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**FILED**

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**JAN 29 1991**

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_

Chief Deputy Clerk

STATE OF FLORIDA,  
Appellant/Petitioner,  
v.  
FORRESTINE SIMS,  
Appellee/Respondent.

CASE NO. 91,073

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Party designations, references, and emphasis will be as in the Petitioner's Initial Brief. "IB" will reference the Initial Brief, and "AB" will reference Respondent'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?

Respondent argues (at AB 3) that the issue is "simple and straightforward" because it requires no statutory interpretation and no consideration of public policy. Respondents' position would exalt oversimplicity over well-settled principles of statutory construction and public policy, which are not "overly complicated" (AB 3).

The State respectfully submits that the answer to the issue resides in the reasonably "straightforward" application of the principle recently enunciated in State v. Mitro, 22 Fla. L. Weekly S532 (Fla. Sept. 4, 1997):

This Court has consistently followed the established precept that, if reasonably possible and consistent with constitutional rights, it should interpret statutes in such a manner as to uphold their constitutionality.

It is would be "reasonably possible and consistent with constitutional rights" to interpret Section 837.011(3), Fla.

Stat., so that it requires the State to prove materiality as a trial judge's threshold determination rather than as an element of the offense. This threshold determination is akin to the pre-trial resolution of a motion to sever or motions to dismiss based upon alleged government outrageous conduct, the alleged expiration of speedy trial, an alleged lack of subject-matter jurisdiction, or alleged deficient charging document. (See IB 18-19)

The trial judge's determination of materiality involves the resolution of factual matters just like, for example, a motion to sever may involve the trial judge's resolution of factual matters pertaining to co-felons' confessions. Thus, a requirement of proof of something does not, by definition, make it an element. In Mitro's words, such an interpretation of Section 837.011(3) would be a "manner" of interpreting it "to uphold [its] constitutionality."

Such an interpretation effectuates the legislative intent, in a manner that United States Supreme Court precedents allow (See IB 6-11), as illustrated by U.S. v. Wells, 519 U.S. \_\_\_, 117 S.Ct. 921, 924, 137 L.Ed.2d 107 (1997).

Therefore, Respondent ignores the critical feature of the instant 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.

Like the DCA majority opinion in State v. Ellis, 22 Fla. L. Weekly D1298 (Fla. 1st DCA May 22, 1997) pending review FSC #90,729, Respondent (at AB 2, 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.

In sum, it is within Florida's domain to determine whether the elements of its crime of Perjury contain materiality, and this Court has repeatedly emphasized that it will adopt a reasonable interpretation to maintain constitutionality. "Simply" put, this is all the State asks here.

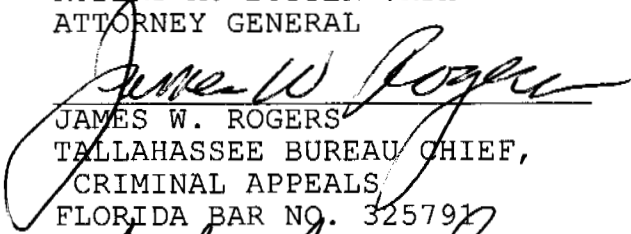
#### CONCLUSION

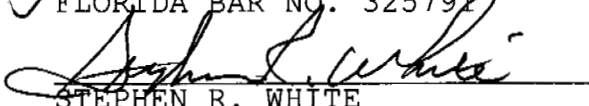
Based on the foregoing discussion and the arguments within the State's Initial Brief, the State respectfully requests that this

Honorable Court uphold the constitutionality of Section 837.011(3), Fla. Stat, disapprove the decision of the District Court of Appeal in State v. Ellis, supra 22 Fla. L. Weekly D1298, approve Judge Miner's dissent to that 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 true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. Mail to Tom Fallis, Esquire, 343 East Bay Street, Jacksonville, Florida 32202, this 29th day of January, 1998.

  
Stephen R. White  
Attorney for the State of Florida

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