IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF FLORIDA,	)	
Petitioner,	)	
v.	)	**CASE NO. SC03-410**
SUN-SENTINEL, INC.,	)	
Respondent.	)	
_____ /		

INITIAL BRIEF OF THE DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from a decision by the Fourth District Court of Appeal that erroneously finds a waiver of an objection to personal jurisdiction, and creates an ill-founded exception to the home venue privilege.

On May 20, 2002, the State of Florida brought criminal charges in Palm Beach County against Amy and Donald Hutton for allegedly neglecting their ten children. (App. 2).[1] These criminal charges sparked several newspaper articles which reported that the Huttons were investigated for similar allegations numerous times over the last 15 years. (App. 3 at Ex. 1). The newspaper articles also reported that the State had brought similar criminal neglect charges against the Huttons in 1998, and that these charges had been dropped in exchange for the Huttons' agreement to comply with conditions required by the Department of Children and Family Services (the "Department"). (*Id.*).

On October 7, 2002, Sun-Sentinel, Inc. ("Sun-Sentinel"), publisher of the *South Florida Sun-Sentinel* newspaper, pursuant to Section 119.07(7), Florida Statutes, filed a civil petition in the criminal case against the Huttons seeking access to the Department's files relating to the Hutton's children. (App. 3).

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[1] Documents contained in the Department's appendix to this initial brief are referred to as "App. ____."

The Department is required to keep records relating to child abuse, abandonment, and neglect, and these records are designated by statute as "confidential" and exempt from Florida's public records act. *See* Fla. Stat. § 39.202(1), (6) (2001). The Department's confidential records relating to child abuse or neglect may only be inspected by certain individuals identified by statute or as permitted by order of the court. *See id*. § 39.202(6). As noted above, Sun-Sentinel sought a court order pursuant to Section 119.07(7), Florida Statutes (2001), which permits any person to "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 . . . ." In the prayer for relief in its petition, Sun-Sentinel specifically requested release of "the Department's file on the Hutton children (including case worker notes, staff reports, case plans, child protection records, and any other records, if any, and correspondence between or among staff)." (App. 3 at 7).

Sun-Sentinel did not move to intervene in the criminal proceeding and did not formally serve the Department with the petition. Instead, Sun-Sentinel faxed the petition to the Department's counsel, the prosecutor, the public defender, and the guardian ad litem. (*See id.*).

The Department moved to dismiss the petition on the grounds of lack of process, service of process, subject matter jurisdiction, and personal jurisdiction reflecting the Department's contention that it was procedurally improper for Sun-Sentinel to file the civil petition in the criminal action rather than filing a separate civil action or, at a minimum, seeking leave to intervene in the criminal action. (App. 4). By separate motion filed the same day, the Department also moved to dismiss or transfer the action for improper venue, based upon the Department's "home venue" privilege to be sued in Leon County where it is headquartered. (App. 5).

While Sun-Sentinel's petition and the Department's motions to dismiss were pending, the Huttons entered into a plea agreement with the State, thereby concluding the criminal case. (App. 6 at p. 2). After the criminal case concluded, the trial court entered an order denying both of the Department's motions to dismiss. (App. 6). The court found that no service of process was required, and that the home venue privilege was inapplicable because, among other reasons, the petition was "not in the nature of a lawsuit" against the Department. (*Id.* at p. 3).

The Fourth District affirmed, holding (1) that by seeking to transfer venue, the Department waived its objection to the sufficiency of service, and (2) that the home venue privilege should be abrogated in this case because an applicant seeking records maintained in Palm Beach County should not be required to travel to Tallahassee to

settle the right to view such records. *See Department of Children and Families, State of Florida v. Sun-Sentinel, Inc.*, 839 So. 2d 790, 791-792 (Fla. 4th DCA 2003) (App. 1). The court further found that none of the policies behind the adoption of the home venue privilege were present in this case. *See id.* at 792. Upon remand, the trial court denied Sun-Sentinel's petition. Sun-Sentinel did not appeal this ruling.

