IN THE SUPREME COURT OF FLORIDA

NATHANIEL H. THOMAS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

Supreme Court Case No. 80,624

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an information filed on March 5, 1991 charging Petitioner with Possession of a firearm by a convicted felon in violation of Section 790.23, Florida Statutes. (R 53)

Petitioner filed a motion to suppress the evidence illegally seized from his home because the officers violated the Florida's knock and announce statute when executing the warrant. (R 28-31) A hearing was held on the motion to suppress on July 22, 1991 before the Honorable Belvin Perry, Jr., Circuit Court Judge of the Ninth Judicial Circuit in and for Osceola County, Florida. (R 1-27) The trial court granted the motion to suppress. (R 40)

The state appealed to the Fifth District Court of Appeal, arguing that the trial court erred in granting Petitioner's motion to suppress the evidence of the firearm. The state argued that according to the Fifth District Court of Appeal's

decision in State v. Bell, 564 So.2d 1235 (Fla. 5th DCA 1990), that where there are small amounts of contraband readily disposable in a residential sink or toilet, that the no knock raid was permissible. Petitioner asked the Fifth District Court of Appeal to reconsider its opinion in Bell based upon a direct conflict with the Second District Court of Appeal's case of State v. Bamber, 592 So.2d 1129 (Fla. 2d DCA 1991).

On September 11, 1992, the Fifth District Court of Appeal reversed the trial court's order granting the motion to suppress while acknowledging conflict with the Second District Court of Appeal's case of State v. Bamber, 592 So.2d 1129 (Fla. 2d DCA 1991).

Notice to Invoke this Honorable Court's Discretionary Jurisdiction was filed in the Fifth District Court of Appeal on October 12, 1992.

SUMMARY OF THE ARGUMENT

Petitioner respectfully requests that this Honorable Court accept jurisdiction, because the opinion of District Court of Appeal, Fifth District, in the instant case expressly and directly conflicts with the Second District Court of Appeal's case in State v. Bamber, 592 So.2d 1129 (Fla. 2d DCA 1991), as acknowledged in the opinion.

ISSUE

> THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN STATE v. BAMBER, 592 So.2d 1129 (Fla. 2d DCA 1991)

This Honorable Court should accept jurisdiction in the instant case, because the decision expressly and directly conflicts with State v. Bamber, 592 So.2d 1129 (Fla. 2d DCA 1991). This Court has jurisdiction to review this matter pursuant to Rule 9.030(a)(2)(A)(6), Florida Rules of Appellate Procedure.

In State v. Bamber, 592 So.2d 1129 (Fla. 2d DCA 1991), the Second District Court of Appeal recognized express conflict with State v. Bell, 564 So.2d 1235 (Fla. 5th DCA 1990) and Armenteros v. State, 554 So.2d 574 (Fla. 3rd DCA 1989). In Bamber an informant told the deputy that the defendant had retrieved cocaine from an area near a bathroom and that he had a Rottweiler dog in the residence. The Second District Court of Appeal refused to accept the rule as announced in Bell. The Court stated that:

> Addressing the merits of the rule announced in Armenteros and Bell, we are not convinced that the existence of normal plumbing in one's home dispenses with the need to knock and announce during the execution of a warrant to search for small quantities of cocaine. Plumbing is required in virtually any home that complies with applicable building codes. Many warrants involve searches for small items which in theory could be flushed down a toilet. If flushable items and plumbing are allowed to create an exigent set of circumstances, then the exception will begin to

> overshadow the rule.
>
> In this case, the police did not provide a case-specific explanation that reasonably caused them to believe that Mr. Bamber's household was likely to destroy evidence. There clearly are facts and circumstances under which the police can reasonably decide, at the time they serve a warrant, that a household presented an unusual risk concerning the destruction of evidence. Such circumstances are not presented in this case.

Id. at 56.

In the instant case, Officer Barnes testified that two purchases of crack cocaine on two different dates were made by confidential informants from Petitioner's residence, each involving a small amount of crack cocaine. He further testified that the house had normal plumbing. A warrant was issued approximately an hour and a half after the second controlled buy. The officers, without knocking forced the door open of Petitioner's home with a battering ram. Petitioner was not home at this time nor were there any drugs found. However, the officers did locate a firearm. The trial court granted the motion to suppress. However, the Fifth District Court of Appeal reversed the trial court's order holding that "Bell is still the law of this District and only requires that the officer believe that because of the small amount of contraband and the facilities available to the suspect, destruction is likely if immediate execution of the warrant is not effected" Id. at 1231.

