W00A 017

**IN THE SUPREME COURT OF FLORIDA**

FILED
SID J. WHITE
SEP 27 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JAMES J. WOLF,

Petitioner,

vs. CASE NO. 88,146

COUNTY OF VOLUSIA,

Respondent.

_____/

# PETITIONER'S INITIAL BRIEF


KIRK N. KIRKCONNELL of
KIRKCONNELL, LINDSEY,
SNURE & HENSON, P.A.
1150 Louisiana Avenue, Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Florida Bar No. 111988

DAVID A. HENSON of
KIRKCONNELL, LINDSEY,
SNURE & HENSON, P.A.
1150 Louisiana Avenue, Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Florida Bar No. 330620

Attorneys for Petitioner

## TABLE OF CONTENTS

## CITATION OF AUTHORITIES

## CITATION OF AUTHORITIES CONTINUED

## STATEMENT OF THE CASE AND FACTS

This appeal raises the legal issue of whether the Petitioner, JAMES J. WOLF, an acquitted citizen, is entitled under Fla. Stat. § 939.06 to recover as "taxable costs" admittedly reasonable and necessary expenditures he made on matters like expert witness and service fees, court reporter and transcription expenses, videotaped deposition expenses, private process server expenses, and copy and duplication expenses. The Circuit Court ruled that the aforementioned categories of expenditures were properly treated as taxable costs under § 939.06 and entered a final judgment for $16,280.43 in favor of Mr. Wolf. On appeal, however, the Fifth District Court of Appeal reached a contrary conclusion, based on its view of this Court's opinion in Board of County Commissioners v. Sawyer, 620 So.2d 757 (Fla. 1993); and ruled that Mr. Wolf was only able to recover the $924.50 he had expended on Clerk of Court expenses, Sheriff expenses, and witness fee expenses. The Fifth District's appellate decision became final on April 23, 1996. Mr. Wolf timely invoked this Court's discretionary jurisdiction on May 22, 1996 alleging express and direct inter-district conflict, jurisdictional briefs were filed by the respective parties, and on August 30, 1996, this Court accepted jurisdiction and ordered the service of merit briefs.

The facts of this case are bottomed on a stipulated factual record, covering both the various amounts expended and the fact that the expenditures at issue were both reasonable in amount, and necessary and useful to Mr. Wolf's defense. By way of

background, Mr. Wolf was arrested and charged in Volusia County in Circuit Court Case No. 92-32544-CFAES with Sexual Battery on a Child under Twelve Years of Age. (R 130) This offense which is proscribed at F.S. § 794.011(2)(a) is a capital felony punishable only by life imprisonment with a mandatory minimum of twenty-five (25) years without parole. (R 130) Mr. Wolf retained private counsel and was not found indigent by the Court. (R 130) On September 14, 1994, following six (6) days of jury trial, Mr. Wolf was acquitted of all charges. (R 130)

On October 6, 1994, Mr. Wolf filed a Motion to Certify Costs with the trial court, pursuant to § 939.06. (R 131) Following a motion hearing conducted on October 29, 1994, Circuit Judge William C. Johnson, Jr., issued an order certifying that Mr. Wolf had expended costs totalling $23,018.74 in defending himself. (R 27,28) Subsequently, the Respondent, County of Volusia, failed to respond to a presented bill requesting the total amount of certified costs -- which prompted Mr. Wolf to commence a civil suit to recover taxable costs. (R-26) Prior to the start of the non-jury trial before Volusia County Judge John W. Watson, III, Mr. Wolf withdrew his request for $6,738.81 in investigative expenses and certain other expenses. (R-135) Consequently, the final amount sought by Mr. Wolf was $16,280.43. (R-135) In particular, Mr. Wolf sought reimbursement for expert witness and service fees (R 131), court reporter and transcription expenses (R 131-132), video-taped deposition expenses (R-132), process service expenses by private process servers (R 133), copy and duplicate expenses (R

