ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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CASE NO. 88,146

JAMES J. WOLF,

Petitioner,

v.

COUNTY OF VOLUSIA,

Respondent.

AMICI BRIEF OF
THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
AND
THE FLORIDA ASSOCIATION OF CRIMINAL DEF'ENSE LAWYERS

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 9,000 attorneys. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to the area of criminal defense and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among other things, the NACDL seeks to promote the proper and fair administration of criminal justice and the continued recognition and adherence to the Bill of Rights which is necessary to sustain the quality of the American system of justice.

The Florida Association of Criminal Defense Lawyers (FACDL) is a not-for-profit corporation formed to assist in the reasoned development of the criminal justice system in our state. The founding purposes of the FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, and furthering the education of the criminal defense community through meetings, forums, and seminars. Approximately 1,000 FACDL members provide legal representation to those facing criminal prosecution.

This NACDL and FACDL brief is submitted in the interest of those persons who were arrested on criminal charges and later acquitted and/or discharged. The NACDL and FACDL's interest in the reasoned development of the criminal law leads to support of Petitioner's argument that the Fifth District Court of Appeal has improperly limited recoverable costs to acquitted and/or discharged criminal defendants.

It should be noted that none of the costs sought to be recovered by Mr. Wolf are beyond the norm in today's criminal litigation. Many offenses, such as the sexual battery offense involved in Wolf, must be defended by the use of expert witnesses. s involve the need for deposition expenses, witness fees, and copying costs. These expenses are vital to give teeth to the federal and Florida constitutional protections of due process, effective assistance of counsel, the right of confrontation, and other trial rights provided to criminal defendants. The legislature has simply seen fit to permit recoupment of certain costs when the state has put a defendant through the ordeal of criminal litigation and been unsuccessful in proving its allegation. In this matter, the statutes act as a reasonable check and balance against frivolous criminal prosecution. Because these resources are vital to the defense of individuals charged with crimes in this state, Amici request this Court to uphold the proper application of these statutes in Mr. Wolf's case,

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts of Petitioner, James J. Wolf.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal breaks with a historical commitment by the State of Florida to protect acquitted and discharged criminal defendants from certain costs associated with the defense of the criminal charges brought against them. The decision of the Fifth District must be reversed, as that court has improperly applied this Court's decision in **Sawyer**, rendering §§ 939.06 and 939.07, Fla.Stat. virtually meaningless.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN ITS APPLICATION OF SAWYER WHEN IT CONCLUDED THAT THE COUNTY HAD NO DUTY TO REIMBURSE AN ACQUITTED DEFENDANT FOR REASONABLE AND NECESSARY COSTS FOR EXPERT WITNESS FEES, SERVICE OF PROCESS COSTS, TRANSCRIPTION COSTS, VIDEO DEPOSITION COSTS, AND COPYING/DUPLICATION EXPENSES.

A. Introduction

The decisions of the Fifth District Court of Appeal in County of Volusia v. Wolf, 672 So.2d 563 (Fla. 5th DCA 1996), and the case it relied upon, Volusia County v. Carrin, 666 So.2d 603 (Fla. 5th DCA 1996), break with a historical commitment by the people of Florida, the Florida Legislature, and the Florida Courts ". . . to protect a [criminal] defendant from costs when he is innocent or when the state fails to pursue a vigorous prosecution." State v. Crawford, 378 So.2d 822 (Fla. 2d DCA 1979). The Fifth District Court of Appeal has relied upon this Court's decision in Board of County Commissioners v. Sawyer, 620 So.2d 757 (Fla. 1993), to virtually destroy the benefit afforded to acquitted or discharged criminal defendants by §§ 939.06 and 939.07, Fla.Stat. Under the decisions of the Fifth District in Wolf and in Carrin, an acquitted or discharged criminal defendant may no longer recover many costs which have historically been reimbursable under the Florida Statutes and the Florida caselaw construing those statutes.

