

0-15-

IN THE SUPREME COURT OF FLORIDA

JAMES J. WOLF,

Petitioner,

vs.

CASE NO. 88,146

COUNTY OF VOLUSIA,

Respondent.

_____ /

FILED

SID J. WHITE

JUN 8 1996

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

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

	<u>PAGE</u>
CITATION OF AUTHORITIES*	iii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT*	4
ARGUMENT:	
WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE <u>SUB JUDICE</u> IS IN EXPRESS AND DIRECT CONFLICT WITH OTHER DISTRICT COURT DECISIONS SUCH AS <u>POWELL V. STATE</u>, 314 So. 2d 788 (FLA. 2d DCA 1975); <u>CLARK V. STATE</u> 570 So.2d 408 (FLA. 2d 1990); AND <u>DINAUER V. STATE</u>, 530 So.2d 792 (FLA. 1st DCA 1975) -- ON THE SAME QUESTION OF LAW -- THEREBY PERMITTING THIS COURT TO EXERCISE ITS DISCRETIONARY REVIEW JURISDICTION PURSUANT TO ARTICLE V, § 3 OF THE FLORIDA CONSTITUTION AND FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(iv).*	5
CONCLUSION****,*	8
CERTIFICATE OF SERVICE**,*	9

CITATION OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Board of County Commissioners v. Sawyer,</u> 620 So.2d 757 (Fla. 1993).....	2,7
<u>Clark v. State,</u> 570 So.2d 408 (Fla. 2d DCA 1990)	4,5,6
<u>Dinauer v. State,</u> 317 So.2d 792 (Fla. 1st DCA 1975)	4,5,6,7
<u>Haves v. State</u> 387 So.2d 539 (Fla. 5th DCA 1980)' *.....*.*.....**.....*..	6,7
<u>Osceola County v. Otte,</u> 530 So.2d 478 (Fla. 5th DCA 1988)"....."....."	6,7
<u>Powell v. State,</u> 314 So.2d 788 (Fla. 2d DCA 1975)	4,5,6,7
<u>Volusia County, Florida v. Carrin,</u> 666 So.2d 603 (Fla. 5th DCA 1996) *.....*....	6,7

OTHER AUTHORITIES

<u>Fla. Stat. § 794.011(2)(a)</u>	1
<u>Fla. stat. § 914.09</u>	2
<u>Fla. Stat. § 939.06</u>	1,5,6
Article V, § 3(b)(3), Florida Constitution	4,5,8
<u>Fl.R.App.P. 9.030(a)(2)(A)(iv)</u>	4,5,8

STATEMENT OF **THE** CASE AND FACTS

This appeal, which concerns the issue of what is a "taxable **cost**" under Fla. Stat. § 939.06 was tried in Volusia County in June of 1995 on the following stipulated factual record. (R 129-153)

Back in June of 1992, the Petitioner, **Mr. James J. Wolf**, was arrested and charged in Circuit Court Case No. **92-32454-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 found not 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 in favor of Mr. Wolf for \$924.50. (Appendix 3) On March **29**, 1996, Mr. Wolf filed a timely Motion for Rehearing, and for Certification, **or**, alternative, Motion for Rehearing **En Banc**. (Appendix 2) The Fifth District issued an Order on April 23, 1996 denying said Motion for Rehearing, etc. (Appendix 1)

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.

SUMMARY OF ARGUMENT

Discretionary review of the case sub iudice is appropriate and warranted in that even though the instant case raises the same legal issue ruled upon by the First and Second District Courts of Appeal in cases such as Dinauer v. State, 317 So.2d 792 (Fla. 1st DCA 1975); Powell v. State, 314 So.2d 788 (Fla. 2d DCA 1975); and Clark v. State, 570 So.2d 408 (Fla. 2d DCA 1990) -- and involves substantially the same controlling facts as the aforementioned cases -- the Court below has issued an opinion producing a vastly different result. Accordingly, this Court should accept discretionary review pursuant to Article V, § 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

ARGUMENT

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE **SUB JUDICE** IS IN EXPRESS AND DIRECT CONFLICT WITH OTHER DISTRICT COURT DECISIONS SUCH AS POWELL V. STATE, 314 **So.2d** 788 (FLA. 2d DCA 1975); CLARK V. STATE, 570 **SO.2d** 408 (FLA. 2D DCA 1990); AND DINAUER V. STATE, 317 **SO.2d** 792 (FLA. **1ST** DCA 1975) -- ON THE SAME QUESTION OF LAW -- THEREBY PERMITTING THIS COURT TO EXERCISE ITS DISCRETIONARY REVIEW JURISDICTION PURSUANT TO ARTICLE V, § 3 OF THE FLORIDA CONSTITUTION AND FLORIDA RULE OF APPELLATE PROCEDURE **9.030(a)(2)(A)(iv)**.

Petitioner Wolf submits that the decision of the Fifth District Court of Appeal in the instant case applies a rule of law to produce a different result than the results reached by the **First** and Second District Courts of Appeal, on substantially the same controlling facts, in the cases of Dinauer v. State, 317 **So.2d** 792 (Fla. 1st DCA 1975) (Appendix 6); Powell v. State, 314 **So.2d** 788 (Fla. 2d DCA 1975) (Appendix 7); and Clark v. State, 570 **So.2d** 408 (Fla. 2d DCA 1990) (Appendix 8).

