IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Petitioner,

v.

FORRESTINE SIMS,

Appellee/Respondent.

CASE NO. 91,073

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant, the State of Florida, the Petitioner in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Appellant, the prosecution, or the State. Appellee, Forrestine Sims, the Respondent in the First District Court of Appeal (DCA) and the defendant in the trial court, will be referenced in this brief as Appellee or her proper name.

The record on appeal consists of the items A through H attached as the Appendix to the State's Petition for Writ of Certiorari filed in the DCA. References to facts, therefore, will be designated by App/DCA, the A-through-H letter in that Appendix, and any appropriate page number within the volume. For example, "App/DCA G 2" would indicate page 2 of Appendix G.

Items in the appendix of the instant brief will be referenced as "Appendix," followed by a letter designating the item in the appendix and any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

The State has presented a similar issue to this Court in State v. Ellis, FSC #90,729. Ellis is currently pending. This brief has been updated with recent cases.

STATEMENT OF THE CASE AND FACTS

The State appeals from a decision of the First District Court of Appeal that upheld the trial court's order (App/DCA H) striking down Section 837.011(3), Fla. Stat., as "unconstitutional under the Fifth And Sixth Amendments of the United States Constitution." The DCA decision is attached as Appendix A to this brief. Events leading up to that DCA decision follow.

Appellee was listed on discovery (App/DCA A) as a witness in the criminal case of State v. Keith Johnson (App/DCA B). Appellee was charged with perjury in the instant case as a result of the deposition taken of her in that case. The following, quoted from the arrest warrant underlying the instant case (App/DCA C), summarized some of the key facts of the alleged perjury:

> Your affiant is an investigator at the State Attorneys Office.
>
> Your affiant has read police reports and depositions relating to an armed robbery suspect by the name of Keith Johnson. The armed robber was driven to the scene by the suspect [Appellee]. The suspect stated under oath in a deposition that she did not witness the armed robbery because she was sitting in the car reading a bible. The suspect also stated in deposition that the robber came to her car with some women whom he was hugging and told her that he would see her later. Five independent witnesses state that the robber tried to get into her car but she, the suspect, had locked the doors. The witnesses also state that the victim of the robbery was bleeding and yelling for help and tugging on the robber as he tried to enter the suspect's car. The suspect then drove away from the scene at a high rate of speed.

Appellee was arrested (App/DCA D) pursuant to the arrest warrant. The narrative portion of the Arrest and Booking Report (App/DCA D) provided the following additional facts:

> On July 18, 1996, F. Sims [Appellee] gave a sworn statement to Asst State Attorney Teresa Persellin. During that statement F. Sims described that she had taken a friend to pick up a check from his employer. F. Sims said that her friend told her she could leave and at the time was hugging and kissing people at his employment. F. Sims said she then left the area.
>
> Independent witnesses stated that F. Sims friend had actually robbed his employer at the time and was trying to get into F. Sims vehicle when she fled away in a hurried manner.

On December 27, 1996, an information was filed charging Appellee with perjury in an official proceeding [Section 837.02(1), Fla. Stat.]. (App/DCA E)

On May 5, 1997, Appellee filed a Motion to Dismiss the Information. (App/DCA F) Appellee claimed that Florida Statutes, Section 837.02(1) which provides, inter alia, "Whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding in regards to any material matter shall be guilty of a felony of the third degree...," is facially unconstitutional. Appellee argued that Florida Statutes, Section 837.02(1) is unconstitutional because Florida Statutes, Section 837.011(3) provides that the determination as to whether a matter is material is a question of law, as provided for in Section 837.011. Appellee alleged that this denial of the right to have a jury determine the materiality of a false statement under Florida Statutes, Section 837.011(3) is unconstitutional.

