DA. 3-2-93 047

IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS,
PINELLAS COUNTY, FLORIDA,

Petitioner,

vs.

TOM F. SAWYER,

Respondent.

CASE NO. 79,839
DCA CASE NO. 91-01332

RESPONDENT'S ANSWER BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

SONDRA GOLDENFARB
Florida Bar No. 160108
2454 McMullen Booth Road
Suite 501-A
Clearwater, Florida 34619
(813) 726-4781
Attorney for the Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

CONSTITUTIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In this brief, Petitioner, Board of County Commissioners of Pinellas County, Florida, will be referred to as the "County," and Respondent, Tom F. Sawyer, will be referred to as "Sawyer." References to the original Record on Appeal will be by the letter "R" followed by the page number; references to Petitioner's Appendix to its Initial Brief will be by the letter "A" followed by the page number; and references to Petitioner's Initial Brief will be by the letters "PB" followed by the page number.

* * * *

Since accepting jurisdiction, this Court has granted five motions for leave to file amicus curiae briefs in support of the County (by Broward, Dade, Hillsborough, Leon, and Palm Beach Counties). Sawyer will address separately at the conclusion of this Answer Brief the issues raised in these amicus briefs.

STATEMENT OF THE CASE AND OF THE FACTS

Sawyer accepts the Statement of the Case and of the Facts contained in the County's Initial Brief, but would invite the Court's attention to the following additional facts which Sawyer considers relevant to this review proceeding.

Pursuant to Chapter 939, Florida Statutes, Sawyer, as a discharged criminal defendant, submitted a trial court order, R 29, certifying the payment of certain reasonable and necessary investigative "costs," to the Pinellas County Board of County Commissioners for reimbursement, in the amount of $10,364.47; [1] the Board denied payment. Thereafter, Sawyer brought suit in the Circuit Court for the "costs" in question, Complaint, R 1-2. The County's Answer, R 3-4, admitted all allegations of the Complaint except for the allegation that investigative costs reasonably incurred and paid by a subsequently discharged criminal defendant are taxable costs reimbursable under Chapter 939, which allegation the County denied.

The parties submitted a stipulated Statement of Facts, R 7-8, and Cross-Motions for Summary Judgment, R 5-6 and R 9. The single issue for the trial court's determination was the

---

1 Inexplicably, the amicus briefs of both Dade (p.1) and Hillsborough Counties (p.1) refer to $9,000 in costs sought; since this cause of action accrued after July 1, 1990 (at the time the Board denied payment), a claim under $10,000 would have deprived the Circuit Court of jurisdiction, §34.01(c)2, Fla. Stat. (1991).

question of law as to whether Sawyer was entitled to reimbursement for the certified investigative costs. The trial court heard oral argument and reviewed written memoranda of law submitted by the parties, R 10-20 and R 21-28. The memoranda of law deal solely with the question of whether the case-law-delineated definition of "taxable costs" in Section 939.06, Florida Statutes, was expanded by implication as a result of the 1987 amendment to Section 939.01, Florida Statutes. The County relied on previous cases from the Third and Fifth Districts, neither of which makes any reference to the 1987 amendment, for its argument that Section 939.06 does not include investigative costs. The County did not raise the question nor present argument as to whether the County's coffers differ from those of other governmental entities in this context, although Sawyer specifically argued the concept of mutuality in the assessment of litigation costs, see R 8-10.

By written Order of April 10, 1991, R 30-31, the trial judge denied Sawyer's Motion for Summary Judgment and granted the County's Motion for Summary Judgment. Shortly thereafter, Final Summary Judgment, R 32, was entered, from which an appeal was taken to the Second District Court of Appeals, R 33-34.

The Second District reversed the trial court, see A 1-7 for Opinion; the meaning and interpretation of the Second District's Opinion will be further discussed below. This Court took discretionary jurisdiction on grounds of district court decisional conflict.

QUESTIONS PRESENTED

I. WHEN APPLIED TO REIMBURSEMENT OF CRIMINAL LITIGATION COSTS, DOES THE SECOND DISTRICT'S GENERAL REFERENCE IN ITS OPINION TO "THE PROSECUTION" CONSTITUTE A MISAPPLICATION OF THE CONCEPT OF MUTUALITY?

II. DOES THE SECOND DISTRICT'S OPINION, WHICH RELIES ON ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION TO REIMBURSE A DISCHARGED CRIMINAL DEFENDANT FOR AN ITEM OF COSTS FOR WHICH A CONVICTED DEFENDANT CAN BE ASSESSED, CONSTITUTE AN "UNREASONABLE EXTENSION" OF THE DEFINITION OF TAXABLE COSTS WHERE THAT TERM IS UNDEFINED IN THE STATUTE?

III. ARE THE DECISIONS RENDERED BY THE THIRD AND FIFTH DISTRICTS, WHICH FAIL TO CONSIDER THE 1987 STATUTORY AMENDMENT ENLARGING THE DEFINITION OF TAXABLE COSTS IN CRIMINAL MATTERS, RELEVANT OR PERSUASIVE PRECEDENT IN THIS CASE?

IV. DO THE AMICUS CURIAE BRIEFS FILED SEPARATELY BY FIVE COUNTIES IN SUPPORT OF PETITIONER PROVIDE GROUNDS FOR REVERSAL OF THE SECOND DISTRICT?

SUMMARY OF ARGUMENT

I. In criminal litigation, the party-plaintiff is "the government" as agent for and on behalf of the public, the citizenry of the State of Florida. The Second District opinion, which holds that the taxable costs reimbursable to a discharged criminal defendant must include as an item of costs those expenses for which a convicted defendant may be taxed, finds support in the notion of mutuality or reciprocity in the traditional award of costs. Law enforcement, state attorneys' offices, and county government are all agents of the government with the county serving merely as the administratively convenient governmental entity to make cost reimbursement.