The Department sought to invoke this Court's discretionary jurisdiction based upon an express and direct conflict with *Jacksonville Elec. Auth. v. Clay County Utility Auth.*, 802 So. 2d 1190 (Fla. 1st DCA 2002), *rev. dismissed*, 821 So. 2d 293 (Fla. 2002). This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Fourth District erred as a matter of law in rejecting the Department's objections to lack of service of process. The Department did not waive its objection to the court's jurisdiction by simultaneously moving to transfer venue to Tallahassee, because the Florida Rules of Civil Procedure expressly permit–indeed, *require*–defendants to raise defenses relating to personal jurisdiction, service of process, and venue in response to an initial pleading.

Because Sun-Sentinel failed to properly serve the Department with the civil petition, the trial court lacked jurisdiction and its order is void in its entirety. Sun-

Sentinel was required to file a "civil action" in order to invoke the provisions of Chapter 119. Service of process is required on all defendants in civil proceedings in order to vest the trial court with personal jurisdiction over the defendants. Sun-Sentinel could not avoid this requirement by improperly filing its civil petition in a criminal proceeding to which the Department was not a party. Sun-Sentinel deliberately sought to bypass the procedure set out in Chapter 119 for seeking access to records, as well as the Florida Rules of Civil Procedure, and should not be permitted to avoid service by violating these procedures.

Even if the trial court did have jurisdiction over Sun-Sentinel's civil petition, it erred as a matter of law in deciding that the Department was not entitled to transfer venue to the county in which the Department's principal headquarters is located. For more than 50 years, Florida courts have recognized the "home venue privilege" available to state government agencies. The purpose behind this privilege is applicable to this case. The interests of the public, the children of this state, and the persons named in an investigative report must be evaluated according to uniform standards. Moreover, application of the home venue privilege reduces public expenditure by consolidating in a single location the Department's litigation of actions involving access to its records.

To the extent the Fourth District applied the "sword-wielder exception" to the home venue privilege, such application was erroneous because none of Sun-Sentinel's constitutional rights are threatened and the Department has not taken or threatened to take any imminent action that constitutes the "raising of the sword." If the sword-wielder exception applies in this case, then this exception would apply in any case in which the state's conduct in the plaintiff's chosen venue is purely passive. This result is contrary to the historical limitation of this exception to cases where the state's active conduct presents a real and imminent threat to the plaintiff's fundamental constitutional rights.

Nor is a special exception to the home venue privilege warranted simply because this action involves public records which are portable personal property maintained in the county where suit is brought. Application of the home venue privilege does not depend on the physical location of a file folder.

ARGUMENT

I. THE TRIAL COURT LACKED JURISDICTION OVER SUN-SENTINEL'S PETITION.

The Department moved to dismiss Sun-Sentinel's petition on several procedural grounds including insufficient process, insufficient service of process, and lack of

personal jurisdiction. (App. 4). These objections stemmed from the fact that Sun-Sentinel filed the civil petition in an existing criminal proceeding to which the Department was not a party, and Sun-Sentinel never formally served the Department with the petition.

The trial court rejected these arguments and denied the Department's motion to dismiss. (App. 6). The Fourth District affirmed. *See Department of Children and Families v. Sun-Sentinel*, 839 So. 2d at 791-92. This ruling is subject to *de novo* review. *See Execu-Tech Business Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 584 (Fla. 2000) (ruling on a motion to dismiss based upon questions of law subject to *de novo* review), *cert. denied*, 531 U.S. 818, 121 S. Ct. 58 (2000).

A. The Department did not waive its objection to service.

The Fourth District did not address the merits of the Department's procedural challenges, but rather held that the Department waived its challenge to the sufficiency of service of process by seeking to transfer venue to Leon County. *See Department of Children and Families v. Sun-Sentinel, Inc.*, 839 So. 2d at 791-92. This ruling was erroneous as a matter of law.

