IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
APPELLANT,

v.

FORRESTINE SIMS,
APPELLEE.

CASE NO.: 91,073
FIRST DCA NO: 97-2193

ANSWER BRIEF OF APPELLEE

On Appeal from the First District Court of Appeal

THOMAS G. FALLIS
Florida Bar No.: 0699233
343 East Bay Street
Jacksonville, Florida 32202
(904) 356-6440

Counsel for Appellee

TABLE OF CONTENTS

Statement of the Case and Facts 1

Summary of the Argument 2

Argument 3

I. Is the determination of the issue of materiality in a perjury prosecution an essential element of perjury requiring the jury, instead of the trial court to decide this issue pursuant to *United States v. Gaudin*, _____U.S. _____, 115 S. Ct. 2310, 132 L. Ed.2d 444 (1995), (restated).

A. Introduction 3

B. The Legislature's Discretion to Eliminate Materiality as an Element 4,5,6,7,8

C. Appellant's Statutory Construction Arguments . . 8

D. Florida's Statutory Scheme is an Innovation Adding a Layer of Protection for a Defendant . . 9

Conclusion 10

TABLE OF AUTHORITIES

Hirsch v. State,
275 So. 2d 866 (Fla. 1973) 2,8

In re Winship,
397 U.S. 358, 905 S.Ct. 1068,
25 L. Ed. 2d 368 (1970) 7

Johnson v. United States,
10 Fla. L. Weekly Fed S 431 (May 12, 1997) . . . 6

Patterson v. New York,
432 U. S. 197, 525 S. Ct. 2319,
53 L. Ed. 2d (1977) 7

State v. Ellis
FSC #90, 729 1

Sullivan v. Louisiana,
508 U.S. _____, 113 S. Ct. 2078,
125 L. Ed. 2d 192 (1993) 7

United States v. Gaudin,
_____U.S. _____, 115 S. Ct. 2310,
132 L. Ed. 2d 444 (1995) 2,3,4

United States v. Wells,
519 U.S. _____, 117 S. Ct. 921,
137 L. Ed. 2d 107 (1997) 8

STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of facts in the initial brief as being a part of the record. However, the recitation of the underlying facts if this case is irrelevant to this cause. This case presents a purely legal issue - the constitutionality of Section 837.02(1), Florida Statutes. This Court can decide the constitutional issue without any consideration of the underlying facts.

This case presents the same exact issues that are before this court in *State v. Ellis,* Florida Supreme Court Appeal # 90,729. *Ellis* is currently pending before this court.

Appellee takes the exact position of that of *Ellis* and has adopted and recited the *Ellis* brief verbatim as there are no facts of any relevance in this case that would lead to a different conclusion than that of *Ellis* as both cases have originated from the very same trial court and the same decision of the First District Court of Appeal.

Counsel has diligently researched the law since the filing of the *Ellis* brief and finds no other authority than that cited in *Ellis.*

SUMMARY OF THE ARGUMENT

This case presents the simple question of whether materiality of a false statement is an essential element of perjury. Materiality is unquestionably a part of the gravamen of the perjury: an immaterial statement made under the oath in an official proceeding is not perjury. A perjury conviction cannot stand unless the statement is material. This Court in *Hirsch v. State*, 275 So. 2d 866 (Fla. 1973) held that materiality is an essential element of perjury.

In *United States v. Gaudin*, _____U.S. _____, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) held that if an element of an offense is an essential element (an element which is necessary for the state to prove the charge beyond a reasonable doubt), then a jury must decide the issue. The decision of the First District Court of Appeal merely followed the decision in *Gaudin* : because the element of materiality is an essential element of perjury, a jury must decide that issue. Consequently, the decision in *Gaudin* supercedes Appellant's arguments about policy, statutory interpretation and appellate standards of review.

ARGUMENT

I. Is the determination of the issue of materiality in a perjury prosecution an essential element of perjury thereby requiring the jury, instead of the trial court to decide this issue pursuant to *Untied State v. Guadin*, _____ U.S. _____, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (restated).