In addition, by failing to argue the budgetary distinction, raised here for the first time, in either the trial court or in the Second District, the County has failed to preserve the issue.

II. The definition of taxable costs in Section 939.06 has been developed by case law, because the phrase itself is ambiguous and does not delineate the specific items of expense which are reimbursable to a discharged defendant. Prior to the 1987 amendment expanding the prosecution costs chargeable against a convicted defendant, case law had held that investigative expenses were not taxable costs. When such expenses became an item of "costs" of prosecution, they by

implication became an item of "costs" of defense. The County's argument that a staggering economic burden will result from affirmance of the Second District is unsupported by any record evidence or otherwise.

A discharged defendant must receive reimbursement for those expenses which a convicted defendant is required to pay, or the 1987 amendment must fail as an unconstitutional violation of equal protection principles, both federal and state. Discrimination between the parties to litigation (here the government-plaintiff and the accused defendant) must rest on a "rational purpose." The policy of the State of Florida must assuredly be to deter unfounded prosecution. In addition, the individual accused citizen is by far the weaker party economically as against the government. There being no "rational purpose" for granting reimbursement to one prevailing party while denying it to the other in the criminal context, a failure to affirm the Second District decision must result in a declaration that the amendment is unconstitutional.

Florida public policy requires reciprocity in the award of litigation costs. Traditional civil litigation costs are awardable to the prevailing party whether plaintiff or defendant. Civil attorneys' fees, not a traditional element of costs but instructive, by analogy to the investigative costs here at issue, are generally awarded to the prevailing party except in the few situations where strong public policy reasons exist for the discrimination. Reciprocity in the award of

investigative costs in criminal cases is thus supported by the general policy of the state.

III. The district court holdings cited by the trial court, allegedly in conflict with the Second District's holding in this case, do not consider the 1987 statutory amendment which expanded the definition of criminal litigation costs. They are therefore neither relevant nor persuasive precedent when applied to the present case, in which the district court relies on the 1987 amendment for its analysis. Indeed, the decision here under review does not demonstrate "direct and express conflict" with the prior rulings, and therefore, this Court should dismiss this discretionary review proceeding as having been improvidently granted.

IV. For the most part, the amicus briefs filed by five counties in support of Petitioner, Pinellas County, do not raise any new arguments. Dade County argues that the Second District opinion is in error because of the legislative history of the 1987 amendment. However, the district court opinion is interpreting the ambiguous phrase, "taxable costs," in Section 939.06, Florida Statutes; it is not attempting to interpret the 1987 amendment itself. The legislative history of the amendment, such as it is, is thus not helpful to the Court's analysis.

ARGUMENT

ISSUE I

WHEN APPLIED TO REIMBURSEMENT OF CRIMINAL LITIGATION COSTS, THE SECOND DISTRICT'S GENERAL REFERENCE IN ITS OPINION TO "THE PROSECUTION" DOES NOT CONSTITUTE A MISAPPLICATION OF THE CONCEPT OF MUTUALITY.

A. The concept of mutuality is not misapplied.

The County argues as follows: since reimbursement of investigative costs collected from a convicted defendant is made to the relevant law enforcement agencies and not to the county, the Second District's reliance on "mutuality" (bilateral awards of costs to the prevailing party in litigation) is in error - the county per se never having been a "party" to the criminal litigation and the county per se not being the recipient of reimbursement from the convicted criminal defendant.

However, contrary to the County's assertion, the Second District opinion does not "rely on" the concept of mutuality for its holding that investigative costs reasonably incurred by a discharged defendant are reimbursable taxable costs. Rather, the opinion holds that as a matter of statutory interpretation, see Issue II, infra, the concept of taxable costs in criminal litigation was implicitly expanded by the legislature in 1987 by

its amendment to Section 939.01, and that this expansion applies to Section 939.06 of the Florida Statutes as well. Since Section 939.06 contains no definition of "taxable costs" within its own language, the district court looks to other provisions within the same chapter of the Laws of Florida in order to interpret that undefined and therefore ambiguous phrase and give it specific content.

In so holding, the court notes that its interpretation is consistent with the idea put forward in Powell v. State, 314 So. 2d 788 (Fla. 2d DCA 1975), that the public policy of the state favors "mutuality" in imposing litigation costs. In fact, the Second District opinion is relying on principles of fairness and public policy as support for its statutory analysis.

The Second District's opinion below refers to "mutuality" in a much more general sense than the County perceives. The true plaintiff in criminal litigation is the citizenry of the state in the aggregate, the public. That plaintiff can act only through its agents, government employees and officials who are assigned different roles in the prosecutorial process: law enforcement officers as the detectors and investigators of alleged criminal conduct, state attorney personnel as the prosecutors of such conduct, and public treasuries (i.e. taxes of all kinds) as the source of funds for the process as a whole. These agents' principal remains the "public."

State constitutional history supports the above analysis. The original 1885 constitution required the state itself to pay

the legal costs and expenses of a discharged defendant. 25 Fla. Stat. Ann. 564 (1981 ed.).

The governmental scheme whereby the county is designated as the entity financially responsible for criminal prosecution failures was established by constitutional amendment in 1894.

> In all criminal cases prosecuted in the name of the State, when the defendant is insolvent or discharged, the legal costs and expenses, including the fees of officers, shall be paid by the counties where the crime is committed, under such regulations as shall be prescribed by law, and all fines and forfeitures collected under the penal laws of the State shall be paid into the county treasuries of the respective Counties as a general County fund to be applied to such legal costs and expenses. Amended, general election 1894.

