

**ORIGINAL**

**FILED**

IN THE SUPREME COURT OF FLORIDA

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JUN 19 1996

CLERK, SUPREME COURT  
By B. J. [Signature]  
Chief Deputy Clerk

JAMES J. WOLF,

Petitioner,

vs.

CASE NO.: 88,146

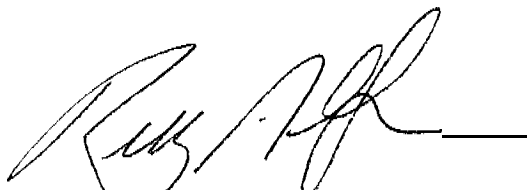
COUNTY OF VOLUSIA,

Respondent.

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**RESPONDENT'S BRIEF ON JURISDICTION**

On Appeal from the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida and Fifth District Appellate Court of Florida.



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**TABLE OF CONTENTS**

	page
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS .....	ii
STATEMENT OF THE CASE AND FACTS .....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	3
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....*	8

**TABLE OF CITATIONS**

<b><u>Cases</u></b>	<b><u>page</u></b>
<u>Board of County Commissioners, Pinellas County v. Sawyer</u> 620 So.2d 757 (Fla. 1993).....	5
<u>Clark v. State,</u> 570 So.2d 408 (Fla. 2d DCA 1990).....	3
<u>Consolidated Electric Supply, Inc. v. Consolidated Electrical Distributors Southeast, Inc.,</u> 355 So.2d 853 (Fla. 3d DCA 1978).....	4
<u>County of Volusia v. Wolf</u> Case No.: 95-1773, Fifth District Court of Appeal dated March 22, 1996.....	2, 3, 4
<u>Dinauer v. State,</u> 317 So.2d 794 (Fla. 1st DCA 1973).....	3, 5
<u>Dodi Publishing Company v. Editorial America, S.A.,</u> 385 So.2d 1369 (Fla. 1980).....	4, 5
<u>Ford Motor Company v. Kikis,</u> 401 So.2d 1341, 1342 (Fla. 1981).....	4
<u>Jenkins v. State of Florida,</u> 385 So.2d 1356 (Fla. 1980).....	3
<u>Lillibridge v. City of Miami,</u> 276 So.2d 40 (Fla. 1973).....	6
<u>P o w e l l ,</u> 314 So.2d 788 (Fla. 2d DCA 1975).....	3, 5
<u>W a r r e n ,</u> 282 So.2d 873 (Fla.1973).....**.....	5
<u>Volusia County V. Car .</u> 666 So.2d 603 (Fla. '5th DCA 1996).....	3, 4
 <b><u>OTHER AUTHORITIES</u></b>	
F.S. 914.06.....**.*.....*****.....*****.	5
F.S. 939.06.....	5
Article V §3(b)(3), Fla. Const.....	2, 3, 4
Fla. R. of App. P. 9.030(a)(2)(A)(iv).....	2, 3

**STATEMENT OF THE CASE AND FACTS**

Respondent adopts the statement of the case and facts as presented by Petitioner.

### SUMMARY OF ARGUMENT

This court should deny the Petitioner's request for discretionary review. Discretionary review pursuant to Article V §3(b)(3) of the Florida Constitution and the Florida Rules of Appellate Procedure 9.030(a) (2) (A)(iv) is strictly limited to decisions of the district court that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. Art. V, Sect. 3(b)(3), Fla. Const. The decision of the Fifth District Court of Appeal in County of Volusia v. Wolf, Case No. 95-1773, Fifth District Court of Appeals dated March 22, 1996, (Appendix 1), did not expressly or directly conflict with another district court decision but merely cited a prior written opinion with a per curiam decision as authority. As the decision does not expressly and directly conflict with a decision of another district or of the supreme court, discretionary review should be denied.

## ARGUMENT

Jurisdiction of the Supreme Court to review decisions of the district courts of appeal was strictly limited by the 1980 amendment to the Florida constitution. Jenkins v. State of Florida, 385 So.2d 1356 (Fla. 1980) (Appendix 9). Discretionary review is granted only if the decision of the district court expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Art. V §3(b)(3) Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv). Unless the petitioner can demonstrate that the decision expressly or directly conflicts with another decision, discretionary review should be denied.

