IN THE SUPREME COURT OF FLORIDA

JAMES DONALD RAULERSON,

Petitioner,

v. Case No. 91,611

STATE OF FLORIDA

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

# MERITS BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE AND FACTS

The State generally accepts Raulerson facts with the following addition:

On September 16, 1996, James Raulerson was charged by information with driving while license suspended in violation of section 322.34(1), Fla. Stat. (1995), and having two or more offenses of driving with a suspended license or revoked license based upon offenses occurring on December 12, 1987, January 10, 1989, and December 20, 1995. (Vol. I, R. 12).

## SUMMARY OF ARGUMENT

The Fifth District Court of Appeal correctly determined that a conviction under section 322.34(1), Fla. Stat. (1995) includes instances where adjudications of guilt are withheld. This Court has expressly determined that a "conviction" is distinct from a "judgment of conviction" and includes adjudications withheld. See Gazda v. State, 257 So. 2d 242 (Fla. 1971). This is consistent with this court's definition of conviction in Fla. R. Crim. P. 3.701(d)(2) and 3.702(d)(2), and furthers the legislative intent of the statute which is to increase the penalty for repeat offenders. If a conviction required adjudication, repeat offenders would circumvent this penalty because a prior adjudication withheld would not count as a prior conviction under the statute. This Court is required to construe a statute to be constitutional, and construing "conviction" in § 322.34(1) to include adjudications withheld renders this statute constitutional.

## ARGUMENT

SECTION 322.34(1) OF THE FLORIDA STATUTES DOES NOT VIOLATE THE CONSTITUTIONAL PROTECTION OF SEPARATION OF POWERS.

Raulerson contends that section 322.34(1), Fla. Stat. (1995) is unconstitutional because it violates the constitutional protection of separation of powers set forth in Art. II, § 3 of the Florida Constitution.[1] He argues that § 322.34(1) is unconstitutional because it unlawfully delegates a legislative function to the judicial branch by affording the circuit court the discretion to determine whether a third or subsequent offense of driving while license is canceled, suspended or revoked after the prior adjudications were withheld, is a felony or misdemeanor.

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.

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[1] Article II, § 3 provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the branches unless expressly provided herein.

Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)(quoting 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." Id. (quoting Firestone v. News-Press Publishing Co., 538 So. 2d 457, 459-60 (Fla. 1989) (citations omitted)).

The statute at issue is § 322.34(1), Fla. Stat. (1995) which provides:

> (1) Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, except persons defined in Sec. 322.264, and who drives any motor vehicle upon the highways of this state while such license or privilege is canceled, suspended, or revoked, upon:
>
> (a) A first conviction is guilty of a misdemeanor of the second degree, punishable as provided in Sec. 775.082 or Sec. 775.083.
>
> (b) A second conviction is guilty of a misdemeanor of the first degree, punishable as provided in Sec. 775.082 or Sec. 775.083.
>
> (c) A third or subsequent conviction is guilty of a felony of the third degree, punishable as provided in Sec. 775.082, Sec. 775.083, or Sec. 775.084.

The Fifth District Court of Appeal rejected Raulerson's constitutional claim, and determined that a conviction under §

322.34(1) includes instances when the sentencing court decides to withhold an adjudication of guilt. Thus, there is no encroachment by the trial court, and no separation of powers violation. The court opined:

> A common sense reading of the instant statute indicates that the legislature intended the term "conviction" to mean a determination of a defendant's guilt by way of plea or verdict. There appears to be no requirement that there be an adjudication. The obvious legislative intent of section 322.34(1) is to increase the penalty for repeat violations of the statute. The legislative goal is accomplished by application of the Gazda definition of the conviction. Accordingly, we conclude that the statute is constitutional.

Raulerson v. State, 699 So. 2d 339, 340 (Fla. 5th DCA 1997). This determination is proper for several reasons.