Art. XVI §9, Fla. Const. (1885) as amended and see Buchman v. Alexander, 24 Fla. 46, 3 So. 817 (Fla. 1888); Warren v. Capuano, 269 So.2d 380 (Fla. 4th DCA 1972), aff'd 282 So.2d 873 (Fla. 1973).

Chapter 142 of the Laws of Florida was enacted in 1895 to implement this amended constitutional provision. The old constitutional provision as amended is still part of the laws of the State of Florida, by virtue of the preservation clause in the state's present constitution, Art. XII, §10, Fla. Const. (1968).

In terms of "mutuality," all arms of the state, in whose name criminal prosecutions of accused citizens are brought, constitute the prosecuting authority. The constitution of the State of Florida specifically establishes counties as "political subdivisions" of the state, the existence of which is totally

under the control of the state legislature. Art. VIII, §1(a), Fla. Const. (1968). As has been stated,

> [a] county is created for administrative purposes; it is the representative of the sovereignty of the state, auxiliary to it, an aid to the more convenient administration of the government.

12 Fla. Jur. 2d, Counties and Municipal Corporations §75 and cases cited.

Thus, counties being administrative units of the state have no independent existence apart from state government.

As administrative units of the state, counties have been required by statute to provide financially for certain criminal prosecution expenses, but not for others. There is a division of the public purse, for example, in the contributions to maintaining state attorneys' offices and public defenders' offices, under Chapter 27, Florida Statutes: the "State," through general appropriations, pays for salaries of the attorneys staffing the two offices, §§27.25 and 27.53, Fla. Stat., while the "County" pays for certain case-specific and identifiable expenses of prosecution and indigent defense, §§27.34 and 27.54, Fla. Stat. The county also is required to provide office space and physical facilities at its expense, id.

Pursuant to the 1885 Constitution (as amended) each county is required by law to create a fine and forfeiture fund, as the vehicle for the payment of certain case-specific expenses, Ch. 142, Fla. Stat. These funds, administered by the respective boards of county commissioners, are the repositories for certain payments to the individual counties, including specifically

payment of attorneys' fee liens imposed for public defender representation, §27.562, Fla. Stat.; bail bond forfeitures, §§142.03 and 903.26, Fla. Stat.; most fines imposed as punishment in criminal cases which resulted in conviction, §§142.01 and 142.03, Fla. Stat.; and reimbursement to a county of certain "costs" expended during successful prosecutions, §142.01, Fla. Stat. These fine and forfeiture funds are also the source of funds from which a county reimburses acquitted or discharged defendants after unsuccessful prosecutions, §142.01, Fla. Stat.

While the County is correct in asserting that there is a symmetry in connection with some of the collections and disbursements from the county fine and forfeiture funds, it is clear from the above referenced statutes and the 1885 constitution that literal "mutuality" is in no way a determining factor for the use of the county as the administratively convenient bank account for either collection or disbursement of expenses related to the criminal justice system. Thus, for example, although the "State" pays the salaries of assistant public defenders, any funds collected by means of an attorneys' fee lien from a convicted defendant represented by the public defender's office go into the "County" fine and forfeiture fund. Similarly, most fines go into this fund, although there is no specific reciprocal disbursement. Bail bond forfeitures also increase the amount in the county fine and forfeiture fund, without any county obligation for reimbursement of bail bond

premiums, for example, to the acquitted or discharged defendant. See e.g. Doran v. State, 296 So. 2d 86 (Fla. 2d DCA 1974). In sum, the county fine and forfeiture funds serve merely to collect and disburse designated moneys at a local level, as an administrative convenience to the state.

From the perspective of the citizen-accused, it is the "public" in the name of the State of Florida that is the prosecuting agency, and it is the "public" which is entitled to reimbursement for prosecution costs if the accused is convicted. Conversely, if an individual has been wrongfully accused, it is the "public" to which the accused will look for reimbursement of those expenses of defense which the statutes encompass. To the acquitted or discharged defendant, the specific budget from which the public makes reimbursement is totally irrelevant. The Second District recognizes this reality: if a convicted defendant can be made to pay certain specific costs of his own (successful) prosecution, then an acquitted or discharged defendant should be reimbursed for the analogous costs of his own (successful) defense. A county in this situation merely serves as a conduit for the funds of the "public." This Court has previously so held: the county, in the context of criminal litigation costs, is merely the designated governmental agency "chargeable with providing the payment of these costs and expenses" on behalf of "the government," State v. Byrd, 378 So. 2d 1231, 1232 (Fla. 1979).

Ignoring the Second District's statement that it is

"resolv[ing] this case under statutory interpretation," Opinion at A 4, the County here attempts to recast the core issue as one of bookkeeping, by splitting the public's funds into its component bank accounts. Since the legislature itself uses the county fine and forfeiture funds for a variety of non-reciprocal purposes, however, the County's effort to draw the distinction urged in its brief must fail. Requiring the "public" to reimburse a discharged defendant for an item of costs for which the "public" is reimbursed by a convicted defendant is a proper application of the concept of mutuality.

B. The issue was not preserved below.

Sawyer also contends that the County's failure to raise or to argue below the bookkeeping distinction now urged on this Court is fatal to its argument on this point. Initially, Sawyer sought to establish his reimbursable costs within the context of his criminal case. The criminal division of the Pinellas County Circuit Court awarded him his "traditional" costs, but refused to certify the investigative costs. Sawyer sought review in the Second District, and in its opinion the appellate court directed that the procedures in Pinellas County for taxation of costs in favor of an acquitted or discharged defendant be substantially revised. Sawyer v. State, 570 So. 2d 410 (Fla. 2d DCA 1990) and Clark v. State, 570 So. 2d 408 (Fla. 2d DCA 1990). At that time, the Second District expressed no opinion on the issue of whether Sawyer was legally entitled to be reimbursed for his investigative expenses as an item of taxable costs. However,

the opinion is clear that the County was the governmental entity to which Sawyer would be looking for reimbursement if such was awarded, and that source of funds was never challenged in the proceeding.

