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IN THE SUPREME COURT OF FLORIDA

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CASE NOS. 88,146

JAMES J. WOLF,

PETITIONER,

VS.

COUNTY OF VOLUSIA,

RESPONDENT.

AMICUS BRIEF OF BOBBY FLNJE

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF INTEREST

While he was a minor, Bobby Fijnje was arrested on charges of sexual battery and lewd and lascivious assault on three other minors. After a lengthy trial, he was acquitted of all charges. Presently pending in Circuit Court in Dade County is Bobby Fijnje's claim for costs based on his acquittal.

STATEMENT OF THE CASE AND FACTS

Amicus adopts the Statement of the Case and Facts of Petitioner James J. Wolf.

SUMMARY OF THE ARGUMENT

The district court erred in concluding that long-standing case precedent allowing the recovery of expert fees and other costs by acquitted defendants under Section 939.06, Florida Statutes, was overruled by this Court in *Sawyer v. Board of County Commissioners*, 620 So. 2d 757 (Fla. 1992). The only issue in *Sawyer* was the recoverability of the cost of an investigator.

The district court also erred in refusing to apply Section 939.07, which provides for the recovery of some costs by discharged defendants. The district court's conclusion that this statute does not apply to defendants who are acquitted is contrary to Florida law, renders the statute meaningless, and leads to an absurd result. Under Section 939.07, costs including the cost of an expert witness, court reporter costs, and the cost of copies of depositions may be recovered by an acquitted defendant.

ARGUMENT

The district court opinion should be quashed and the prior opinion upon which it relied should be disapproved. County *of Volusia v. Wolf*, **672 So. 2d 563** (Fla. 5th DCA 1996); *Volusia County v. Carrin*, 666 So. 2d 603 (Fla. 5th DCA 1996). The opinions improperly concluded that costs which have historically been recoverable by acquitted defendants in Florida are no longer recoverable.

I. FLORIDA'S HISTORIC COMMITMENT TO PAY A PORTION OF THE COSTS INCURRED BY ACQUITTED DEFENDANTS

Florida has historically provided that a defendant who has been charged with a crime and forced to defend himself, but is eventually acquitted, may recover from the government some of the costs incurred in the successful criminal defense. This principle is almost as old as our state. More than 100 years ago this Court explained that the state, departing from the "ancient rule" that each party bears its own costs, "undertakes to pay the costs of criminal cases prosecuted in the courts where the defendant is insolvent **or discharged.**" *Buckman v. Alexander*, 3 So. 817 (Fla. 1888) (emphasis added). The Court added, however, that "this liberality may not be made the source of abuse, the undertaking to be guarded by regulations of law." *Id.*

Under these principles, most of the cost of defending against criminal charges remains unrecoverable. The courts have noted that there are many costs incurred in a successful criminal defense which may be reasonable, but must be borne by the acquitted defendant. *Doran v. State*, 296 So. 2d 86 (Fla. 2nd DCA 1974); *Holton v. State*, 311 So. 2d 711 (Fla. 3rd DCA 1975); *Benitez v. State*, 350 So. 2d 1100 (Fla. 3d DCA 1977). Attorneys' fees, investigative expenses,

and lost income due to imprisonment before acquittal are clearly *not* recoverable. The burden of these costs is borne solely by the acquitted defendant. And of course there is no compensation for the various non-economic losses which befall a person who is charged with a crime, but subsequently acquitted.



Before proceeding to our legal argument, we note a few considerations which we believe may be of interest to the Court.

First, the statutes providing for the recovery of costs by acquitted defendants do not often come into play. A very substantial number of criminal defendants are indigent, so they do not pay costs in the first place. See Bureau of Justice Statistics, *Indigent* Defense (Feb. 1996) (noting that 75% to 80% of inmates in state prisons were represented by court-appointed counsel). Of the cases which involve non-indigent defendants, few-like few criminal prosecutions in general-result in an acquittal. Of those cases involving nonindigent defendants which end in acquittal, the amount spent in costs will usually be modest. The relative paucity of reported opinions over the last hundred years demonstrates that the recovery of costs by an acquitted defendant is very much the exception, rather than the rule, in the criminal justice system.

