IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

LAURI A. ELLIS,

Appellee.

CASE NO. 90,729

APPELLANT'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Party designations, references, and emphasis will be as in the Appellant's Initial Brief. "IB" will reference the Initial Brief, and "AB" will reference Appellee's Answer Brief, followed by any applicable page number(s).

ARGUMENT

ISSUE

IS THERE ANY STATUTORY INTERPRETATION THAT RENDERS CONSTITUTIONAL THE PORTION OF THE PERJURY CHAPTER, §837.011(3), FLA. STAT., DESIGNATING MATERIALITY AS A QUESTION OF LAW FOR THE TRIAL JUDGE'S DETERMINATION?

Appellee poses six arguments within her brief why Section 837.011(3), Fla. Stat., is unconstitutional.

First, she argues (at AB 5) that "even under Justice Rehnquist's view, the issue of materiality is still an essential element of the perjury statute." Appellee totally ignores the key to this case: Chapter 837 of the Florida statutes is "materially" different from the federal statute reviewed in U.S. v. Gaudin, ___U.S.___ , 115 S.Ct 2310, 132 L.Ed 2d 444 (1995), or Johnson v. U.S., 10 Fla. L. Weekly Fed. S432 (May 12, 1997)(cited at AB 6). Neither 18 U.S.C. §1001, reviewed in Gaudin, nor 18 U.S.C. §1623, reviewed in Johnson, contained the explicit legislative intent of Section 837.011(3) that materiality is a question of law for the judge to decide in Florida.

Moreover, in Gaudin, the government conceded that materiality was an element of 18 U.S.C. §1001. The State makes no such

concession here. Instead, the State argued at length (at IB 11-22) for a statutory construction comporting with Florida law and rendering materiality **not** an element of Section 837.02, Fla. Stat.

Johnson interpreted 18 U.S.C. §1623, which repeatedly emphasized the importance of materiality: "each declaration was material to the point in question," 18 U.S.C. §1623(c)(1); "the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question," 18 U.S.C. §1623(c). Perhaps most importantly, Section 1623 then concluded that proof beyond a reasonable doubt (the burden of proof for elements of an offense) was required for conviction, 18 U.S.C. §1623(e). Section 837.02 lacks this repeated emphasis on materiality and lacks the element-implication of requiring proof beyond a reasonable doubt.

It is within Florida's domain to determine whether the elements of its crime of Perjury contains materiality. Thus, for purposes of statutory interpretation Appellee and the DCA totally ignore Section 837.011(3), Fla. Stat., until it comes down to concluding that it is unconstitutional. They, therefore, have ignored one of the most well-settled principles in statutory construction: "'[w]henever possible, a statute should be construed so as not to conflict with the constitution,'" State v. Stalder, 630 So.2d 1072, 1076 (Fla. 1994), quoting Firestone v.

News-Press Publishing Co., 538 So.2d 457, 459-60 (Fla.1989), citing State v. Gale Distributors, Inc., 349 So.2d 150 (Fla.1977), citing Hancock v. Sapp, 225 So.2d 411 (Fla.1969), and Rich v. Ryals, 212 So.2d 641 (Fla.1968).

In keeping with this "long" held policy, for example, Ryals interpreted "shall" as "[p]ermissive and not mandatory," 212 So.2d at 643. Here, the State has posed a reasonable interpretation of Sections 837.011(3) and 837.02, Fla. Stat., so that **both** are constitutional under Gaudin.

Second, like the DCA majority opinion, Appellee (at AB 2, 7-8) cites to Hirsch v. State, 279 So.2d 866 (Fla. 1973), as the only Florida authority indicating that materiality is an element. However, like the DCA majority, she ignores the fact that Hirsch was decided prior to the passage of the very statute at issue, (See IB 15-16) which under well-settled principles of statutory construction, cannot be ignored. See, e.g., State v. Webb, 398 So.2d 820, 824 (Fla. 1981)(consider entire statute)(cited at IB 13, 16). Section 837.011(3)'s intent to allow the trial judge to determine materiality as a question of law must be effectuated if at all possible. (See authorities at IB 12-13) Moreover, the portion of Hirsch on which Appellee and the DCA majority rely was dicta.

