IN THE SUPREME COURT OF FLORIDA

Case No. SC_____

On Petition for Discretionary Review of
A Decision of the Fourth District Court of Appeal
(Fourth District Case No. 4D02-4466)

DEPARTMENT OF CHILDREN AND FAMILIES,
STATE OF FLORIDA,
Petitioner,

v.

SUN-SENTINEL, INC.,
Respondent.

INITIAL BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, the Department of Children and Families ("the Department"), an agency of the State of Florida ("State of Florida"), seeks review of a decision of the Fourth District Court of Appeal in *Department of Children and Families v. Sun-Sentinel, Inc.*, 28 Fla. L. Weekly D510 (Fla. 4th DCA Feb. 19, 2003) (hereinafter "the decision below").

In May 2002, the State Attorney for Palm Beach County brought a criminal prosecution against certain parents accusing them of criminal neglect of minor children. (App. at 1). While the criminal case was pending, the Respondent, Sun-Sentinel, Inc. ("the newspaper"), filed a petition seeking access to confidential records maintained by the Department and concerning these children. (App. at 1).[1]

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[1] The records at issue are confidential and exempt from the general public records disclosure requirements of section 119.07(1), Fla. Stat. (2002).

> In order to protect the rights of the child and the child's parents or other persons responsible for the child's welfare, all records held by the department concerning reports of child abandonment, abuse, or neglect, including reports made to the central abuse hotline and all records generated as a result of such reports, shall be confidential and exempt from the provisions of s. 119.07(1) and shall not be disclosed except as specifically authorized by this chapter.

§ 39.202(1), Fla. Stat. (2002). Under section 119.07(7)(a), however, any person or organization may petition the court for a determination as to whether "good cause" exists for public access to such records, as the newspaper did in the instant case. *See* § 119.07(7)(a), Fla. Stat. (2002).

The Department timely filed a motion challenging venue and requesting that the case be dismissed or transferred to Leon County, the location of the Department's headquarters, based upon the Department's home venue privilege.[2] (App. at 1). The trial court determined venue was proper in Palm Beach County, and it denied the motion on all grounds.[3] (App. at 1).

On appeal, the Fourth District Court of Appeals ("Fourth DCA") affirmed the trial court's denial by recognizing a heretofore unrecognized exception to the State's home venue privilege: "[W]e 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." (App. at 3).

The State of Florida then timely filed its notice to invoke discretionary review by this Court.

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[2] Government defendants in Florida have a common law "home venue privilege" to be sued in the county where they maintain their principal headquarters. *See Fla. Pub. Serv. Comm'n v. Triple "A" Enter., Inc.*, 387 So. 2d 940, 942 (Fla. 1980); *Carlile v. Game & Fresh Water Comm'n*, 354 So. 2d 362, 363-64 (Fla. 1977).

[3] The Department's motion to dismiss also alleged insufficiency of process and lack of jurisdiction. (App. at 1).

SUMMARY OF ARGUMENT

The decision below expressly and directly conflicts with decisions of this Court and of other district courts of appeal regarding the permissible exceptions to the state's "home venue privilege" and the proper application of the "sword wielder" doctrine. The decision below also expressly and directly affects a class of state officers. Accordingly, this Court has discretionary review jurisdiction.

ARGUMENT

I. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT OR OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

The decision below expressly and directly conflicts with decisions of this Court and of other district courts of appeal on at least two grounds.

A. The decision below expressly and directly conflicts with *Jacksonville Electric Authority v. Clay County Utility Authority*, 802 So. 2d 1190 (Fla. 1st DCA 2002), which recognized "only three exceptions" to the home venue privilege - none of which include an exception for suits involving public records requests.

In *Jacksonville Electric Authority*, a case addressing the same question of law as the decision below (i.e., whether the trial court improperly denied a government entity's home venue privilege), the First DCA - unlike the Fourth DCA in the decision below - refused to craft an exception to the home venue privilege beyond that already

established by the Florida courts.

> Absent waiver or application of an *identified* exception, the home venue privilege appears to be an absolute right. Florida courts have allowed *only three exceptions* to the home venue privilege [i.e., waiver by statute; when a government body is sued as joint tortfeasor; and the "sword-wielder" doctrine].