134), Clerk of Court expenses (R-132), process service by the Sheriff expenses (R 133), and witness fees pursuant to § 914.09. (R 133-134) Volusia County stipulated that each amount spent in each category of expenditures had, in fact, been expended by Mr. Wolf in defense of the criminal charges; and that each expenditure was reasonable and necessary for Mr. Wolf's defense. (R 134-135) However, out of the just-mentioned categories, Volusia County took the position that it was only obligated to reimburse Mr. Wolf $924.50 (rather than the demanded $16,280.43) since only Clerk of the Court expenses, Sheriff expenses, and witness fee expenses were valid "taxable costs" under § 939.06 in light of this Court's opinion in Board of County Commissioners v. Sawyer, 620 So.2d 757 (Fla. 1993). (R 134-135, 12-21)

After considering the stipulated facts as set forth above, and after hearing counsel's arguments, the trial court rejected Volusia County's claim that admittedly reasonable and necessary expenditures for expert witness and service fees, court reporter and transcription expenses, video deposition expenses, private process server expenses, and copy and duplicate expenses could not be recovered by Mr. Wolf as legally taxable costs. Accordingly, the trial court entered a final judgment requiring Volusia County to pay Mr. Wolf the full amount of $16,280.43. (R-154).

Volusia County timely commenced an appeal from that final judgment; and on March 22, 1996, the Fifth District Court of Appeal issued an opinion in Case No. 95-1773 which reversed the trial

court's cost award of $16,280.43 and remanded for entry of a judgment awarding Mr. Wolf the sum of $924.50. On March 29, 1996, Mr. Wolf filed a timely Motion for Rehearing, and for Certification, or, alternative, Motion for Rehearing En Banc. The Fifth District issued an Order on April 23, 1996 denying said Motion for Rehearing, etc.

On May 22, 1996, Mr. Wolf timely invoked this Court's jurisdiction by filing a Notice to Invoke Discretionary Jurisdiction with the Fifth District Court of Appeal. This appeal follows.

## SUMMARY OF ARGUMENT

The Fifth District's opinion in County of Volusia v. Wolf, 672 So.2d 563 (Fla. 5th DCA 1996), rendered April 23, 1996, expressly and directly conflicts with valid decisions out of other District Courts of Appeal on the legal issue of whether an acquitted person can obtain "taxable costs" reimbursement for expert witness and service fees, court reporter and transcription expenses, video-taped deposition expenses, private process server expenses, and copy and duplication expenses. Petitioner Wolf contends that this Court's decision in Board of County Commissioners v. Sawyer, 620 So.2d 757 (Fla. 1993) neither supports nor requires the legal result reached by the Fifth District Court of Appeal since Sawyer dealt exclusively with the question of whether private investigative costs were taxable, and did not address the expense categories at issue here. Mr. Wolf further contends that by misapplying Sawyer, Id., to the case at bar, the Court below has produced a result which is absurd, unjust, and which defeats the very purpose of § 939.06.

## ARGUMENT

**THE FIFTH DISTRICT COURT OF APPEAL ERRED IN RELYING ON BOARD OF COUNTY COMMISSIONERS V. SAWYER, 620 SO.2D 757 (FLA. 1993) TO CONCLUDE THAT EXPERT WITNESS AND SERVICE FEES, COURT REPORTER AND TRANSCRIPTION EXPENSES, VIDEO DEPOSITION EXPENSES, PRIVATE PROCESS SERVER EXPENSES, AND COPY/DUPLICATION EXPENSES WERE NO LONGER "TAXABLE COSTS" AS A MATTER OF LAW.**

This "taxable costs" appeal is about defining the parameters of what this Court actually decided in Board of County Commissioners v. Sawyer, 620 So.2d 757 (Fla. 1993); about the doctrine of stare decisis; and about whether non-indigent people who are forced to defend themselves against one or more state criminal charges are to be able to obtain any semblance of meaningful reimbursement for litigation costs after either an acquittal or after the State has dropped the charge(s). For all times, intents, and purposes relevant to this case, or to the underlying criminal case which generated the expenditures at issue, Petitioner Wolf was and is a presumptively innocent man who by State action was forced to defend himself against a capital felony charge, and was found not guilty of the charge by a jury. See, Article I, Section 9 of the Florida Constitution; Fifth and Fourteenth Amendments to the United States Constitution. Had he been found guilty, as charged, the only possible sentence which could have been imposed was a mandatory life sentence accompanied by parole eligibility after twenty-five (25) years of incarceration.