According to Rule 1.140 (b), Florida Rules of Civil Procedure, certain defenses must be raised in response to an initial pleading. These defenses include, among others, lack of personal jurisdiction, improper venue, insufficiency of process, and

insufficiency of service of process. *See* Fed. R. Civ. P. 1.140 (b)(2)-(4). If any of these defenses are not raised in response to an initial pleading, the defense is waived. *Id.* ¶ (b). Importantly, however, "no defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion." *Id.*

The plain language of Rule 1.140(b) establishes that the Department's defenses regarding service and personal jurisdiction were not waived simply because the Department simultaneously raised the defense of improper venue. Because all of these defenses were required to be raised in response to an initial pleading or be waived, the Department was permitted to raise these defenses simultaneously without waiving any or all of them. *See, e.g., M.T.B. Banking Corp. v. Bergamo Da Silva*, 592 So. 2d 1215, 1215-16 (Fla. 3d DCA 1992) (defendant did not waive personal jurisdiction defense by asserting other defenses at the same time). Conversely, if the Department had moved to dismiss on jurisdictional grounds only and that motion was denied, the Department could not thereafter have raised the defense of improper venue. *See Florida Dept. of Transp. v. Gulf-Atlantic Constrs., Inc.*, 727 So. 2d 305 (Fla. 1st DCA 1999) (city waived home venue privilege by failing to raise it in answer, because Rule 1.140(b) requires improper venue to be raised prior to or contemporaneous with answer).

This Court's decision in *Babcock v. Whatmore*, 707 So. 2d 702 (Fla. 1998),

cited by the Fourth District in favor of waiver, actually supports the conclusion that the Department was permitted to raise all of the defenses available to it under Rule 1.140(b) at the same time. In *Babcock*, the defendant moved to dismiss the complaint for lack of personal jurisdiction, and also simultaneously moved for relief from prior judgments. 707 So. 2d at 703. The Court held that although a defendant could waive the defense of lack of personal jurisdiction by seeking *affirmative relief* on the merits, no such waiver occurred in that case. *Id.* at 704-05. In so holding, the Court observed that the grounds for the defendant's motion for relief from judgments were "affirmative defenses which can properly be joined or pled in the alternative with the [defendant's] jurisdictional challenge." *Id.* at 705 (citing Fla. R. Civ. P. 1.140(b)). *Babcock* did not address the issue of whether a motion to dismiss or transfer based on improper venue constitutes a request for affirmative relief inconsistent with a challenge to personal jurisdiction when both are raised simultaneously under Rule 1.140(b).

The other case relied upon by the Fourth District, *Hubbard v. Cazares*, 413 So. 2d 1192 (Fla. 2d DCA 1981), *rev. denied*, 417 So. 2d 329 (Fla. 1982), addresses a different procedural question than is presented in this case. In *Hubbard*, the defendant first moved to dismiss for lack of personal jurisdiction and subsequently sought a change in venue under Section 47.101(1)(b), Florida Statutes (1979), under

the theory that she could not receive a fair trial where the action was brought. 413 So. 2d at 1192. The Second District held that by requesting a change in venue *after* having challenged jurisdiction, the defendant waived the jurisdictional challenge because she sought affirmative relief inconsistent with her jurisdictional challenge. *See id*. at 1193. There are two important distinctions between *Hubbard* and the present case. First, the Department challenged venue at the same time it objected to service, whereas the defendant in *Hubbard* moved to transfer venue after she challenged jurisdiction. Second, the Department's motion was based upon improper venue, a defense specifically enumerated under Rule 1.140(b), whereas the *Hubbard* defendant sought a discretionary change in venue from one proper location to another. *See Management Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627, 630 (Fla. 1st DCA 1999) (distinguishing between a discretionary change in venue to ensure the right to a fair trial and a mandatory change in venue when the initial forum is improper). These distinctions render *Hubbard* inapplicable to the present case.[2]

[2] In any event, it is not at all clear that *Hubbard* was correctly decided. As noted by the dissent, a motion to change venue has nothing to do with the merits of the case, and cases relied upon by the majority in *Hubbard* were not on point. 413 So. 2d at 1194 (Hobson, J., dissenting). *See also Heineken v. Heineken*, 683 So. 2d 194, 200 (Fla. 1st DCA 1996) (noting that a change of venue might logically be seen as a defensive measure rather than a request for affirmative relief).

