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IN THE SUPREME COURT OF FLORIDA

NATHANIEL HIRUM THOMAS,

Petitioner,

v.

CASE NO. 80,624

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

RESPONDENT'S JURISDICTIONAL BRIEF

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SUMMARY OF ARGUMENT

The state acknowledges that the decision of the Fifth District Court of Appeal in this case is in direct and express conflict with the decision of the Second District Court of Appeal in State v. Bamber, 592 So.2d 1129 (Fla. 2d DCA 1991). However, the state submits that the decision in this case correctly applied this court's previous decisions and that this court should accordingly decline to exercise its discretionary jurisdiction in this case.

## ARGUMENT

### WHETHER THE DECISION IN THIS CASE CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

The state acknowledges that the decision of the Fifth District Court of Appeal in this case is in direct and express conflict with the decision of the Second District Court of Appeal in State v. Bamber, 592 So.2d 1129 (Fla. 2d DCA 1991). However, the state submits that the Fifth District's decision in this case correctly applies this court's decisions in State v. Kelly, 287 So.2d 13 (Fla. 1973) and in Earman v. State, 265 So.2d 695 (Fla. 1972), and that this court should accordingly decline to exercise its discretionary jurisdiction to review the decision in this case.

In Kelly and Earman, this court established the rule that when police officers, at the time they enter a private residence to execute a search warrant, have reasonable grounds to fear that evidence will be immediately destroyed, they need not announce their presence. See Kelly, 287 So.2d at 16-17. In this case, a police officer involved in the search testified that a controlled buy of rock cocaine from Mr. Thomas's house was made before, and supported issuance of, the search warrant, and that a second controlled buy was made from his house an hour and thirty-four minutes before execution of the warrant. State v. Thomas, 17 FLW 2130, 2130 (Fla. 5th DCA September 11, 1992). The officer also testified that he checked utilities records and that the house to be searched had normal residential plumbing. Id.

The Fifth District concluded in this case that the officer's testimony established reasonable grounds to fear that evidence would be immediately destroyed if the officers announced their presence. Accord State v. Bell, 564 So.2d 1235 (Fla. 5th DCA 1990); Armenteros v. State, 554 So.2d 574 (Fla. 3rd DCA 1989). The Second District court, in Bamber, concluded that on similar facts the police were not justified in entering without evidence showing that the "[defendant's] household presented an unusual risk concerning the destruction of evidence." 592 So.2d at 1133. The Second District court found no such unusual risk in Bamber's case, noting that

[t]he evidence does not suggest that the occupants had prior criminal records, had attempted to destroy evidence in the past, were known to be violent, had expressed an intention to destroy evidence, or had unusual sophistication concerning the destruction of evidence.

Id. at 1133, n.3.

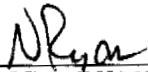
The state submits that the decision in this case applied the rule of Kelly and Earman in a reasonable fashion and that this court should accordingly decline to review this case.

CONCLUSION

The respondent submits that this court should decline to exercise its discretionary jurisdiction in this matter.

Respectfully submitted,

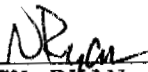
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Jurisdictional Brief has been delivered by hand to M.A. Lucas, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 6<sup>th</sup> day of November, 1992.

  
\_\_\_\_\_  
NANCY RYAN  
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