IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-410

DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF FLORIDA

Petitioner,

vs.

SUN-SENTINEL, INC.,

Respondent.
_____/

ANSWER BRIEF ON THE MERITS OF RESPONDENT SUN-SENTINEL

John R. Hargrove
Florida Bar No. 173745
W. Kent Brown
Florida Bar No. 856347
HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A.
500 E. Broward Boulevard, # 1000
Fort Lauderdale, FL 33394
(954) 527-2800
(954) 524-9481 (fax)

David S. Bralow
Florida Bar No. 802727
Senior Counsel/Florida Media Tribune Company
633 N. Orange Avenue
Orlando, FL 32801
(407) 420-5627
(407) 420-5760 (fax)

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THE CASE

The primary issue before the Court is whether a Florida citizen seeking immediate access to the public records of petitioner DEPARTMENT OF CHILDREN AND FAMILIES ("DCF") must travel to Tallahassee to litigate the issue regardless of where the records are located.[1] Both the Fourth District and the trial court refused to impose such a burden on the public, particularly where the records sought and the parties whose interests would be affected by disclosure of the records are already a part of an existing criminal action elsewhere in the state. (RII:22:439-41)

While investigating and reporting on the competence of DCF, respondent SUN-SENTINEL -- the publisher of the *South Florida Sun-Sentinel* -– learned that there was a pending criminal prosecution in Palm Beach County against the adoptive parents of ten disabled children under DCF's supervision. According to court records, multiple charges of criminal neglect had been

[1] Petitioner raised two grounds under Florida Rule of Appellate Procedure 9.030(a)(2)(A) for discretionary review in its brief on jurisdiction, claiming that the order expressly and directly conflicts with the First District's decision relating to "home venue" in Jacksonville Electric Authority v. Clay County Utility Authority, 802 So. 2d 1190 (Fla. 1st DCA 2002) and expressly and directly affects a class of constitutional or state officers.

brought against Donald and Amy Hutton after a law enforcement report was issued detailing the squalid conditions in which their ten children were living. (RII:13:241-50)

In order to obtain DCF's records regarding this matter, SUN-SENTINEL filed a petition for access to these public records directly in the pending criminal case against the Huttons. (RII:13:232)[2] The petition was filed pursuant to § 119.07(7)(a), Florida Statutes, which states:

> Any person or organization, including the Department of Children and Family Services, may petition the court for an order making public the records of the Department of Children and Family Services that pertain to investigations of alleged abuse, neglect, abandonment, or exploitation of a child .... The court shall determine if good cause exists for public access to the records sought or a portion thereof.

The statute goes on to describe exactly what the court is to consider in making a "good cause" finding –- namely, the "best interest of the vulnerable adult or child", the "privacy right of other persons identified in the reports" and the "public interest." The statute says nothing about any right or interest of DCF to be considered by the court. But rather than

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[2] Citations to the record transmitted by the Fourth District are designated as (R [volume #]:[document #]:[page #]). Since the case was before the Fourth District on an interlocutory basis, there was no record prepared by the trial court. However, the appendix which accompanied the answer brief filed by SUN-SENTINEL in the Fourth District –- which contains the relevant trial court documents -- is item #13 in the record.

facilitate what is normally a *pro forma* matter, DCF delayed the process by challenging the petition for lack of jurisdiction and improper venue. The trial court denied DCF's motions to dismiss. (RI:2:3) DCF then took an interlocutory appeal, and the Fourth District affirmed. (RII:22:439)

The gist of DCF's argument below was that members of the public seeking immediate access to its records must file a *separate* lawsuit to resolve the issue, must file it in civil court *in Tallahassee*, and must serve DCF through *formal process*. (RI:5:20) The Fourth District rejected DCF's argument.

At the outset, the Fourth District recognized that there is a judicially-created "home court" privilege (also known as the "home venue" privilege) for public agencies to be sued in the location of their headquarters. However, it concluded that such a privilege is not applicable by its very terms because this is not an "action seeking judgment directly against the agency for money damages or for declaratory relief binding the agency in regard to some policy or practice of the agency itself." (App. at 2)[3] The court further explained that application of the privilege here would be inconsistent with public records laws. (Id.) In the court's words:

> [I]t would severely burden the right of

[3] A copy of the Fourth District's opinion is attached as an appendix to this brief and is cited herein as (App.).

> access to public records to require that all such actions in court to vindicate that right be deemed within the home court privilege of state government. To do so is to require all those seeking access to inspect records actually maintained in an applicant's home county elsewhere to tread their way to Tallahassee to bring a judicial proceeding just to settle their right to do so. There is absolutely nothing in the Public Records laws to suggest such an interpretation of the general venue statute, and everything implicit in the Public Records laws indicates that such a burden was never intended ....