In sum, the Department preserved its objections to personal jurisdiction, insufficient service, and insufficient service of process by moving to dismiss the civil petition on these grounds. The Department's simultaneous motion to dismiss for improper venue was expressly permitted, indeed *required*, by Rule 1.140(b), and did not constitute a waiver of any of the other defenses that the Department was required to raise in response to Sun-Sentinel's initial pleading.

B. The lack of service upon the Department deprived the court of jurisdiction.

Sun-Sentinel never formally served the Department with the civil petition for access to the Department's investigatory records involving the Huttons' children. The trial court's ruling that service of process of the petition was not required was erroneous as a matter of law.

Sun-Sentinel filed its civil petition in the Huttons' criminal case pursuant to Section 119.07(7), which permits any person to "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 . . . ." Fla. Stat. § 119.07(7) (2001). Related portions of Chapter 119 make clear that the means for seeking access to public records under that chapter is by filing a "civil action." *See id.* § 119.07(2)(b) (in any *civil action* in which an exemption to [Section 119.07(1)] is asserted . . . the public record or part

thereof in question shall be submitted to the court for an inspection in camera"); *id.* § 119.11(2) (Whenever *an action is filed* to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases."); *id* § 119.11(4) ("Upon service of a complaint, counterclaim, or cross-claim in a *civil action* brought to enforce the provisions of this chapter, the custodian of the public record . . . [shall not dispose of the record]"); *id* § 119.12 ("If a *civil action* is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected . . . the court shall assess . . . reasonable attorneys' fees.") (all emphasis added).

A "civil action" is commenced by filing a petition or complaint. *See* Fla. R. Civ. P. 1.050. Upon the commencement of an action, service of process must be made on each defendant. *See* Fla. R. Civ. P. 1.070; Fla. Stat. § 48.031 (2001). Even in existing actions, service of process must be made when claims are brought against new parties. *See* Fla. R. Civ. P. 1.170(g) (service of process required for crossclaims against parties who have not yet appeared in action); *see id*. R. 1.170(h) (service of process required when additional parties are brought in to grant complete relief in determination of counterclaim or crossclaim); *See* Fla. R. Civ. P. 1.180(a) (service of summons and complaint required for third-party claim).

The purpose of service of process is to give a defendant proper notice of the suit, and to vest the court with jurisdiction. *See Shurman v. Atlantic Mortgage & Invest. Corp.*, 795 So. 2d 952, 953-54 (Fla. 2001); *Beckwith v. Bailey*, 161 So. 576, 581 (Fla. 1935). Without proper service of process, the court lacks personal jurisdiction over the defendant. *See Beckwith*, 161 So. at 581; *M.J.W. v. Department of Children & Families*, 825 So. 2d 1038, 1041 (Fla. 1st DCA 2002). The burden of proof to demonstrate valid service of process is upon the person seeking to invoke the court's jurisdiction. *See M.J.W.*, 825 So. 2d at 1041; *Carlini v. State of Florida, Dept. of Legal Affairs*, 521 So. 2d 254, 255 (Fla. 4th DCA 1988). The defendant's receipt of actual notice of the proceeding does not establish lawful service of process. *See M.J.W.*, 825 So. 2d at 1041.

In this case, Sun-Sentinel contends that it was not obligated to serve the Department with the civil petition because the civil petition was filed in the criminal proceeding and did not constitute a new civil action governed by the statutes and civil procedure rules that require service of process. This contention makes it apparent that Sun-Sentinel deliberately sought to bypass the procedure set out in Chapter 119 for seeking access to records, as well as the Florida Rules of Civil Procedure, and now seeks to benefit from having created this procedural anomaly. But the nature of a Section 119.07(7)(a), petition and the requirements for its adjudication are determined

according to Chapter 119 and the relevant civil procedure rules, not according to the case style and court name strategically selected by the petitioner. To allow a plaintiff to circumvent the service requirement in this manner elevates form over substance and seriously jeopardizes a defendant's right to receive notice of and the opportunity to be heard in an action.