### Florida's Taxable Costs Statute: Fla. Stat. § 939.06

Section 939.06 reads as follows:

> **939.06. Acquitted defendant not liable for costs.** 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. 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.

Interestingly, this bare-boned statute, with very little alteration, has served as Florida's statutory mechanism for partially reimbursing acquitted or discharged criminal defendants since it was enacted 150 years ago in 1846. The statute, which only consists of two (2) sentences, contains no specified definition of what a "taxable cost" is. Instead, the statute's first sentence states that the acquitted defendant shall not be held responsible for any costs or fees of the court or ministerial office, or be assessed for subsistence charges arising from being held in custody. The second sentence states that if the acquitted defendant actually paid out "taxable costs", he or she can have the payment of such costs certified and seek a refund by the appropriate county. Since § 939.06 does not define its use of the term "taxable costs", the task of determining what types of costs can or cannot be properly classified as "taxable" has necessarily been undertaken by Florida's trial and review courts; and a body of guiding caselaw has developed.

First, in Volusia County v. Carrin, 666 So.2d 603 (Fla. 5th DCA 1996), and then in the instant case, County of Volusia v.

Wolf, 672 So.2d 563 (Fla. 5th DCA 1996), the Fifth District Court of Appeal has seized upon some language found in Sawyer, supra to conclude that this Court has silently repudiated much of that general consensus which had been hammered out on the issue of what can or cannot be a taxable cost under § 939.06. According to the Fifth District Court of Appeal, § 939.06 is to be applied as if its first sentence constitutes the exclusive, exhaustive definition of what is a "taxable cost". Utilizing that constricted viewpoint, the threshold test for whether any given litigation expense is legally "taxable" is whether the expense appears to fall within a category explicitly mentioned in the first sentence. If it does, then it would be a taxable cost. If not explicitly mentioned, then it is not a "taxable cost", and it would be reversible error to order its reimbursement. Based on the aforementioned rationale, the Fifth District Court of Appeal determined that the Circuit Court committed reversible error when it ordered Volusia County to reimburse Mr. Wolf for extremely legitimate and ordinary litigation expenses for expert witnesses, deposition costs, video deposition expenses, private process server expenses, and copy/duplication expenses. In this appeal, Mr. Wolf is requesting that the Circuit Court's final judgment be reinstated on the ground that the Fifth District's analysis and application of Sawyer, supra, as evidenced in Carrin, supra, and the case at bar, is flawed.

**Analysis of Board of County Commissioners v. Sawyer, 620 So.2d 757 (Fla. 1993)**

This Court reviewed Sawyer v. Board of County Commissioners, 596 So.2d 475 (Fla. 2d DCA 1992) based on certified conflict with Benitez v. State, 350 So.2d 1100 (Fla. 3d DCA 1977), cert. den. 359 So.2d 1211 (Fla. 1978), and Osceola County v. Otte, 530 So.2d 478 (Fla. 5th DCA 1988) on the issue of whether private investigator costs were taxable. Specifically, the Second District, in Sawyer, supra, had "parted company" with prior long-standing decisions out of the other intermediate appellate courts in concluding that Mr. Sawyer should be allowed to recover his investigative costs. On review, this Court rejected Mr. Sawyer's mutuality and equal protection claims, quashed the Second District's opinion, and simply held that it approved of Benitez, supra, and Osceola County, supra, because investigative costs were not taxable under § 939.06 as a matter of law. Supra at 758, 759.