The question of law shared by the case **sub iudice** and the aforementioned cases of Dinauer, supra; Powell, **supra**; and Clark, supra; is whether reasonable, necessary, and useful expenditures on matters such as expert witness and service fees, and court reporter and transcription expenses can be recovered as legally taxable costs by an acquitted citizen under **Fla. Stat. § 939.06**. In Dinauer, supra, for example, the First District reversed a trial judge for disallowing deposition costs following the entry of a Nolle Prosequi. In Powell, supra, the Second District 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. Similarly, in

Clark, supra, the Second District treated, inter alia, deposition costs incurred prior to the entry of a **Nolle Prosequi** as legally taxable costs. However, in the instant appeal, the Fifth District reversed the lower court **for** awarding Mr. Wolf as taxable costs admittedly reasonable and necessary sums he spent on, inter alia, expert witness and service fees, as well as court reporter and transcription expenses. And, while the instant appeal happens to also involve several categories of expenditures not seen in Dinauer, supra; Powell, supra; or Clark, supra (such as video deposition expenses, private process server expenses, and copy and duplicate expenses) -- those cases nevertheless present substantially the same controlling facts as involved in the present appeal of Mr. Wolf's -- yet an entirely different result was reached by the First and Second District Courts of Appeal'

The Fifth District's March 22, 1996 decision (Appendix 3) denying Mr. Wolf the ability to obtain reimbursement for reasonable and necessary costs which have routinely been awarded to acquitted citizens, throughout the State of Florida, for at least the last twenty (20) years under § 939.06 is not based on any legislative overhaul or amendment of the statute. Instead, the Fifth District's March 22, 1996 decision is explicitly hinged on Volusia

¹ Although this Court's discretionary jurisdiction is not based on the existence of intra-district conflict, it warrants mention that prior to issuing its decisions in Volusia County, Florida v. Carrin, 666 **So.2d** 603 (Fla. 5th DCA 1996) (Appendix 4) and the appeal sub judice, the Fifth District had likewise had uniformly held that court reporter and deposition expenses were taxable costs under § 939.06 if reasonable and necessary. See, Haves v. State, 387 **So.2d** 539 (Fla. 5th DCA 1980); Osceola County v. Otte, 530 **So.2d** 478 (Fla. 5th DCA 1988).

County. Florida v. Carrin, supra (Appendix 4), which, in turn, is explicitly hinged on the single-issue case of Board of County Commissioners v. Sawyer, supra (Appendix 5), wherein this Court held, in June of 1993, that investigative costs were not taxable under § 939.06. From its decisions in Carrin, supra, and in Mr. Wolf's appeal, it is apparent that the Fifth District Court of Appeal has adopted a radically different view of what is a legally taxable cost under § 939.06 than the **caselaw** precedent out of the First and Second Districts because the Fifth District has subscribed to Volusia County's claim that this Court in Sawyer, supra silently overruled cases such as Dinauer, supra; e l l, supra; Clark, supra; Hayes, supra; and Osceola County v. Otte, supra.

Since the controlling facts in the case sub iudice are far too close to the controlling facts in Dinauer, supra; Powell, supra; and Clark, supra; to reasonably produce or justify such different results; and since only this Court is in a position to definitively speak toward whether it intended for its decision in Sawyer, supra to be viewed as drastically changing and restricting the ability of the acquitted citizen to obtain any meaningful degree of reimbursement -- this case is clearly appropriate for review under this Court's discretionary jurisdiction.

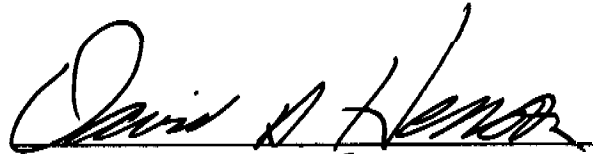
CONCLUSION

Based on the foregoing argument and authorities, Petitioner Wolf requests this Court to exercise its discretionary review jurisdiction pursuant to Article V, **§ 3(b)(3)** of the Florida Constitution, and Florida Rule of Appellate Procedure **9.030(a)(2)(A)(iv)**.

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
Florida Bar No. 111988

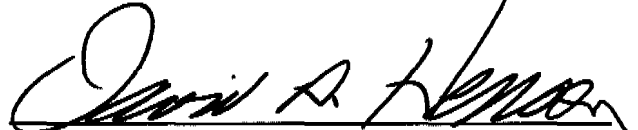


DAVID A. HENSON of
KIRKCONNELL, LINDSEY,
SNURE & HENSON, P.A.
1150 Louisiana Avenue, Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
TELEPHONE: (407) 644-7600
Florida Bar No. 330620

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail delivery to Kelly A. Greene, Assistant County Attorney, 123 W. Indiana Avenue, **DeLand**, FL 32720, this **31st** day of May, **1996**.


Attorney