On May 12, 1997, the trial court heard the Motion to Dismiss. The trial court indicated that it would enter the same order as it did in the "Laurie Ellis Case," and the prosecutor indicated her intent to seek certiorari review of such a ruling. (App/DCA G)

On May 14, 1997, the trial court issued an order denying Appellee's Motion to Dismiss; however, citing U.S. v. Gaudin, ___U.S.___ , 115 S.Ct 2310, 132 L.Ed 2d 444 (1995), the trial court found the last sentence in Florida Statutes, Section 837.011(3), unconstitutional under the United States Constitution because the question of materiality must be submitted to the jury. (App/DCA H) The sentence provides: "Whether a matter is material in a given factual situation is a question of law."

It is from this trial-court ruling (App/DCA H) that the State petitioned the DCA for a writ of certiorari.

On June 23, 1997, the DCA denied the State's Petition for Writ of Certiorari, citing to another case currently pending in this Court, State v. Ellis, 22 Fla. L. Weekly D1298 (Fla. 1st DCA May 22, 1997). The DCA decision in the instant case is attached to this brief as Appendix A. The DCA decision in Ellis is attached as Appendix B.

On July 22, 1997, the State filed in the DCA its Petitioner's Notice to Invoke Jurisdiction, and on October 27, 1997, this Court issued an Order Accepting Jurisdiction.

SUMMARY OF ARGUMENT

The State agrees with the DCA in Ellis that the issue distills to whether the legislature has designated materiality as an element of Perjury. Thus, this case turns on statutory interpretation, with one interpretation rendering a statute unconstitutional and one rendering it constitutional. The trial judge and the DCA in Ellis and here contravened well-settled principles of statutory construction in opting for the one resulting in unconstitutionality, thereby also producing the absurd result of entirely nullifying a statutory provision. Such a result does not reasonably effectuate legislative intent. Judge Miner's dissent in Ellis was well-reasoned and merits approval.

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?

A. The Florida Legislature's Discretion to Eliminate Materiality as an Element.

The trial court and the DCA, via Ellis, thought that Gaudin controlled, thereby concluding that Section 837.011(3), Fla. Stat., offends the United States Constitution. They were incorrect. Gaudin does not control because the federal statute there was significantly different from the Florida statutes at issue here. The federal statute in Gaudin lacked the language which renders the Florida statute constitutionally sound. Since the State contends infra that this statutory language eliminates materiality as an element in Florida, a basic prerequisite to this argument is whether Florida can constitutionally do this. In other words, does the Florida legislature constitutionally have the discretion to eliminate materiality as an element of Perjury? If it has no such discretion, the inquiry ends.

Each state, including Florida, has this discretion. A legislature may entirely dispense with materiality as a matter for the State to prove in a perjury prosecution:

> Nothing in the court's decision stands as a barrier to legislatures that wish to define - or have defined - the elements of their criminal laws in such a way as to remove issues such as materiality from the jury's consideration. *** Within broad constitutional

> bounds, legislatures have flexibility in defining the elements of a criminal offense. ***

United States v. Gaudin, ___U.S.___, 115 S.Ct 2310, 2321, 132 L.Ed 2d 444, 459 (1995)(Chief Justice Rehnquist, Justices O'Connor and Breyer concurring; collecting authorities). Accordingly, Justice Scalia, writing for Gaudin's majority, distinguished federal perjury, where the rule allowing the trial judge to find materiality was solely created through judicial interpretation, from English law, where Parliament created the rule, 115 S.Ct. at 2316, 132 L.Ed. 2d at 453. In contrast to Gaudin, here Florida's legislature explicitly created the rule in Section 837.011(3). Thus, Sections 837.011(3) and 837.02 are significantly different than the statute at issue in Gaudin and constitute a legitimate exercise of legislative discretion.