The Fifth District Court of Appeal has based its decisions in Wolf and in Carrin on its myopic reading of this Court's decision in Sawyer, ignoring many other precedents left untouched by Sawyer, however, dealt solely with the issue of whether investigative costs were recoverable under § 939.06, Fla.Stat. The decision in Sawyer, that § 939.06,

Fla.Stat., did not authorize an acquitted defendant to be reimbursed for investigative costs, was in keeping with prior decisions from the district courts. The same cannot be said for the Fifth District's holding that §§ 939.06 and 939.07, Fla.Stat., do not authorize an acquitted defendant to be reimbursed for costs such as expert witness fees, deposition costs, transcription costs, service of process costs, and copying/duplication expenses.

B. Sawyer, Carrin, and Wolf

To understand the Fifth District's decisions in Carrin and Wolf, it is necessary to revisit Sawyer. In Sawyer, the sole issue was whether an acquitted defendant could recover investigative costs under § 939.06, Fla.Stat. (1989). This Court followed the lower court decisions in Osceola County v. Otte, 530 So.2d 478 (Fla. 5th DCA 1988), and Benitez v. State, 350 So.2d 1100 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1211 (Fla. 1978), and ruled that investigative costs were not recoverable under that statute, This Court did not define "taxable costs" but merely held that investigative costs did not fall within that term. 620 So.2d at 758. In so doing, it disapproved of prior overly broad language in Lillibridge v. City of Miami, 276 So.2d 40, 41 (Fla. 1973), and Warren v. Capuano, 282 So.2d 873, 874 (Fla. 1973), concerning a defendant's right to recoup costs. 620 So.2d at 759, n. 3. What is unmistakable from Sawyer is that it did not discuss the specific costs at issue in Wolf.

However, the specific costs at issue in Wolf were discussed in Carrin.[1] Carrin involved such costs as expert witness fees and expenses, video deposition transcripts, travel expenses, copies of documents obtained from the state attorney, and service of subpoenas by a private

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1/ Carrin and Wolf are the only two district court of appeal decisions to discuss Sawyer. Apparently, no other district court has seen fit to change its prior caselaw based upon Sawyer.

process server. 666 So.2d at 604. Carrin reads Sawyer as limiting "taxable costs" under § 939.06 to solely court costs, court fees, any costs or fees of a ministerial government office, or any charges for subsistence. Id. This result in Carrin does not derive logically from Sawyer, as will be discussed below. Secondly, Carrin ruled that these costs were not recoverable under § 939.07. The court based that decision upon the difference between an "acquitted" and a "discharged" defendant. Id. Of course, all acquitted defendants are discharged defendants, so that the Fifth District's distinction, as applied to both Mr. Carrin and Mr. Wolf, is illogical.

Finally, in the Wolf opinion now before this Court for review, the Fifth District simply followed Carrin and excluded payment of all costs except for clerk of the court expenses, sheriff expenses, and witness fees. 672 So.2d at 564. Yet on its very face, Wolf appears to give a broader reading of § 939.06 than was provided in Carrin, for at least Wolf authorized the payment of witness fees. Obviously, witness fees are not costs or fees of the court or a ministerial government office, or a charge of subsistence.

With that background as to the current controversy facing this Court, Amicus will attempt to put this issue in historical perspective.

C. Constitutional Underpinnings

Sections 939.06 and 939.07 find their underpinnings in the current and prior constitutions of the state of Florida.

> In the [Florida] constitution there are three clauses relating to witnesses and costs in criminal prosecutions Section 11 of the Declaration of Rights provides that in such prosecutions the accused "shall * * * have * * * compulsory process for the attendance of witnesses in his favor." Section 14 of this declaration provides that "no person shall be compelled to pay costs except after conviction on a final trial." Section 9 of Article 16, provides that "in all criminal cases prosecuted in the name of

> the state, where the defendant is insolvent or discharged, the state shall pay the legal costs and expenses, including the fees of officers, under such regulations as shall be prescribed by law. "

Buckman v. Alexander, 3 So. 817, 818 (Fla. 1888).

The Florida Constitution of 1885 was amended in 1894 to shift legal costs and expenses owed to a discharged criminal defendant to the counties, rather than the state. See DeSoto County Commissioners v. Howell, 40 So. 192, 193 (Fla. 1906).