In the instant matter, Petitioner seeks review of the Fifth District Court of Appeal decision in County of Volusia v. Wolf Case No. 95-1773, Fifth District Court of Appeals dated March 22, 1996 (Appendix 1). That decision reversed a trial court's award of taxable costs pursuant to F.S. 939.06 of \$16,280.43 to Petitioner. The Wolf case however did not express a direct conflict with other district court decisions such as Clark v. State, 570 So.2d 408 (Fla. 2d DCA 1990) (Appendix 8), Dinauer v. State, 317 So.2d 794 (Fla. 1st DCA 1973) (Appendix 6) and Powell v. State, 314 So.2d 788 (Fla. 2d DCA 1975) (Appendix 7). Instead, the Wolf decision, which was a per curiam decision, cited one of its own prior written opinions Volusia County v. Card, 666 So.2d 603 (Fla. 5th DCA 1996) (Appendix 2) as authority. In the Wolf case, the district court also stated that the Petitioner himself had conceded that

this matter was virtually identical to the Carrin case. In the instant matter, the Petitioner having conceded there was no distinction between the two cases, allowed the district court to rule consistently by having the Wolf decision agree with the earlier Carrin decision.

In seeking to have Wolf reviewed, Petitioner seeks review of a limited, per curiam decision that merely affirmed a previous written opinion of the district court. Discretionary review is not appropriate to determine whether a prior written opinion now cited for authority is in conflict with other appellate decisions. Dodi Publishin Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980) (Appendix 10). In the Dodi case, the Petitioner requested review of a decision that in totality stated "PER CURIAM. Affirmed. See Consolidated Electric Supply, Inc. v. Consolidated Electrical Distributors Southeast. Inc., 355 So.2d 853 (Fla. 3d DCA 1978)." Dodi 385 So.2d at 1369. The decision of the Fifth District in this matter, although more verbose, essentially directed the parties to the Carrin case as a basis for its ruling without drawing an express and direct conflict with other district court decisions. Since the decision does not expressly and directly express a conflict with other decisions, discretionary review should be denied.

The Respondent is aware that it is not necessary that a district court explicitly identify a conflicting district court order or supreme court decision in its opinion in order to create an express conflict under Article V. Section 3(b)(3). Fla. Const.

Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981) (Appendix 11). However, the court decision must discuss the basis upon which it reversed the trial court's entry of a directed verdict in order for the Petitioner to state that an express and direct conflict exists. *Id.* at 1342. The Fifth District Court, in the instant matter, similar to the district court in Dodi, relying on its earlier opinion pointed to the Carrin case for any explanation of its decision. Having failed to discuss the basis for its opinion other than to point out a prior opinion, it is difficult to state that an express and direct conflict exists with other district courts. Therefore discretionary review should be denied.

The cases cited by the Petitioner are not good examples of an express and direct conflict. See Petitioner's Jurisdictional Brief, p. 5-6. In Powell v. State, 314 So.2d 788 (Fla. 2 DCA 1975) the court awarded expert witness fees on the basis of a faulty mutuality doctrine stating that since under F.S. 914.06, the County could tax the reasonable costs of expert witnesses against a convicted felon, the court believed an acquitted, non-indigent defendant could do likewise against the County. *Id.* at 788. Thus, it was not just the construction of F.S. 939.06 alone but rather a combination of F.S. 914.06 and F.S. 939.06 which were the issues in that case.

In addition, the Powell case and Dinauer v. State, 317 So.2d 1369 (Fla. 1980) (Appendix 6), are twenty years old. The Powell decision was governed by a general policy which prohibited the



imposition upon an acquitted Defendant of any cost or fees of the court. Powell v. State, 314 So.2d at 789(Appendix 7). The Dinauer decision relied in part on Warren v. Capuano, 282 So.2d 873 (Fla. 4th DCA 1972)(Fla. 1973)(Appendix 4). The Clark decision is now six years old and based its findings on Warren, 282 So.2d 873 (Fla. 1973)(Appendix 4). All of these decisions were written without the benefit of the Board of County Commissioners, Pinellas County v. Sawyer, 620 So.2d 757 (Fla. 1993)(Appendix 3) in which this court expressly receded from the prior Warren decision and from Lillibridge v. City of Miami, 276 So.2d 40 (Fla. 1973)(Appendix 5). This court has stated that the expansive view of F.S. 939.06 as found in Warren and Lillibridge is no longer good law. It is not so much that the Fifth District Court of Appeals decision in Wolf is in conflict with the other courts, it is simply that the Fifth District is the first district court to apply the specific and plain meaning of the Sawyer decision and the other district courts have yet to catch up to the Fifth District's lead.

### CONCLUSION

The decision of the Fifth District did not expressly and directly raise a conflict with other district court opinions. The Fifth District neither stated a direct conflict nor did it discuss the basis for its ruling providing no basis for an inference of a conflict. Rather, the Fifth District's decision cited an earlier written opinion of the district as the basis for its ruling. Failing to state or refer to an express or direct conflict with another district court's decision, the discretionary review of the Supreme Court pursuant to Article 5, 3(b)(3) I should not be granted.

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, Fl 32790-2728 this 19 day of June, 1996.



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