Second, it is important for the Court to understand the general structure of the payment of costs in the criminal justice system. The costs incurred by a defendant who is acquitted of criminal charges are only one part-and only a small part-of the burden imposed on counties. Counties are responsible for almost all of the costs of prosecution. Section 27.34, Fla. Stat. And counties are responsible for almost all the costs of indigent defendants. Chapter 939, Fla. Stat.

See generally *Paying for the courts: who should pick up the tab?*, FLA. BAR NEWS, Oct. 15, 1995, at 1.

The burden imposed on counties of paying some of the costs incurred by acquitted, nonindigent defendants is small, by comparison.

Finally, we stress that we do not ask the Court to create a new right, or impose new burdens on counties. Instead, we simply ask the Court to apply statutes which have been in effect for more than one-hundred years. If the counties object to these laws, then the appropriate forum for change is the Legislature, not the courts. The fact that the Legislature has not repealed these laws, in an age of concern about crime and about government expenditures, provides some indication of the degree to which these principles are entrenched in Florida law and government. Florida has made a choice that when a nonindigent defendant is charged with a crime but is eventually acquitted, the government and the acquitted defendant should share the cost of the defendant's defense. This has long been the law in Florida, and there is no basis for the judiciary to change this.

II. THE DISTRICT COURT OPINION IMPROPERLY CONCLUDED THAT VARIOUS TYPES OF COSTS TRADITIONALLY RECOVERABLE BY AN ACQUITTED DEFENDANT UNDER SECTION 939.06 ARE NO LONGER RECOVERABLE, DUE TO THIS COURT'S OPINION IN *Sawyer v. Board of County Commissioners*, 620 So. 2d 757 (FLA. 1992)

The Fifth District opinions in *Wolf* and *Can-in*, which held that an acquitted defendant may not recover costs such as expert witness fees and video deposition transcripts under Section 939.06, are in conflict with numerous precedents of Florida courts, which have awarded these and similar expenses. See, e.g., *Short a. State*, 579 So. 2d 163 (Fla. 2nd DCA 1991) (expert witness fees); *Bothwell v. State*, 450 So. 2d 1150 (Fla. 2nd DCA 1984) (expert witness fees);

Powell v. State, 314 So. 2d 788 (Fla. 2nd DCA 1975) (expert witness fees); *Hayes v. State*, 387 So. 2d 539 (Fla. 5th DCA 1980) (deposition and court reporter costs); *Dinauer v. State*, 317 So. 2d 792 (Fla. 1st DCA 1975) (court reporter costs).

The Fifth District misinterpreted *Sawyer v. Board of County Commissioners*, 620 So. 2d 757 (Fla. 1992), as holding that such costs are no longer recoverable. As Petitioner James Wolf notes in his initial brief, the sole holding of the *Sawyer* case was that investigative costs are not recoverable. The Second District in *Sawyer*, 596 So. 2d 475 (Fla. 2d DCA 1992), had erroneously held that investigative costs **are** recoverable, and this Court quashed this decision awarding investigative costs, which under long-standing precedent are not taxable. See *Benitez v. State*, 350 So. 2d 1100 (Fla. 3d DCA 1977); *Osceola County v. Otte*, 530 So. 2d 478 (Fla. 5th DCA 1988).

But nothing in the *Sawyer* decision addressed the recoverability of other expenses, such as expert witness fees or the cost of transcripts. The pre-Sawyer cases awarding these costs remain good law, and the district court should have followed them. It goes without saying that this Court is capable of making clear when it is overruling cases. Indeed, in *Sawyer* it specifically overruled language in two prior cases. *Sawyer*, 620 So. 2d at 759 n.3 (receding from language in *Lillibridge v. City of Miami*, 276 So. 2d 40 (Fla. 1973), and *Warren v. Capuano*, 282 So. 2d 873 (Fla. 1973)). This Court did not overrule the abundant precedent awarding costs for expert witnesses and other expenses.

The executive branch of the Florida government has agreed that expert witness fees are recoverable by an acquitted defendant under Section 939.06. In a formal opinion in 1986, the

Attorney General discussed the county's responsibility for payment of numerous costs, including *pretrial consultations* fees for expert *witnesses*. Op. of the Attorney General of Florida, No. 86-85 (Oct. 6, 1986). The Attorney General expressed the opinion that Sections 939.06 and 939.15 "operate in conjunction with ss. 27.34(2) and 27.54(3) to require a certificate of the judge or clerk or judgment of the court prior to imposition of *liability on the county forpayment of such costs in the case of an acquitted or discharged defendant* who has paid such costs." (emphasis added).