A. Introduction.

Appellee respectfully submits that the initial brief, based upon Judge Miner's dessent below, has overly complicated the i ssue in this case. The initial brief presents arguments which involve complex matters of statutory interpretation, standards of appellate review, and policy. These arguments are not necessary to resolve this cause. The issues in this case are simple and straightforward. The logical framework for this case is as follows:

1. Under *United States v. Gaudin, supra*, if an element of proof is an essential element of an offense (and not an affirmative defense or sentencing element), then, as a matter of federal constitutional law, a jury must decide that issue.
2. Is the issue of materiality in Section 937.011(3) an essential element of Section 837.02(1), Florida Statutes and not an affirmative defense or sentencing provision?

3. If materiality is an essential element of perjury, then under *Gaudin*, this Court has no choice but to find that materiality is an jury question. The decision below did not find that the perjury statute itself was unconstitutional.

The decision simply found that the part of the statute which made materiality a legal issue was unconstitutional; the decision, based upon the ruling on the trial court, then construed the perjury statute to make materiality a jury question. Consequently, Appellant's arguments about statutory interpretation and intent are without merit because the Florida perjury statute, as constituted by the District Court of Appeal, is still intact and is now constitutional under *Gaudin*.

B. **The legislature's Discretion to Eliminate Materiality as an Element**.

Appellant argues, in great detail, that the Legislature has the discretion to element materiality as an essential element of proof. Appellant bases this argument on Justice Rehnquist's opinion in *United States v. Gaudin*, (joined by Justices O'Connor and Breyer). Therefore, this argument does not derive from the majority opinion of the Supreme Court in *Gaudin*. Moreover, Appellant omits the second part of the Justice Rehnquist's argument in *Gaudin* concerning the elimination of issues as essential elements of proof:

> **Nothing in the Court's decision stands as a barrier to Legislatures that wish to define - or that have defined the elements of their criminal laws in such a way to remove issues such as materiality from the jury's consideration. We have noted that the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute (citations omitted). Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense (citations omitted). Federal and State legislatures may relocate burdens of proof by labeling elements as affirmative defenses, ibid., or they may convert elements into sentencing factors for consideration by the sentencing court (citations omitted) 115 S. Ct. at 2321.**

The above opinion is not binding precedent for this Court. The opinion of the six justices who joined the majority opinion in *Gaudin* is the precedent for this Court. This Court need not decide the issue of whether the Florida Legislature could constitutionally eliminate materiality as an essential element of proof. Justice Rehnquist noted that the Legislature could, within broad constitutional bounds, redefine an element of an offense as an affirmative defense or as a sentencing factor. This review recognizes there are some constitutional limits to the definition of an element as an affirmative defense or sentencing factor instead of as an essential element.

In this case, this Court need not decide, as a matter of constitutional law, whether materiality must be a part of the gravamen of the offense of perjury and must therefore be an essential element. This Court need not decide that issue because even under Justice Rehnquist's view, the issue of materiality is

still an essential element of the perjury statute. Under Justice Rehnquist's view, the issue of materiality is still an essential element of the perjury statute. Under Justice Rehnquist's view, a Legislature may (if otherwise constitutional) redefine an element of an offense as an affirmative defense or sentencing factor. In this case, the issue of materiality is not a sentencing factor nor an affirmative defense.

The language of the Florida perjury statute unquestionably makes materiality an essential element. The Legislature has already made materiality an essential element; this Court need not decide whether materiality has to be an essential element under *Gaudin*. Consequently, Appellant's reliance upon Justice Rehnquist's opinion is misplaced. In *Johnson v. United States*, 10 Fla. L. Weekly Fed S 431 (May 12, 1997), the United States Supreme Court held that the issue of materiality in a federal perjury case is a jury question under *Gaudin*. The decision in *Johnson v. United States*, conclusively establishes that materiality is an essential element of perjury.

Assuming arguendo, a legislature may remove an essential element from proof by the State, the issue in this case is not whether materiality is an essential element of Perjury, but who should decide the issue of materiality. The majority opinion in *Gaudin*, held that if an element was an essential element of an offense, then the jury must decide that issue.