Jacksonville Elec. Auth., 802 So. 2d at 1192 (emphasis added). The First DCA clearly does not recognize an exception to the home venue privilege for cases involving petitions for access to public records. Moreover, and also unlike the court below, the First District declined to create a new exception to the home venue privilege, concluding, "we are still required to apply the home venue privilege because no exception exists which would allow us to decline to apply the privilege." *Id.* at 1193.[4]

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[4] The decision below also expressly and directly conflicts with *Jacksonville Electric Authority* because the Fourth DCA misapplied controlling precedent by considering the absence of factors supporting the policy that motivated the adoption of the home venue privilege as a basis for crafting a new exception. In *Jacksonville Electric Authority*, the First DCA recognizes "[n]o efficient or economic policy is served" by its decision to honor the home venue privilege, and concedes "it would be more appropriate" for a court sitting in another venue to address an underlying issue in the case. 802 So. 2d at 1193. Nonetheless, the First DCA concludes "we are still required to apply the home venue privilege because no exception exists which would allow us to decline to apply the privilege." *Id.* In the decision below, however, the Fourth DCA expressly *relies on* the absence of factors supporting the policy reasons for adopting the home venue privilege as a basis for rejecting its application and creating a new exception. (App. at 2) ("None of the policies that motivated the adoption of the home court privilege are present in this case.").

In short, an irreconcilable holding conflict exists within the "four corners" of these opinions concerning what are the allowable exceptions to the home venue privilege. The First DCA's interpretation holds firm to only three exceptions - none of which include any exception for cases involving public records requests. Moreover, the First DCA squarely rejects the notion that the home venue privilege does not apply when there is a perceived absence of the factors supporting the policy. In direct contrast, the Fourth DCA expressly creates an additional exception to the privilege largely on the basis of a perceived absence of such factors.[5]

B. The decision below expressly and directly conflicts with decisions of this Court and of other district courts of appeal because it misapplies the "sword wielder" doctrine.

This Court has accepted "misapplication conflict" jurisdiction based upon "erroneous extension," i.e., "where the district court correctly states a rule of law but then proceeds to apply the rule to a set of facts for which it was not intended." Gerald Kogan and Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova. L. Rev 1151, 1232 (1993). Therefore, to the extent the court below relied on the sword wielder doctrine where there was no allegation of a

[5] The dissenting opinion in the decision below also recognizes a conflict exists with the First DCA's decision in *Jacksonville Electric Authority*. (App. at 3) (Shahood, J., dissenting).

violation of a fundamental constitutional right and where the state was not the initial sword wielder, such reliance creates conflict with decisions of this Court and of other district courts of appeal.

i) The decision below does not indicate that a violation of a fundamental constitutional right was alleged.

Jacksonville Electric Authority holds that in order for the sword wielder doctrine to apply, the plaintiff must allege a "fundamental" constitutional right violation. 802 So. 2d at 1193; *see also Fish & Wildlife Comm. v. Wilkinson*, 799 So. 2d 258, 263 (Fla. 2d DCA 2001) (finding allegations in complaint are "not sufficient to allege an appropriate constitutional violation necessary for the application of the sword wielder exception"); *State v. Lindquist*, 698 So. 2d 299, 303 (Fla. 2d DCA 1997).

However, there is nothing within the four corners of the decision below that suggests the newspaper alleged a violation of any constitutional right, let alone a fundamental right.[6] The opinion merely states the newspaper "filed a petition" under section 119.07(7) "seeking access to investigative files." (App. at 1). By overlooking

[6] Indeed, the newspaper's petition is void of any allegation concerning a violation of any constitutional right. Moreover, there is no "fundamental" right to access public records. Article I, Section 23, of the Florida Constitution, expressly permits the legislature to make records exempt from general public access.

this key component of the sword wielder doctrine, at least as determined by the First and Second Districts, the decision below creates conflict as to the proper application of the sword wielder doctrine.

ii) The decision below does not establish that the State was the initial sword wielder.

In *Florida Public Service Commission v. Triple "A" Enterprises, Inc.*, 387 So. 2d 940 (Fla. 1980), this Court stated the sword wielder exception to the home venue privilege only applies "if the state is the *initial* sword-wielder in the matter and whether the plaintiff's action is in the nature of a shield against the state's threat." *Id*. at 942 (emphasis added). Moreover, "by merely implementing the law . . . the Department's activity . . . does not constitute sword wielding." *Dep't of Highway Safety & Motor Vehicles v. Sarnoff*, 734 So. 2d 1054, 1056 (Fla. 1st DCA 1998); *State v. Lindquist*, 698 So. 2d 299, 302 (Fla. 2d DCA 1997) (finding state must take "affirmative action" for sword wielder doctrine to apply); *Dep't of Rev. v. First Fed. Savings & Loan Assoc.*, 256 So. 2d 524, 526 (Fla. 2d DCA 1971) (finding home venue privilege applies where state or state agency is "passive or dormant").