Because the District Court of Appeal's decision in this case, expressly and directly conflicts with a decision of another

district court of appeal on the same point of law, this Honorable Court has jurisdiction to review this cause.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and review the decision of the Fifth District Court of Appeal herein.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Nathaniel H. Thomas, 606 Person Street, Kisimmee, FL 34741, this 22nd day of October, 1992.

M.A. LUCAS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

NATHANIEL H. THOMAS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	Supreme Court Case No. 80,624

A P P E N D I X

State v. Thomas, 17 FLW D 2130 (Fla. 5th DCA September 11, 1992)

> Any actual, express agreement between two or more jurors to disregard their oaths and instructions constitutes neither subjective impression nor opinion, but an overt act. It thus is subject to judicial inquiry even though that inquiry may not be expanded to ask what impressions or opinions motivated jurors to enter into the agreement in the first instance.

579 So. 2d at 100.

In *Orange County v. Piper*, 585 So. 2d 1182 (Fla. 5th DCA 1991), a juror stated that the verdict was a compromise and that the deliberations involved discussions of matters not introduced into evidence, such as insurance. The record revealed no allegation that an actual, express agreement was reached by the jurors to disregard their oaths and ignore the law or instructions. This court found that, even if true, the facts alleged failed to warrant a postverdict interview because the juror's statements were nothing more than that juror's opinion about the reasons the jury arrived at its verdict.

An overt act justifying juror interview was present in *Snook v. Firestone Tire & Rubber Company*, 485 So. 2d 496 (Fla. 5th DCA 1986), when it was alleged that a juror had consulted with outside experts regarding the case in deliberate disregard of the court's instructions and had reported her finding to the remainder of the jury. In *Preast v. Amica Mutual Insurance Company*, 483 So. 2d 83 (Fla. 2d DCA), *review denied*, 492 So. 2d 1334 (Fla. 1986), the evidence indicated that the jurors actually agreed to disregard their oath and instructions when they determined that there was no permanent injury proven, but nevertheless awarded damages, determining the amount by lot and deliberately agreeing to circumvent the law. The court held: "Such deliberate, blatant disregard of the court's instructions on the applicable law cannot be sanctioned, neither can it be seen as a matter which inheres in the verdict itself." *Preast*, 483 So. 2d at 86.

In the instant case, Patel's allegation that the jury decided to rule against Ashoka because he was a rich doctor and did not need the money clearly fits within the category of prohibited inquiry into the emotions and mental processes of the jurors, matters which essentially inhere within the jury verdict. These matters are similar to those in *Baptist Hospital of Miami* involving jury sympathy for an injured child where the supreme court determined that interviews were not permissible. Further, Patel's affidavit falls far short of alleging that the jury expressly agreed to ignore the evidence in the case and refused to look at documentary evidence. Also, the record is not consistent with these allegations. During the seven hours of deliberation, the jury asked questions regarding the evidence and answered the four pages of questions included in the verdict form, including making a finding that Rabun delayed the project and the number of days the project was delayed, and calculating the dollars awarded to Ashoka for the delay.

We grant the petition for a writ of certiorari and quash the circuit court's Order Granting Motion to Interview Juror.

Certiorari GRANTED; order QUASHED. (SHARP, W., and GRIFFIN, JJ., concur.)

* * *

Criminal law—Sentencing—Community control revocation—Imposition of two years additional community control time exceeded maximum period available for one offense

ELBERT BERNARD SIPP, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-2096. Opinion filed September 11, 1992. Appeal from the Circuit Court for Volusia County, Gayle S. Graziano, Judge. James B. Gibson, Public Defender, and James T. Cook, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James N. Charles, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING
[Original Opinion at 17 F.L.W. D524]

(PER CURIAM.) Appellee's Motion for Rehearing is hereby granted. Upon reconsideration of the appellee's brief, we find that our opinion remains unchanged and therefore reissue our original opinion.