First, this Court has expressly determined that when used in a statute the term "conviction" means a finding of guilty not requiring an adjudication whereas a term "judgment of conviction" would require an adjudication. See State v. Gazda, 257 So. 2d 242, 243-44 (Fla. 1971). There, this Court determined that, for purposes of section 775.14 of the Florida Statutes which provided that a person cannot be sentenced for a conviction where sentence is withheld for five years, "the term 'conviction' means determination of guilty by verdict of the jury or by plea of guilty, and does not require an adjudication by the court." Id. This Court further noted that the term "judgment of conviction" is

distinguishable because it is defective unless it contains an adjudication of guilt. Id. at 244. Compare also Smith v. Bartlett, 570 So. 2d 360, 361 (Fla. 5th DCA 1990), rev. denied, 581 So. 2d 1310 (Fla. 1991)(one who pleads guilty or is found guilty by a jury is "convicted" under § 775.089(8)); Jones v. State, 502 So. 2d 1375, 1377 (Fla. 4th DCA 1987)(withholding of adjudication is a conviction for double jeopardy purposes); Johnson v. State, 449 So. 2d 921, 923 (Fla. 1st DCA 1984)(defendant was "convicted" even though not yet adjudicated for purposes of impeachment evidence); Maxwell v. State, 336 So. 2d 658, 659-60 (Fla. 2d DCA 1976)(conviction under § 893.13 includes when adjudication is withheld).

Raulerson argues that this Court's determination in Gazda should not be applied as a general rule. He argues that Gazda was upon the specific statute at issue, and that this Court relied upon statutes and rules defining judgment and rendition of judgment which have since been amended to "refine" the distinction between a conviction and an adjudication of guilt. However, there has been no such refinement. The definition of judgment has remained the same from the statutes and rules relied upon in Gazda. See section 921.01, Fla. Stat. (1971)(replaced by Fla. R. Crim. P. 1.650 and now at Fla. R. Crim. P. 3.650). While section 921.02, Fla. Stat.

(1971)(replaced by Fla. R. Crim. P. 1.670 and now at Fla. R. Crim. P. 3.670) has been amended to change the meaning of rendition of judgment, the Committee Notes state that the purpose of this proposed rule concerned the defendant's right of appeal. The revisions had nothing to do with "refining" the distinction between a conviction and an adjudication. Thus, Raulerson's attempt to dispel Gazda fails.

This Court's interpretation of "conviction" in Gazda is bolstered by this Court's own definition of a conviction set forth in the criminal procedure rules where conviction "means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended." Fla. R. Crim. P. 3.701(d)(2), 3.702(d)(2)(emphasis added).

Moreover, this Court's interpretation of conviction is consistent with the plain and ordinary meaning of the word "conviction." The plain meaning of statutory language is the first consideration of statutory construction. Capers v. State, 678 So. 2d 330, 332 (Fla. 1996). The plain meaning of "conviction" relates to the finding of guilt. See Black's Law Dictionary, 333-34 (6th ed. 1990)("or the final judgment on a verdict or finding of guilty, a plea of guilty or a plea of nolo contendere which does not

include a final judgment which has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.").[2]

Notably, this construction of "conviction" is also consistent with the legislative intent of § 322.34(1) which is to increase the penalty for repeat offenders, punishing and deterring recidivism. To construe the statute otherwise would achieve an effect which is directly contrary to this legislative intent. If this Court were to conclude that "conviction" required an adjudication, repeat offenders would be given a windfall as they would not only receive the benefit of a withhold of adjudication, but also the additional benefit of not having their prior crime counted at all if they fail in their rehabilitation and commit the same crime again. This directly contradicts the purpose of chapter 322. See section 322.42, Fla. Stat. (1995)(chapter 322 "shall be liberally construed to the end that the greatest force and effect may be given to its provisions for the promotion of public safety").

The purpose of § 322.34(1) is to increase the severity of the crime and penalty with each offense. Thus, if this Court were to adopt Raulerson's contention, the status of a person charged for the second time would be controlled by whether the trial court

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[2] A court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term. L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997).

withheld adjudication the first time or not. This is not what is intended. If so, it creates the problem the Second District set forth in Maxwell.