Thereafter, Sawyer brought suit against the County for the investigative costs now in dispute. The proceedings in the trial court culminated in the Final Summary Judgment for the County which was reversed by the Second District in the opinion now under review. In the lower court proceedings, the issue was joined solely on the legal question: is a non-indigent acquitted or discharged defendant entitled to be reimbursed for his investigative expenses as an item of taxable costs against the County? See memoranda of law filed by the parties in the trial court, R 10-20 and R 21-28. Neither the legal memoranda nor the trial court's orders make reference to any fiscal distinction between a county and other public entities.

In its appeal to the Second District, as the opinion itself makes clear, this fiscal distinction again was neither raised nor argued. It is raised for the first time in these prolonged proceedings by way of the County's brief in this Court. Thus, neither the trial court nor the district court has ever been given the opportunity to consider the argument now put forth as determinative by the County.

It is an elementary principle of appellate practice that new arguments raising new issues cannot be injected into a proceeding at the appellate level. As this Court stated a few

years ago:

> In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.

Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985) (e.s.). See also Perkins v. Scott, 554 So. 2d 1220, 1222 (Fla. 2d DCA 1990); cf. Universal Underwriters Ins. v. Morrison, 574 So. 2d 1063, 1065 (Fla. 1990) (the "claim for coverage . . . was squarely addressed in the legal memorandum submitted to the trial judge in opposition to the motion for summary judgment. It was also clearly argued before the district court of appeal and before this Court.").

Sawyer submits that under Tillman, supra, the County has failed to preserve the issue (Issue I) it raises for the first time in its brief to this Court.

ISSUE II

THE SECOND DISTRICT'S OPINION, WHICH RELIES ON ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION TO REIMBURSE A DISCHARGED CRIMINAL DEFENDANT FOR AN ITEM OF COSTS FOR WHICH A CONVICTED DEFENDANT CAN BE ASSESSED, DOES NOT CONSTITUTE AN "UNREASONABLE EXTENSION" OF THE DEFINITION OF TAXABLE COSTS WHERE THAT TERM IS UNDEFINED IN THE STATUTE.

A. The definition of "taxable costs" was implicitly expanded by the 1987 amendment.

"Taxable costs" awardable to a discharged defendant under Section 939.06, Florida Statutes (1991), must be defined as including "investigative expenses" since those are now included as "costs" against a convicted defendant and in favor of the prevailing authorities under amended Section 939.01, Florida Statutes (1991).

In 1987, the Florida legislature amended Section 939.01, Florida Statutes, as follows:

> (1) In all criminal cases ~~of conviction for crime~~ the costs of prosecution, including investigative costs incurred by law enforcement agencies, and by fire departments for arson investigations, if requested and documented by such agencies, shall be included and entered ~~up~~ in the judgment rendered against the convicted person.

Ch. 87-243, §47, Laws of Fla., effective date October 1, 1987. [standard usage of underlining for new matter, stricken through for words omitted].

Section 939.01, Florida Statutes (1991), is part of Chapter 939 entitled "Costs," which deals in general with the award of costs to either party in criminal litigation. Sections 939.06 and 939.07 provide for the reimbursement of "taxable costs" to an acquitted or discharged defendant. Nowhere in Chapter 939 is there a definition of either "the costs of prosecution" or "taxable costs," except for the specification of certain expenses as reimbursable costs in Section 939.07. The determination of what items are includable and what items are excludable has been left to the courts. See e.g. Holton v. State, 311 So. 2d 711 (Fla. 3d DCA 1975).

It is clear that the long-standing general policy of the state is to reimburse a defendant for the expenses of criminal defense if he is successful in the criminal prosecution, Art. I, §19, Fla. Const. (1968) and Art. XVI, §9, Fla. Const. (1885), preserved by Art. XII, §10, Fla. Const. (1968); Lillibridge v. City of Miami, 276 So. 2d 40 (Fla. 1973). Not all such expenses are reimbursable, however, Doran v. State, 296 So. 2d 86 (Fla. 2d DCA 1974).

Sawyer concedes that under the case law construing Chapter 939 as it existed prior to the 1987 amendment, the investigative expenses of an acquitted or discharged defendant were not reimbursable, Benitez v. State, 350 So. 2d 1100 (Fla. 3d DCA 1977), followed in Osceola Co. v. Otte, 530 So. 2d 478 (Fla. 5th DCA 1988); the cited cases are those upon which the trial court

relied in denying Sawyer's request for reimbursement of investigative costs, see Order, R 30.

The various sections of Florida Statutes must be read in pari materia to determine if they shed light on the appropriate elements of taxable costs, whether awarded in favor of the prosecution against a convicted defendant, or in favor of an acquitted or discharged defendant against the unsuccessful prosecution. In Powell v. State, 314 So. 2d 788 (Fla. 2d DCA 1975), the district court held that the reimbursement of a non-indigent criminal defendant for expert witness fees was appropriate, because Section 939.07, Florida Statutes (1973), allowed generic "witness fees" to the acquitted or discharged defendant and because the prosecution could tax reasonable compensation of its expert witnesses as costs against a convicted defendant under Section 914.06, Florida Statutes (1973). The witness fee reimbursement statute, Section 939.07 itself, however, did not specifically provide for such expert compensation.