In reviewing this *Anders* appeal, we have observed an error in the sentence that requires correction on remand. The defendant was initially placed on two years of community control. After violation of community control three months later, the defendant was again placed on two years of community control and, as a special condition of community control, was required to serve 240 days in county jail.[1] Two years is the maximum period of community control available for any one offense. § 948.01(5), Fla. Stat. (1989). Because the total term of community control imposed exceeds two years, the sentence is illegal.

SENTENCE VACATED; REMANDED for resentencing. (COWART, HARRIS and GRIFFIN, JJ., concur.)

[1]Credit was given for forty-five days time served.

* * *

Criminal law—Search and seizure—Warrant—Execution—Failure to comply with Knock and Announce statute justified by officer's belief that destruction of evidence was likely because cocaine for which officers were searching was in small-sized rocks which could easily be disposed of by being eaten, flushed, crushed or hidden; utility records check had revealed that house had normal plumbing facilities which could be used for destruction of small quantities of contraband; and officers' experience was that dealers in small quantities of contraband generally tried to conceal or discard contraband when confronted by law enforcement officers

STATE OF FLORIDA, Appellant, v. NATHANIEL HIRUM THOMAS, Appellee. 5th District. Case No. 91-1756. Opinion filed September 11, 1992. Appeal from the Circuit Court for Osceola County, Belvin Perry, Jr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Nancy Ryan, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellee.

(HARRIS, J.) Nathaniel H. Thomas was a convicted felon suspected of selling small quantities of cocaine from his home. After conducting a controlled buy, the officers obtained a search warrant on February 4, 1991. Four days later a second controlled buy was effected at 7:56 p.m. The warrant was executed one hour and thirty four minutes after the second purchase.

The officers did not comply with the knock and announce rule. When they entered, Thomas was not there. The search revealed no drugs but a firearm was discovered. Thomas was arrested for possession of a firearm by a convicted felon.[1]

Thomas moved to suppress, and the court granted suppression, solely on the basis that the officers had failed to knock and announce. We reverse.

Officer Barnes testified that the cocaine purchased from Thomas had been small size rock cocaine. The officer had reason to believe that additional cocaine was in the house. The size of the rocks involved in this case could easily be disposed of by being "eaten, flushed, crushed or hidden." The utility records were checked and the house was determined to have normal plumbing facilities.

The officer further testified that normally drug dealers with small amounts of drugs will try to conceal or discard such drugs. The officers believed that Thomas, dealing in small amounts of cocaine, would follow that "general normal procedure."

The trial judge suppressed the evidence for two reasons. First, the knock and announce rule should be enforced because the search warrant was executed more than 30 minutes after the last controlled buy. This fact is totally irrelevant as to whether the destruction of evidence exception is applicable to the knock and announce rule.

The trial court gave as the second reason: "Officer Barnes did testify that he had no articulable facts in this particular case that would lead him to believe that the destruction of evidence would occur, except that in all cases of user-type quantities, that is a

possibility."

The trial judge apparently relied on the Second District opinion in *State v. Bamber*, 592 So.2d 1129 (Fla. 2d DCA 1991) which disagreed with our *Bell* decision.[2] The *Bamber* court held:

> Addressing the merits of the rule announced in *Armenteros* and *Bell*, we are not convinced that the existence of normal plumbing in one's home dispenses with the need to knock and announce during the execution of a warrant to search for small quantities of cocaine. Plumbing is required in virtually any home that complies with applicable building codes. Many warrants involve searches for small items that could in theory be flushed down a toilet. If flushable items and plumbing are allowed to create an exigent set of circumstances, then the exception will begin to overshadow the rule.
>
> In this case, the police did not provide a case-specific explanation that reasonably caused them to believe that Mr. Bamber's household was likely to destroy evidence. There clearly are facts and circumstances under which the police can reasonably decide, at the time they serve a warrant, that a household presented an unusual risk concerning the destruction of evidence. Such circumstances are not presented in this case.

Bamber at 56.

