

NO. 79481-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

v.

DUSTIN ABRAMS,

Respondent.

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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR DOUGLAS COUNTY

The Honorable John Hotchkiss, Judge

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BRIEF OF RESPONDENT

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A. ISSUES IN RESPONSE

1. In light of United States Supreme Court precedent, Washington's perjury statute violates due process because it requires judges, and not juries, to determine materiality of the false statement. Did the trial court properly dismiss the information charging Abrams with perjury?

2. The Washington Legislature has several options for adopting a constitutional perjury statute, including: (1) remove the requirement that judges decide materiality and treat it as an element to be decided by jurors; (2) have judges *and* juries enter findings on materiality, or (3) delete the materiality requirement altogether, thereby expanding the statute's reach. Given that this decision is a uniquely legislative prerogative, shouldn't that body decide any statutory fix?

B. STATEMENT OF THE CASE

The Grant County Prosecutor's Office charged Dustin Abrams with perjury in the first degree, alleging that he knowingly made materially false statements while under oath. CP 1-2, 13-14, 18-19.

Previously, Abrams had been charged with murder. During a CrR 3.5 hearing to determine the admissibility of a statement made to investigating officers, Abrams claimed he was assaulted, forced to provide

an incriminating statement under duress, and he did not write or sign the written statement attributed to him. CP 3-8, 35. The trial court suppressed the statement because officers improperly questioned Abrams after he had terminated the interview. CP 22. But each of Abrams's three claims of police misconduct resulted in a separate perjury charge. CP 18-19.

In a pretrial memorandum filed in the perjury case, the State noted that under Washington law, one of the elements of perjury -- materiality of the false statement -- had to be determined by the trial court as a question of law. CP 25. The State conceded that in light of the United States Supreme Court's decisions in United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) and Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), "this provision appears to be unconstitutional." CP 6.

Following this concession, the defense moved to dismiss all three perjury counts, arguing that Washington's perjury scheme was facially unconstitutional or unconstitutional as applied. CP 34-43. The State asked the trial court to save the perjury statute by "requiring additional procedures" permitting a jury determination. CP 46-48.

Noting that the perjury statute expressly required the court to determine materiality, the trial court refused to modify that legislative

directive. CP 50-51. Citing State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled on other grounds, Washington v. Recuenco, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), the court reasoned it was the Legislature's role to define crimes and that body was best positioned to modify the scheme. CP 51-52. The trial court held the perjury statute unconstitutional and, after denying a motion for reconsideration, dismissed the perjury charges with prejudice. CP 60-61.

The State has appealed.

C. ARGUMENT

THE PERJURY STATUTE IS UNCONSTITUTIONAL AND MUST BE FIXED THROUGH THE LEGISLATIVE PROCESS.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). “The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty’.” Id. In combination with the Fifth Amendment Due Process Clause, these provisions require the prosecution to prove all essential elements of a criminal offense to a jury beyond a reasonable doubt. Id. at 277-78.

In United States v. Gaudin, the Supreme Court addressed 18 U.S.C. § 1001, under which it is a crime to make “materially false” statements in any matter within the jurisdiction of the federal government.<sup>1</sup> The Court struck down as unconstitutional the historical practice of treating materiality as a question of law to be decided by the courts. Gaudin, 515 U.S. at 515-23. Because materiality was an essential element of the offense involving a mixed question of law and fact, the Fifth and Sixth Amendments required a jury determination. Gaudin, 515 U.S. at 511-515.

Two years later, in Johnson v. United States, the Supreme Court held that materiality was also an essential element under 18 U.S.C. § 1623,

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<sup>1</sup> 18 U.S.C. § 1001 provides:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully --

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be [guilty and sentenced accordingly].

the federal perjury statute, which proscribes “knowingly mak[ing] any false material declaration” under oath in federal court. Citing Gaudin, the Court once again held that materiality had to be decided by jurors, not the court. Johnson, 520 U.S. at 465.

Under Gaudin and Johnson, the trial court properly found Washington’s perjury statute unconstitutional. Our statute provides:

- (1) A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law.
- (2) Knowledge of the materiality of the statement is not an element of this crime, and the actor’s mistaken belief that his statement was not material is not a defense to a prosecution under this section.
- (3) Perjury in the first degree is a class B felony.

RCW 9A.72.020.

Notably, under RCW 9A.72.010:

“Materially false statement” means any false statement written or oral, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; whether a false statement is material shall be determined by the court as a matter of law;

RCW 9A.72.010(1)(emphasis added).