Sun-Sentinel also contends that no service of process was required under subsection 7(a) of 119.07 because that subsection contains no express service requirement. Fla. Stat. § 119.07(7)(a) (2001). Sun-Sentinel contrasts this subsection with subsection (7)(b), which specifies that when the Department files a petition to release records in cases involving serious injury to a child or vulnerable adult, "the petition must be personally served on the child or vulnerable adult." Fla. Stat. § 119.07(7)(b) (2001). This distinction is meaningless, however, because the Florida Statutes and Florida Rules of Civil Procedure governing service of process apply to *all* civil lawsuits–not just those based upon statutes that expressly require service. The service requirement in subsection 7(b) simply reflects an added level of specificity regarding who must be served due to the importance of the rights involved. Subsection 7(a) does not similarly specify who must be served because in most cases the petitioner will not know whose rights will be affected by the disclosure of the records. Thus, the differences between these two subsections are reconcilable and in

no way justify suspension of the Florida Statutes and Rules of Civil Procedure that require service of process.

Finally, Sun-Sentinel contends that service was not required because the petition did not name the Department as a defendant and did not implicate the Department's substantive rights. Once again, this contention seeks to elevate form over substance. It is true that Sun-Sentinel did not literally name the Department in the case style of the petition;[3] however, the petition clearly sought relief from the Department by seeking access to and release of the Department's file. (App. 3 at 1, 7). If the court had granted Sun-Sentinel's petition, the court would have entered an order relieving the Department of its obligation to keep the file confidential pursuant to Section 39.202, and requiring the Department to disclose the contents of the file. Such an order would be tantamount to a grant of declaratory or injunctive relief *against the Department*. Furthermore, the petition sought an award of attorney's fees, presumably from the Department. (*Id.* at 7). The trial court simply could not enter an order granting this kind of relief against the Department without first obtaining personal jurisdiction over the Department through service of process. *See Bedford Computer Corp. v. Graphic*

[3] Nor did Sun-Sentinel name *itself* in the case style of the petition. (App. 3 at 1). Sun-Sentinel did, however, consent to amend the case style in the Fourth District to reflect that the Department was the appropriate appellant and Sun-Sentinel was an appropriate appellee. (App. 7).

Press, Inc., 484 So. 2d 1225, 1227 (Fla. 1986) (personal judgment entered against defendant without personal service violates due process).

Because service was required in this action and the Department was never served, the trial court lacked jurisdiction. Thus, the court's order denying the Department's motion to dismiss is void in its entirety. *See, e.g., Johnson v. Clark*, 198 So. 842, 844 (Fla. 1940) (where defendant was not properly served, court's judgment against defendant was void).

II. SUN-SENTINEL'S PETITION WAS SUBJECT TO THE HOME VENUE PRIVILEGE.

In a matter of a few paragraphs, the Fourth District's opinion largely abrogates the common law home venue privilege that has been recognized and applied by Florida courts for over half of a century. This ruling is contrary to the history and purpose of the home venue privilege, and has implications far beyond the scope of this case.

Because the trial court's order determined that venue was proper in Palm Beach County as a matter of law, and there are no factual disputes, the order is subject to *de novo* review. *See, e.g., Dive Bimini, Inc. v. Roberts*, 745 So. 2d 482, 483-84 (Fla. 1st DCA 1999); *PricewaterhouseCoopers LLP v. Cedar Resources, Inc.*, 761 So. 2d 1131, 1133-34 (Fla. 2d DCA 1999).

A. The historical policy reasons behind the home venue privilege are applicable in this case.

For more than 50 years, this Court has commanded that, absent waiver or exception, venue in civil actions against the state or one of its agencies or subdivisions properly lies in the county where the state, agency or subdivision maintains its principal headquarters. *See Board of County Comm'rs of Madison County v. Grice*, 438 So. 2d 392, 394-95 (Fla. 1983)*; Public Serv. Comm'n v. Triple "A" Enterprises*, 387 So. 2d 940, 942 (Fla. 1980) *("Triple "A"*); *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 365-66 (Fla. 1977)*; Gay v. Ogilvie*, 47 So. 2d 525, 526 (Fla. 1950); *Smith v. Williams*, 35 So. 2d 844, 847 (Fla. 1948).