McMillan v. Penn., 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67, 75-76 (1986), illuminated and illustrated the states' vast discretion in determining the elements of crimes the prosecution must prove beyond a reasonable doubt to a jury:

> Patterson [v. N.Y., 432 U.S. 197 (1977)] stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive: '[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense of which the defendant is charged.*" Id., at 210 (emphasis added [in McMillan]). While 'there are obviously constitutional limits beyond which the States may not go in this regard,' ibid., '[t]he applicability of the reasonable-doubt standard ... has always been dependent on how a State defines the offense that is charged in any given case,' id., at 211, n. 12, 97 S.Ct., at 2327. Patterson rests on a premise that bears repeating here:
>
> > 'It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government,

> Irvine v. California, 347 U.S. 128, 134 [74 S.Ct. 381, 384, 98 L.Ed. 561] (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Speiser v. Randall, 357 U.S. 513, 523 [78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460] (1958).' Id. 432 U.S., at 201-202, 97 S.Ct., at 2322 (citations omitted).

McMillan upheld a statutory provision that, in part, "'up[ed] the ante' ... by raising to five years the minimum sentence which may be imposed within the statutory plan." 477 U.S. at, 106 S.Ct. at 2417.

McMillan stressed the nature of the "federal system, which demands '[t]olerance for a spectrum of state procedures,'" 477 U.S. at 90, 106 S.Ct. at 2418 quoting Spencer v. Texas, 385 U.S. 554, 566, 87 S.Ct. 648, 655, 17 L.Ed.2d 606 (1967), and reasoned that the states' discretion includes

> making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions. 'From the vantage point of the Constitution, a change in law favorable to defendants is not necessarily good, nor is an innovation favorable to the prosecution necessarily bad.' Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1361 (1979).

477 U.S. at 89 n. 5, 106 S.Ct. at 2418 n. 5.

Consistent with McMillan, Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980), held that the "determination of whether one may be sentenced as an habitual offender is independent of the

determination of guilt of the underlying substantive offense, and new findings of fact separate and distinct from the crime charged are required." Accord U.S. v. Lewis, 113 F.3d 487, 492 (3d Cir. 1997)("the requirement that the jury determine beyond a reasonable doubt that the defendant committed the crime depends on how the state defines the offense"; "[b]ecause we conclude that the court at sentencing must determine the nature of the controlled substance, the government need only have proved by a preponderance of the evidence that Lewis distributed cocaine base").

Under Patterson v. N.Y., 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), each State could designate immateriality as an affirmative defense. Therefore, as New York could define Murder as an "intentional killing," leaving it up to the defendant to show "mitigating circumstances," 432 U.S. at 206, 97 S.Ct. at 2325, Florida could define Perjury as "making any false statement, which he does not believe to be true, under oath," §837.02(1), Fla. Stat., while providing for immateriality as an affirmative defense "demonstrat[ing] ... mitigating circumstances," 432 U.S. at 206, 97 S.Ct. at 2325. Here, rather than an affirmative defense, **requiring the defense** to produce evidence to convince the jury, the legislature has, in its discretion, chosen to **require the State** to produce the evidence to convince the judge.

This year, U.S. v. Wells, 519 U.S.___, 117 S.Ct. 921, 924, 137 L.Ed.2d 107 (1997), in essence, applied this principle of legislative discretion in interpreting a federal statute as not

including a materiality element, thereby upholding the trial court's jury instruction divesting the jury of deciding materiality. Wells held that materiality was not an element even though the "indictment charged respondents with submitting one or more statements that were both false and 'material,'" Id. The United States Supreme Court rejected the application of Gaudin and the rule of lenity, interpreted the statute not to include materiality as an element, and vacated the decision of the Eighth Circuit to the contrary. Thus, although the federal statute and its history were distinct from Florida's perjury statute, Wells illustrates the legislature's discretion in determining whether materiality is an element and the non-applicability of Gaudin where it is not an element. Accord U.S. v. Pappert, 112 F.3d 1073, 1077 (10th Cir. 1997)("[a]lthough this circuit, like many others, treated materiality as an element of [18 U.S.C.] § 1014, *** the Supreme Court has recently decided that materiality of a falsehood is not an element of a § 1014 offense") citing Wells.

The State contends here that, under well-settled principles of statutory construction that effectuate this State's legislative discretion, materiality is not an element of Perjury in Florida and that, therefore, Gaudin does not apply.