(App. at 2) Both the trial court and the Fourth District were emphatic that Palm Beach County was clearly the most appropriate venue for SUN-SENTINEL's petition, particularly since "the records are located in Palm Beach County and it is the citizenry of Palm Beach County and the [Huttons] that are most affected by release of the sought-after documents." (RI:2:3)[4]

As to DCF's claim that the trial court lacked personal jurisdiction because it had not received *formal* service of process, the Fourth District concluded that issue had been waived by DCF affirmatively requesting a transfer of venue to Leon County. DCF now seeks this Court's discretionary review of

[4] SUN-SENTINEL has moved to supplement the record to inform this Court of the proceedings on remand. While the trial court ultimately refused to compel record production, the transcript of the hearing makes it abundantly clear that the only interests considered by the trial court related to parties *other than DCF*.

the Fourth District's rulings on both venue and personal jurisdiction.

II

THE FACTS

DCF's operations and effectiveness have been the subject of extensive news coverage over the past few years in light of the tragic disappearance of five-year-old Rilya Wilson as well as other children entrusted to DCF's care who later turned up missing or dead. (RII:13:264-89) When Palm Beach County residents Donald and Amy Hutton were charged with criminally neglecting children under DCF's supervision, SUN-SENTINEL sought immediate access to the relevant governmental records in order to inform the public about this newsworthy situation on a timely basis. (RII:13:232)

According to published newspaper reports and court records, the Huttons were charged with multiple counts of criminal neglect after law enforcement authorities discovered ten of their disabled children living in squalor for the second time in less than five years. A Palm Beach County sheriff's deputy who had been called to the Hutton home reported that he witnessed areas of the house covered with mold, dirt and urine stains. He also observed a pile of dog feces in the living room, a couch without cushions, exposed wires, and insufficient food for the number of occupants in the home. (RII:13:241-50) The Huttons

later pled guilty to several of the charges.

This was not the first time that these types of problems had surfaced at the Hutton home. DCF had investigated the Huttons at least 10 times over a 15-year period, with complaints dating back to 1987. (RII:13:240-63) In fact, the Huttons had been criminally charged for child neglect in 1998, but those were dropped after the couple agreed to comply with conditions recommended by DCF. (RII:13:250-63) Despite this extensive history of complaints, investigations, and criminal charges, DCF continued to allow the Huttons to care for more than a dozen severely developmentally-disabled children -– one of which recently died. (RII:26:451, 463)

_____The Hutton case predictably drew tremendous public attention in light of the ongoing public debate over DCF's competency. (RII:13:241-48,264-89) Since the DCF records being sought were already a part of the pending criminal case against the Huttons in Palm Beach County (RII:13:295) and since the Palm Beach court presiding over the criminal proceeding would be the most familiar with the circumstances surrounding the neglected children and the Huttons' fair trial rights, SUN-SENTINEL filed its good cause petition directly in that criminal proceeding. SUN-SENTINEL invited DCF –- as the custodian of the records –- to participate by electronically sending it a facsimile copy of the petition. Even though DCF had filed *its own* § 119.07(7)(a) petition in a prior criminal case,

[5] it nevertheless challenged SUN-SENTINEL's petition claiming that under the "home venue" privilege the petition *must* be brought in Leon County, rather than in Palm Beach County. It further argued that the petition was required to be filed as a separate lawsuit and that formal service of process should have been given. As detailed above, both the trial court and the Fourth District rejected DCF's arguments, recognizing that the agency should not be allowed to place a series of procedural roadblocks in the way of the public and thereby inhibit the public from an immediate resolution to public records issues.

STANDARD OF REVIEW

Venue is reviewed for an abuse of discretion. See Carr v. Stetson, 741 So. 2d 567, 568 (Fla. 4th DCA 1999); see also Fla. Dep't of

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[5] The trial court admonished DCF for taking patently inconsistent positions with respect to § 119.07(7)(a) petitions:

> [T]he court notes the blatantly hypocritical and disingenuous position advanced by the [DCF] in light of previous pleadings filed within this circuit. In State v. Deeson, 30 Med. L. Rep. 1990 (Fla. 15th Cir. Ct. Dec. 18, 2001), it was the [DCF] that sought public release of its own otherwise confidential records pursuant to Section 119.07(7)(a) on the grounds "that the citizens of Palm Beach County, Florida, need to know of and adequately evaluate the actions of the Department in an ongoing criminal proceeding."

(RI:2:4)

Insurance v. Accelerated Benefits Corp., 817 So. 2d 1086, 1088 (Fla. 4th DCA 2002). Jurisdiction is reviewed *de novo.* See, e.g., Northwestern Aircraft Capital Corp. v. Stewart, 842 So. 2d 190 (Fla. 5th DCA 2003).