There, under the statute at the time, the first offense for marijuana possession was a misdemeanor, but if the defendant had a prior conviction, such an offense was felony. Maxwell, 336 So. 2d at 659. Maxwell had previously entered a no contest plea with adjudication withheld on his first offense. Id. Rejecting Maxwell's claim that he should not have been charged with a felony because his adjudication was withheld on his first offense, the Second District noted:

> . . . [O]nce possession has been judicially established, whether by a guilty plea, a nolo plea, or a jury verdict, the status of the second charge must not be determined on the basis of whether or not the judge had withheld adjudication pursuant to RcrP 3.670. If that were a controlling factor, a judge may be reluctant to exercise the power to withhold adjudication granted under the above rule. He might be unwilling to give the defendant an unwarranted second chance to risk no more than another misdemeanor charge should the defendant again possess marijuana. This in turn would be a great detriment to first offenders.

Id.

Thus, construing the term "conviction" to require an adjudication of guilt would tie the hands of trial judges because it would affect the discretion of trial courts to withhold adjudication when appropriate for fear that the second offense

would not be subject to the harsher degree and penalty because it was not a "conviction" under the statute. See section 948.01, Fla. Stat. (1995)("where it appears . . . that the defendant is not likely to engage in a criminal course of conduct . . . the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt").

This is what undermines the decision of the First District Court of Appeal in State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997). There, the First District Court of Appeal agreed with the Fifth District Court of Appeal's conclusion in Raulerson, that § 322.34(1) did not violate the doctrine of separation of powers, but with different reasoning. That court concluded that trial courts did not have the discretion to choose between a misdemeanor or a felony, because a misdemeanor was not an available alternative. Id. at 1176. The First District determined that pursuant to sections 948.01(2) and 948.06(1), Fla. Stat. (1995), an offender whose adjudication of guilt is withheld and is successful on his probation, is not "convicted" under the statute. Id. Thus, the court concluded that a third time or subsequent offender of § 322.34(1) will either be adjudicated guilty of a felony under § 322.34(1)(c) or not convicted at all, depending upon whether the adjudication of guilt has been withheld and the offender

successfully completes his probation. Id.

While the rationale set forth by the First District eliminated the constitutional problem, the First District failed to address the fact that the offender who successfully withholds without conviction will then avoid the harsher degree of crime and penalty on his third or subsequent offense because he was not previously "convicted." Thus, this interpretation frustrates the legislative intent of § 322.34(1) which is to subject the third or subsequent offender to the harsher degree of crime and penalty under § 322.34(1) for each subsequent offense. As a result, the term "conviction" when used in this statute must include instances where adjudications are withheld.

Furthermore, Raulerson's construction of conviction would lead to absurd results. The statute provides that "upon ... [a] first conviction" the defendant is guilty of a misdemeanor. § 322.34(1), Fla. Stat. If, as Raulerson contends, "conviction" under the language of the statute does not include a withhold of adjudication, then in cases where a trial court withholds adjudication it essentially divests itself of any jurisdiction at all by eliminating an element of the crime -- there is no "first

conviction" on which to sentence.[3] The Legislature clearly could not have intended this nonsensical result, and it is a fundamental principle that statutes should not be construed in such a way as to lead to absurd results. See, e.g., State v. Iacovone, 660 So. 2d 1371, 1373 (Fla. 1995).

Moreover, Raulerson's contention that the third or subsequent offense requires an adjudication is misguided because the only crime committed on the third or subsequent offense is a felony. Once that defendant drives with a suspended license for the third time, he commits the felony.[4] This is the clear intent of the statute. The sentencing of the defendant, even if adjudication is

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[3] The same result would follow if the court withholds for a second or third conviction -- there would be no "conviction" on which to sentence.

