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.

---

# Michael Vasilinda's Reply Brief

---

Talbot D'Alemberte
Donald M. Middlebrooks
Thomas R. Julin
Edward M. Mullins
Florida Bar Nos. 017529, 153975, 325376 & 863920

STEEL HECTOR & DAVIS
Attorneys for Michael Vasilinda
200 S. Biscayne Boulevard, 40th Floor
Miami, Florida 33131-2398
(305) 577-2844

## TABLE OF CONTENTS

## TABLE OF CITATIONS

### CASES



### STATUTES AND REGULATIONS

## INTRODUCTION/SUMMARY OF ARGUMENT

The procedural morass of this litigation has overshadowed the real issues raised by the petitioner in this Court, and indeed, in each of the various courts he has been forced to argue the procedural aspects of his case rather than than the vastly more important substance. The response briefs filed by the State and the defendant/respondent (Lozano) do nothing to solve this problem; both address the jurisdictional question, but only the defendant's brief touches on the merits. The State hovers above the fray, indifferent to whether there should have been camera coverage of the full trial. But, that is the issue that should be addressed by this Court.

The petitioner believes that the jurisdictional issue is resolved easily. He proposes a simple rule to be adopted by this Court: when an order is styled in a given circuit, the appeal from that order lies in the district court having jurisdiction over that circuit. The State's and Lozano's arguments are interesting, but, in the end, largely academic.

The true issue on this appeal was set forth in the petitioner's initial brief: whether a Florida state trial judge may exclude electronic media coverage of a jury and the voir dire in a criminal trial based upon his own personal views and a hearsay news account regarding the alleged effects on the jurors of another criminal trial tried in another state. The answer to that question is a resounding "no" because it is completely contrary to the precedent of this Court established fourteen years ago. Pursuant to that law, the trial judge in this case

was required to make a finding that electronic media coverage of each trial participant -- here the members of the jury and the venirepersons -- would be "qualitatively different from the effect on members of the public in general and such effect [would] be qualitatively different from coverage by other types of media." In re Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 779 (Fla. 1979). As the petitioner explained in his initial brief, the trial judge below did not make any such findings, and, indeed, it would have been impossible for him to do so at the time he entered the order, given the fact that the jury venire had not even been selected and thus the requisite individualized showings could not possibly have been made.

In the face of these arguments, Lozano vainly attempts to fit the trial judge's decision into the Post-Newsweek framework, but fails. He fills many pages detailing how the trial judge took judicial notice of court records and newspaper articles, without explaining how, even if such procedures could properly be applied here (which they could not) and would support the judge's decision (which they do not), these materials could have led the judge to conclude that electronic media coverage of the jurors and venirepersons not yet selected would be qualitatively different from the effect on the public in general.

For its part, the State recognizes it has no interest in the merits of this case, but nonetheless posits that this issue is moot. The issue is not moot because of its great public importance and because it is capable of repetition yet evades review. This is evidenced by the record in is very case, in which these proceedings were bounced back and forth between

two District Court of Appeals and this Court while the underlying trial of this case was imminent. The petitioner lost his chance to have a decision on the merits before the trial began in this case in three appellate courts. He should be given the opportunity to have this Court decide whether future rulings by trial courts in this state under similar circumstances can withstand scrutiny under the dictates of this Court's precedent.

## ARGUMENT

### I.

### THE FORUM FOR APPEAL SHOULD BE THE FORUM IN WHICH THE ORDER APPEALED FROM WAS ENTERED

In a scholarly and labored way, the State reveals its fascination with the procedural aspects of this case. Its brief details the procedural conundrum in which the petitioner found himself. The petitioner, faced with an order entered in the Eleventh Circuit by an Eleventh Circuit Judge who held the hearing in the Eleventh Circuit and styled the order as an Eleventh Circuit Order, elected to appeal to the appellate court which has jurisdiction over the Eleventh Circuit, the Third District Court of Appeal, which as the State's brief takes pains to demonstrate, has handed down extensive case law dictating that that is exactly where the appeal should have been filed.

