of the criminal justice system is the right to be tried by a jury of one's peers. Historically members of the community have been called upon to sit in open court in judgment of the actions of their neighbors even in small towns where they are known to everyone. Those serving as jurors perhaps are the most critical of all trial

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[6] It is hard to imagine the juror whose sensitivity to television coverage meets the two "qualitatively" different standards of the rule and yet is able to sit in a case which is open to the public and other media.

participants. Elimination from all electronic media coverage of the jury leaves the public with an inaccurate and perhaps confusing view of a trial.

General policy considerations for open trials are even more significant here where the very crux of public interest in this case has been the composition of the jury. By his order, Judge Spencer eliminates electronic coverage of the jurors and of all other trial participants during the jury selection process. Citizens will not be able to observe the judge or the lawyers during one of the most important stages of this case unless they go to Orlando and attend the trial. The veiling of a jury to those observing a trial through electronic media may cause wonder whether the defendant is being tried by a jury of peers or by a group that is prejudiced in favor or one side or the other. Public confidence in the jury selection process is certainly not promoted by the sudden departure from a rule of openness which has so long served the Florida courts and public.

An audience kept from glancing even perfunctorily at the composition of the jury may believe that race or some other factor played a large role in jury selection and that the resulting jury is biased in some way.

The intelligence of the public is also underestimated by Judge Spencer's order. It assumes that the public cannot evaluate information about the trial in a rational manner and that angry citizens will attempt to

retaliate against jurors who decide a case contrary to the public's notion of justice. There is no basis for such a conclusion.[7]

Assuming a member of the public were so involved with the outcome of a trial that he would want to seek retribution against jurors who decided contrary to the desired outcome it is doubtful that preventing this hypothetical outraged citizen from seeing to photograph likenesses of jurors on television and in newspapers will be an effective deterrent. The public nature of the trial makes it possible for every citizen to go to the courtroom to see what each juror looks like and other media are free to describe the jurors and even sketch the jurors.

Should danger to a jury be shown to exist, there are less restrictive means available to prevent harm to the jurors. If a community feels so strongly about a case that the judge perceives there may be danger to any of the trial participants, including the jurors, the judge may grant a motion for a change of venue.

Judge Spencer did not articulate the reasons for his order, beyond the statement that the reproduction of the jury's image might bring unnecessary pressure to bear on the

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[7] The United States Supreme Court has been critical of all paternalistic government action which assumes that the public will not be able to evaluate information intelligently. See e.g., Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

jurors. Pressure of public awareness increases juror responsibility. Jurors should feel accountable for their actions in much the same manner as all other trial participants. Our system of justice is not tailored toward irresponsibility, indeed, the opposite is true. The notion that jurors are aware of some public scrutiny may make them more cognizant of their responsibilities.

The study performed by the Court in Petition of Post-Newsweek, supra, affirmatively showed that the jurors do not feel threatened by electronic media, are not distracted by electronic media, and increase their attentiveness in the presence of electronic media.

Finally, the privacy rights of jurors are insufficient to override the interest of the public in viewing all parts of a trial. The Post-Newsweek Court noted that "a judicial proceeding, subject to certain limited exceptions, is a public event which by its very nature denies certain aspects of privacy." 370 So.2d at 779.

D. The Suggested Protocol Is a Common Sense Approach.

The protocol suggested by Michael Vasilinda, the Petitioner, is a common sense approach to the coverage of the voir dire. It proposed that the voir dire be covered by cameras but the prospective jurors' pictures not be shown until at least there was the opportunity for the particularized inquiry of individual jurors contemplated by

the Post-Newsweek decision.[8]

The Court is urged to review and approve the suggested protocol as the rule to govern the voir dire process in this case, allowing the question of access to be determined by the facts, if any, brought out in voir dire. If a problem with camera coverage is developed which meets the tests of Post-Newsweek, then at that time the trial judge may entertain a motion based on that evidence to exclude cameras from covering the jurors who have the problem. On a finding of substantial effect on a particular juror and the satisfaction of the two qualitatively different tests, camera access may be denied.

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[8] A better way of approaching this would be to craft questions relating to the particularized inquiry for juror questionnaires where these are being used.

CONCLUSION

The decision of the Fifth District and the underlying order of the trial court should be quashed and Pre-Trial Order I should be vacated. This Court has previously determined the electronic media may show jurors and the trial court failed to adhere to the rule which limits discretion to exclude electronic media. The order disserves the public interest in an open criminal justice system and the order violates the First Amendment by proscribing media reporting about the jurors who will decide this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief and appendix were hand-delivered to Roy Black, Black & Furci, 201 South Biscayne Boulevard, Suite 1300, Miami, Florida 33131 and John Hogan, Assistant State Attorney's Office, 1351 N.W. 12th Street, Suite 600, Miami, Florida 33125 this 10th day of May, 1993.

Talbot D'Alemberte

Talbot D'Alemberte