Section 939.06, Florida Statutes (1991), refers to "taxable costs," without definition. Section 939.01, Florida Statutes (1991), refers to costs as specifically including "investigative costs." Sawyer successfully contended in the district court that the definitional aspects of that inclusion (in Section 939.01) must apply to the "costs" in Section 939.06 as well: if "costs" in one section of a chapter includes such expenses, then the same word, "costs," in another section of the same chapter

must include such expenses as well.

The County's primary argument against the district court's holding rests on its bald assertion of financial ruin which will be visited upon the County by requiring it to reimburse investigative costs to acquitted and discharged criminal defendants. Sawyer suggests that the imposition of costs against the government in a losing prosecution deters unfounded prosecution and serves the salutary public purpose of encouraging responsible charging decisions. The government, after all, just like any other plaintiff, chooses to initiate the litigation. And, when that decision results in a losing effort against a citizen who had no choice in the matter, it is only fair - as in other litigation - to require the losing side to reimburse the successful one. To assess a given item of costs in favor of the government if it wins, but not in favor of the accused citizen if he or she wins, serves to encourage unfounded prosecutions - surely not a result consistent with established Florida public policy.

In addition, the County put forth no statistics or other evidence in the trial court to support its argument that the financial resources of Pinellas County would be unduly burdened by the Second District's ruling in favor of Sawyer. In fact, very few criminal charges actually filed result in dismissals, nolle prosequis, or acquittals; the various state attorneys boast regularly of conviction rates well in excess of 90%. Even fewer cases involve non-indigent defendants who have incurred

significant investigative expenses prior to their legal discharge. An issue of elemental fairness must not be determined on the basis of unsupported allegations of "staggering expense."

This Court and others have ruled courageously in a number of recent cases that legislative failure properly to fund the criminal justice system is insufficient justification for judicial failure to preserve Floridians' rights. See e.g. White v. Board of County Commissioners of Pinellas County, 537 So. 2d 1376 (Fla. 1989). Sawyer urges the Court to exercise that same courage in affirming the Second District here.

B. Principles of equal protection require the Second District's holding.

Unless the 1987 amendment expands the definition of taxable criminal litigation costs bilaterally, the amendment is unconstitutional. Art. I, §§2 and 9, Fla. Const.(1968); Amendments V and XIV, U.S. Const. This alternative ground for upholding the Second District's ruling was argued, but not decided by that court, see A 4. [See also brief filed in support of Respondent by FACDL as amicus curiae].

Traditionally, investigative expenses have not been considered costs taxable against a convicted criminal defendant. See in general 65 ALR 2d 854, Annotation: Items of costs of prosecution for which defendant may be held. And, as noted at p.18, supra, Florida case law has not previously allowed

investigative costs to be taxed in favor of an exonerated defendant. To determine if such a non-traditional item of costs can be constitutionally awarded by statute unilaterally, an examination of another non-traditional cost item, attorneys' fees, may prove instructive.

As noted, attorneys' fees are also not a traditional element of costs in either criminal or civil litigation. See 12 Fla Jur 2d, Costs §31; Goldberg v. County of Dade, 378 So. 2d 1242 (Fla. 3d DCA 1980). However, such fees are often allowed as taxable costs by statute in certain circumstances. Most commonly, these statutes require reciprocity, that is, attorneys' fees are assessed against the losing party and in favor of the prevailing party, regardless of which party initiated the litigation.

Where statutes award attorneys' fees only to a prevailing plaintiff, the courts have upheld the statutes against constitutional challenge (on equal protection or due process grounds) only if there is a "rational purpose" or strong public policy reason supporting the discrimination. See in general 73 ALR 3d 515, Annotation: Validity of statute allowing attorney's fees to successful claimant but not to defendant or vice versa. For example, in Florida, a property owner may be subject to an unilateral assessment of attorneys' fees if it unsuccessfully defends a lawsuit brought by a laborer's lien claimant, Hunter v. Flowers, 43 So. 2d 435 (Fla. 1949), because there is a strong public policy in favor of encouraging settlement of such claims. Where fees are awarded unilaterally (i.e. to a prevailing

plaintiff but not to a prevailing defendant), the award is generally made to the weaker party - an individual litigant suing a government agency or corporation, for example. See 73 ALR 3d, supra; Murphy v. Amoco Production Co., 729 F. 2d 552 (8th Cir. 1984) (upholding a unilateral North Dakota attorneys' fee provision against equal protection challenge on ground that the provision is an incentive for the superior party to settle); State ex rel. Kidwell v. U.S. Marketing, Inc., 631 P. 2d 622 (Idaho 1981) (unilateral attorneys' fee provision is constitutional where it furthers a legitimate governmental objective).

An important rule of statutory construction applicable under Florida case law is that a court must construe a statute, if possible, in such a way as to avoid successful Constitutional challenge, 49 Fla. Jur. 2d, Statutes §113 and cases cited. If the investigative costs provision in Section 939.01, Florida Statutes (1991), is interpreted to be unilateral only, i.e. the successful government may assess investigative expenses against a losing (convicted) defendant, but a successful (acquitted or discharged) defendant may not assess investigative expenses against the government, then the provision itself is open to constitutional attack on due process and equal protection grounds.

In the case of investigative expenses, it would be difficult to imagine a "rational purpose" for discriminating in the award of this item of costs, awarding such costs to the government

after a successful prosecution but not awarding them to the discharged citizen after an unsuccessful prosecution. By all measures, the citizen is the weaker party, facing the powerful forces of government; the citizen has not initiated the litigation of which he becomes the economic victim; and surely deterrence of unfounded prosecutions is the policy of the State of Florida.

