IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JAMES J. WOLF,

Petitioner,

vs. CASE NO.: 88,146

COUNTY OF VOLUSIA,

Respondent.

**DISCRETIONARY PROCEEDINGS TO REVIEW
A DECISION OF THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIFTH DISTRICT**

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent agrees with the statement of the case presented by the Petitioner with the following additional facts.

It should be noted that the Petitioner, the Plaintiff in the trial court, sought payment from the Respondent for taxable costs solely pursuant to F.S. 939.06 (1993). Petitioner did not seek costs pursuant to any other statutory scheme allowing for the recovery of taxable costs.

In addition, the decision of the Fifth District Court of Appeal in County of Volusia v. Wolf, 672 So.2d 563 (Fla. 5th DCA 1996) was preceded by its decision in Volusia County v. Carrin, 666 So.2d 603 (Fla. 5 DCA 1996) which was decided while Wolf, supra, was pending review. Petitioner filed with the Fifth District, a Notice of Identity of Issues in the Wolf matter stating that the issues in Wolf were "virtually identical" to the issues in the Carrin case. Thereafter, the Fifth District decided Carrin and then Wolf.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal in County of Volusia v. Wolf, 672 So.2d 563 (Fla. 5th DCA 1996) should be affirmed. The Fifth District in Wolf, supra, correctly limited the recovery of taxable costs by an acquitted Defendant pursuant to F.S. 939.06 (1993) to court costs and fees, the costs and fees of a ministerial office and costs of subsistence paid by the accused while detained in custody. There exists no other statute specifically requiring the Respondent to pay expert witness fees and associated expenses, videotaped deposition expenses, court reporter and transcription expenses, process service by a private process server cost, fees for copies of documents obtained from the state attorney, architectural services expenses and exhibit expenses. As such, the Fifth District was correct to reverse the trial court's order directing the Respondent to pay $16,280.43 in costs and expenses which were not court costs or fees, costs of a ministerial office or costs of subsistence paid by the Petitioner as a result of the criminal prosecution.

For over one hundred years, the Supreme Court of Florida has held that cost provisions against the state must be expressly authorized. Board of County Commissioners, Pinellas County v. Sawyer, 620 So.2d 757, 758 (Fla. 1993) citing Buckman v. Alexander, 24 Fla. 46, 493 So. 817, 818 (1888). It is the legislature that creates provisions for taxable costs. Id. Unless there is a specific statute directing the state to pay a certain cost as a taxable cost, the state and its subdivisions should not be obligated to pay a judicially created taxable cost. By returning to the plain and unequivocal meaning of the sole statute requiring counties to pay the taxable costs of an acquitted

Defendant, the Florida Supreme Court in Pinellas County, and the Fifth District Court of Appeal in Wolf, and Volusia County v. Carrin, 666 So.2d 603 (Fla. 5th DCA 1996) have established a uniform, legislatively sanctioned basis upon which the counties can expect to pay taxable costs to an acquitted Defendant.

ARGUMENT

THE FIFTH DISTRICT OPINION REVERSING THE TRIAL COURT'S ORDER TO PAY AS TAXABLE COSTS ITEMS THAT WERE NOT COURT COSTS, COURT FEES, FEES OF A MINISTERIAL OFFICE OR CHARGES FOR SUBSISTENCE, WAS CORRECT AND SHOULD BE AFFIRMED.

The Fifth District Court of Appeal was correct to reverse the trial court's decision ordering the Respondentto pay $16,280.43 to the Petitionerfor items that were not taxable costs. The trial court, pursuant to its understanding of F.S. 939.06 (1993) had ordered the Respondent to pay expert witness fees, private process server costs, court reporter and transcription costs, photocopying costs, architectural service expenses and exhibit expenses. The trial court had ignored the ruling of this Court in Pinellas Countv, supra, which limited taxable costs to court costs and fees, the costs of a ministerial office and charges of subsistence. In reversing the trial court, the Fifth District Court of Appeal followed the precedent set by this Court in the Pinellas County decision.