Inexplicably, the Third District ignored its own authority and transferred the case to the Fifth District. That court returned the favor by ignoring precedents from the other

districts and held that it, too, did not have jurisdiction.[1/]

The petitioner urges the Court to carefully read the brief of the State. It does provide an honest and lucid account of the decisions of the Florida appellate courts and provides insights into the reasons the petitioner sought relief in the Third District. The State's brief fails, though, by not providing a sensible rule to solve the problem.

The petitioner proposes a simple, easily applied rule. Although the petitioner hopes never again to enter this

---

[1/] The Fifth District, noting that the imminent trial of Lozano required its immediate ruling should this Court determine that it had jurisdiction over the appeal, denied the petitioner's relief on the basis that the rule-mandated emergency appeal was not in order since it did not include the court reporter's transcript of the trial court's proceedings and one of the orders relevant to the appeal. That portion of the Fifth District opinion is grounds in of itself to reverse its decision should this Court decide that that district was the proper forum for the appeal.

First, the Fifth District's decision is completely inapposite to Florida Appellate Rule 9.200(f)(2), which provides that "[n]o proceeding shall be determined because of an incomplete record, until an opportunity to supplement the record has been given." Incredibly, the Fifth District in this case recognized that its ruling contradicted this rule, but decided that the petitioner's seeking emergency relief precluded waiting for the record to be supplemented. The Fifth District effectively created a "Catch-22": orders excluding the press must be filed as soon as practicable, see Fla. R. App. P. 9.100(d)(1), but appealing too soon will create an incomplete and thus unreviewable record. The Fifth District's decision is unsupportable and nonsensical.

Moreover, it was entirely unnecessary. The court had before it the trial court's original sua sponte order showing that no factual findings were made regarding the effect of electronic media on the jurors and opposing counsel did not contest the petitioner's representations of the record. The issue was ripe for review in that court. And, even if it were not ripe for review in that court, the full record is before this court, and the petitioner is entitled to have this Court review this issue. See Rupp v. Jackson, 238 So. 2d 86, 89 (Fla. 1970).

procedural House of Mirrors and admits, candidly, that he has no stake in this rule, common sense dictates that petitioner's decision to file in the Third District was the correct one. In other words, when a case has been ordered transferred to Circuit Y but is argued before a judge of Circuit X, in a hearing set in Circuit X, the parties appear in Circuit X, the court reporter types the transcript styled in Circuit X, the order is entered by a judge sitting in Circuit X, and the order is styled in Circuit X, the appeal should lie in the appellate court having jurisdiction over Circuit X.

Indeed, the petitioner suggests a simpler rule that would employ but one of the "contacts" noted above: when the order is styled in Circuit X, the appeal lies to the appellate court having jurisdiction over Circuit X.

The petitioner proposes this rule in interests of an expeditious process for reviewing orders excluding the media because this issue is likely to reoccur. See infra Point II(B).

## II.

## THE TRIAL COURT'S ORDER LIMITING ELECTRONIC MEDIA COVERAGE OF JURORS DIRECTLY CONTRADICTED THIS COURT'S PRECEDENT AND IS REVERSIBLE

Neither the State nor Lozano have brought forth any principled arguments that would show how the trial judge's decision excluding electronic media coverage of the jurors even comes close to complying with this Court's decision in Post-Newsweek, 370 So. 2d at 764. Lozano tries to fit the trial's court decision into the Post-Newsweek framework; he fails. For its part, the State concedes that it has no interest

in this matter, (State Brief at 30), but nonetheless argues that the issue is moot. It is incorrect. Their points will be addressed in turn.

### A. The Trial Judge Did Not Make Any Evidentiary Findings that Electronic Media Coverage Would Be Qualitatively Different than Other Media And That It Would Have a Qualitatively Different Effect on Each Juror or Venireperson As Compared to the General Public

Contrary to Lozano's assertions, Post-Newsweek did more than reverse the prior rule prohibiting electronic media coverage. (Lozano Brief at 6). The Post-Newsweek decision also put in place a new rule, a rule that Lozano neither quotes nor addresses. That rule is:

> 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.