One of the more basic and fundamental observations to be made of this Court's opinion in Sawyer, supra, is that the only identifiable subject matter addressed by this Court was whether private investigative costs were recoverable by the acquitted defendant. Nowhere in the opinion did this Court discuss or even allude to any other category of expenditures. The same observation holds true of the Second District's Sawyer opinion. To even further illustrate that Sawyer, supra, was a single issue "costs" case, from beginning to end, the stipulated record in the present appeal contains various pleadings from Mr. Sawyer's Circuit Civil court file (such as his Complaint, the Answer filed by Pinellas

County, and a Stipulated Statement of Facts) all reflecting that the sole issue being litigated between the parties was whether Mr. Sawyer was entitled to be reimbursed for the monies spent on investigators. (R 148-153)

Because Sawyer, supra, has all the earmarks of being a single issue case devoted to investigative costs, Petitioner Wolf submits that the Fifth District Court of Appeal has misapplied Sawyer, supra, by relying upon it to conclude that expert witness and service fees, court reporter and transcription expenses, videotaped deposition expenses, private process server expenses, and copy/duplication expenses are no longer taxable costs as a matter of law. Given the limited nature of what was actually litigated and determined in Sawyer, supra, the precedential impact of the case is similarly limited, since the doctrine of stare decisis does not apply to any question not raised or considered in an earlier case. See, City of Miami Beach v. Traina, 73 So.2d 860 (Fla. 1954); State Department of Public Welfare v. Melser, 69 So.2d 347 (Fla. 1953), receded from on other grounds in Dept. of Legal Affairs v. Dist. Ct. of Appeal, 434 So.2d 310 (Fla. 1983). It follows, therefore, that the Circuit Court's Final Judgment for $16,280.43 did not run afoul of this Court's decision in Sawyer, supra because Volusia County was not ordered to reimburse Mr. Wolf a single penny of the sums he spent on private investigation.

At the urging of Volusia County, the Fifth District Court of Appeal has erroneously construed and applied Sawyer, supra, as if it silently overruled and rendered obsolete much of Florida's

prior caselaw on taxable costs. Mr. Wolf submits that Sawyer, supra, is nothing more, and nothing less, than this Court's "last word" to-date on the issue of whether investigative costs incurred by a non-indigent defendant are taxable against the county in the event of either an acquittal or a dismissal. This Court's ruling in Sawyer, supra, is plainly a conservative or cautious one in the sense that the Court chose not to endorse the Second District's action of opening up a whole new category of taxable costs. Under Sawyer, investigative costs are to remain unrecoverable as "taxable costs", just like attorneys' fees, regardless of how reasonable, necessary, or useful. However, Sawyer's stated rationale hardly compels the Courts of this State to ignore well-established caselaw precedent and eliminate cost awards for such mainstream litigation expenses as involved in the case at bar. In explanation of its holding, Sawyer does instruct that statutory cost provisions are to be "carefully construed" which, in part, serves as a reminder that defense expenditures do not ipso facto become "taxable costs" merely because the expenditures are reasonable in amount, and necessary and useful to the defense. With its stated decision to recede from some expansive "general policy" language contained in Lillibridge v. City of Miami, 276 So.2d 40, 41 (Fla. 1973), and Warren v. Capuano, 282 So.2d 873, 874 (Fla. 1973), Sawyer further instructs that § 939.06 was not intended by the Legislature to accomplish complete, or, dollar-for-dollar, reimbursement to the acquitted or discharged defendant. Sawyer, supra at 759 f.3.

The Fifth District's decision in the case at bar (as well

as its decision in Carrin, supra) cannot be reconciled with the Dinauer v. State, 317 So.2d 792 (Fla. 1st DCA 1975), for example, where the First District reversed a trial judge for disallowing deposition costs following the State's entry of a Nolle Prosequi. Nor can it be reconciled with Powell v. State, 314 So.2d 788 (Fla. 2d DCA 1975) where it was plainly held that expert witness fees and deposition costs were taxable under § 939.06 so long as the sums were reasonable, and the depositions and expert testimony served a useful defensive purpose. The Fifth District's decision also conflicts with Clark v. State, 570 So.2d. 408 (Fla. 2d DCA 1990) where the Second District treated, inter alia, deposition costs, incurred prior to the State's action of filing a Nolle Prosequi, as taxable costs.