SUMMARY OF ARGUMENT

As the Fourth District correctly recognized, the home venue privilege is inapplicable to petitions seeking access to DCF's public records under § 119.07(7)(a), Florida Statutes. To transfer this proceeding to Tallahassee when the records sought and all individuals affected by disclosure are already part of an *existing* criminal proceeding in Palm Beach County would impose an unnecessary burden on the public in accessing DCF's records. Not only would this frustrate Florida's public records laws as well as fundamental principles of *open* government and agency accountability, but it would unduly complicate an otherwise routine proceeding -- thereby creating the very inefficiency that the privilege is designed to prevent. Moreover, this type of petition is not subject to the privilege in the first place since it is *not* a lawsuit against DCF, nor does it address any uniform policy or practice of DCF. Instead, each petition is fact specific and focuses primarily on the best interest of the particular child who is the subject of the records sought. Finally, by affirmatively requesting a venue transfer, DCF waived its objection to personal jurisdiction. There was no merit to that objection anyway because formal service of process is not required for a § 119.07(7) petition brought within an existing proceeding.

ARGUMENT

I

HOME VENUE PRIVILEGE IS INAPPLICABLE TO THIS PUBLIC RECORDS CASE

As this Court and the intermediate appellate courts have repeatedly recognized, a trial court has discretion to dispense with the home venue privilege –- which allows a state agency to be sued only in the county where its headquarters are located -- when "considerations of justice, fairness, and convenience under the circumstances of the case" so dictate.[6] See Bd. of Co. Comm'rs of Madison County v. Grice, 438 So. 2d 392, 395 (Fla. 1983); see also State Dept. of Ins. v. Accelerated Benefits Corp., 817 So. 2d 1086, 1087-88 (Fla. 4th DCA 2002); Levy County School Bd. V. Bowdoin, 607 So. 2d 479, 481 (Fla. 1st DCA 1992).[7] This public records case falls squarely into that category. As the Fourth District explained below, it would severely burden the right of access to public records to require a member of the public seeking access to locally-maintained DCF records to file a petition only in Leon County where DCF maintains its headquarters. Moreover, the court explained that the privilege is not even applicable here nor would it serve any useful purpose since this is not an action against the agency itself nor does it involve any uniform policy or practice of the agency.

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[6] It is curious that DCF chose to address the venue issue last in its initial brief since DCF devoted virtually its entire jurisdictional brief to an alleged express and direct conflict between the First and Fourth Districts on this issue. Since DCF itself opted to rely on venue as its "hook" to obtain further review in this Court, venue has been addressed first in this brief.

[7] Even Jacksonville Electric –- the case which DCF claims is in express and direct conflict –- acknowledged this critical point from Grice.

In its initial brief, DCF claims that the Fourth District's ruling is erroneous because this Court "has commanded" that the privilege be applied in civil actions against a state agency. In essence, DCF contends that the privilege must be applied across the board regardless of the type of case, the relief sought, or the expedited nature of the proceedings at issue.[8] (Init. Br. at 16-17) As such, DCF effectively treats home venue as an absolute *right* rather than what Florida law actually prescribes that it is –- a *privilege*. Such a hard-line approach runs contrary to this Court's directive in Grice and to the very concept of venue generally. By definition, venue is the "*privilege* of being sued in [a] specific location" and is essentially based on notions of convenience and practicality. See, e.g., State Dept. of Highway Safety & Motor Vehicles v. Scott, 583 So. 2d 785 (Fla. 2d DCA 1991) (emphasis added). Unlike jurisdiction which addresses a court's power to act, there is simply nothing "absolute" about venue. Id. In this Court's own words:

> *[T]he right of governmental defendants to insist on venue at their headquarters is not absolute*. Modern methods of communication and transportation have weakened the policy reasons supporting the privilege while current crowded court docket conditions have strengthened the policy reasons for avoiding duplicative litigation if possible.

Grice, 438 So. 2d at 395 (emphasis added).

As the following explains in greater detail, application of the privilege was properly rejected in this case since it would have frustrated Florida's mandate of open government, would not have served the very purpose for which the privilege was created, and would have unnecessarily interfered with expedited public records proceedings. Each point is separately discussed.

A. Privilege Does Not Apply

1. Privilege Frustrates Public Records Laws

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[8] Decisional law appears to use the labels "home court" privilege and "home venue" privilege interchangeably.

Application of the home venue privilege in *any* public records proceeding has a direct and adverse impact on the public's exercise of its right of access to governmental records. While DCF has attempted in its brief to downplay the importance of this right, the fact remains that it is a zealously protected right under *both* the Florida Constitution and the Florida Statutes. See Art. I, § 24, Fla. Const.;[9] § 119.01(1), Fla. Stat.[10] Indeed, Florida has a "heritage of open government and tradition of public access", see Government in the Sunshine Manual, *Introduction* at xvii (Att'y Gen'l 2002), and a state agency is not at liberty to frustrate both the will of the people and legislative enactments in this regard. To give meaning and effect to this long-standing commitment to open government, Florida courts go to great lengths to allow liberal public access to governmental records. See, e.g., Wolfson v. State, 344 So. 2d 611, 613 (Fla. 2d

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[9] In 1992, the citizens of the State of Florida ratified an amendment to the constitution's Declaration of Rights which provides:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

Art. I, § 24, Fla. Const.; see generally Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992) (each right in the Declaration of Rights is "a distinct freedom guaranteed to each Floridian against government intrusion").