However, the facts herein establish that, by seeking access to confidential records and filing a petition in order to do so, it was *the newspaper* that wielded the initial sword in this matter. (App. at 1) ("In this action by the newspaper ...," "the

Sun-Sentinel filed a petition..."). The Department, on the other hand, was merely implementing the law by acting as the passive custodian of records it is required, by law, to keep confidential.[7] Indeed, the facts in the decision below reflect that the State took no "affirmative action" against the newspaper, and there was clearly no "threat" to the newspapers as required by the Court in *Triple "A."* Because the court below attempted to apply the sword wielder doctrine where the State was clearly not the initial sword wielder, it misapplied precedent from this Court and other district court of appeals; therefore, conflict jurisdiction exists.

C. The decision below interjects ambiguity into settled-principles of law and creates conflict on issues of statewide importance.

"The final element in obtaining review of a conflict case is a showing that the issues are significant enough for the Court to exercise its jurisdiction." Kogan and

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[7] The Department is statutorily obligated under Chapter 39 to keep certain child abuse records (like the ones at issue here) confidential. These records are exempt from disclosure even under the Public Records law with the exception of a limited class of persons under section 39.202 (media not included) or by court order. *See* § 39.202, Fla. Stat. (2002). Indeed, the release of any such records to the newspapers requires a finding of "good cause" by a court. *See* § 119.07(7), Fla. Stat. (2002). Therefore, the Fourth DCA improperly characterizes the Department's mere implementation of the law as an "act of denial." (App. at 3). Such a misperception of the facts arguably also creates misapplication conflict based upon "erroneous use." *See* Kogan and Waters, *supra.* at 1232-33 (misapplication conflict exists where "the district court misapplies a rule of law based on its own misperception of the facts").

Waters, *supra.* at 1237. The decision below interjects ambiguity as to when a state agency is entitled to be sued in a location where it maintains its principal headquarters and also as to what is required for proper application of the sword wielder doctrine. As it stands, the decision creates a lack of uniformity among circuits concerning the application of each of these important doctrines. Moreover, the decision below affects all state agencies in Florida, not just the Department of Children and Families. Accordingly, the conflicts created by the decision below present issues of major consequence to state government and, therefore, are significant enough for this Court to accept jurisdiction.[8]

II. THE DECISION BELOW EXPRESSLY AFFECTS A CLASS OF STATE OFFICERS.

Article V, section 3(b)(3), of the Florida Constitution, authorizes this Court to review a decision of a district court of appeal that expressly affects a class of constitutional or state officers. *See, e.g., Pullen v. State,* 802 So. 2d 1113 (Fla. 2001).

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[8] Additionally, the decision may open the floodgates to further erosion of the state's home venue privilege, thereby significantly reducing or eliminating the very benefits it was intended to achieve. *See, e.g.'s, Smith v. Williams*, 35 So. 2d 844, 847 (Fla. 1948) (stating home venue privilege exists to "promote orderly, efficient, and economical government;" "[u]niformity of interpretation of rules and regulations;" and "preventing conflicting judicial rulings in different jurisdictions"); *Triple "A" Enter., Inc.*, 387 So. 2d at 943 (finding principal reason behind home venue privilege for state government is to "minimiz[e] expenditure of effort and public funds").

In order to vest this Court with jurisdiction, "a decision must directly and, in some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers." *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974).

Article IV, section 6, of the Florida Constitution requires the organization of the executive branch of state government into various "departments," with administration of each to include an "officer" serving at the pleasure at the governor. Accordingly, by requiring state agencies, and the state officers overseeing each of these agencies, to defend public records petitions in the county where such actions are brought, the decision below directly and exclusively affects the "powers" and "duties" of these state officers.

CONCLUSION

For all of the aforementioned reasons, the State respectfully requests this Court accept jurisdiction and permit the matter to be briefed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF PETITIONER ON JURISDICTION and APPENDIX was furnished by United States mail to JOHN R. HARGROVE and DANA J. McELROY of Heinrich Gordon Hargrove Weihe & James, P.A., Broward Financial Centre, 500 East Broward Blvd., #1000, Fort Lauderdale, Florida, 33394, and DAVID S. BRALOW, Tribune Company, 633 N. Orange Avenue, Orlando, Florida 32801, on this ____ day of March, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font, and is compliant with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure.

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APPENDIX

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