Art. XVI, § 9 of the 1885 State Constitution became a statute pursuant to Art. XII, § 10 of the schedule of the 1968 constitutional revision. See State v. Nell, 297 So.2d 90 (Fla. 2d DCA 1974). Under our current Constitution, Art. I, § 19 states that:

> [n]o person charged with crime shall be compelled to pay costs before a judgment of conviction has become final.

As the commentary to Art. I, § 19 notes, the section was derived from § 14, Declaration of Rights, of the Constitution of 1885.

D. Florida Statutes

Historically, § 939.06, Fla.Stat. (1995), can be traced back to 1846. Section 4062, General Florida Statutes (1906), is virtually identical to its modern day successor.

> No defendant in a criminal prosecution who shall be acquitted or discharged therefrom shall be liable for any costs or fees of the court of any ministerial office, or for any charge of subsistence while detained in custody. And if he shall have paid any taxable costs in the case, the clerk or justice shall give him a certificate of the payment of such costs, with the items thereof, which, when audited and approved according to law, shall be refunded to him by the county.

§ 4062, Florida General Statutes (1906). See Jackson County v. Stewart, 75 So. 543 (Fla. 1917). There are only three changes from this 1906 predecessor statute to the present day §

939.06, Fla.Stat. (1995). In the first line of § 939.06, Fla. Stat. (1995), the words "shall be" were replaced by the word "is."

> No defendant in a criminal prosecution who is acquitted or discharged shall be liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody.

(emphasis added to reflect change in statute).

In the second sentence of § 939.06, Fla.Stat. (1995), the word "And" has been deleted from the beginning of the sentence and the word "justice" has been replaced with the word "judge" to conform terminology to the revision of the judiciary brought about by the adoption of the revised Article V of the Florida Constitution.

> [ ] If he shall have paid any taxable costs in the case, the clerk or **judge** shall give him a certificate of the payment of such costs, with the items thereof, which, when audited and approved according to law, shall be refunded to him by the county.

(emphasis added to reflect change in statute).

It is clear from a review of § 939.06, Fla. Stat. (1995), that it has remained virtually unchanged for decades .

This statute has never defined the term "taxable costs," However, the Fifth District Court of Appeal has now limited the term "taxable costs" by use of the first sentence in § 939.06, Fla.Stat. (1995). Under this restrictive reading, the Fifth District defines "taxable costs" only as "costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody." This limited reading of the term "taxable costs" is clearly erroneous when the legislative intent and historical origins of today's statute are reviewed.

The legislature's intention that "taxable costs" mean more than "costs or fees of the court or any ministerial office" is evidenced by the fact that the Florida Legislature has allowed §

939.06, Fla. Stat. **(1995),** to remain virtually unchanged in the wake of repeated trial court and district court decisions construing the term "taxable costs" to include costs associated with expert witnesses, depositions, transcripts, and service of process.

That the legislature never repealed or amended the statute evidences its approval of those judicial interpretations of the term "taxable costs." Furthermore, although many of those decisions have been rendered in the twenty-three years since the last amendment and reenactment of § 939.06, **Fla.Stat.,** some district court decisions defining "taxable costs" more broadly than the narrow reading given by the Fifth District today, were rendered prior to 1973. See, e.g., Warren v. Capuano, 269 **So.2d** 380 (Fla. 4th DCA 1972) (discharged defendant entitled to reimbursement for costs of private process service and for mileage and per diem expenses of summoned witness), aff'd 282 **So.2d** 873 (Fla. **1973).**[2]

This Court has held that:

> **[t]he** legislature is presumed to be cognizant of the judicial construction of a statute when contemplating making changes in the statute . . . .

State v. **Quigley,** 463 **So.2d** 224, 226 (Fla. 1985). See also, **Bidon** v. **Department** of Professional Regulation, Florida Real Estate Commission, 596 **So.2d** 450, 452 **(Fla.** 1992).