[4] Raulerson's contention that § 322.34(1) does not give circuit courts jurisdiction on third offense cases is unavailing because the third offense should be charged as felony because the elements of the crime become whether the defendant drove with a suspended license and had two prior convictions. A violation of § 322.34(1)(c) is not chargeable as a misdemeanor until conviction, but is a felony on its face. Thus, there is no problem with jurisdiction in the circuit court. But see State v. Santiago, 4 Fla.L.Weekly Supp. 220-221 (Fla. 17th Cir. August 2, 1996). There, the Seventeenth Judicial Circuit Court ruled that on the third offense, the trial court can make a choice between felony and misdemeanor. However, the First District's decision in Gloster rejects this argument. Moreover, the Santiago court did not consider that the third offense is felony under § 322.34(1)(c) nor did that court even address this Court's determination in Gazda that convictions include adjudications which are withheld.

withheld, is ample "conviction" of the third offense. See Raulerson, 699 So.2d at 342 (Harris, J., concurring).

Raulerson's reliance upon Wooten v. State, 332 So. 2d 15 (Fla. 1976), the only case he cites by this Court in support of his contention, is misplaced. While this Court did determine that a conviction includes an adjudication under the driving under the influence of alcohol statute, section 316.028, it did so in conjunction with section 322.281 and Traffic Court Rule 6.290(a) which required mandatory adjudication in driving under the influence offenses. Wooten, 332 So. 2d at 17. There, the defendant argued that her right to equal protection under the law was denied because the trial court was denied the discretion in withholding adjudication in light of the mandatory adjudication rule. Id. She contended that while a conviction was mandatory in drunk driving cases, the withhold of adjudication was available in serious cases such as murder, rape, and robbery. Id. However, this Court disagreed, and determined by including a mandatory adjudication under the statute and court rule, all drunk drivers were treated the same as there was no disparity in the punishment authorized for subsequent offenders. Id.

Wooten raises the question that if the drunk driving statute stood alone, without the mandatory adjudication rule, the multiple

offender, who avoided formal adjudication in three previous prosecutions, could not be punished as severely as the drunken driver whose single previous offense resulted in conviction. Id. at 17. Thus, the mandatory adjudication rule cured this problem.

Here, we have no corresponding mandatory adjudication requirement for violators of § 322.34(1). However, this requirement is not necessary had this Court followed its prior ruling in Gazda that "conviction" does include offenses where adjudications were withheld. This eliminates the need for an additional mandatory adjudication provision, and ensures that those who commit subsequent violations after their prior adjudications were withheld are treated the same as those who are adjudicated on their first offense. The problem that Wooten raised becomes superfluous because when "conviction" includes adjudications that are withheld, all offenders will be subject to the progressively harsher crimes and penalties of statutes such as §§ 316.028 and 322.34(1).[5] However, Wooten never addresses this interpretation nor does Wooten even consider the distinction between "conviction" and "judgment of conviction" set forth in Gazda.

[5] If this Court were to disagree with that conclusion, then this begs the question that mandatory adjudications in driving with suspended licenses cases must be necessary to ensure the equal protections of the law. See Raulerson, 699 So. 2d at 341 (Harris, J., concurring).

In sum, the determination by the Fifth District Court of Appeal that a "conviction" under § 322.34(1) includes adjudications which are withheld follows this Court's decision in Gazda, this Court's definition of conviction, and is the only interpretation which comports with the legislative intent of the statute. Any other construction would frustrate this intent and lead to absurd results. This Court is required to construe a statute so that it will not conflict with the constitution. Stalder, 630 so at 376. Determining that "conviction" under § 322.34(1) includes instances where an adjudication of guilt is withheld embraces this rule of statutory construction.

However, should this Court reject the State's argument that "conviction" under § 322.34(1) includes adjudications which are withheld, the State urges this Court to consider and adopt the reasoning of the First District in Gloster which upholds the constitutionality of § 322.34(1) on different grounds.

Nevertheless, should this Court find that § 322.34(1) does unconstitutionally delegate legislative authority to the judicial branch, this finding should not result in the entire statute being declared unconstitutional. Rather, the unconstitutional component of the statute -- the escalation in the degree of the offense upon subsequent convictions -- should be severed and the remained of the

statute enforced without this subunit. Schmitt v. State, 590 So. 2d 404, 414-15 (Fla. 1991), cert. denied, 112 S.Ct. 1572 (1992).

## CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by delivery to Assistant Public Defender Kenneth Witts, counsel for petitioner, this _____ day of April, 1998.

_____
MARY G. JOLLEY
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