Accordingly, in Florida, State v. Ashley, 22 Fla. L. Weekly S682, S683 (Fla. Oct. 30, 1997), recently recognized the broad discretion of the legislature within the context of separation of powers: "As we have said time and again, the making of social policy is a matter within the purview of the legislature -- not this Court." Here, as a matter of social policy, the legislature

innovatively provided a layer of protection to a defendant, requiring the prosecution to prove materiality as a threshold matter, without imposing materiality as an element of Perjury. This Court's principles of statutory interpretation effectuate the legislature's federally recognized discretion to legislate this social policy. The discussion turns to these principles of statutory interpretation.

B. Standards of Appellate Review and Statutory Interpretation.

State v. Stalder, 630 So.2d 1072, 1076 (Fla. 1994), summarized the applicable standard of appellate review of the constitutionality of a state statute:

> We note that in assessing a statute's constitutionality, this Court is bound 'to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent.' *State v. Elder*, 382 So.2d 687, 690 (Fla.1980). Further, '[w]henever possible, a statute should be construed so as not to conflict with the constitution. Just as federal courts are authorized to place narrowing constructions on acts of Congress, this Court may, under the proper circumstances, do the same with a state statute when to do so does not effectively rewrite the enactment.' *Firestone v. News-Press Publishing Co.*, 538 So.2d 457, 459-60 (Fla.1989) (citations omitted).

State v. Bales, 343 So.2d 9, 11 (Fla. 1977), applied these principles in interpreting the meaning of criminal provisions regulating massages so that they did not "trespass[] upon the enjoyment of sexual relations between married couples" or "regulate a simple handshake or a slap on the back":

> [I]t should be clear that 'gratuity' means 'tip' and that the phrase does not mean 'for free.' This

> construction should put at rest any confusion which might develop on that score.

These principles were also applied in Sandlin v. Criminal Justice Standards & Training Com'n, 531 So.2d 1344, 1346 (Fla. 1988), which rejected a "literal reading" of a statute (§943.13, Fla. Stat.) that would have rendered it unconstitutional, reasoning:

> The legislature will be presumed to have intended a constitutional result. *Marsh v. Garwood*, 65 So.2d 15 (Fla.1953). Moreover, courts will avoid declaring a statute unconstitutional if such statute can be fairly construed in a constitutional manner. *Industrial Fire & Casualty Insurance Co. v. Kwechin*, 447 So.2d 1337 (Fla.1983). Such a construction is possible in this case.
>
> We thus approach the question of whether or not section 943.13 and the concept of pardons can coexist. We believe they can, but in doing so we must select one of contrary views on the effect of a pardon on an eligibility statute for employment.

Recently, L.B. v. State, 22 Fla. L. Weekly S609, S610 (Fla. Oct. 2, 1997) quoting Dept. of Law Enforcement v. Real Property, 588 So.2d 957, 961 (Fla. 1991), applied these principles in upholding a statute criminalizing possession of a weapon on school property: "all doubts as to the validity of a statute are to be resolved in favor of constitutionality where reasonably possible."

Consistent with the maxim that a statute should be interpreted so that it is constitutional, this Court has indicated that interpretations that would be absurd or unreasonable must be rejected. See, e.g., City of Miami Beach v. Galbut, 626 So. 2d 192, 193 (Fla. 1993)("statute's plain and ordinary meaning must be given effect unless to do so would lead to an unreasonable or

ridiculous result"); State v. Smith, 547 So. 2d 613, 615 (Fla. 1989)(three-step process of determining meaning of statute: first, apply plain meaning; second, if plain meaning unclear, interpret and effectuate the legislative intent; and, "[t]he third rule or step is the application of the rule of lenity"; steps include avoiding unreasonable results); Dorsey v. State, 402 So. 2d 1178, 1180, 1183 (Fla. 1981)(interpretation of RICO statute; "such conflict would present at most a problem of construction and not a constitutional defect"; "a well-settled principle that statutes must be construed so as to avoid absurd results").