Thus, contrary to Lozano's arguments, Post-Newsweek did not vest trial courts with full discretion to eliminate electronic coverage, (Lozano Brief at 7), but rather carefully circumscribed the trial judge's discretion by promulgating the above rule. Because the trial court below made no attempt to follow that test, its decision must be overruled.

And, having failed to acknowledged this rule, it is not entirely strange that Lozano fails to show how the trial judge's

ruling even remotely complied with this rule. In reality, the trial judge totally disregard for the rule. There was no record and no individualized findings. Indeed, there could not have been any such findings because the Court entered its orders and ruled on the petitioner's motion before the venire was identified, brought to court, and questioned.

In the face of the Post-Newsweek rule, Lozano oddly cites this Court's decision in State v. Palm Beach Newspapers, Inc., 395 So. 2d 544 (Fla. 1981), as supporting his position. The holding in Palm Beach Newspapers, however, was that a trial judge may not exclude electronic media without complying with the Post-Newsweek rule. Id. at 549. Indeed, the Palm Beach Newspapers court found that, while trial judges have discretion in this area, that discretion is not unbridled: "[W]e do not give trial judges carte blanche authority. Trial judges can, obviously, abuse their discretion in a variety of ways, such as foreclosing a meaningful presentation of evidence, defeating adequate notice requirements, or acting wholly without record support which is readily available." Id. at 549 (emphasis added).

Of course, the latter -- acting without record support -- is exactly what happened here. Judge Spencer made no individualized findings because the "individual participants," the members of the jury and the venire, were not even identified at the time that he ruled.

Lozano, not entirely insensitive to the lack of record support for Judge Spencer's ruling, next creatively argues that the court took "judicial notice" of the newspaper account of the

Rodney King trial that is attached to his order and the judicial records of the prior trial in this case. (Lozano Brief at 9-11).

First, this is revisionist history. The record nowhere indicates that Judge Spencer took judicial notice of any fact here.

Second, a trial court obviously cannot take judicial notice of any fact at any time for any purpose in any manner. The Florida Rules of Evidence carefully detail which facts can be judicially noticed, how that process must be undertaken, and what notice must be provided.[2/]

More importantly, it is entirely unclear how a newspaper article regarding a case trying other defendants in another state and the judicial records in the prior trial of this defendant supposedly showing that the jurors feared reprisals if they had found the defendant guilty satisfies the particularized evidence requirement of Post-Newsweek. These materials could not, in any manner, show that each juror or venireperson in this trial of this defendant would be effected in a qualitatively different manner than the effect the other media would have on each of those persons and that effect would

---

2/ Just as an example, even assuming the trial court took judicial notice of the newspaper article in the Rodney King trial to support its closure ruling, it did so improperly. See § 90.204(3), Fla. Stat. (1991) (before court uses "documentary sources of information not received in open court," court must "afford each party reasonable opportunity to challenge such information, before judicial notice of the matter is taken"); State v. Brown, 577 So. 2d 704, 705 (Fla. 4th DCA 1991) (trial court violated § 90.204 when it considered newspaper articles before judge gave the parties the opportunity to challenge the matter contained therein).

be qualitatively different on each of those persons compared to the public in general.

Indeed, the notion is completely inconsistent with the Post-Newsweek framework. While, it is true that certain "facts" (prison violence, for example) can be judicially noticed under certain circumstances in the Post-Newsweek analysis, see Palm Beach Newspapers, 395 So. 2d at 547, those judicially noticed "facts" must be raised in conjunction with evidence that the particular trial participant at issue meets the two "qualitatively different" Post-Newsweek tests. In Palm Beach Newspapers itself the state provided affidavits of the participants in question -- two prisoners testifying against the defendant -- who feared reprisals if they testified. This Court found this evidence insufficient under the facts of the case: the affidavits had not been afforded to the media beforehand; no evidence was presented as to how the electronic media coverage of the prisoners' testimonies would be qualitatively different from the print media despite having an opportunity to do so; and no evidentiary hearing had been conducted, although the fears of the witnesses had been made an issue. Id. at 548-50.