The Court established the "home venue privilege" because it encourages uniform interpretation of the laws applicable to state government--and minimizes the possibility of conflicting judicial rulings in different jurisdictions. *See Smith*, 35 So. 2d at 847; *Carlile*, 354 So. 2d at 364; *Triple "A"*, 387 So. 2d at 943. By concentrating litigation involving a government entity in one location, the home venue privilege also minimizes the government's costs of defending suits, thereby reducing the expenditure of public funds and manpower. *See Smith*, 35 So. 2d at 847; *Carlile*, 354 So. 2d at 364; *Triple "A"*, 387 So. 2d at 943.

The home venue privilege is properly invoked whenever a "civil action" is

brought against the state or one of its agencies or subdivisions. *See Carlile*, 354 So. 2d at 363-64. Thus, although the privilege was originally articulated in the context of a challenge to the validity of agency rules, *see Game & Fresh Water Fish Comm'n v. Williams*, 28 So. 2d 431, 434 (Fla. 1946), it has since been applied in a wide variety of situations involving the determination of plaintiff's rights relative to the rights or obligations of a state agency. *See Gay*, 47 So. 2d at 526 (questioning interpretation of agency's action under existing statute); *Carlile*, 354 So. 2d at 365-66 (agency sued for negligence); *Triple "A"*, 387 So. 2d at 942-43 (questioning interpretation and challenging constitutionality of statute as applied to plaintiffs); *Department of Revenue v. First Federal Sav. & Loan Assoc.*, 256 So. 2d 524, 525-26 (Fla. 2d DCA 1971) (seeking to enjoin tax collector from collecting certain intangible taxes); *Department of Community Affairs v. Holmes County*, 668 So. 2d 1096, 1102 (Fla. 1st DCA 1996) (action to enjoin state agency from disbursing federal funds); *Jacksonville Elec. Auth. v. Clay County Util. Auth.*, 802 So. 2d 1190, 1193-94 (Fla. 1st DCA 2002) (challenging validity of city utility authority's contract with private developer to provide water service to property in adjoining county), *rev. denied*, 821 So. 2d 293 (Fla. 2002); *Florida Dept. of Ins. v. Amador*, 841 So. 2d 612, 613 (Fla. 3d DCA 2003) (breach of contract action).

The present case merely represents the latest in a long line of civil suits in which

a trial court was asked to determine a plaintiff's rights relative to the rights or obligations of an arm of state government. In this case the trial court must determine Sun-Sentinel's right under Section 119.07(7)(a) to view certain records retained by the Department, in light of the Department's obligation to keep these records confidential pursuant to Section 39.202. In making this determination, the court must construe the meaning of the phrase "good cause" under Section 119.07(7)(a), and must make judgments about the "public interest" in disclosure of the records as weighed against the best interests of the child, the best interests of the child's siblings, and the privacy interests of the individuals named in the investigative report. *See* Fla. Stat. § 119.07(7)(a) (2001). To protect and stabilize these important interests, all petitions seeking disclosure of the Department's confidential records under Section 119.07(7)(a) must be evaluated against uniform standards.

If petitions brought under Section 119.07(7)(a) are permitted to be filed and decided in each of the 67 counties throughout the state, the petitions may be decided according to at least that many definitions of "good cause." Appellate decisions from these rulings will also likely conflict. Those with interests under this section– seekers of confidential records, child advocates, and accused abusers–will be unable to assess their rights under Section 119.07(7)(a), causing more litigation. Furthermore, the Department will be forced to litigate these actions throughout the state, increasing its

costs and hindering its ability to implement uniform practices and procedures. By litigating Section 119.07(7)(a), petitions in a single venue, both the Department and the courts will maximize consistency and efficiency, thus minimizing public expenditure.