The crux of this crime is materiality. At common law, perjury included only material misstatements, a limitation traced back to the days of Sir Edward Coke, Sir William Blackstone, and Lord Mansfield. See State v. Wilson, 83 Wash. 419, 421-22, 145 P. 455 (1915). Washington's earliest perjury statutes included this requirement. See Rem. & Bal. Code, § 2351 (1909) (proscribing testimony on "any material matter which [the individual] knows to be false . . ."). The materiality requirement

arose because courts and legislatures did not want to punish de minimis false statements. The underlying reason to proscribe and prosecute only material false statements is logical: The court's time should not be wasted with meaningless prosecutions, and society likely would reject a statute that criminalized any immaterial false statement as both overbroad and purposeless.

Jeffrey Saks, *United States v. Gaudin: A Decision With Material Impact*, 64 Fordham L. Rev. 1157, 1177-78 (1995).

The materiality limitation is consistent with the extremely narrow construction given perjury statutes. "[T]he requirements of proof in such cases are the strictest known to the law, outside of treason charges." State v. Olson, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979). Indeed, beyond statutory requirements, there are requirements as to the number and quality of witnesses necessary for conviction. In re Huddleston, 137 Wn.2d 560, 570, 974 P.2d 325 (1999); Olson, 92 Wn.2d at 136 (at least two witnesses

directly contradicting defendant's statement or one such witness plus corroborating evidence). Evasive answers are not perjury. Olson, 92 Wn.2d at 137-140. Nor do opinions or legal conclusions violate the statute. Huddleston, 137 Wn.2d at 571.

The purpose of these strict requirements is to ensure witnesses are not unduly discouraged from appearing and testifying out of fear of prosecution. Olson, 92 Wn.2d at 138-39. “[T]he obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges, of having borne false testimony, is far paramount to that of giving even perjury its des[s]erts.” Id. at 138 (quoting W. Best, Principles of the Law of Evidence § 606 (C. Chamberlayne ed. 1883)).

Consistent with the current statute, the issue of materiality in Washington has long been a question for the court, not the jury. See State v. Carpenter, 130 Wash. 23, 28, 225 P. 654 (1924)(“the materiality of the testimony is a question of law for the court to decide.”). While it appears there are no Washington cases discussing the purpose behind this requirement, there is some indication materiality was relegated to judges based upon the belief it was simply too difficult for jurors to decide. Saks, supra, at 1165-1170; see also CP 51 (in finding Washington's statute unconstitutional, judge notes Legislature may have assumed “materiality

would be difficult for a jury to determine and/or for the Defendant to defend against.”).

Despite any concern in this regard, under Gaudin, the question of materiality is a mixed question of law and fact and, as such, must be decided by a jury. And because RCW 9A.72.010(1) requires a judicial determination, it is unconstitutional.

Despite the statute’s plain language -- “whether a false statement is material shall be determined by the court as a matter of law” -- the State argues the statute is not unconstitutional because this language does not prevent jurors from *also* deciding materiality. In its brief, the State refers to any judicial determination on materiality as a “threshold determination.” Brief of Appellant, at 7.

But a statute cannot be interpreted in a manner plainly contrary to the Legislature’s intent and “to the point of disingenuous evasion.” Communication Workers v. Beck, 487 U.S. 735, 762, 108 S. Ct. 2641, 101 L. Ed. 2d 634 (1988) (quoting United States v. Locke, 471 U.S. 84, 96, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985)). The word “shall” in a statute is presumptively imperative and operates to create a duty . . . [and] mandatory requirement unless a contrary legislative intent is apparent.” State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting

Erection Co. v. Dept. of Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993)).

It appears Washington's judges have *always* determined materiality in perjury prosecutions. And the current statute demands the same. For perjury, the Legislature drew a clear distinction between materiality (which "shall" be decided by the court) and the remaining elements (decided by the jury). Courts do not rewrite statutes that are plain on their face. Rather, this Court assumes the Legislature "means exactly what it says." State v. Delgado, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003) (quoting Davis v. Dept. of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

Contrary to the State's argument in its opening brief, RCW 9A.72.010(1) is not silent on whether juries can decide materiality. See Brief of Appellant, at 13-14. By specifically indicating judges must decide the issue, juries are necessarily excluded. See Delgado, 148 Wn.2d at 729 ("Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other."). Had the Legislature intended to give both judges and juries the authority to decide materiality, it knew how to craft an appropriate statute. See RCW 71.09.060(1) ("The court or jury shall determine whether,

beyond a reasonable doubt, the person is a sexually violent predator.”  
(emphasis added)).