Florida Statutes 939.06 provides for a vehicle for an acquitted Defendant in a criminal prosecution to obtain a refund for all paid,taxable costs from the county within which the prosecution occurred. F.S. 939.06 (1993). The statute limits taxable costs to court costs and fees, costs and fees of a ministerial office and charges of subsistence. Id. Since the legislature created this provision for the recovery of taxable costs there have been no significant amendments to the statute that have had the effect of expanding the recovery of costs items beyond court costs and fees, the costs and fees of a ministerial

office and charges of subsistence.' Since the right to recover paid taxable costs from the state was created by the legislature, the statute should be carefully construed by the courts. Pinellas Countv, supra, at 758.

This Court did carefully construe F.S. 939.06 (1993) when it rendered the Pinellas County, supra, decision. In that opinion, this Court reiterated that for over one hundred years the highest court has required that cost provisions against the state be expressly authorized. Pinellas County, supra, at 758 citing Buckman v. Alexander, 24 Fla. 46,493 So. 817, 818 (1888). Unless the legislature creates a specific statute providing for a trial cost to be taxed against the state, the plain meaning of F.S. 939.06 limits taxable costs recoverable against the state to court costs and fees, the costs and fees of a ministerial office and costs of subsistence paid by the acquitted Defendant

Given the statutory construction in Pinellas County by this Court, the Fifth Districts decision to reverse the trial court order awarding $16,280.43 was correct and should be affirmed. It is a fundamental principle of statutory construction that where the language of the statute is plain and unambiguous, the terms within the statute are not open to judicial interpretation. Pardo v. State, 596 So.2d 665,667 (Fla. 1992). Although other courts and Petitioner may find ambiguity to the statute, this Court has found the statute unequivocal in its disallowance of any additional disbursements other than court costs or court fees, any costs or fees of a ministerial office or any charges of subsistence. The Fifth District has not legislated any other taxable cost burdens on the state and has followed the plain and

[1]It should be noted that in the three years since the Pinellas County decision, there have been no amendments to F.S. 939.06.

unambiguous language of F.S. 939.06 (1993). The Fifth District decision should be affirmed.

THE FIFTH DISTRICT CORRECTLY FOLLOWED THE PRECEDENT OF PINELLAS COUNTY AND CARRIN.

Petitioner argues vociferously but incorrectly that Pinellas County should not have been followed by the Fifth District as the ruling in Pinellas County was limited to the issue of whether investigativecosts were recoverable by an acquitted Defendant? However, the decision in Pinellas County reviewed the opinion of the Second District Court of Appeal in Sawyer v. Board of County Commissioners, 596 So.2d 475 (Fla. 2d DCA 1992) (Sawyer), wherein the Second District stated that taxable costs were not defined within F.S. 939.06 and thus, taxable costs were open to judicial interpretation.

In order to determine whether the Second District was correct in its determination that investigativecosts were taxable costs, it was necessary for this Court to determine the definition of taxable costs. The district courts were not only split on whether investigative costs were taxable costs, recoverable by an acquitted defendant but, they were also split as to whether F.S. 939.06 was subject to judicial interpretation (thus allowing the judiciary to determine what expense was a taxable cost) or whether taxable costs were legislatively created (and thus limited to the plain meaning of F.S. 939.06 (1993). Cf. Sawyer v. Board of Countv Commissions, Id. and Benitez v. State, 350 So.2d 1100, 1102 (Fla. 3rd DCA 1977). Although the Sawyer case arrived at this Court pursuant a dispute of whether investigative fees were taxable costs, clearly to reach that decision the Court needed to settle the definition in F.S. 939.06 of taxable costs.

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*Consistent with this argument, Petitioner withdrew his request for investigation costs on the day of the trial.

An authoritative construction of a state statute by the Supreme Court of Florida is binding as to what the statute does or does not mean. Alford v. State, 307 So.2d 433,437 (Fla. 1975) citing Wainwriaht v. Stone, 414 U.S. 21, (1973). Further, if there is a conflict between the decision of a District Court of Appeal and the Supreme Court, the decision of the Supreme Court prevails until the Supreme Court overrules itself. Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973). To come to its conclusion on investigative costs in Pinellas County, this Court necessarily had to construe F.S. 939.06. Because construction of F.S. 939.06 was central to the decision of this Court in Pinellas County, its decision has a wider impact than the issue of whether investigative costs are taxable costs.

Clearly, Pinellas County decided what the definition of taxable costs was pursuant to F.S. 939.06 and that investigative costs did not fit the definition. Just as clearly, this Court equated taxable costs with court costs and fees, costs and fees of a ministerial office and charges of substance. As stated by this Court.