Uniformity of application is all the more important given that one of the reasons the legislature created a vehicle for disclosure of the Department's confidential records was to evaluate the effectiveness of the Department and the courts in protecting the children and vulnerable adults in Florida. Fla. Stat. § 119.07(7)(a) (2001) (public interest includes need for citizens to know of and adequately evaluate actions of the Department of Children and Family Services and the court system). If the effectiveness of the Department *as a whole* is evaluated based upon records disclosed pursuant to Section 119.07(7)(a), then that evaluation is most meaningful when disclosure pursuant to this subsection is made according to a uniform set of standards.

B. The sword-wielder exception does not apply.

In deciding not to apply the home venue privilege in this case, the Fourth District cites the portion of this Court's decision in *Carlile* that articulates an exception to the home venue privilege known as the "sword-wielder" doctrine:

> Under exceptional circumstances, a complainant may be entitled to sue a public official or board in a county other than that of his or its official residence. One recognized

> exception to the rule exists where an unlawful invasion of a lawful right secured to the plaintiff by the Constitution or laws of the jurisdiction is directly threatened in the county where the suit is instituted. Parties seeking relief from alleged threats to their personal and property rights by the operation of unconstitutional acts of an agency of the state may bring suit in the county where the alleged wrongs are threatened or alleged to have been committed.

Department of Children and Families v. Sun-Sentinel, Inc., 839 So. 2d at 793 (quoting *Carlile*, 354 So. 2d 362, 365-66 (Fla. 1977)). Immediately following this quotation, the Fourth District concludes that the home venue privilege is not applicable in this case "because this government agency, DCF, has denied the right of inspection of public records in Palm Beach County, not in Leon County. The agency performed its act of denial here, not at the home office. Here is where the legal action to rectify that denial should take place." *Id.*

It is unclear whether the Fourth District actually found the sword-wielder doctrine described in *Carlile* applicable to this case, or merely relied upon the quoted language for the general proposition that the venue privilege may be inapplicable under "exceptional circumstances." If the sword-wielder exception is held applicable under the facts of this case, this exception would become so broad as to effectively swallow the home venue privilege and render it meaningless.

The sword-wielder exception applies when a state agency is enforcing or has threatened to enforce a statute, rule or regulation in a way that invades the plaintiff's constitutional rights. *See Smith v. Williams*, 35 So. 2d 844, 847 (Fla. 1948). It applies only when the state agency has taken its allegedly unconstitutional action in the county where suit is filed, or where the threat of such action is "real and imminent." *Carlile*, 354 So. 2d at 365. In such a case, the state is the "initial sword-wielder" in the matter and the plaintiff's action "is in the nature of a shield against the state's thrust." *See id.* (quoting *Department of Revenue v. First Fed. Sav. & Loan Assoc. of Ft. Myers*, 256 So. 2d 524 (Fla. 2d DCA 1971)).

The present case does not satisfy any of the elements of the sword-wielder doctrine. Sun-Sentinel is not in danger of having a constitutional right violated by the Department and, contrary to the Fourth District's statement, the Department did not deny access to its records. Indeed, Sun-Sentinel's petition recognizes that the requested records are exempt from the Public Records Act and that the Department is prohibited by statute from disclosing the records without a court order. (App. 3 at ¶ 7). Because Sun-Sentinel has no constitutional (or even statutory) right to view the requested records absent a court order, there is no threat to a constitutional right that would warrant invoking the sword-wielder exception. *See, e.g.*, *Carlile*, 354 So. 2d at 365-66 (alleged negligence by state does not threaten constitutional rights);

Jacksonville Elec. Auth. v. Clay County Util. Auth., 802 So. 2d 1190, 1193 (Fla. 1st DCA 2002) (rejecting sword-wielder doctrine where "no basic or fundamental constitutional deprivation" was alleged), *rev. denied*, 821 So. 2d 293 (Fla. 2002); *Florida Dept. of Ins. v. Amador*, 841 So. 2d 612, 614 (Fla. 3d DCA 2003) (sword-wielder doctrine inapplicable in breach of contract action where "no constitutionally guaranteed right or property interest was infringed upon").