Third, Appellee argues (at AB 6-7) that because the State must prove materiality, it is, by definition, an element. Appellee's position ossifies Florida law into a "brittle bone" that she then finds easy to break. Consistent with effectuating the intent of

all of Chapter 837 where possible, Section 837.02 can be interpreted to pose materiality as a non-element threshold question for the trial judge, much like trial judge's determinations of entrapment, severance/joinder, speedy trial, subject-matter jurisdiction, and the sufficiency of the charging document (See IB 18-22).

Fourth, Appellant assumes (IB 8-9) that the judge's role in reviewing the sufficiency of evidence effectuates Section 837.011(3). However, she ignores the intent that Section 837.011(3) expresses. It does not say a jury question for judge review. It narrows materiality to a question of law, nothing more and nothing less. It is axiomatic that judges decide questions of law. Moreover, one must assume that the legislature, in enacting Section 837.011(3), was aware that the law for over a century already required judge-review of the sufficiency of the evidence. See, e.g., Luster v. State, 2 So. 690 (Fla. 1887)("The other assignments are, in effect, that the evidence is not sufficient to support the verdict"). The legislature enacted Section 837.011(3) for a purpose above and beyond what was already axiomatic.

A fifth main point in Appellee's brief is woven throughout her discussion of the others. Appellee wants to simplify this issue to the point that she assumes what is at issue here: Whether materiality is an element of Perjury in Florida. Thus, she accuses (at AB 3) the State's brief and Judge Miner's dissent of being "overly complicated." The State will concede that

ascertaining the meaning of a statute and effectuating its intent are "simple" (AB 2, 3) if one simply assumes what is at issue or if one relies on a case decided when the "material" statutes were significantly different than today.

The task at hand does not call for bald assumptions or bald reliance upon inapplicable cases. The task at hand is to determine whether Chapter 837 and **all of its provisions** can be read as a whole so that each and every part of it, including Section 837.011(3), is constitutional. Therefore, the State adheres to its reliance upon (at IB 11-22) the well-settled principles of statutory construction and their application here.

Appellee's sixth point actually appears first in her brief: She for all time would require materiality in all perjury statutes; there is no legislative discretion whatsoever. She argues (at AB 4-5) that the State's reliance upon Rehnquist's opinion in Gaudin is misplaced because a majority of the Gaudin court did not join in it. She then **summarily concludes** (at AB 5) that "this Court need not decide" whether Florida has the discretion to eliminate materiality as an element. However, her **summary dismissal** of this foundational point obviously ignored the State's other authorities (at IB 7-11) supportive of the Rehnquist view.

Moreover, Johnson, on which Appellee relies (at IB 6), corroborates the position that discretion resides in the states to define perjury without materiality as an element. It held that the failure to submit materiality to the jury was not plain error

because it did not "'seriously affect[] the fairness, integrity or public reputation of judicial proceedings." In other words, the failure to submit materiality to a jury does not per se rise to **fundamental** proportions, thereby suggesting state discretion within a **"federal system, which demands '[t]olerance for a spectrum of state procedures,'"** McMillan v. Penn., 477 U.S. 79, 90, 106 S.Ct. 2411, 2418, 91 L.Ed.2d 67, 75-76 (1986), quoting Spencer v. Texas, 385 U.S. 554, 566, 87 S.Ct. 648, 655, 17 L.Ed.2d 606 (1967). An interpretation of Chapter 837 provides such a state procedure by affording the protection of a materiality requirement while making it a threshold "question of law" for the trial judge alone to determine.

CONCLUSION

Based on the foregoing discussion and the arguments within the State's Initial Brief, the State respectfully requests that this Honorable Court uphold the constitutionality of Section 837.011(3), Fla. Stat, disapprove the decision of the District Court of Appeal, approve Judge Miner's dissent to that decision, and remand for the reversal of the trial court's order of August 12, 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing APPELLANT'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to James T. Miller, Esq., Corse, Bell & Miller, P.A,233 E. Bay Street, Suite 920, Jacksonville, Florida, 32202, this 2d day of September, 1997.

Stephen R. White
Attorney for the State of Florida

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