State v. Webb, 398 So.2d 820, 824 (Fla. 1981)(interpreting Florida Stop and Frisk Law), summarized:

> It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided. To determine legislative intent, we must consider the act as a whole 'the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject.'

Thus, in its role defining crimes, the presumption that the "legislature ... intended a constitutional result," Sandlin, avoids the "absurd result," E.g., Dorsey, of striking down a statute when it could have been interpreted in a manner comporting with the constitution.

In sum, **this case distills to an issue of statutory interpretation.** As elaborated in the next section, if Sections

837.011(3), Fla. Stat., and Section 837.02, Fla. Stat., given their language, intent, and the emergence of the Gaudin decision, are construed to establish materiality as an **element** of perjury that the judge alone can decide, then Section 837.011(3), Fla. Stat., is unconstitutional under Gaudin. However, if they can be construed so that they do not establish materiality as an element, then the trial judge can constitutionally decide the matter of materiality. The latter interpretation, if plausible, comports with the obvious: **The legislature does not intend that its statutory language be nullified; this would be an absurd result.**

C. Applying Principles of Statutory Interpretation.

The question becomes whether Section 837.02's mention of materiality per se elevates it to element status regardless of the legislative intent expressed in Section 837.011(3) and regardless of the effect such an interpretation has on the statutory scheme.

1. Reading Sections 837.02 and 837.011(3), Fla. Stat., in pari materia.

The State respectfully submits that, where the legislature **has not explicitly designated materiality as an element** of perjury and where it **has explicitly stated its intent that materiality is a question of law**, a "fair construction that is consistent with the federal and state constitutions as well as with the legislative intent," Stalder supra, is that materiality is not an element of perjury.

Nowhere does Chapter 837 designate, in so many words, materiality as an element of perjury. However, Section 837.011(3) explicitly designates materiality as a "question of law," which, as a question of law, axiomatically **must** be decided by the trial judge. See also Section 837.021(2), Fla. Stat. ("question of law to be determined by the court"). Thus, the explicit provision vis-a-vis the implied provision should prevail.

Current Chapter 837 is not the same as when Hirsch v. State, 279 So.2d 866 (Fla. 1973), was decided. The DCA's reliance upon Hirsch illustrates its opting for a statutory interpretation rendering legislation unconstitutional when there is a reasonable option to the contrary. Hirsch was decided in 1973, but the statutory language at issue was added by the 1974 legislature, See Ch. 74-383, §53, Laws of Fla. Thus, Hirsch did not interpret[1] the statute as presently constituted and as enlightened by Gaudin. Hirsch did not have the benefit of Gaudin, but, more importantly, it did not have the benefit of Section 837.011(3), the very statute that the DCA decided was unconstitutional. The DCA interpreted Section 837.02 in isolation, without the benefit of the legislative intent of Section 837.011, and then used that isolated interpretation to strike down Section 837.011.[2] This

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[1] Indeed, the issue in Hirsch did not even concern materiality but rather the inadmissibility of hearsay evidence. Thus, Hirsch's passing litany of elements was not part of its holding.

[2] As represented by an officer of the Court, the State at first thought it must acknowledge that the reasoning in Adams v. Murphy, 394 So.2d 411 (Fla. 1981), discussed materiality as an element of Perjury. However, although a 1981 case, Adams cited to the 1973 statute as controlling there and indicated that it would

interpretation violated the obvious legislative intent of reading Section 837.011(3) in pari materia with Section 837.02 – indeed, the former section defines terms in the latter one.

2. Reading Each Statutory Provision in Isolation of the Other so that Each Is Effectuated.

Today, in 1997, it must be assumed that the legislature intends that Section 837.011(3), Fla. Stat., remain as viable as it constitutionally can. Arguendo, it may also be assumed that the legislature intended the full effectuation of materiality as a prerequisite to a successful Perjury prosecution pursuant to Section 837.02(1), Fla. Stat. In Webb's words, if possible and reasonable, each statute should be construed so that it is not rendered "purposeless," 398 So.2d at 824. The only statutory interpretation that maintains the vitality of materiality in Section 837.02 while also effectuating the language of Section 837.011(3) is to allow the trial judge to determine materiality as a threshold matter.