Nor has the Department taken any action or threatened to take any imminent action that would constitute the "raising of a sword." At most, the Department's "official action" in this case consisted of maintaining records in Palm Beach County and moving to dismiss the Sun-Sentinel's petition when it was filed in the criminal action. These actions are insufficient to invoke the sword-wielder exception. *See State Dept. of Highway Safety & Motor Vehicles*, 734 So. 2d 1054, 1056 (Fla. 1st DCA 1998) (agency's mere act of implementing law did not constitute "sword wielding"); *Florida Dept. of Revenue v. Hardy*, 697 So. 2d 954, 956 (Fla. 5th DCA 1997) (filing motions in response to suit did not constitute official action sufficient to warrant application of sword-wielder exception to home venue privilege).

The Fourth District's impression that the Department "denied" Sun-Sentinel access to the requested records, as shown, is mistaken. In fact, Sun-Sentinel did not ask the Department to disclose the investigative files regarding the Hutton children

prior to filing its petition in the criminal action. Indeed, as discussed above, Sun-Sentinel's petition expressly acknowledged that the documents it sought to review were exempt from the Public Records Act. Sun-Sentinel's petition for access to records was filed to overcome a statutory prohibition on disclosure of records that are designated as "confidential."

If an exception to the home venue privilege were to exist in every case in which a state agency takes *any* "official action" in the county in which a suit is brought, even when the agency's action is purely passive and threatens no constitutional right of the plaintiff, then the sword-wielder "exception" would become so broad as to render the home venue privilege meaningless. State actors necessarily carry out their responsibilities statewide. Nevertheless, for purposes of consistency and efficiency, the home venue privilege restricts suits against state actors to the venue in which the state actor is headquartered. There are sound reasons for this privilege as well as for allowing an exception to this privilege in circumstances where a plaintiff's constitutional rights are imminently threatened. There are no sound reasons for extending this exception to cases in which a state actor merely conducts its routine business, such as record-keeping, in one of the many counties within the state.

C. No special exception is warranted based upon the physical location of the records sought.

The Fourth District expresses concern that plaintiffs seeking access to public records stored locally should not be required to bring suit in the county where the state agency responsible for the records is headquartered:

> We think it would severely burden the right of 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 the right to do so.
>
> . . . .
>
> Hence we think the correct use of the general venue statute in a case involving access to public records entirely located in one county is that such an action may be brought where the records are being kept and where access is being denied.

Department of Children & Families v. Sun-Sentinel, Inc., 839 So. 2d at 792-93.

Contrary to the Fourth District's suggestion, no special exception is warranted in public records cases simply because the records sought to be reviewed are maintained in the county where suit is brought. Surely the long-recognized home venue privilege, and the valid policy reasons upon which it is premised, cannot be eliminated based upon the mere physical location of a file folder. The records themselves are entirely portable, and would not be the proper basis for venue in the

first instance, much less the proper basis for the vitiation of a doctrine central to this state's common law. *See* Fla. Stat. § 47.011 (2001) (actions may be brought "where the property in litigation is located"); *Goedmakers v. Goedmakers*, 520 So. 2d 575, 578 (Fla. 1988) ("property in litigation" in Section 47.011 refers to "property having a fixed location," not personal property).

Moreover, application of the home venue privilege rests upon an historical recognition that the benefits of uniform decision-making and reduced public expenditure outweigh the burdens that it may impose on some plaintiffs. Thus, there is no recognized exception to the privilege based upon its potential inconvenience or cost to a litigant. *See Dickinson v. Florida Nat'l Organization for Women, Inc.*, 763 So. 2d 1245, 1248 (Fla. 4th DCA 2000) (finding venue privilege applicable notwithstanding plaintiffs' argument that transfer would be inconvenient and costly); *State Dept. of Corrections v. Edwards*, 410 So. 2d 959 (Fla. 1st DCA 1982) (venue privilege applicable in negligence action even though incident occurred in Collier County and nearly all witnesses were located there).

CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court vacate the decision by the Fourth District that affirms the trial court's orders denying the Department's motions to dismiss, and grant such further relief as the Court deems just and proper.

Respectfully submitted

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CERTIFICATE OF SERVICE

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I hereby certify that the type size and style used in this brief is 14-point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

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