The Fifth District's opinions in Wolf, supra, and Carrin, supra, clearly run counter to Dinauer, supra; Powell, supra; and Clark, supra. Nor does the Fifth District even acknowledge that its Wolf and Carrin opinions are an about-face from its own decisions in Hayes v. State, 387 So.2d 539 (Fla. 5th DCA 1980), and Osceola County v. Otte, supra. With the limited exception of Osceola County v. Otte, supra, (which was approved by the Sawyer Court because of its disallowance of investigative costs) -- none of the other cases of Dinauer, Powell, Clark, or Hayes are mentioned in Sawyer -- much less repudiated; yet the Fifth District erroneously assumes them to all be overruled. It simply borders on the incredible to conclude, as the Fifth District Court of Appeal has apparently done, that this Court intended its decision in

Sawyer to effectively rewrite the law on what can or can't be a taxable cost in this State -- but simply elected not to mention the cases it was overruling or to articulate the scope of its ruling.

**The Consequences**

The direct, inescapable consequence of applying Sawyer, supra, as the Fifth District has done, is to substantially gut the statute which was undoubtedly originally intended to provide some degree of meaningful reimbursement to the acquitted or discharged defendant. This misapplication of Sawyer, supra, contravenes the principle of statutory construction which recognizes that statutes are not to be construed or applied in such a way as to produce a result which is absurd, unreasonable, unjust, or defeats the purpose of the statute. See, generally, Neu v. Miami Herald Pub. Co., 462 So.2d 821, 825 (Fla. 1985); City of St. Petersburg v. Siebold, 48 So.2d 291, 294 (Fla. 1950); Owen v. Cheney, 238 So.2d 650,654 (Fla. 2d DCA 1970). The grim reality is that for most non-indigent persons, the financial costs, standing alone, of having been forced to defend themselves against State-initiated criminal charges are simply enormous; as are, usually, the comparative resources of the prosecuting authority. Although neither intended nor designed to make the acquitted or discharged defendant financially whole in a dollar-for-dollar sense, § 939.06 has been applied meaningfully and realistically over the years to enable presumptively innocent persons to recoup a variety of mainstream and ordinary litigation expenses arising, for example, from

appropriate discovery and appropriate use of experts. Petitioner Wolf does not believe that this Court ever intended for Florida's trial and reviewing courts to apply Sawyer, supra, as it has been applied in the case at bar. Accordingly, Mr. Wolf urges this Court to restore the Circuit Court's Final Judgment which awarded him taxable costs in the sum of $16,280.43.

In the unlikely event that this Court intended Sawyer to be interpreted and applied as the Fifth District has done, Mr. Wolf respectfully requests this Court to reconsider its position in light of the foregoing considerations; and in light of the fact that through the years the Legislature never once reacted to decisions like Dinauer, Powell, Clark, Hayes, or Osceola County v. Otte by amending § 939.06 to preclude such cost awards. Mr. Wolf's case stands as a prime example of how § 939.06 should not be applied.

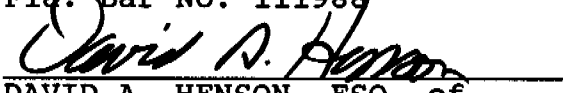
## CONCLUSION

Based on the foregoing argument and authorities, Petitioner Wolf requests this Court to reverse the decision of the appellate court below with directions that the Circuit Court's Final Judgment for $16,280.43 be reinstated.

Respectfully submitted,

KIRK N. KIRKCONNELL, ESQ. of
KIRKCONNELL, LINDSEY,
SNURE & HENSON, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
Telephone: (407) 644-7600

Attorneys for Petitioner
Fla. Bar No. 111988



DAVID A. HENSON, ESQ. of
KIRKCONNELL, LINDSEY,
SNURE & HENSON, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
Telephone: (407) 644-7600

Attorneys for Petitioner
Fla. Bar No. 330620

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Brief has been furnished by U.S. Mail delivery to Kelly A. Greene, Assistant County Attorney, 123 W. Indiana Avenue, DeLand, FL 32720, on this 24th day of September, 1996.

David A. Hixon
Attorney