The question is not whether RCW 9A.72.010(1) is unconstitutional. It is. The question is the severity of the constitutional defect -- whether the statute is facially unconstitutional or simply unconstitutional as applied. In the trial court, Abrams argued both theories. CP 38-41. In finding the statute unconstitutional, the trial court was not specific on this point. See CP 49-52.

A statute is facially invalid where “no set of circumstances exist in which the statute, as currently written, can be constitutionally applied.” City of Redmond v. Moore, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Such statutes are declared inoperative or void. Id. In contrast, to prove a statute is invalid as applied, a party must merely show that the statute’s application to that party’s specific circumstances is unconstitutional. Upon such a showing, the statute may not be applied to those circumstances in the future, but the statute is not completely invalidated. Id.

Washington’s perjury statute is clearly unconstitutional as applied. Under the Fifth and Sixth Amendments to the United States Constitution, Abrams had the right to demand the State prove each and every element of

the charged offenses beyond a reasonable doubt, to a jury. Washington's perjury statute expressly denies Abrams that right by mandating a judicial decision on materiality.

But the infirmity goes farther than just Abram's case. The statute is facially unconstitutional because it applies anytime an individual is charged with the crime. In every prosecution, the statute dictates a judicial finding on materiality.

In response to the claim of facial invalidity, the State may seek to rely on this Court's opinion in State v. Hughes. In Hughes, this Court found several of the exceptional sentence provisions in the Sentencing Reform Act (SRA) unconstitutional in light of the United States Supreme Court's opinions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which hold that any fact -- other than prior criminal history -- increasing the applicable punishment for a crime must be pled and proved to a jury beyond a reasonable doubt. Hughes, 154 Wn.2d at 199-204.

Although the SRA provisions were unconstitutional as applied to the defendants in Hughes, this Court found they were not facially unconstitutional. One of those provisions indicated "[t]he facts shall be

deemed proved at the [sentencing] hearing by a preponderance of the evidence.” Former RCW 9.94A.530(2). Citing Blakely, this Court noted that because a defendant could stipulate to facts supporting an exceptional sentence or could waive the right to jury findings, there were situations in which this provision could be applied constitutionally. Therefore, it was not facially invalid. Hughes, 154 Wn.2d at 132-34 (citing Blakely, 124 S. Ct. at 2541).

The State may argue that because individuals charged with perjury could waive their right to a jury determination on materiality (by agreeing to a bench trial or pleading guilty), the perjury statute is not facially invalid, either. But Hughes and Blakely involved sentencing procedures *following* a valid guilty plea or trial and should be limited to that circumstance.

Were the reasoning in those cases applied more generally, no criminal statute could ever be deemed facially unconstitutional because individuals always retain the option of waiving constitutional rights, thereby creating a situation in which the statute can be applied constitutionally in *some* imagined scenario. But whether a statute defining a substantive crime is facially unconstitutional should not turn on the possibility individuals might choose to waive the infirmity. Otherwise, the

statute's constitutionality is based on individuals who do not even enjoy the constitutional rights at issue. Under the current statutory scheme, not a single individual charged under the perjury statute has the right to a jury determination on materiality. Therefore, this Court should find the perjury statute facially unconstitutional.

Regardless, however, whether the perjury statute is facially unconstitutional or merely unconstitutional as applied to Abrams, the question of remedy remains. The State points out that RCW Title 9A contains a severability clause:

If any provision of this title, or its application to any person or circumstance is held invalid, the remainder of the title, or the application of the provision to other persons or circumstances is not affected, and to this end the provisions of this title are declared to be severable.

Brief of Appellant, at 10 (quoting RCW 9A.04.010(4)). According to the State, the non-offending portion of the perjury statute (that portion not requiring the court to determine materiality) should simply be severed from the remainder of the statute so that juries can now determine materiality. Brief of Appellant, at 10-14.

This Court rejected a similar argument in Hughes. Like Title 9A, the SRA also contains a severability clause. See RCW 9.94A.910 ("If any provision of this act or its application to any person or circumstance is

held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.”). Following Blakely, Division One held that the provisions authorizing a judicial determination on aggravating factors could simply be severed from the remaining statutory scheme, thereby allowing aggravating factors to be tried to juries. See State v. Harris, 123 Wn. App. 906, 916-926, 99 P.3d 902 (2004), review granted in part, cause remanded, 154 Wn.2d 1032 (2005).