In sum, were this Court to hold that the legislature "intended" only a unilateral award of investigative costs, then the 1987 amendment to Section 939.01, Florida Statutes (1991), must ultimately be held unconstitutional on equal protection and due process grounds under both the federal and state constitutions.

C. Florida public policy requires reciprocity in the award of litigation costs.

It is generally the public policy of the State of Florida to award costs to either prevailing party. The Second District also relied in part on this principle for its decision, see A 3.

The general cost statutes governing Florida civil litigation provide mutuality or reciprocity of awards, see §57.041, Fla. Stat. (1991) (traditional costs awarded to either prevailing party) and §57.105, Fla. Stat. (1991) (attorneys' fees as an element of taxable costs awarded to either prevailing party if the action or defense is patently insupportable). So far as Sawyer can determine, there are no statutes awarding traditional

costs only to a prevailing plaintiff or a prevailing defendant, and, as previously noted, the statutes which award attorneys' fees as an item of costs only to a prevailing plaintiff or only to a prevailing defendant apply exclusively to situations in which doing so either fosters a particular public policy or there is a rational purpose for the discrimination.

Illustrative of the fact that the public policy of the state favors mutuality or reciprocity in the area of taxation of litigation costs is the amendment to Section 57.105(2), Florida Statutes (1991), dealing with awards of attorneys' fees based on contract. After several cases held that a contract provision for fees in the event of litigation need not be mutual to be enforceable in a private contract, see e.g. Edward L. Nezelek, Inc., v. G.E. Drywall, Inc., 406 So. 2d 1220 (Fla. 4th DCA 1981); Cheek v. McGowan Elec. Supply Co., 511 So. 2d 977 (Fla. 1987), the Florida legislature adopted a statute requiring that every contract in which only one party can be awarded fees after successful litigation on the contract is deemed to allow either party to the contract to collect such fees if it prevails, Ch. 88-160, Laws of Fla., amending §57.105, Fla. Stat. (1987).

The legislature has insisted on strict mutuality in specific areas of criminal costs as well. In 1985, when it revised Section 27.34(2) and Section 27.54(3), Florida Statutes (1983), to require the county to reimburse both the state attorney's office and the public defender's office for the costs of copies of depositions in successful convictions, for example, it also

revised Section 939.07, Florida Statutes (1983), to provide that the costs of copies of depositions be reimbursed to a discharged or acquitted defendant as well, Ch. 85-213, §§1, 4, and 7, Laws of Fla. As the Second District implied in Powell v. State, 314 So. 2d 788 (Fla. 2d DCA 1975), fairness and the public policy of the State of Florida require that reciprocity apply in the determination of what costs are taxable in a criminal prosecution: if a particular item of costs is taxable against a convicted defendant, then that item must also be taxable in favor of an acquitted or discharged defendant.

ISSUE III

THE DECISIONS RENDERED BY THE THIRD AND FIFTH DISTRICTS, WHICH FAIL TO CONSIDER THE 1987 STATUTORY AMENDMENT ENLARGING THE DEFINITION OF TAXABLE COSTS IN CRIMINAL MATTERS, ARE NOT RELEVANT OR PERSUASIVE PRECEDENT IN THIS CASE.

Neither of the two cases cited by the County as having precedential value in the case under review are relevant to the core issue: Does the 1987 amendment to Section 939.01, Florida Statutes (1991), require reinterpretation of Section 939.06 in determining what costs are taxable in favor of an acquitted or discharged defendant?

The decision in Benitez v. State, 350 So. 2d 1100 (Fla. 3d DCA 1977) preceded the amendment in question. Its reasoning therefore is not helpful, since it relied on the lack of any statutory authority for reimbursement of investigative costs to either criminal party-litigant.

Indeed, the court in Benitez seemed to believe that if it included an acquitted defendant's investigative costs within the meaning of "taxable costs," it would have to include all reasonable and necessary costs. However, a convicted defendant is not taxed with all "reasonable and necessary costs" today,

but only with those spelled out in chapter 939 and developed by case law. And Sawyer is not seeking reimbursement of costs other than those having a statutory basis.

The decision in Osceola County v. Otte, 530 So. 2d 478 (Fla. 5th DCA 1988) was rendered a little less than a year after the effective date of the amendment in question. The issue before the Fifth District, however, dealt with whether a post-acquittal determination of indigency could retroactively allow a previously determined non-indigent defendant to obtain reimbursement of his investigative costs. The district court took as a "given" that investigative costs for a non-indigent acquitted defendant were not reimbursable, relying on Benitez, supra. The opinion makes no reference whatsoever to the then-recent statutory amendment, and therefore one must assume that issue was never raised.

The County's reference to Mitchum v. State, 251 So. 2d 298, 300 (Fla. 1st DCA 1971), PB 10, in connection with Osceola County is puzzling, since Mitchum deals with a trial court's taking judicial notice, without the need for expert testimony, of whether certain materials are obscene. Sawyer concedes that all courts in the State of Florida are expected to "know" the statutes. However, the issue presented here is whether an amendment to a statute affects the interpretation of another part of the statute. That is not a matter for judicial notice, but rather must be raised and argued by the appellate parties before any reviewing court can be expected to address the

question. Indeed, deciding an issue not raised or briefed may well be beyond the scope of appellate review entirely. There is no basis to assume that the district court in Osceola County considered or addressed the impact of the 1987 statute.