Contrast that evidence -- affidavits of the trial participants expressing fear -- with the complete lack of any evidence on how the electronic media coverage would affect the unidentified jurors and venirepersons in this case. In fact, Lozano's analysis has leaped over the primary issue: the court cannot even reach the issue of whether the evidence regarding the effect of the electronic media coverage on the given trial participants is sufficient to satisfy Post-Newsweek and Palm

Beach Newspapers until the trial court determines exactly who the trial participants are.

### B. The Issue of the Propriety of the Trial Court's Ruling On the Merits is Exempt from the Mootness Doctrine Due to the Great Public Importance of the Issue and its Likelihood of Reoccurrence

The State's suggestion that the resolution of this main issue is moot requires treatment by the petitioner. The petitioner initially notes that the State's suggestion is gratuitous, given that the State concedes that it has no interest in the resolution of this issue and therefore takes no position on it, (State's Brief, at 30), and that Lozano and the petitioner have fully briefed the issue.

Moreover, the State's argument is entirely disingenuous. If the issue on the merits is moot, why is not the procedural issue -- the issue that the State finds so fascinating -- also moot? It is true that Lozano has been tried and acquitted. But, there is no principled way that this Court could find that the procedural issue of which district court of appeal has jurisdiction over appeals rendered by criminal courts after the case have been transferred to another district is any more "live" in this case than the primary issue on the merits of whether the trial court followed this Court's precedent regarding the exclusion of cameras in courtrooms.

The State readily recognizes that exceptions exist to the mootness doctrine. This Court has found that "mootness will not destroy this Court's jurisdiction when the questions raised

are of great public importance or are likely to recur." (State Brief at 30) (citing In re T.W., 551 So. 2d 1186, 1189 (Fla. 1989); Holly v. Auld, 450 So. 2d 217, 218 (Fla. 1984)). In cases involving the media, this Court frequently has invoked these exceptions to the mootness doctrine in order to have cases involving great public importance resolved. See, e.g., Tribune Co. v. Cannella, 458 So. 2d 1075, 1076 (Fla. 1984) (issue of whether nonexempt public records could be delayed automatically not moot even though records were released because problem was "'capable of repetition yet evading review'"), appeal dismissed sub nom. Deperte v. Tribune Co., 471 U.S. 1096 (1985); State ex. rel. Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 911 (Fla. 1976) (press' challenge to trial court's order not allowing news media to publish certain information regarding securities fraud case not moot even though the underlying trial had concluded because controversy "was capable of repetition, yet evading review.").[3/]

---

[3/] See also Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487, 491 (Fla. 2d DCA 1990) (issue of whether draft leases for stadium were public records, although moot, was "capable of repetition while evading review"); Miami Herald Publishing Co. v. Lewis, 452 So. 2d 144, 145 (Fla. 4th DCA 1984) (although in-camera hearing already had been conducted, newspaper's motion for a "good cause" hearing on the closure was not moot); Palm Beach Newspapers, Inc. v. Cook, 434 So. 2d 355, 356 (Fla. 4th DCA 1983) (while hearing in which press access was denied already had been held, matters in dispute were not moot because they were "'capable of repetition yet evading review'"); Times Publishing Co. v. Burke, 375 So. 2d 297, 298 (Fla. 2d DCA 1979) (issue of propriety of order compelling newsreporter to testify was not moot, even though the reporter already had testified, when "the matters involved are of substantial public interest, and [the court's] opinion [would] provide guidance in the event of similar occurrences in the future.").