It is clear that the legislature intended that the first and second sentences in § 939.06, Fla.Stat., have separate and distinct effects. Sentence one states that:

> **[n]o** defendant in a criminal prosecution who is acquitted or discharged shall be liable for any costs or fees of the court or any

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2/ Amicus recognizes that in **Sawyer,** this Court receded from its decision in Warren to the extent that dicta in this Court's Warren opinion might be read as inconsistent with Sawyer. Sawyer, 620 **So.2d** at 759, n. 3. It remains that the Fourth District's decision in Warren had already been rendered at the time of the Legislature's reenactment of § 939.06 in 1973.

> ministerial office, or for any charge of subsistence while detained in custody.

The words "shall be liable" instruct us that an acquitted or discharged defendant may not be charged or billed any court costs, court fees, or subsistence fees after the time that he is acquitted or discharged. Bothwell v. State, 450 So.2d 1150, 1152 (Fla. 2d DCA 1984) (acquitted defendant may not be required to pay cost of state's expert). This sentence means for example, that an acquitted or discharged defendant may not be assessed investigative costs pursuant to § 939.01 or costs of incarceration pursuant to § 941.24.

The second sentence of § 939.06, Fla.Stat., contemplates reimbursement for "taxable costs" already expended by the acquitted or discharged defendant.

> If he shall have paid any taxable costs in the case, the clerk or judge shall give him a certificate of the payment of such costs, with the items thereof, which, when audited and approved according to law, shall be refunded to him by the county.

The legislature never intended for the term "taxable costs" in the second sentence to be defined by the first sentence of § 939.06, Fla.Stat. That is clear based both on a plain reading of the two sentences and on the fact that the statute has not been repealed or amended in light of the district court decisions which have been rendered over the past twenty-three years. The predecessor statute, § 4062, General Florida Statutes (1906), is also instructive. In that statute, the second sentence began with the word "And." The presence of the word "And" at the beginning of the second sentence of the predecessor statutes indicates the original legislative intent that two different areas of costs be dealt with by the two different sentences of the statute.

The Fifth District decisions in Wolf and in Carrin conflict with long-standing law concerning what costs are "taxable" to the county when a criminal defendant is acquitted or

discharged. In numerous cases, expert witness fees, deposition costs, and court reporter costs have been deemed "taxable" by the various district **courts.**[3] Despite the fact that this Court's decision in Sawver neither expressly disapproves of these opinions, nor even mentions these opinions, the Fifth District now implicitly reads Sawyer as overruling each of them. r , in Sawyer this Court merely ruled that investigative costs were not reimbursable to an acquitted criminal defendant under § 939.06, Fla.Stat.

E. Expert Witness Fees

This case and the Carrin case break with the longstanding rule that expert witness fees are authorized and taxable as costs pursuant to § 939.06, **Fla.Stat.** (1995). Powell v. State, 314 **So.2d** 788, 789 (Fla. 2d DCA 1975). Powell was not disapproved by this Court's holding in Sawyer. The legislature has not seen fit to alter § 939.06, Fla.Stat., since the Powell decision. Therefore, it is clear that § 939.06 and § 939.07 allow for reimbursement of expert witness fees to the acquitted or discharged defendant. See also Short v. State, 579 So. 2d 163, 164 (Fla. 2d DCA 1991).

F. Witness Fees and Mileage Costs

The decisions of the Fifth District Court of Appeal in the instant case and in Carrin also conflict with the decision of the Fourth District Court in Warren v. Canuano, 269 **So.2d** 380 (Fla. 4th DCA 1972). In Warren, the court held that a discharged defendant was entitled to

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3/ In this state there are uniform guidelines for taxation of costs in civil actions. While obviously those guidelines, on their face, are not applicable to criminal cases, they do represent an understanding in the largest civil segment of our justice system that certain costs are taxable. Those guidelines specifically provide that costs of certain deposition and transcription costs, certain expert witness fees, certain copying costs are taxable. **See** Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

reimbursement for mileage and per diem expenses paid to a witness summoned from another state. Warren was decided prior to the Florida Legislature's reenactment of § 939.06, **Fla.Stat.** in 1973. As was previously discussed, the only Legislative change to § 939.06, **Fla.Stat.** in 1973 was the substitution of the word "judge" for the word "justice" in an attempt to conform terminology to the revision of the judiciary brought about by the adoption of the revised Article V of the Florida Constitution. The Florida Legislature was presumptively aware of the Warren court's decision when it reenacted § 939.06, **Fla.Stat. (1995),** in 1973, without substantive change.