3. Pertinent Jury Instructions Consistent with Constitutionality.

Sections 837.011(3) and 837.02 are substantially the same now as when this Court excluded materiality from the elements of Perjury in Standard Jury Instructions-Criminal Cases No. 92-1, 603 So.2d 1175 (Fla. 1992):

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have to refer to "decisional law," 394 So.2d at 413, in the absence of statutory guidance. Subsequent to the 1973 statutes, the legislature did provide guidance, on which the State relies here, i.e., Section 837.011(3), Fla. Stat.

> PERJURY (Amended) (NOT IN AN OFFICIAL PROCEEDING--F.S. 837.012) (IN AN OFFICIAL PROCEEDING--F.S. 837.02)
> Before you can find the defendant guilty of [Perjury Not in an Official Proceeding] [Perjury in an Official Proceeding], the State must prove the following five elements beyond a reasonable doubt:
> Elements
> 1. (Defendant) took an oath or otherwise affirmed that [he] [she] was obligated by conscience or by law to speak the truth in (describe proceedings, official or unofficial, in which the alleged oath was taken).
> 2. The oath or affirmation was made to (person allegedly administering oath), who was a (official capacity).
> 3. (Defendant), while under an oath, made the statement (read from charge).
> 4. The statement was false.
> 5. (Defendant) did not believe the statement was true when [he] [she] made it.
> ***
> **The law requires the judge to decide if the alleged statement is applicable material,** and I have decided that it is material. Therefore, you will not further concern yourself with this issue.

Here, Florida's legislative branch, as properly recognized by this Court's jury instructions, Fla. Std. Jury Instr. (Crim) Perjury FS 837.02, has "regulate[d]" its "procedures," McMillan supra, by making materiality a threshold question of law for the trial judge rather than a question of essential-element fact for the jury. Congress had not done this in the statute Gaudin analyzed.

4. Florida's Statutory Scheme as an Innovation Adding a Layer of Protection for a Defendant.

The foregoing sections argue that Sections 837.011(3) and 837.02 pose a burden to establish materiality yet, to maintain

the constitutionality of Section 837.011(3), they do not elevate materiality to element status. In essence, then, Florida's statutory scheme implements what McMillan had characterized not only as a regulation of procedures but also as an "innovation," 477 U.S. at 89 n. 5, 106 S.Ct. at 2418 n. 5, within federalism's constitutional "'[t]olerance for a spectrum of state procedures." 477 U.S. at 90, 106 S.Ct. at 2418.

A fortiori, unlike the statute in McMillan that "up[ed] the ante" on defendants by raising the minimum sentence, here the statutory plan adds **a layer of protection for the defendant.** In this sense, the trial judge's determination of materiality is like trial judge's threshold determinations that, for example,

- the government engaged in outrageous conduct, See State v. Glosson, 462 So.2d 1082, 1085 (Fla. 1985)("we hold that a trial court may properly dismiss criminal charges for constitutional due process violations in cases where an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution");
- defendants should be severed due to their confessions, See, e.g., Fla. R. Cr. P. 3.152(b)("... a statement of a codefendant makes reference to him or her ..."); Escobar v. State, 22 Fla. L. Weekly S412 (Fla. July 10, 1997) (reversed murder conviction because trial court erred in not severing defendants' trials "then by admitting into evidence at the joint trial the codefendant's statement, which incriminated appellant");

- the case should be dismissed due to speedy trial, See Fla. R. Cr. P. 3.191(p) ("defendant not brought to trial within the 10-day period through no fault of the defendant, ... shall be forever discharged from the crime"), including the comparison of the fact-imbued episode currently charged with one that was previously nol prossed, See Fla. R. Cr. P. 3.191(o);
- the case should be dismissed due to lack of subject matter jurisdiction, See, e.g., § 26.012, Fla. Stat. (circuit court "shall have exclusive original jurisdiction ... [o]f all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged"); or
- the information should be dismissed due to a significant deficiency in alleging elements of the offense, See, e.g., Fla. R. Cr. P. 3.140(b,o); M.F. v. State, 583 So.2d 1383, 1386 (Fla. 1991)("a charging document is subject to dismissal if it fails to properly allege every essential element of the offense").