Indeed, although unstated, this Court apparently relied upon these exemptions to the mootness doctrine in Palm Beach Newspapers because, while at the same time observing that the underlying trial of the defendant had concluded, the Court rendered its decision on the merits. 395 So. 2d at 550.

This case falls within both of those exceptions to the mootness doctrine. The issue of whether a trial judge may sua sponte exclude camera coverage in a highly publicized criminal trial based solely upon news reports and his or her own intuition in direct contravention of this Court's precedent is an issue of great public importance. As explained in the petitioner's initial brief, electronic media coverage serves a variety of societal interests, including inspiring public confidence in the judicial system. Electronic media coverage is an extension of the historical right of a defendant to be tried by one's peers in an open court and of the public concomitant right to be present at the trial. These are important interests, this is an important issue.

This issue also is "capable of repetition yet evading review." With tongue planted firmly in cheek, the State argues that it is unlikely that a criminal trial of this magnitude and importance ever will find itself in a Florida courtroom. Controversial criminal trials obviously are occurring all over Florida and the nation. Indeed, the petitioner must note that it is quite ironical that the State would make such a bold claim, given the trial judge's reliance, albeit misplaced, on the experiences of the Rodney King jurors in support of his

order. The Court can be assured that many "William Lozanos" will be tried in Florida courts in the future, just as Florida courts have been forums for many highly publicized cases, including the William Kennedy Smith rape case, the Pulitzer and Firestone divorce proceedings, and the McDuffie criminal trial.

Finally, the procedural record in this case is the best testament to the fact that the these issues have been evading review. The "ping-pong" treatment of this case by the appellate courts and the Fifth District's decision on the merits has created troublesome precedent that will, as in Holly, "only cause more problems in the future." 450 So. 2d at 218 n.1.

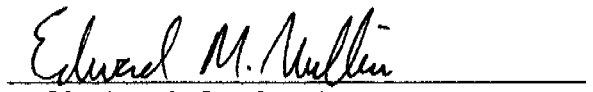
These problems are inherent in the context in which these issues arise. These issues always arise on the eve of trial, and thus the media is forced to seek immediate relief in the district court -- assuming it can determine the correct court in which it can file its appeal -- and then ask this Court for its expedited review of the district court's decision, all within a time period that frequently is only a few days in length.

Indeed, this Court's decision in this case not to grant an expedited review guaranteed that the issue would be moot before a decision by this Court could be rendered. The petitioner in no way suggests that that decision was erroneous, however. It allowed the parties to brief fully all the relevant issues and thus, in turn, allowed this Court the opportunity to render a reasoned decision, a decision unencumbered by the pressure of an imminent criminal trial. But, these issues having been so fully briefed, the parties are entitled to have this Court rule upon them.

## CONCLUSION

Judge Spencer bypassed several levels of analysis developed by this Court over a number of years in its Post-Newsweek framework by using his own intuition and the contents of a New York Times article. His decision and that of the Fifth District should be quashed and Pre-Trial Order I should be vacated. These courts' decisions contravene this Court's precedent regarding the standards that must be met before a court can exclude electronic media. The decisions disserve the public interest in an open criminal justice system, are of great public interest, and are likely to reoccur in the future. The petitioner deserves a decision on the merits.

Respectfully submitted,



Talbot D'Alemberte
Donald M. Middlebrooks
Thomas R. Julin
Edward M. Mullins
Fla. Bar No. 017529, 153975,
325276 & 863920

STEEL HECTOR & DAVIS
Attorneys for Mike Vasilinda
200 S. Biscayne Boulevard
Miami, Florida 33131-2398

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed to Roy Black, Black & Furci, 201 South Biscayne Boulevard, Suite 1300, Miami, Florida 33131; John Hogan, Assistant State Attorney's Office, 1351 N.W. 12th Street, Suite 600, Miami, Florida 33125; and Penny Brill, State Attorney's Office, Legal Division, 1350 N.W. 12th Avenue, Miami, Florida, 33136-2102, on June 17, 1993.

Edward M. Mullins

EMM/1504