As was stated by the Second District below, see A 4, neither Benitez, supra, nor Osceola County, supra, expressly considers the 1987 amendment to Section 939.01 in the opinion. Therefore, neither case constitutes relevant precedent. Nor, one might add, do these cases create "direct and express" conflict with the Second District's opinion in the case instanter. Because of the new fact situation (i.e. new legislation) presented in the current case, this Court can decide that conflict review was not providently granted, Miami Daily News, Inc., v. Alice P., 467 So. 2d 697 (Fla. 1985), on the grounds that the Second District opinion is actually a ruling on a matter of first impression.

ISSUE IV

THE AMICUS CURIAE BRIEFS FILED SEPARATELY BY FIVE COUNTIES IN SUPPORT OF PETITIONER PROVIDE NO GROUNDS FOR REVERSAL OF THE SECOND DISTRICT.

A. Broward, Leon, and Palm Beach Counties raise essentially the same arguments as Petitioner, Pinellas County.

Broward County raises the same spectre of economic ruin being visited upon the counties by the district court as does Petitioner, Pinellas County, in its Initial Brief. However, Broward fails (as does Petitioner) to provide any statistical documentation for its assertions and points to no record evidence supporting them. See discussion, supra, pp. 20-21.

Leon County charges the Second District with "improperly attempt[ing] to remedy . . . a harsh effect of a statute ...." (p. 2). However, where a statute contains an inherent ambiguity (here, the undefined phrase "taxable costs"), courts traditionally look for assistance to similarly worded statutes, in order to flesh out the content of the unclear wording. By using the 1987 amendment of Section 939.01 to give an expanded meaning to Section 939.06, the district court is doing what courts have done historically, that is, interpreting ambiguous legislation. See discussion, supra, pp. 17-19.

Palm Beach County states that only those costs "permitted by

statute or by case law" are taxable and reimbursable to an acquitted (or, presumably, discharged) defendant (p. 2). Prior to the case instanter raising the issue, no Florida appellate court had been asked to rule as to the effect of the 1987 amendment on the meaning of "taxable costs" reimbursable to a successful criminal defendant. Hence, the Second District's opinion in this case, being one of first impression, provides the "case law" interpretation of an otherwise ambiguous term. See also discussion of "mutuality," supra, at pp. 8-14.

B. The amicus brief of Hillsborough County demonstrates a failure to understand the Second District's opinion.

Substantively, Hillsborough County seriously misreads the Second District's opinion in this case. The district court refers very briefly to a 1988 amendment to Section 57.105(2), Florida Statutes - not to subsection (1) dealing with so-called frivolous lawsuits - as an illustration of legislative policy favoring mutuality in the award of civil litigation expenses; the court then suggests that a similar policy favoring mutuality is applicable in the criminal context. Hillsborough's brief, however, goes off on a tangent to deal with §57.105(1), which is irrelevant, see Hillsborough brief at pp. 3-4, and then goes on to discuss contracts (p. 5).

Hillsborough County further asserts, with absolutely no basis in the lower court opinion or elsewhere, that affirmance in this case would result in the award of attorneys' fees to acquitted or discharged defendants (p. 6). However, convicted

defendants are not currently chargeable with attorneys' fees for the state attorney which prosecuted them, so this "logical extension" is wholly illogical.

Hillsborough County also argues that private investigative expenses are discretionary and not "easily verifiable" and therefore should be disallowed (p. 8 ff.). This argument, of course, applies with equal force to law enforcement investigative expenses which are nonetheless taxable against a convicted defendant. Present procedures allow for litigation of the reasonableness and necessity of all claimed costs. See §939.08, Fla. Stat., and e.g. Funje v. State, 17 Fla. L. Weekly D2646 (Fla. 3d DCA Nov. 24, 1992). In fact, investigative costs have already specifically been found subject to the "reasonable and necessary" standard in connection with an insolvent defendant, Carrasquillo v. State, 502 So. 2d. 505 (Fla. 1st DCA 1987). An exonerated criminal accused must prove to the Board of County Commissioners that his costs were appropriately incurred; this requirement provides the necessary limitation on spurious claims.

Hillsborough County makes the statement (p. 10) that "practically all of the costs related to the services performed by the private investigator" (e.s.) are already reimbursable; this statement is without foundation. A private investigator, just as a law enforcement investigator, takes statements, examines a crime scene, tracks down and talks to witnesses, confers with counsel and client, takes photographs, etc. None

of these activities is included within the list of "traditional" costs previously reimbursable to the innocent accused.

Hillsborough County makes the utterly astonishing statement that "acquitted or discharged criminal defendants should bear some portion of the costs incurred in a criminal prosecution as a deterrence for [sic] engaging in activity that is subject to prosecution." Hillsborough brief at p. 10. In one stroke, Hillsborough has apparently unilaterally done away with the presumption of innocence and decided that acquitted or discharged defendants are nonetheless "guilty" - of something. Undersigned counsel is incredulous that a member of the Bar can make such a statement.

Note: Hillsborough County repeatedly refers to "Respondent's brief," Hillsborough brief at pp. 1, 4, 5, and 10; since Sawyer has not yet filed a brief in this Court, undersigned counsel must assume that Hillsborough is referring to some brief filed elsewhere - which is, of course, not before this Court. The references are therefore confusing and irrelevant to his proceeding.

The other comments and statements in Hillsborough County's brief are duplicative of the arguments made by Petitioner, Pinellas County.

C. By focusing on F.S. 939.01 rather than on F.S. 939.06, the amicus brief of Dade County "interprets" the wrong statute.

Dade County argues that the "plain language" of Section 939.01, Florida Statutes (1991), requires no interpretation and

that, therefore, the Second District's opinion is flawed. However, it is the language of Section 939.06 that requires interpretation, or in this case, reinterpretation, in light of the 1987 amendment to Section 939.01.