> "given its plain meaning, the relevant portion of this statute simply says, no acquitted criminal defendant shall be liable for any court costs or court fees, costs and fees of a ministerial government office or charge for subsistence and that if such defendant has paid any of these taxable costs, he or she shall be reimbursed by the county". Pinellas County, supra, at 758. (emphasis added).

Even if one argues as the Petitioner did before the trial court, that the Supreme Court's construction of F.S. 939.06 is dicta, dicta in an opinion by the Supreme Court is still persuasive because of its source. Horton v. Uniauard Ins. Co., 355 So.2d 154, 155 (Fla. 4th DCA 1978).

THE DECISIONS OF WARREN V. CAPUANO, LILLIBRIDGE V. CITY OF MIAMI AND HAYES V. STATE HAVE BEEN OVERRULED BY THE PINELLAS COUNTY DECISION.

Petitioner argues that there remains a longstanding caselaw basis for allowing miscellaneous unnamed costs as taxable costs to an acquitted Defendant payable by the county as well as a general legislative policy that persons acquitted or discharged shall not be liable for costs incurred. This argument has been flattly rejected by this Court. In Pinellas Countv, supra. This Court could not have been clearer in Pinellas County that taxable costs must be enumerated by a statute and receded.

> "To the extent language in Lillibridge v. City of Miami, 276 So.2d 40, 41 (Fla. 1973) ("[Section 939.061 expresses a general policy of the Legislature that persons acquitted or discharged shall not be liable for costs..."). and Warren v. Caouano, 282 So.2d 873, 874 (Fla. 1973) ("The courts have historically...held that the defendants in criminal cases who are acquitted or discharged be allowed costs.. ."), may be read as inconsistentwith the present opinion, we recede from Lillibridaeand Warren."

Petitioner also argues that the decision in Wolf contradicts the Fifth District's decision in Hayes v. State of Florida, 387 So.2d 539 (Fla. 5th DCA 1980) without specifically overruling Hayes. The Hayes decision awarded subpoena costs, witness fees, court reporter and deposition costs and the costs of filing the appeal and preparation of a record on appeal and was based on this Court's decision in Warren. Petitioner however, misses the point that not only has this Court receded from Warren and Lillibridae implicitly overruling the Hayes decision but also that the Fifth District was bound according to the statutory construction principles in Alford, supra to follow this Court's construction of F.S. 939.06 in Pinellas County.

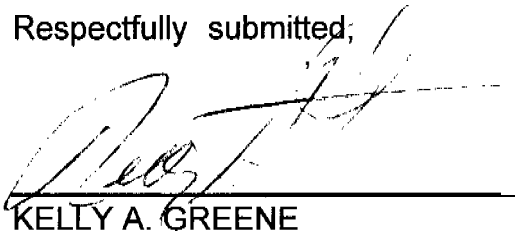
In addition, Petitioner's reliance on Hayes is misplaced because the general rule is that insofar as any inconsistency exists between two decisions of the same court, the older case must be held to be overruled by the later case whether relevant or not. 20 Am. Jur. 2d Courts §232, 13 Fla. Jur. 2d $150, p. 271. Hayes is overruled not only because its judicial underpinning (Warren) has been receded from but because it is the older case and inconsistent with the later Carrin and Wolf cases.

Wolf and Carrin have overruled Hayes and the Fifth District is in accord with the precedent set by the Florida Supreme Court's decision in Pinellas County. Thus, the decision in Wolf must be affirmed.

CONCLUSION

The Fifth District Court of Appeals was correct to follow the precedent of Pinellas County. In applying this Court's construction of F.S. 939.06 (1993), the Fifth District agreed to limit taxable costs, taxable paid by the state or its subdivisionsto court costs and fees, the costs and fees of a government office and charges of subsistence. No longer can there be a judicial interpretation as to what taxable costs are as F.S. 939.06 defines those costs as court costs and fees, the cost and fees a ministerial government office or charge of subsistence. In the three years since the Pinellas County case, courts have not sought to change the law and have not increased the burden on county government for non-indigent citizens litigation costs. As such, this court should affirm the fifth District ruling in Wolf.

Respectfully submitted;



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Kirk Kirkconnell, Esq. and David Henson, Esq., Suite 1, 1150 Louisiana Avenue, P.O. Box 2728, Winter Park, FI 32790-2728 this 17 day of October, 1996.

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