The Fifth District misinterpreted *Sawyer* as overruling prior case law. The decision of the district court in *Wolf* should be quashed, and the decision in *Carrin* should be disapproved.

III. THE FIFTH DISTRICT IMPROPERLY INTERPRETED SECTION 939.07 AS NOT PROVIDING FOR THE RECOVERY OF COSTS SUCH AS EXPERT WITNESS FEES AND COURT REPORTER COSTS

The Fifth District in *Carrin* and by incorporation in *Wolf* ruled that an acquitted defendant cannot recover costs such as expert witness fees and deposition transcripts under Section 939.07, Florida Statutes. This conclusion is contrary to the language of the statute and Florida case precedent.

A. Section 939.07 provides for the recovery of witness fees and other costs incurred by acquitted defendants

Section 939.07, entitled "Pay of defendant's witnesses," provides the following:

In all criminal cases prosecuted in the name of the state in the circuit courts or county courts in this state where the defendant is indigent or discharged, the county shall pay the legal expenses and costs, as is prescribed for the payment of costs incurred by the county in the prosecution of such cases, including the cost of the defendant's copy of all depositions and transcripts which are certified by the defendant's attorney as serving a useful purpose in the disposition of the case; provided, that before any witness is

subpoenaed on behalf of a defendant in the circuit or county court an application shall be made to the judge, in writing, on behalf of the defendant, setting forth the substance of the facts sought to be proved by the witness or witnesses, making affidavit that the defendant is insolvent, and if upon such showing the judge is satisfied that the witness or witnesses are necessary for the proper defense of the defendant, he shall order that subpoena issue, and that the costs as herein provided shall be paid by the county, and not otherwise.

The heart of the statute has been part of Florida law for more than one hundred years. It was part of the Florida Constitution of 1885, and in 1903 became part of the Florida Statutes.’

While the statute is not a model of clarity, it unmistakably provides for the recovery of certain costs by acquitted defendants. See generally *Buckman v. Alexander*, 3 So. 817 (Fla. 1888). As the emphasized portion of the statute explains, where a defendant is “discharged,” “the county shall pay the legal expenses and costs” of the defendant. This general right of reimbursement is limited, however. First, the costs must be “certified by the defendant’s attorney as serving a useful purpose in the disposition of the case.” Presumably if there is a dispute about the reasonableness of the costs, the acquitted defendant has the burden of establishing that the

‘The Florida Constitution of 1885 provided that “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,” Section 9, article XVI. **See generally** *Rollo v. Wiggins*, 5 So. 2d 458, 460 (Fla. 1942); *Atkinson County v. Stewart*, 75 So. 543 (Fla. 1917); *DeSoto County Commissioners v. Howell*, 40 So. 192 (Fla. 1906). This constitutional provision remains part of the law of Florida, preserved by the residual clause of the 1968 revision of the Constitution. Art. 12, Section 10. See *Warren v. Capuano*, 269 So.2d 380, 381-82 (Fla. 4th DCA 1972), *affirmed*, 282 So. 2d 873 (Fla. 1973); *Goldberg v. County of Dade*, 378 So. 2d 1242 (Fla. 3d DCA 1980).

The statute as originally enacted in 1903 was entitled “An Act to pay defendant’s Witnesses in Criminal Cases,” and provided in part that “In all criminal cases prosecuted in the name of the State in the Circuit Courts of the State, where the defendant is insolvent or discharged, the county shall pay the legal expenses and costs as is now prescribed by law for the payment of costs incurred by the county in the prosecution of such cases.” Laws of Florida, 1903, Chapter 5132.

costs were reasonable. Second, the reimbursement is limited to “the legal expenses and costs, as is prescribed for the payment of costs incurred by the county in the prosecution of such cases.” In other words, the county’s responsibility is to pay for certain costs of acquitted defendants on the same terms as it pays for the costs of prosecution.

The statute also provides some examples of recoverable costs: the statute is entitled “pay of defendant’s witnesses,” and the statute also provides for payment of “the cost of the defendant’s copy of all depositions and transcripts.”