[10] Section 119.01 (2003) provides that "[i]t is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person" and that "providing access to public records is a duty of each agency" that must not be eroded. See also Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) (Chapter 119 ensures "the right freely to gain access to governmental records"); City of Gainesville v. State ex rel. Int'l Ass'n of Fire Fighters Local No. 2157, 298 So. 2d 478, 479 n.3 (Fla. 1st DCA 1974) ("right of citizens to be informed of all facets of governmental operations is zealously protected").

DCA 1977). Indeed, the very concept of *open* government carries with it an implicit duty by the government not to impose any unnecessary burdens on the public in exercising its right of access.

In Tribune Company v. Cannella, 458 So. 2d 1075 (Fla. 1984),[11] this Court recognized that the legislature has established the procedures for accessing public records and that *only* the legislature (constrained by the dictates of Article I, § 24) has the power to alter them. Section 119.07(7)(a) sets forth the specific procedure established by the legislature to access confidential records in the custody of DCF, and that provision expressly allows any member of the public to file a petition with the court setting forth "good cause" for disclosure of the records. The statute itself lists the various interests to be balanced by the court in determining whether "good cause" has been shown:

> In making this [good cause] determination, the court shall balance the *best interest of the vulnerable adult or child* who is the focus of the investigation, and in the case of the child, the *interest of that child's siblings*, together with the *privacy right of other persons identified* in the reports against the *public interest*.

(Emphasis added) Conspicuously absent from that list is *any* right or interest of DCF.

In keeping with the constitutional and legislative mandate of *open* government and minimizing the burden on the public, this statute can *only* be interpreted as requiring the good cause petition to be filed

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[11] Cannella involved a newspaper's access to the personnel files of three Tampa police officers who had been involved in an incident where a suspect was shot and killed. The records custodian refused to release the records under a city policy of delaying release of personnel files seven days pending notice to the affected employee. The newspaper brought a legal action seeking release of the records under Chapter 119. In the course of that litigation, the Second District certified to this Court the question of whether disclosure of nonexempt public records may be automatically delayed for any reason. The Court answered this question in the negative, rejecting the argument by the City of Tampa and the police officers that a delay was necessary to allow the police officers the opportunity to bring a constitutional challenge to the release of the records.

in the particular court which has the most familiarity with the enumerated interests at stake.[12] In this case the venue best suited for this inquiry would be Palm Beach County -- where the parties whose interests are being considered reside, where the public records sought are maintained, where the community with the greatest interest in evaluating the actions of the agency or court lies, where the criminal actions to be evaluated have taken place, and where the criminal proceeding relating to the relevant DCF investigation is occurring. Nothing in Chapter 119 even suggests, much less requires, that an individual seeking access to DCF records must go to Tallahassee and file a separate civil action. To accept DCF's argument that such a requirement should be read into the statute would mean that the party seeking access, the criminal defendants who have been investigated by DCF, the affected children, and all other relevant witnesses would have to travel to Tallahassee and appear before a civil judge who in all likelihood would be unfamiliar with the matter. Such a substantial and unnecessary burden simply cannot be reconciled with the principle of *open* government. Accordingly, the Fourth District was correct in concluding that the home venue privilege cannot be applied in this case.

2. <u>SUN-SENTINEL's Petition Not Subject to Privilege</u>

Further supporting the Fourth District's rejection of the home venue privilege is the fact that a § 119.07(7) petition does not fall within the category of cases subject to the privilege. As the decisional law

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[12] In fact, the public interest in accessing DCF's records is also set forth in this statute:

> The public interest in access to such records is reflected in s. 119.01(1), and includes the need for citizens to know of and adequately evaluate the actions of the Department of Children and Family Services and the court system in providing vulnerable adults and children of this state with the protections enumerated in ss. 39.001 and 415.101.

reflects, this privilege has a very specific purpose, namely to promote efficiency in government by avoiding duplicity of lawsuits and conflicting decisions and by minimizing expenditure of public funds and manpower. Smith v. Williams, 35 So. 2d 844, 847 (Fla. 1948); Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364. To that end, as the Fourth District observed below, this judicially created doctrine has been applied only in two specific types of cases: (1) those which seek judgment directly against an agency for money damages and (2) those which seek declaratory relief binding the agency to a policy or practice of the agency itself. This is precisely what the decisional law — including the cases cited by DCF -- reflects. See, e.g., Grice, 438 So. 2d at 392 (claim for damages from wrongful death); Fla. Pub. Serv. Comm'n v. Triple "A" Enters., Inc., 387 So. 2d 940, 942 (Fla. 1980) (claim for declaratory and injunctive relief); Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 366 (Fla. 1977) (claim for damages from tort); Gay v. Ogilvie, 47 So. 2d 525 (Fla. 1950) (claim for damages and declaratory relief); Smith, 35 So. 2d at 844 (claim for declaratory and injunctive relief); Dep't of Community Affairs v. Holmes Co., 668 So. 2d 1096, 1102 (Fla. 1st DCA 1996) (claim for injunctive relief); Navarro v. Barnett Bank of W. Fla., 543 So. 2d 304 (Fla. 1st DCA 1989) (claim for damages from statutory violation and tort).