See also Albrecht v. State, 444 So.2d 8, 12 (Fla. 1984)(action against State for taking without compensation; "well settled by this Court that several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the claim is made").

In each of the foregoing examples, as in the determination of materiality, the trial judge makes a threshold determination

pertinent to the case's ripening for trial. Moreover, the potential involvement of trial judge consideration of facts of the case, as in co-felons' confessions requiring severance, does not render the determination inappropriate for the trial judge. The consideration of facts does not render the trial judge's decision any less a legal determination, or, in Section 837.011(3)'s words, any less "a question of law." Accordingly, the pre-trial determination of "outrageous government misconduct" is "an objective question of law for the trial court," Glosson, even though it involves factual allegations.

Thus, while true that the legal determination of materiality may involve predicate factual matters, it also may involve complex legal issues, requiring the trial judge's legal expertise, such as in considering outrageous-government-conduct issues. Cf. State v. Bender, 382 So.2d 697, 700 (Fla. 1980)(in determining whether decision making is properly vested in an entity, "the practicalities of the subject matter sought to be controlled must be considered" among other things; "statutory authority empowering these agencies to approve testing methods for the implementation of breath- and blood-testing apparatus is proper and allowable"). In a drug case, the trial judge may be required to conduct an evidentiary hearing on an allegation of outrageous-government-conduct, and perjury charges may eventually spring from that evidentiary hearing. The materiality of the testimony in the pre-trial evidentiary hearing of the drug case could involve juxtaposing the allegedly perjurious testimony against Glossen and other precedents, an exercise that the jury

would be as ill-suited as the trial judge would be well-suited. See, e.g., Taylor v. State, 634 So.2d 1075, 1076-77 (Fla. 1994).

Indeed, if materiality were a question for the jury, some Perjury prosecutions would embody a battle of the experts, in which opposing counsels call to the witness stand those purportedly well-versed in the area of the law to which the Perjury pertained to testify as to materiality or immateriality. Rather than a battery of expensive experts, who would attempt to "educate" the jurors on all the subtleties of the law, the best expert is the trial judge sitting on the case; a fortiori, the judge as the best expert, should be allowed to fulfill the legislature's intent to decide the issue of materiality as "a question of law," §837.011(3), Fla. Stat., which, in turn, would be reviewable on appeal.

In sum, Section 837.011(3), in its wisdom, has accommodated the legislature's policy concern that falsehoods about a trivial (non-material) matter should not constitute Perjury. Yet, it also has accommodated potential complex legal questions that can arise in determining materiality. Consistent with the constitution, the legislature could have totally dispensed with materiality as any type of requirement imposed upon the State or could have imposed upon the defense the burden of proving an affirmative defense of immateriality, but it has added it as a threshold determination for the trial judge, in effect, providing the defendant more protection than she is entitled. In any event, the trial-judge's threshold determination of materiality, as such, does not offend

the United State Constitution. The trial court erred, as did the DCA here and in Ellis.

CONCLUSION

Based on the foregoing, 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 in the State v. Ellis decision, and remand for the reversal of the trial court's order of May 14, 1997.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS and its Appendix have been furnished by U.S. Mail to Tom Fallis, Esquire, 343 East Bay Street, Jacksonville, Florida 32202, this 21st day of November, 1997.

Stephen R. White
Attorney for the State of Florida/
Petitioner

[C:\USERS\CRIMINAL\PLEADING\97110120\SIMS-2BI.WPD --- 11/21/97,1:16 am]