Neither *Bell*, *Armenteros v. State*, 554 So.2d 574 (Fla. 3d DCA 1989), nor *Berryman v. State*, 368 So.2d 893 (Fla. 4th DCA 1979) require "that a household present an unusual risk concerning the destruction of evidence" in order to justify the exception.[3]

If the concern about the destruction of evidence is a valid exception to the knock and announce rule, it must be interpreted reasonably or, rather than the exception overshadowing the rule, the exception will be rendered meaningless. The Second District has not told us what "facts and circumstances" would justify a belief that the "household present[s] an unusual risk." It appears that drains and fireplaces would be insufficient. Certainly if the officers viewed the destruction of the evidence from outside, or heard the suspects planning or carrying out the destruction, the *Bamber* test might be met. That is of little comfort, of course, if the small quantities of contraband have been destroyed during this delay. The practical effect of *Bamber* will render the execution of search warrants where only a small amount of contraband is involved totally ineffective.

Bell is still the law of this district and only requires that the officers believe that because of the small amount of contraband and the facilities available to the suspect, destruction is likely if immediate execution of the warrant is not effected.

REVERSED and REMANDED. (SHARP, W., J., concurs. GOSHORN, C.J., dissents with opinion.)

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[1]The record does not indicate how or where the firearm was discovered.

[2]State v. Bell, 564 So.2d 1235 (Fla. 5th DCA 1990).

[3]Actually Berryman requires that "the police must have some facts pertaining to the case which would reasonably cause such apprehension." (Berryman at 895). The requirement in Berryman was satisfied because "the police had viewed the small amount of narcotics and other contraband . . . hence, they had good reason to fear destruction of the evidence if there was any delay in making their entry."

Consider also State v. Roman, 309 So.2d 12 (Fla. 4th DCA 1975), rev. denied, 312 So.2d 761 (Fla. 1975), in which the court refused to apply the destruction of evidence exception where "the occupants of a room which had no drain and only two exits, at both of which armed police officers were standing, had no opportunity at all to get rid of the seized marijuana . . ." (Roman at 14.)

(GOSHORN, C.J., dissenting.) I respectfully dissent. While I agree that the lapse of time between the last controlled buy at 7:56 P.M. and the execution of the search warrant at 9:30 P.M. would not justify granting Thomas's motion to suppress, I cannot accept the view that this court's opinion in *State v. Bell*, 564 So. 2d 1235 (Fla. 5th DCA 1990), provides an exception to the knock and announce requirement of section 933.09, Florida Statutes (1991), in all instances where the subject of the search warrant consists of small quantities of drugs. Such an expansive reading of *Bell* renders meaningless the protection guaranteed to the citizens of this state by the legislature's enactment of the "knock and announce" statute.

Our holding in *Bell* relied upon the supreme court's opinions in *Earman v. State*, 265 So. 2d 695 (Fla. 1972) and *Benefield v. State*, 160 So. 2d 706 (Fla. 1964). *See Bell*, 564 So. 2d at 1236-37. In *Benefield*, where the court quashed an opinion of the district court of appeal denying the defendant's motion to suppress, Justice Terrell observed:

> Entering one's home without legal authority and neglect to give the occupants notice have been condemned by the law and the common custom of this country and England from time immemorial. It was condemned by the yearbooks of Edward IV, before the discovery of this country by Columbus. Judge Prettyman for the Court of Appeals in Accarino v. United States, 85 U.S.App.D.C. 394, 179 F.2d 456, 465, discussed the history and reasons for it. See also 22 Mich.L.Rev. 541, 673, 798, "Arrest Without a Warrant," by Wilgus. William Pitt categorized a man's home as his castle. Paraphrasing one of his speeches in which he apostrophized the home, it was said in about this fashion: The poorest pioneer in his log cabin may bid defiance to the forces of the crown. It may be located so far in the backwoods that the sun rises this side of it; it may be unsteady; the roof may leak; the wind may blow through it; the cold may penetrate it and his dog may sleep beneath the front steps, but it is his castle that the king may not enter and his men dare not cross the threshold without his permission.
>
> This sentiment has moulded our concept of the home as one's castle as well as the law to protect it. The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door, giving his name and the purpose of his call. There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the insignia of his office. This is why the law protects its entrance so rigidly. The law so interpreted is nothing more than another expression of the moral emphasis placed on liberty and the sanctity of the home in a free country. Liberty without virtue is much like a spirited horse, apt to go berserk on slight provocation if not restrained by a severe bit.