Applying the home venue privilege in those two categories of cases makes sense because the very purposes underlying the privilege would be furthered. For instance, in cases seeking monetary damages, litigation should take place in the location of the agency's headquarters since the agency *itself* is the target of the litigation and from an efficiency standpoint defense strategies should be centralized. In cases seeking declaratory relief as to a particular policy, rule, or practice of the agency itself, application of the home venue privilege is beneficial because it avoids a multiplicity of litigation in various jurisdictions on an identical point with the potential of inconsistent results and a waste of taxpayer's money.[13]

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[13] As fully explained in SUN-SENTINEL's jurisdictional brief, there is no express and direct conflict with Jacksonville Electric. In fact, that case falls squarely within this second category of lawsuits subject to the home venue privilege because the relief

By stark contrast, every § 119.07(7)(a) petition stands on its own in that it involves a fact-specific inquiry as to whether there is good cause for the records to be publicly disclosed. Under the statute, the focus of this good cause inquiry is on the best interest of the child. At issue are documents concerning the child which are maintained in DCF's local office where the child lives rather than in its agency headquarters in Tallahassee.[14] While DCF repeatedly argues that the privilege must be invoked in this case to ensure "uniform standards" are applied (Init. Brf. at 19-20, 26), the very nature of a good cause inquiry requires that it be handled on a case-by-case basis. It is shocking that DCF would even suggest that an inquiry which focuses on the best interest of the child can be made by reference to a uniform, one-size-fits-all formula. As DCF should be well aware, every child is unique and must be treated as such. No uniform practice or interest of DCF is at issue here. No rule or regulation of the agency is being interpreted. And no threat of multiple litigation with potentially inconsistent results exists. Accordingly, the very underpinnings of the home venue privilege are absent here.[15]

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sought was a declaration as to the legality of a standard utility contract. As such, home venue was properly invoked in that case to prevent multiple litigation and inconsistent results in different counties. To the extent Jacksonville Electric expressed some concern that home venue may be absolute, the First District was neither certain of nor comfortable with such a notion. This is evidenced by the fact that the court stated that it felt "constrained by prior case law" to rule as it did, then certified a question of great public importance as to whether trial court discretion would lie in the absence of one of the three recognized exceptions to home venue.

[14] DCF's characterization of this case as "merely … the latest in a long line of civil suits in which a trial court was asked to determine a *plaintiff's* rights" is particularly disingenuous. (Init. Brf. at 18; emphasis added) It is *not* the rights of a particular *plaintiff* that are at issue in connection with a § 119.07(7)(a) proceeding, but rather the rights of the abused or neglected children and the public generally. SUN-SENTINEL sought DCF records in this case as a surrogate for the public.

[15] DCF will in no way be prejudiced if good cause petitions are heard

Furthermore, a § 119.07(7)(a) petition is not in the nature of a lawsuit against DCF, so its request to change venue was not even appropriate.[16] By its own admission (RI:5:22), DCF is merely the passive custodian of the records sought. It has no protectable interest in connection with this type of petition — a point that is apparent from the very terms of the statute. As noted, § 119.07(7) lists the various interests to be balanced by the court in making its good cause determination and does not include any right or interest of DCF in the balance.[17] As such, there is no reason for DCF to have complicated this otherwise routine proceeding by challenging venue.[18]

As previously stated, by specifically enumerating the interests to be balanced in making a good cause determination, the legislature certainly contemplated that such a proceeding would be conducted by

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in the venue where the records are located since the agency has 15 separate district offices in the state -- each of which is assigned an attorney. In fact, DCF *routinely* litigates cases throughout the state. See, e.g., C.C. v. Dept. of Children and Families, 2003 WL 21755029 (Fla. 1st DCA July 31, 2003); In the Interest of S.C., 2003 WL 21766512 (Fla. 2d DCA Aug. 1, 2003); Pena v. Dept. of Children and Families, 2003 WL 21537134 (Fla. 3d DCA July 9, 2003); J.M v. Dept. of Children and Families, 2003 WL 21800438 (Fla. 4th DCA Aug. 6, 2003); S.L. v. Dept. of Children and Families, 2003 WL 21946441 (Fla. 5th DCA Aug. 15, 2003).

[16] Underscoring this point is the fact that DCF never answered the petition, nor is there any requirement that it do so. Once the motion to dismiss was denied, the case proceeded directly to a final hearing with no further pleadings being required. (RII:26)

[17] See note 4 *supra*.