Ironically, the Fifth District Court's decision in the instant case and in Carrin also conflicts with its prior holding in Haves v. State, 387 So.2d 539 (Fla. 5th DCA 1980). In Haves, that court directed the lower court to order the county to make payment pursuant to § 939.06, Fla.Stat. for witness fee and mileage costs, among other things. Id. at 539. Neither Wolf nor Carrin expressly overrules or makes mention of the Haves decision.

G. **Subpoena Costs**

Also in Hayes, the Fifth District held that "subpoena costs (praecipe and service)" were taxable costs pursuant to § 939.06, Fla.Stat. Again, this intra-district conflict is not addressed by the court below.

In Warren, the Fourth District held that costs associated with private service of process should be reimbursed to a discharged defendant as taxable costs. Warren, 269 So.2d at 381. Because the Florida Legislature was presumptively aware of the Warren decision when it reenacted § 939.06 in 1973, and reenacted § 939.07 in 1982 and 1985, it is clear that the

legislature intended that those statutes be interpreted to provide reimbursement for subpoena and service of process costs incurred by the acquitted or discharged criminal defendant.

H. Court Reporters, Depositions, and Transcription Costs

As is the case with expert witness fees, witness fees and mileage costs, and subpoena costs, the Fifth District has now broken from longstanding authority which holds that costs associated with court reporters, depositions, and transcriptions, are costs which are reimbursable to the acquitted or discharged defendant. Again, the Fifth District's most recent decisions fail to explain or account for its own conflicting opinion in Haves. In Haves, the Fifth District previously ruled that court reporter and deposition costs were taxable costs, for which the acquitted defendant in that case should have been reimbursed. Haves, 387 So.2d at 539.

Over twenty years ago, the Powell court also held that deposition costs were properly reimbursable to the acquitted defendant. Powell, 314 So.2d at 789. Similarly, the First District has held that sums expended for depositions are proper taxable costs for which a discharged defendant should be reimbursed. Dinauer v. State, 317 So.2d 792, 793 (Fla. 1st DCA 1975).

CONCLUSION

Based on the arguments and authorities set forth in Mr. Wolf's briefs, and the arguments and authorities set forth in this Amicus Brief, this Court must reverse the Fifth District's decision in Wolf. In so doing, the Court must recognize that certain costs, beyond the mere payment of fees to the clerk, sheriff, or jailer, must be recoverable to an acquitted or discharged

defendant, Among them are the expert witness costs, deposition-related costs, copying costs, and witness fees sought in Wolf.

Respectfully submitted this 7th day of October, 1996 in Orlando, Orange County, Florida.

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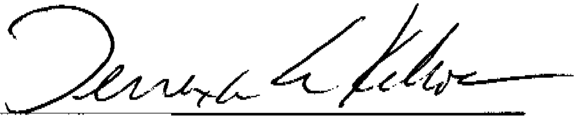

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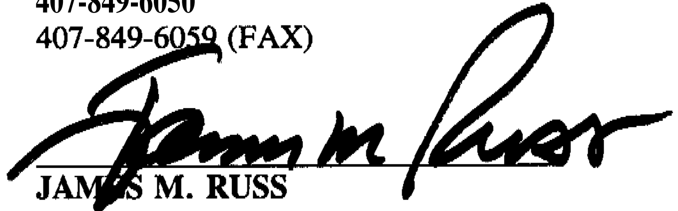

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail this 7th day of October, 1996 to **KELLY A. GREENE, ASSISTANT VOLUSIA COUNTY ATTORNEY,** 120 West Indiana Avenue, Deland, Florida 32720, and **DAVID A. HENSON, ESQUIRE,** Kirkconnell, Lindsey, Snure & **Henson,** P. A., P. 0. Box 2728, Winter Park, Florida 32790-2728; with the original and 7 copies being sent by Federal Express to **SID J. WHITE,**

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