B. The Fifth District incorrectly concluded that Section 939.07 provides for recovery of costs by discharged defendants, but not acquitted defendants

In its *Carrin* decision, and by incorporation in its *Wolf* decision, the Fifth District rejected the application of Section 939.07. The court reasoned that the acquitted defendant could not recover his costs under Section 939.07 because he was “acquitted,” and not “discharged”:

We are also unable to accept appellee’s argument that certain of these costs are recoverable under section 939.07. That statute applies to indigent and discharged defendants. Although the term “discharged” appears to have a fluid meaning in Florida statutes and may have been interpreted to include defendants who have been acquitted as well as those who have had charges dropped or served their sentence, *the language of section 939.06 itself shows that the Florida legislature discerns a distinction between defendants who are discharged and those who are acquitted. Unlike section 939.06, section 939.07 expressly applies to defendants who have been discharged, not to those who have been acquitted.* The defendant in this case was acquitted. We do not comment on the logic or fairness of these statutes. We take them as they are written and as they have been interpreted by the high court in *Sawyer*.

Volusia County v. Carrin, 666 So. 2d 603, 604-05 (Fla. 5th DCA 1996) (emphasis added).

The court's finding of a crucial distinction between a defendant who is "discharged" and one who is "acquitted" is simply wrong. A defendant who is acquitted is necessarily discharged. This is the proper sequence of events: a defendant is found not guilty by the fact-finder, is therefore acquitted, and is then discharged by the court, Florida Rule of Criminal Procedure 3.690 provides that "When a judgment of not guilty is entered, the defendant, if in custody, shall be immediately **discharged**," unless the defendant is in custody on another charge. Indeed, the Second District has specifically held that "Section 939.07 provides for the payment of witness costs of an **acquitted** or discharged defendant. . . ." *Powell v. State*, 314 So. 2d 788, 789 (Fla. 2nd DCA 1975) (emphasis added). Courts interpreting Section 939.07 have if anything found acquittal to be the more important factor, rather than discharge—that is, they have inquired into whether the discharge was based on an acquittal or the functional equivalent of an acquittal. In *State v. Crawford*, 378 So. 2d 822 (Fla. 2nd DCA 1979), the appellate court refused to award costs to a defendant who was "discharged," because the discharge was based on the defendant's ill health, rather than on a lack of evidence to support the prosecution's case.

In addition to being an incorrect interpretation of Florida criminal law, the Fifth District's opinion also renders Section 939.07 meaningless. The court never explained precisely who would be entitled to recover costs under Section 939.07, if it does not include those who are acquitted. By excluding the obvious group of people who could and should benefit from the statute—those persons who have been acquitted—the Fifth District rendered the statute without meaning, in violation of the principle that legislation should not be interpreted in such a way as

to render it meaningless. *Ellis v. State*, 622 So. 2d 991 (Fla. 1993). To the extent to which the district court held that a defendant who is “discharged” for a reason such as poor health can recover costs, but a defendant who is acquitted because of a lack of evidence cannot, the district court’s interpretation is absurd and should be rejected. See *Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995).

The Fifth District’s conclusion that Section 939.07 does not apply to acquitted defendants was erroneous and should be disapproved.

C. The Fifth District erroneously concluded that its holding on Section 939.07 was mandated by *Sawyer*

The Fifth District-while recognizing that its decision concerning Section 939.07 was not necessarily logical or fair-stated that it felt bound by this Court’s decision in *Sawyer v. Board of County Commissioners*. In reaching this conclusion, the Fifth District was undoubtedly incorrect. *Sawyer* had absolutely nothing to do with Section 939.07; instead, it involved Section 939.06.

The fact that *Sawyer* did not involve Section 939.07 is apparent. The costs at issue in that case were investigative expenses, which clearly are not within the scope of Section 939.07, which limits reimbursement to costs involving witnesses, including the cost of transcripts. Since investigative expenses are by no stretch of the imagination recoverable under Section 939.07, the court opinion concerning the recovery of such expenses is obviously not a decision interpreting that statute.

Indeed, the Fifth District's improper reliance on Sawyer can be seen from the fact that the Sawyer opinion never once cited or referred to Section 939.07. The Sawyer case did not involve Section 939.07, and the opinion did not mention Section 939.07. Sawyer interpreted Section 939.06, and nothing in that opinion in any way limited the recovery of costs under Section 939.07.