[18] SUN-SENTINEL learned after filing its petition that DCF had already turned over copies of the records sought to the State Attorney who was prosecuting the case against the Huttons. (RII:13:82) Since the State Attorney was already a party in that criminal proceeding and since DCF has no substantive interest to be considered by the court under § 119.07(7)(a), the merits of SUN-SENTINEL's petition could arguably have been resolved whether or not DCF participated in the proceeding.

the court most familiar with these specific interests.[19] In this case no court is better suited to address such concerns than the Palm Beach County criminal court before which the Hutton prosecution is pending. That court already has the closest relationship to and most intimate knowledge of the affected children, the criminal defendants, and the criminal investigation. It would also have a greater appreciation for the competing public interests in the surrounding community than a judge in a distant jurisdiction. Requiring a Tallahassee judge to step in and learn what the criminal court already knows would accomplish nothing but an increase in the very inefficiency and taxpayer expense that the home venue privilege is designed to cure. Moreover, forcing the civil court in Tallahassee to absorb all of this additional litigation would undoubtedly strain the resources of that court and create even further inefficiency.

But these are not the only problems flowing from an application of the home venue privilege here. To preclude the Palm Beach County criminal court from deciding whether disclosure of the records would prejudice the fair trial rights of the Huttons flies directly in the face of this Court's decision in Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32 (Fla. 1988). In that case, this Court made it clear that when a request is made to release public records relating to a criminal defendant, it is the *constitutional* duty of the *criminal* court to consider how the release of those records may affect the fair trial rights of the accused. McCrary, 520 So. 2d at 34; see also City of Miami v. Post-Newsweek Stations, 837 So. 2d 1002, 1003 n.2 (Fla. 3d DCA 2002) (noting that criminal judge is in better position

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[19] While the legislative intent is apparent from the face of the statute itself, it should also be noted that legislative history further supports this interpretation. The amendment to § 119.07, creating the original version of § 119.07(7), was enacted as part of House Bill 2409 (Public Law #94-164). House Bill 2409 made numerous changes to dependency and termination of parental rights proceedings. The inclusion of the § 119.07 amendment in HB 2409 strongly suggests that "the court" the legislature was referring to was the court in which the dependency, termination of parental rights or other proceeding relating to the relevant DCF investigation was taking place.

to determine whether investigation or prosecution would be compromised by release of related records). In other words, given the gravity of the Sixth Amendment rights at stake when criminal records are about to be publicly disclosed, see amend. VI, U.S. Const., a criminal judge cannot constitutionally "pass off" the public records issue to a Tallahassee civil court to decide. However, this is precisely what DCF asks this Court to permit, and this Court should not *and cannot* countenance such a result.

Since SUN-SENTINEL's argument against home venue is based on provisions of the United States Constitution, the Florida Constitution, and the Florida Statutes, it is particularly disingenuous for DCF to suggest on page 25 of its brief that SUN-SENTINEL has offered nothing more than the "physical location of a file folder" to support venue in Palm Beach County. By so arguing, DCF also ignores that Palm Beach County is also the "physical location" of its ten neglected children –- whose best interests are the primary focus of the statutory good cause inquiry. Accordingly, DCF has failed to establish any abuse of discretion by the trial court in allowing SUN-SENTINEL's § 119.07(7)(a) petition to go forward in Palm Beach County.

3. Privilege Contrary to Expedited Nature of Proceeding

As a necessary adjunct to the policy of open government, Florida courts do not countenance *any* delay tactics by the government in resolving public records issues -– regardless of how slight that delay may be. For instance, in Cannella, 458 So. 2d at 1075 (Fla. 1984), this Court explained that in the context of governmental disclosure of public records:

> [D]elay, no matter how short, impermissibly interferes with the public's right [of access]…. The legislature has placed the books on the table; only it has the power to alter that situation.

In fact, this very notion of minimizing delay and expediting access to public records is reflected throughout the Public Records Act. See, e.g., § 119.11(1), Fla. Stat. (providing for "immediate hearing giving the case priority over other pending cases"); § 119.11(2), Fla. Stat. (providing for agencies to "comply with [order allowing access] within 48 hours"); see generally § 119.12(1), Fla. Stat. (imposing attorney's fees against

agency which unlawfully refuses to permit access to public records). Moreover, *any* delay in the media's access to newsworthy governmental records ultimately harms the public. As this Court has expressly recognized, "[n]ews delayed is news denied" and "[t]o be useful to the public, news events must be reported when they occur." State ex rel. Miami Herald Publ'g Co. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976).

While it is true that DCF records relating to child abuse and neglect are to remain confidential in the agency's ordinary course of business, see § 39.202, Fla. Stat. (2001), the fact remains that these records are still considered "public records", see § 119.011(1), Fla. Stat.; see also Art. I, § 24, Fla. Const. Consequently, *any* governmental delay in allowing this process to run its course as quickly as possible would directly violate the spirit if not the letter of Cannella, McIntosh, and Chapter 119.

[20] Moreover, forcing the public to go to Tallahassee to litigate any issue of access under the Public Records Act, including § 119.07(7)(a), may well discourage many from even trying to obtain access at all -- a result patently at odds with the very notion of *open* government. As such, the privilege cannot and should not be applied in this context.