The issue in this case is whether materiality is an essential element or an affirmative defense or sentencing factor. Appellant repeatedly argues that a legislature may make materiality an affirmative defense - for the sake of argument, Appellee does not dispute the allegation. However, in Florida, the Legislature did not make materiality an affirmative defense and it is unquestionably not a sentencing factor.

Materiality is an essential element of perjury. The gravamen of perjury is a material false statement made under oath in an official proceeding. An immaterial false statement made under oath in an official proceeding is not perjury. The element of materiality is essential because without a material false statement, there is no perjury despite the presence of the other essential elements (false statement made under oath in an official proceeding.)

Justice Scalia, author of the majority opinion, wrote in *Gaudin* that the Constitution give a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. 115 S. Ct. At 2320, *See, Sullivan v. Louisiana*, 508 U.S. _____, 113 S. Ct. 2078, 125 L. Ed. 2d 192 (1993); *Patterson v. New York*, 432 U.S. 197, 525 S. Ct. 2319, 53 L. Ed. 2d (1977); *In re Winship* 397 U. S. 358, 905 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The statute in *Gaudin* , involved the issue of the materiality of false statements to obtain a mortgage. Justice Scalia rejected the

government's argument, by analogy, that a trial judge could decide the issue of materiality in a false statement to obtain a mortgage case because a trial court could decide the issue of materiality in perjury cases. (Justice Scalia acknowledged some historical practice of a judge deciding the issue of materiality in perjury cases). Appellant's citation of *United States v. Wells*, 519 U. S. _____, 117 S.Ct. 921, 137 L. Ed. 2d 107 (1997) is also misplaced because the Court simply decided the materiality of the falsehood was not in element of making a false statement in the statute in question.

The majority opinion below held it is clear that materiality is an element of the crime of perjury. This Court in *Hirsch v. State*, 279 So. 2d 866 (Fla. 1973) also held that materiality is an element of perjury. Consequently, under *Gaudin*, the issue of materiality is a jury question.

C. **Appellant's Statutory Construction Arguments.**

Appellee will not address directly Appellant's detailed arguments on statutory construction and interpretation. Appellee will not address these arguments because the United States Supreme Court has decided as a matter of federal constitutional law, which is applicable to the State of Florida, that if materiality is an essential element of perjury, then the jury must resolve that issue. Consequently, the rules of *State* statutory construction must yield to the decision of the United States Supreme Court.

D. **Florida's Statutory Scheme is an Innovation Adding a Layer of Protection for a Defendant.**

Appellant makes an argument (based upon Judge Miner's dissent below) that the Florida perjury statute protects a defendant by making the judge decide the issue of materiality. This policy argument must yield to the decision of the United States Supreme Court. Moreover, a trial court can still protect a defendant in the ways suggested by Appellant even if the jury ultimately decided the issue of materiality. Under Rule 3.190(b) and (c)(4), Fla.R.Crim.P., a trial court could still decide, as a matter of law, there was insufficient proof of materiality to submit the question to a jury. Even of a case goes to a jury, a court may grant a judgment of acquittal. Appellee frankly does not understand Appellant's argument that the present scheme of a judicial determination of materiality is necessary to protect a defendant. Even if a jury ultimately decides the issue of materiality, the Rules of Criminal Procedure protect a defendant in the precise manner argued by Appellant.

CONCLUSION

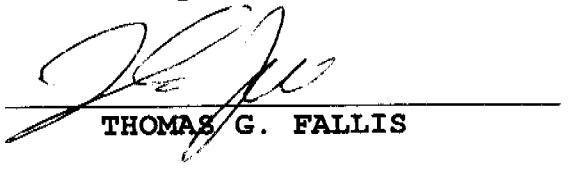
This Court should approve of the decision of the First District Court of Appeal in this case.

Respectfully submitted,

THOMAS G. FALLIS
Florida Bar No.: 0699233
343 East Bay Street
Jacksonville, Florida 32202
(904) 356-6440

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Steven White, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by U. S. Mail, this 5 day of January, 1998.



THOMAS G. FALLIS