D. Expert witness fees, court reporter costs, and copies of transcripts are taxable costs under section 939.07

As explained above, Section 939.07 provides for the recovery by an acquitted defendant of certain types of costs—"the legal expenses and costs, as is prescribed for the payment of costs incurred by the county in the prosecution of such cases, including the cost of the defendant's copy of all depositions and transcripts which are certified by the defendant's attorney as serving a useful purpose in the disposition of the case."

Determining precisely which costs can be recovered under 939.07 can be a rather complicated inquiry. The statute provides that "legal expenses and costs" are recoverable, but case authority instructs us that not *all* legal expenses and costs are recoverable. The statute specifically provides that "the cost of the defendant's copy of all depositions and transcripts which are certified by the defendant's attorney as serving a useful purpose in the disposition of the case" may be recovered. Other expenses may be recovered, if the county is responsible for the payment of the costs in criminal prosecutions. See *generally Powell v. State*, 314 So. 2d 788 (Fla. 2d DCA 1975) (holding, pursuant to Section 939.07, that since county pays for cost of experts

for prosecution, acquitted defendant can recover cost of his expert). The inquiry, therefore, must be on what costs of prosecution the county is obligated to pay.

Costs incurred by the prosecution which must be paid by counties are listed in various statutes. Relevant to this case is Section 914.06, Florida Statutes, which provides for payment of experts:

In a criminal case when the state or an indigent defendant requires the services of an expert witness whose opinion is relevant to the issues of the case, the court shall award reasonable compensation to the expert witness that shall be taxed and paid by the county as costs in the same manner as other costs.

Other costs of prosecution-including pretrial consultation fees for expert witnesses, court reporter costs, and copies of depositions-must be paid by counties, pursuant to Section 27.34(2), Florida Statutes.

The county is therefore responsible for costs of prosecution such as expert witness fees, court reporter costs, and copies of depositions. Since Section 939.07 provides for the county to pay costs such as witness fees and deposition and transcript costs of an acquitted defendant as is prescribed for the payment of costs incurred by the county in the prosecution of the case, the acquitted defendant is accordingly entitled to recover his or her expert witness fees, court reporter costs, and the cost of copies of depositions.

The conclusion that costs such as expert witness fees are recoverable under Section 939.07 is supported not only by the plain language of the relevant statutes, but also by case authority. The Second District has specifically held that expert witness fees and deposition costs are recoverable under Section 939.07. **Powell v. State**, 314 So. 2d 788 (Fla. 2nd DCA 1975). See

also *Garner v. State*, 445 So. 2d 413 (Fla. 4th DCA 1984) (awarding expert witness fees under Section 939.07 for an indigent defendant).’

The Fifth District’s conclusion that expert witness fees and other costs are not recoverable by an acquitted defendant under Section 939.07 is contrary to the plain language of the statutory scheme and contrary to the decisions of other district courts of appeal. The opinions of the Fifth District should be quashed and disapproved.

CONCLUSION

For the above-stated reasons, amicus Bobby Fijnje respectfully requests that the Court quash and disapprove the decisions of the Fifth District in *Wolf* and *Can-in*.

Respectfully submitted,

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²There is some confused dicta in *Hillsborough County v. Martinez*, 483 So. 2d 540 (Fla. 2nd DCA 1986). The court there first stated that some costs can be awarded under Section 939.07, noting that the statute “does not provide for costs or legal expenses other *than* those necessary to *obtain* witnesses, such as the legal expenses required to serve process and the costs incurred in paying witness fees and travel expenses.” The court then inconsistently stated that “Section 939.07 functions as a limitation on the reimbursement of costs authorized by section 939.06 for a discharged defendant; *it is not independent authority for their payment.*” In any event, the holding in *Martinez* was correct, as there the acquitted defendant requested attorneys’ fees, which are clearly not recoverable.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true and correct copies of the foregoing were mailed this 24th day of September, 1996, to Kirkconnell, Lindsey, Snure & Henson, P.A, 1150 Louisiana Avenue, Suite 1, P.O. Box 2728, Winter Park, FL 32790-2728; and Kelly A. Greene, Assistant County Attorney, 123 W. Indiana Avenue, DeLand, FL 32720.