In Hughes, this Court disagreed, noting that the fixing of punishments was uniquely a legislative function. Moreover, this was not a situation where a statute was simply silent or ambiguous on an issue, in which case a court might imply a necessary procedure. Rather, the statutory scheme specifically indicated that judges (not juries) would find aggravating factors. And for the Court to imply a contrary procedure would be a usurpation of legislative authority. Hughes, 154 Wn.2d at 149-151.

Similarly, defining the elements of a crime is uniquely a legislative function. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). And as in Hughes, this is not a situation where the statute is silent or ambiguous. RCW 9A.72.010(1) specifically indicates that judges (not juries) will find materiality. To sever this language from the statute and

hold that juries may decide materiality would constitute a usurpation of legislative authority.

Severance is improper where it is unreasonable to conclude the Legislature would have passed the statute without the offending portion or where elimination of the offending portion renders the statutory scheme incapable of accomplishing the Legislature's purposes. State v. Crediford, 130 Wn.2d 747, 760, 927 P.2d 1129 (1996). Severance is improper here. The perjury statute is strictly construed and its proof requirements intentionally burdensome to ensure witnesses are not unduly discouraged from testifying and to prevent convictions for relatively unimportant testimony. The requirement that judges determine materiality, and not juries, is at the heart of these protections. This purpose is no longer accomplished, however, if the offending portion of RCW 9A.72.010(1) is simply severed from the overall scheme.

The Washington Legislature should determine how materiality will be assessed in future cases. Indeed, referring to past prosecution efforts to change the proof requirements for perjury, this Court has said "[a]ny change must come from the legislative branch of the government." State v. Wallis, 50 Wn.2d 350, 354, 311 P.2d 659 (1957)(rejecting pressure to soften requirements for conviction).

Our Legislature has several options. First, it might modify the statute by simply removing the language requiring judges to decide materiality. This was Colorado's response to Gaudin. See People v. Vance, 933 P.2d 576, 579 (Col. 1997) (noting Colorado General Assembly had removed statutory language indicating "[w]hether a falsification is material in a given factual situation is a question of law."). In a related move, the Washington Legislature might also deem it wise to modify the statutory definition of materiality to ease its application by jurors, who are not skilled or trained in the law and might have difficulty with the current definition. This might ease the historical fear that jurors are incapable of properly deciding materiality.

Second, the Legislature might choose to retain the current statute but supplement with a provision that also requires a jury determination of materiality. In other words, the judge initially assesses whether materiality can be proved in a given case. If not, the case is dismissed in a procedure akin to summary judgment or a motion under State v. Knapstad, 107 Wn.2d 346, 356-57, 729 P.2d 48 (1986). If there is sufficient evidence to prove the element, however, the case proceeds to trial and a jury determination on all elements, including materiality. See Vandivier v. State, 822 N.E.2d 1047 (Ind. App.) (Indiana adopts this procedure in light

of Gaudin where accepted practice was to have courts decide materiality but, unlike Washington, judicial determination not mandated by statute), transfer denied, 831 N.E.2d (2005). This procedure would ensure witnesses are not harassed with frivolous perjury charges related to immaterial statements while satisfying the Fifth and Sixth Amendments.

Third, although less likely given Washington's history, the Legislature could choose to join those jurisdictions without a materiality element in their perjury statutes, thereby expanding conduct subject to prosecution. See Beckley v. State, 443 P.2d 51, 54 (Alaska 1968)(no materiality requirement in Alaska statute); People v. Lively, 470 Mich. 248, 680 N.W.2d 878, 879 (2004) (Michigan the same).

The point is this: whatever change or changes are made to the perjury statute in light of Gaudin, this is a legislative task, not a judicial one. Following this Court's decision in Hughes, the Legislature modified the statutory scheme for exceptional sentences to comply with constitutional requirements. See Laws of 2005 ch. 68 § 3. The Washington Legislature will do the same for the perjury statute.

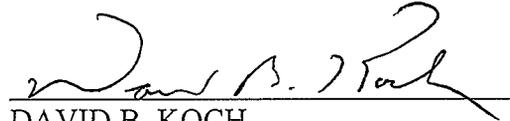
D. CONCLUSION

The perjury statute is unconstitutional. It is the Legislature's duty to modify the statute. The trial court properly dismissed the charges against Abrams.

DATED this 31<sup>st</sup> day of July, 2007.

Respectfully submitted,

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Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 79481-2
vs.	)	
	)	
DUSTIN ABRAMS,	)	
	)	
Petitioner.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF JULY 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TERESA CHEN  
GRANT COUNTY PROSECUTOR'S OFFICE  
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[X] DUSTIN ABRAMS  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF JULY 2007.

x Patrick Mayovsky