B. Alternatively Sword-Wielder Exception Applies

While the above provides a sufficient basis to reject the home venue privilege, the sword-wielder exception to home venue provides an alternative basis to reach the same conclusion. This exception applies where an unlawful invasion of a lawful right secured to the plaintiff by the constitution or laws of the

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[20] This case demonstrates the very type of delay warned against in Cannella. Due to DCF's procedural challenges to SUN-SENTINEL petition, more than five months passed between the time SUN-SENTINEL filed its petition and the time the court actually considered the merits of the petition. (RII:26:Ex.B) The fact that the trial court ruled at the final hearing that SUN-SENTINEL had not satisfied the requisite "good cause" for access does not *and cannot* justify DCF's actions in substantially delaying the process. As Cannella reflects, in the public records arena the ends do not justify the means.

jurisdiction is directly threatened in the county where action is taken. In such cases, the home venue privilege does not apply on the theory that since the government is "wielding a sword" that threatens the plaintiff's rights, the plaintiff should be permitted to litigate the legality of that governmental conduct in the jurisdiction where it has occurred. See Carlile, 354 So. 2d at 365-66 (Fla. 1977).

DCF claims that the sword-wielder exception does not apply because "SUN-SENTINEL is not in danger of having a constitutional right violated" by it. (Init. Brf. at 22) To the contrary, as fully explained in the preceding section, DCF's strategic attempt to stall public records proceedings has directly implicated the public's constitutional right of access. Cannella underscores the fact that *any* tactic used by the government to delay public records proceedings –- no matter how innocuous it may facially appear to be –- adversely impacts that right of access. Since DCF improperly delayed SUN-SENTINEL's right to have the merits of its petition considered by the trial court through a series of procedural maneuvers in the Palm Beach County criminal court, DCF did in fact "wield a sword" that threatened SUN-SENTINEL's constitutional rights. Venue is therefore proper in Palm Beach County, and the trial court committed no abuse of discretion in so ruling.

While DCF in its brief harps on the confidential nature of the documents sought, it simply cannot get around the fact that the legislature has specifically recognized that public scrutiny of DCF serves the public interest and has prescribed a specific procedure for the public to follow in order to gain access to these otherwise confidential records. DCF cannot obstruct the orderly progress of that procedure without directly impacting the public's constitutional right of access. Moreover, by focusing on the confidential nature of the documents sought, DCF overlooks another basic point. As § 119.07(7)(a) very clearly reflects, the confidential nature of these records is to protect the rights of innocent children when there is no public interest served by disclosure of the records –- *not* to protect DCF from public scrutiny. As noted, no matter how DCF attempts to characterize its records, they are still "public records." See § 119.011(1), Fla. Stat.; Art. I, § 24, Fla. Const. So DCF –- as custodian of those records -- has a *duty*

to facilitate access thereto as well as to expedite the process to determine whether access should be granted. Yet DCF has instead gone on the attack in this case and dragged SUN-SENTINEL through months of procedural challenges. As such, DCF is unquestionably a "sword wielder" and is thereby precluded from taking a home court advantage.

II

PERSONAL JURISDICTION ISSUE HAS BEEN WAIVED AND IS MERITLESS

A. Waiver

DCF claims that the trial court lacked personal jurisdiction because SUN-SENTINEL did not effect formal service of process of its § 119.07(7)(a) petition upon it. The case law is clear, however, that once a party seeks affirmative relief from the court, that party has essentially consented to the court's exercise of jurisdiction, thereby waiving any objection thereto. See Babcock v. Whatmore, 707 So. 2d 702 (Fla. 1998), *approving* Hubbard v. Cazares, 413 So. 2d 1192 (Fla. 2d DCA 1981).[21] The opinion in Hubbard could not be any clearer on the point:

> [A] request for change of venue following a timely asserted challenge to personal jurisdiction is a request for affirmative relief *which constitutes a waiver of the jurisdictional challenge*.

Hubbard, 413 So. 2d at 1193 (emphasis added). DCF did not just

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[21] In footnote 2 of its initial brief, DCF suggests that Hubbard may have been decided incorrectly. DCF has evidently overlooked the specific language used by this Court in Babcock which quotes Hubbard at length and then immediately states: "[w]e agree with the above reasoning of the federal and Florida courts that adhere to its reasoning and hold that a defendant waives a challenge to personal jurisdiction by seeking affirmative relief – such requests are logically inconsistent with an initial defense of lack of jurisdiction." Babcock, 707 So. 2d at 704.

file a request to change venue, but it also filed a supporting memorandum of law, fully argued its position on venue at a hearing below, and affirmatively sought attorneys' fees in the process.