Benefield, 160 So. 2d at 709. In *Earman*, the court held that an appellate court is not justified in finding an exception to the knock and announce rule as a matter of law when the record fails to show any proof that the officers had reasonable grounds to fear the destruction of evidence at the time of entry. *Earman*, 265 So. 2d at 697. In so holding, the supreme court rejected the appellate court's broadening of the exception to the knock and announce rule to include instances where the facts merely showed that destruction *could* have occurred. The court was explicit in its rejection of the relaxed "could have" standard:

> Essential to [proof of the validity of the arrest as a predicate for the proper admission of the seized contraband] is testimony by the arresting officers or other competent evidence that they had reasonable grounds to believe the marijuana within the house *would be* immediately destroyed if they announced their presence. Absent such evidence, the fruits of any search conducted pursuant to such arrest must be considered illegally obtained. [Emphasis added.]

Id.

With these precepts in mind, I would read *Bell* to require evidence of articulable and particularized facts showing more than small quantities of drugs and indoor plumbing before dispensing with the requirements of the knock and announce rule. Specifically, I would adopt the reasoning of the Second District Court of Appeal in *State v. Bamber*, 592 So. 2d 1129 (Fla. 2d DCA 1991) and find that *Bell* is in agreement, not conflict, with *Bamber*. In *Bamber*, the Second District considered facts similar to those in *Bell* and held that the mere fact that the small quantity of cocaine could have been disposed of in the home's normal residential plumbing did not constitute exigent circumstances which would

allow the law enforcement officers to dispense with the knock and announce rule. *Id.* at 1132. The court explained:

> In this case, the police did not provide a case-specific explanation that reasonably caused them to believe that Mr. Bamber's household was likely to destroy evidence. There clearly are facts and circumstances under which the police can reasonably decide, at the time they serve a warrant, that a household presented an unusual risk concerning the destruction of evidence. Such circumstances are not presented in this case.

Id. at 1133 (footnote omitted).

While the facts in *Bell* are unclear, the evidence apparently showed that the quantities of contraband maintained by Bell in his residence would be readily disposed of in a residential sink. *Bell*, 564 So. 2d at 1237. However, no such evidence exists in this case. In fact, the record in this case is even devoid of any evidence relating to the amount of drugs the officers had probable cause to believe Thomas kept in his residence. Evidence of the quantity of drugs believed to be involved is relevant to determining the reasonableness of the decision not to knock and announce.

In this case, the only evidence offered to excuse compliance with the knock and announce rule was:

> 1. testimony that controlled buys resulted in the *purchase* of small quantities of drugs from within the residence (but not testimony concerning the quantity of drugs in the residence),
>
> 2. testimony that utility records indicated the residence appeared to have normal plumbing facilities, and
>
> 3. testimony that generally, drug dealers will try to conceal or discard small amounts of drugs when served with a warrant.

The possibility of weapons in the house apparently did not concern the officers and was not discussed by them prior to serving the warrant. The officers further testified that they had no knowledge of specific facts in this case in any way indicating that Thomas would have destroyed evidence had the officers complied with the knock and announce rule when they served the warrant.

Recognizing the scourge in this state caused by illegal drugs and related activity, it is tempting to approve any law enforcement procedure which is perceived as assisting in the control of the drug problem. We must, however, strike a balance and enforce the constitution and laws of this state which are designed and enacted for the protection of all citizens from unlawful governmental intrusion.

For all the reasons set forth, I would affirm the trial court.

* * *

TARPLEY v. STATE. 5th District. #91-2643. September 11, 1992. Appeal from the Circuit Court for Volusia County. AFFIRMED on the authority of *Toliver v. State*, 17 F.L.W. 1907 (Fla. 5th DCA Aug. 14, 1992), *King v. State*, 557 So. 2d 899 (Fla. 5th DCA), *review denied*, 564 So. 2d 1086 (Fla. 1990), and *Roberts v. State*, 371 So. 2d 538 (Fla. 3d DCA 1979).