The specific items of expense, which the term "taxable costs" in Section 939.06 encompasses, are not clearly and comprehensively spelled out in the legislation itself. Florida's appellate courts have been interpreting that phrase by a process of selective inclusion and exclusion for decades. Thus, privately retained attorneys' fees are not taxable , Short v. State, 579 So. 2d 163 (Fla. 2d DCA 1991); Hillsborough County v. Martinez, 483 So. 2d 540 (Fla. 2d DCA 1986); Goldberg v. County of Dade, 378 So. 2d 1242 (Fla. 3d DCA 1980), while privately retained expert witness fees are taxable, Powell v. State, 314 So. 2d 788 (Fla. 2d DCA 1975), but only if the expert was a witness at the trial, Goldberg, supra (disallowing costs for jury selection expert). Appeal bond premiums are taxable, Lillibridge v. City of Miami, 276 So. 2d 40 (Fla. 1973); Wood v. City of Jacksonville, 248 So. 2d 176 (Fla. 1st DCA 1971), while pretrial bail bond premiums are not taxable, Dinauer v. State, 317 So. 2d 792 (Fla. 1st DCA 1975); Holton v. State, 311 So. 2d 711 (Fla. 3d DCA 1975); Doran v. State, 296 So. 2d 86 (Fla. 2d DCA 1974); Warren v. Capuano, 269 So. 2d 380 (Fla. 4th DCA 1972), aff'd 282 So. 2d 873 (Fla. 1973); Wood, supra. Defense witness subpoena costs and mileage are taxable, Hayes v. State, 387 So. 2d 539 (Fla. 5th DCA 1980), even if the witness is from

out of state, Warren, supra, but only if such costs are reasonable and necessary, see Lunetto v. State, 274 So. 2d 251 (Fla. 2d DCA 1973). The acquitted defendant's travel and hotel expenses, however, Warren, supra; Dinauer, supra, and those of his retained attorney, Hayes, supra, are not taxable. Transcripts of depositions, if they serve a useful purpose in the defense, are taxable, Powell, supra; see also Hayes, supra, as are the costs of taking depositions of state witnesses, Powell, supra. Finally, Short, supra, cited by Dade County in its brief at p. 4, holds that the decision as to whether a given item of costs is "taxable" or not rests in the trial court's discretion, because the items involved in Short, could either be taxable costs or not. Presumably because of the role the expenses played in the successful defense, the district court in Short upheld the trial court's exercise of discretion to disallow them.

The above review of case law amply demonstrates that the phrase "taxable costs" as used in Section 939.06, Florida Statutes, is far from clear and unambiguous. Therefore, it requires judicial interpretation. The Second District's reliance on standard principles of statutory construction to determine the meaning of "taxable costs," in light of the 1987 amendment, is proper and should be affirmed.

Dade County makes strenuous efforts to find some relevant legislative history in connection with the 1987 amendment to Section 939.01, Florida Statutes; in fact, there is none other

than the amendment's inclusion as part of an omnibus crime bill. Undersigned counsel has found neither committee hearings nor floor debates on the specific provision; it was a late amendment to the Senate bill, subsequently incorporated into the compromise bill ultimately passed, see 1987 Senate and House Journals where this amendment first shows up in the House journal for June 5. Since it is not the amendment itself, but rather the interpretation of Section 939.06 which is here at issue, Sawyer contends that the history of the amendment is not germane in any event.

Dade County also raises the economic impact argument discussed by the other counties and addressed by Sawyer at pp. 20-21 of this brief.

CONCLUSION

For the reasons stated in this Answer Brief, Respondent Sawyer urges the Court to affirm the decision of the Second District Court of Appeals, or, in the alternative, to dismiss the County's application for conflict review as having been improvidently granted.

Respectfully submitted,

SONDRA GOLDENFARB
2454 McMullen Booth Road
Suite 501-A
Clearwater, Florida 34619
(813) 726-4781
SPN NO. 00041530
FLA BAR NO. 160108
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief has been furnished by U.S. Mail this 21st day of December, 1992, to the following:

Suzanne Daly, Esquire
Assistant County Attorney
315 Court Street
Clearwater, FL 34616
Counsel for Petitioner, Pinellas County

James T. Miller, Esquire, as amicus curiae for FACDL
407 Duval County Courthouse
Jacksonville, FL 32202

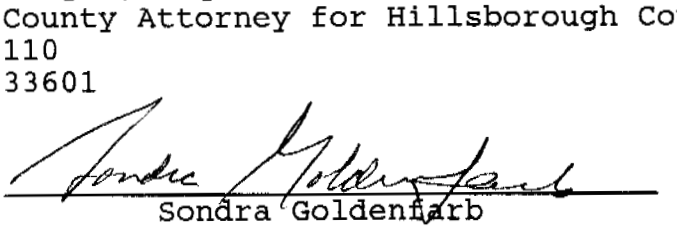
Cassandra K. Jackson, Esquire,
Assistant County Attorney for Leon County
301 So. Monroe St., 5th Floor
Leon County Courthouse
Tallahassee, FL 32302

Andrea Karns Hoffman, Esquire
Assistant County Attorney for Broward County
Broward County Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, FL 33301

Cory J. Ciklin, Esquire
Assistant County Attorney for Palm Beach County
P.O. Box 1989
West Palm Beach, FL 33402

Augusto E. Maxwell, Esquire,
Assistant County Attorney for Metropolitan Dade County
Jackson Memorial Hospital
1611 N.W. 12th Avenue, West Wing 109
Miami, FL 33136

Angela B. Wright, Esquire
Assistant County Attorney for Hillsborough County
P.O. Box 1110
Tampa, FL 33601



Sondra Goldenfarb

sawyer\supreme\brief