DCF essentially argues that it was left with a Hobson's choice under Rule 1.140 -- *either* object to venue in its motion to dismiss and risk waiving personal jurisdiction *or* waive its venue objection altogether –- so it should not be penalized for choosing the former option.[22] By so arguing, DCF fails to recognize the clear distinction between a mere *objection* of improper venue (which is all that Rule 1.140 addresses) and a motion to *transfer* venue. The former seeks no affirmative relief from the court, whereas the latter does seek such relief and requires the court to assume jurisdiction in order to afford the relief requested. The latter is what occurred here, which is precisely why personal jurisdiction has been waived.

B. Formal Service Not Required

Even if DCF had not waived personal jurisdiction as the Fourth District determined, there is no merit to the issue. Not one word in § 119.07(7)(a) indicates that formal service of a petition is required. Consistent with the statute, SUN-

[22] A similar argument was adopted by the Fourth District in Dimino v. Farina, 572 So. 2d 552 (Fla. 4th DCA 1990), but that case was overruled by this Court in Babcock, 707 So. 2d at 704 n. 6.

SENTINEL's petition was not filed as a separate proceeding below, nor was DCF a defendant. The petition was properly filed within a pending criminal action, just as DCF itself had done in Deeson, *supra* at n.3. Consequently, DCF's reliance on rules of procedure relating to initial pleadings in a case are irrelevant to this case. The specific governing statute here, namely § 119.07(7)(a), unlike some other provisions of § 119.07, does *not* require formal service of process. As the trial court explained:

> [S]imilar public record requests are frequently filed within pending actions without the need or necessity of formal service. *Moreover, unlike Section 119.07(7)(b), which does require personal service on specifically enumerated individuals, Section 119.07(7)(a) contains no such provision.*

(App. at 2; emphasis added; footnote omitted)

DCF argues that where a "new party" is brought into litigation that party must be served with formal process. By attempting to characterize itself as a "new party," DCF completely ignores that DCF is itself a division of the State; that the State is already a party to the criminal prosecution of the Huttons; that DCF participated in the investigation of the Huttons and shared its findings with the State Attorney

prosecuting the case consistent with § 39.202(2);[23] and that it is *State* records which are sought in SUN-SENTINEL's petition.[24]

Finally, formal process on DCF within the existing criminal proceeding would have served no purpose because SUN-SENTINEL's petition did not implicate DCF's substantive rights. As noted, the analysis of good cause under § 119.07(7)(a) turns *solely* on the interests of parties *other than DCF* -– namely, the Huttons and the children who were in their custody. In fact, DCF has previously conceded that it is merely the "passive custodian" of the records sought. It is inconsistent for DCF to acknowledge that its substantive rights are unaffected by SUN-SENTINEL's petition, then in the next breath complain that it was entitled to formal service of process. DCF's challenge to personal jurisdiction must therefore fail.

CONCLUSION

For these reasons, respondent SUN-SENTINEL requests that this Court approve the decision of the Fourth District and affirm this case.

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[23] The Palm Beach County State Attorney's Office in fact refused to release the records at issue pursuant to § 39.202. (RII:13:82)

[24] See, e.g., State v. Lopez, 604 So. 2d 2 (Fla. 4th DCA 1992) (affirming criminal trial court order requiring DCF to produce records for inspection where such records implicated the defendant's fair trial rights).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief and appendix thereto has been furnished by U.S. Mail this 21st day of August, 2003 to all counsel on the attached service list.

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned hereby certifies that the font of this brief is Courier New 12.

John R. Hargrove
Florida Bar No. 173745
W. Kent Brown
Florida Bar No. 856347
HEINRICH GORDON HARGROVE
WEIHE & JAMES, P.A.
500 E. Broward Boulevard, # 1000
Fort Lauderdale, FL 33394
(954) 527-2800
(954) 524-9481 (fax)

David S. Bralow
Florida Bar No. 802727
Senior Counsel/Florida Media
Tribune Company
633 N. Orange Avenue
Orlando, Florida 32801
(407) 420-5627
(407) 420-5760 (fax)

By:_____
John R. Hargrove

SERVICE LIST

Charles J. Crist, Jr., Esq.
Christopher M. Kise, Esq
Lynn C. Hearn, Esq.
Office of the Attorney General
PL 01 - The Capitol
Tallahassee, FL 32399-1050
Fax: 850-410-2672

Colleen Farnsworth, Esq.
Counsel, DCF
111 S. Sapodilla Avenue
W. Palm Beach, FL 33401
Fax: (561) 837-5846

Lanna Belohlavek, Esq.
Assistant State Attorney
401 N. Dixie Highway
West Palm Beach, FL 33401-4209
Fax: (561) 355-7055

Mark Wilensky, Esq.
515 N. Flagler Drive
Suite 325
W. Palm Beach, FL 33401
Fax: (561) 655-7818

Ms. Virginia Jordan

205 N. Dixie Highway, Rm. 2.110
West Palm Beach, FL 33401
Fax: (561) 355-2717

Steve Cripps, Esq.

Orsley & Cripps
P.O. Box 1869
West Palm Beach, FL 33402
Fax: (561) 689-5121