* * *

Public records—Non-custodian who is subject of a public record has standing to compel the custodian to assert a statutory exemption to disclosure—Question certified—In instant case, party which was subject of child abuse investigation had standing to compel sheriff to assert statutory exemptions from public records disclosure of all records concerning reports of child abuse or neglect—Trial court improperly dissolved temporary injunction to permit press to inspect records on ground that only sheriff, as custodian of records, had standing to raise statutory exemptions

A.J., I.J., C.C., F.C., M.C., B.C., A.C., O.R., E.R., J.R., K.K., R.K., S.K., S.K., L.L., T.S., F.S., S.T., L.T., J.T., T.T., A.K., A.R., A.T., C.B., C.B., J.N., M.B., J.F., AND N.F., MINORS, and CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION, INC., Operator of the Scientology Cadet School, Appellants/Cross-Appellees, v. TIMES PUBLISHING COMPANY, Appellee/Cross-Appellant, and EVERETT S. RICE, IN HIS CAPACITY AS SHERIFF OF PINELLAS COUNTY, FLORIDA, Appellee. 2nd District. Case Nos. 91-03547 & 91-03550. Consolidated. Opinion filed September 11, 1992. Appeals from the Circuit Court for Pinellas County; Ray E. Ulmer, Jr., Judge and Jack A. Page, Judge. Paul B. Johnson, Robert E. Johnson of Johnson & Johnson, Tampa, for Appellants/Cross-Appellees. George K. Rahdert, Patricia Fields Anderson and Alison M. Steele of Rahdert & Anderson, St. Petersburg, for Appellee/Cross-Appellant Times Publishing Company. Jean H. Kwall, General Counsel, Pinellas County Sheriff's Office, Largo, for Appellee Everett S. Rice.

(THREADGILL, Judge.) The Church of Scientology Flag Service and thirty (30) minors appeal an order dissolving a temporary injunction enjoining the Pinellas County Sheriff's Office from releasing reports concerning allegations of child abuse at the Scientology Cadet School. Times Publishing Company cross-appeals the earlier order granting the temporary injunction. We reverse the order dissolving the injunction.

On September 20, 1991, seven deputies of the Pinellas County Sheriff's Office Youth Services Education Division were invited to the Scientology Cadet School to give a puppet show. Upon arrival they noted conditions indicating that the elementary school children were being neglected or abused. The deputies filed incident reports with the Sheriff's office which were then referred to the central abuse registry and tracking system of the Department of Health and Rehabilitative Services pursuant to the mandatory referral provisions of section 415.504(1)(f), Florida Statutes (Supp. 1990).

The St. Petersburg Times submitted a public records request for all records in the Sheriff's possession concerning reports of child abuse or neglect at the school. The Sheriff found the initial incident reports subject to disclosure and prepared to release them. On October 16, 1991, the appellants filed an ex parte emergency motion in the juvenile division of the circuit court, requesting that the court impose confidentiality on all reports and records generated as a result of harm to the children at the Cadet School. The motion was based on statutory exemptions from public records disclosure of all records concerning reports of child abuse or neglect. §§ 119.07(3)(a), 415.51(1)(a), 39.411(4), Fla. Stat. (Supp. 1990). The court granted the motion and issued the temporary injunction the same day.

Another hearing was held the next day in the juvenile division to determine whether to continue the temporary injunction. Upon learning that an H.R.S. inspection of school premises had uncovered no basis to believe the children were being abused or neglected, the juvenile division transferred the case to the civil division on the ground that it had lost jurisdiction.

The civil division of the circuit court held a hearing on October 18, 1991, to consider the temporary injunction and the appellants' request for an injunction as to all other records concerning the incident. The court found that the case fell clearly within chapter 119, the public records law, and that only the custodian of documents, here the Sheriff, had standing to raise the statutory exemptions. It accordingly dissolved the injunction on this procedural ground and denied the appellants' request for additional relief by way of injunction. We conclude this was error.

It appears from the record and the parties' briefs that the trial judge relied on *Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984) in dissolving the injunction and dismissing the action. In *Cannella* the supreme court held that only the custodian of the public record being requested has the authority to assert an exemption to public disclosure.

We find that *Cannella* is distinguishable. *Cannella* involved a newspaper's action against the custodian of public records in delaying the release of the personnel files of three Tampa police officers in order to accord the officers time to challenge the disclosure. In *Cannella*, the supreme court held that disclosure of nonexempt public records may not be automatically delayed for any reason except to permit the custodian to retrieve a record and delete portions the custodian asserts are exempt. *Id.* at 1077 and 1079. No delay is permitted to allow a court challenge to disclosure: "the purpose of the Act would be frustrated if, every time a member of the public reaches for a record, he or she is subjected to the possibility that someone will attempt to take it off the table through a court challenge." *Id.* at 1079. To agree with the