IN THE SUPREME COURT OF FLORIDA

ALBERT GLOSTER, :

Petitioner, :

v. : CASE NO. 92,235

STATE OF FLORIDA, :

Respondent. :

_____/

# INITIAL BRIEF OF PETITIONER

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

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# INITIAL BRIEF OF PETITIONER

## STATEMENT OF THE CASE AND FACTS

By information, the state charged Gloster under § 322.34(1)(c), Florida Statutes, with the third-degree felony of driving with a suspended license by a person with two previous convictions of the same offense. (R1)[1] On the state's petition, the case was transferred from county to circuit court. (R4-5)

Defense counsel moved to dismiss the information, alleging that §322.34(1)(c) unconstitutionally delegates to trial judges the legislative prerogative to prescribe punishments, because a withhold of adjudication would make the offense a misdemeanor, while imposition of adjudication would make the offense a felony.

[1]In this brief, citations to the record on appeal are in the format (R[page number]).

(R6-9, 11-15) The trial court granted the motion, relying on State v. Santiago, 4 Fla. L. Weekly Supp. 220 (17th Cir. Aug. 2, 1996).

On appeal, the district court reversed, finding that a trial judge has no opportunity to treat a violation of § 322.34(1)(c) as a misdemeanor, and that therefore the potential for a violation of the constitutionally mandated separation of powers does not arise. State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997). The court denied Gloster's motion for rehearing. This court has accepted discretionary review under Article V, Section 3(b)(3), Florida Constitution.

## SUMMARY OF THE ARGUMENT

Section 322.34(1)(c), Florida Statutes (1995), is an inartfully drafted provision which, unlike comparable statutes enhancing a third or subsequent misdemeanor of DUI or petit theft into a felony, hinges the enhancement of a third or subsequent offense of driving while license suspended upon "conviction." In the absence of any clear legislative directive to the contrary, a withhold of adjudication following a no contest plea is not a conviction in this context. Therefore, the authority of the trial judge to impose or withhold adjudication gives the judiciary the power to prescribe punishments reserved by Article III, Section 1 of the Florida Constitution to the legislature.

District courts holding to the contrary are in error. Contrary to the conclusion in State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1998), the option to treat the offense as a misdemeanor is available to the trial judge upon a withhold of adjudication. The judge may impose a sanction of a year or less in duration. Moreover, the strained statutory exegesis in Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997), and State v. Keirn, 23 Fla. L. Weekly D1144 (4th DCA May 6, 1998), notwithstanding, this statute is not excepted from the rule followed in Florida that a plea of nolo contendere followed by

withhold of adjudication of guilt is not a conviction. The Raulerson court has misread precedent in this area, and the construction urged in the concurring opinion smacks of judicial legislation. The Keirn court erroneously incorporated § 322.34(1)(c) into a separate statute dealing with noncriminal traffic infractions to arrive at a flawed conclusion that adjudication is not necessary for felony enhancement.

Consequently, this court should rule § 322.34(1)(c) an invalid delegation of legislative power, in violation of Article III, Section 1 of the Florida Constitution.

## ARGUMENT

SECTION 322.34(1)(C), FLORIDA STATUTES (1995), VIOLATES THE CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS BECAUSE IT ALLOWS TRIAL JUDGES TO PRESCRIBE THE SEVERITY OF THE OFFENSE AND PERMISSIBLE PUNISHMENT VIA EXERCISE OF DISCRETION TO IMPOSE OR WITHHOLD ADJUDICATION OF GUILT.

The issue in this case is whether § 322.34(1)(c), Florida Statutes, violates the constitutional requirement of separation of the powers of the judiciary and legislature, on grounds that it gives trial judges the authority to prescribe crimes and authorized punishments. As set out in the district court opinion, the statute provides that a third or subsequent offense of driving while license suspended (DWLS) is to be punished "upon conviction" as a third-degree felony, an enhancement from misdemeanor treatment for previous offenses. In accord with the decision in State v. Santiago, 4 Fla. L. Weekly Supp. 220 (17th Cir. Aug. 2, 1996), Gloster argued that a conviction under the statute correlates to adjudication of guilt. The authority of the trial judge to withhold or impose adjudication of guilt, pursuant to § 948.01(2), Florida Statutes, unconstitutionally carries with it the legislative prerogative to prescribe authorized punishments. The district court rejected this argument, reasoning that because a withhold of adjudication must

be accompanied by probation, which upon revocation must result in adjudication, the trial judge never has an opportunity to treat a third or subsequent DWLS as a misdemeanor. Thus, concluded the court, the constitutional concern does not arise. State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997). Two other district courts have upheld the statute for different reasons, each construing the statute such that an adjudication of guilt is not necessary for conviction. Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997); State v. Keirn, 23 Fla. L. Weekly D1144 (4th DCA May 6, 1998).

Each of these courts is in error. Under § 322.34(1), unlike other recidivist enhancement statutes, the judge retains authority to impose or withhold adjudication, a decision which determines whether the offense is a misdemeanor or felony, and what punishment may be imposed therefor. Contrary to the conclusion in Gloster, the option to treat the offense as a misdemeanor does indeed arise. Moreover, the strained statutory exegesis in Raulerson and Keirn notwithstanding, this statute is not excepted from the rule followed in Florida that a plea of nolo contendere followed by withhold of adjudication of guilt is not a conviction.

In the discussion that follows, petitioner will contrast

this statute with comparable recidivist enhancement schemes elevating misdemeanors into felonies, set out the pertinent caselaw concerning the meaning of the term "conviction" in Florida law and, finally, point out the flaws in Gloster, Raulerson and Keirn.

**A. "CONVICTION" UNDER FLORIDA LAW**

As one court has noted, the word "conviction" is susceptible of different interpretations depending on the context in which it is used. State Department of Highway Safety v. DeGrossi, 680 So. 2d 1093, 1095 (Fla. 3d DCA 1996). In Smith v. State, 75 Fla. 468, 78 So. 530 (1918), the state prosecuted the defendant for sale of liquor in a dry county, "having been before convicted of the same offense." The conviction was reversed on the court's finding that "convicted" meant "adjudicated" and the information alleged only that the defendant had previously pled guilty to the offense. Citing Smith and other precedent, the Third DCA held that the offense of possession of a firearm by a convicted felon contained, as an essential element, a prior felony adjudication of guilt. Castillo v. State, 590 So. 2d 458 (Fla. 3d DCA 1991).

The federal courts agree that under Florida law, when a "conviction" is an essential element of another offense, adjudication, a guilty verdict or at least a guilty plea is required.

In United States v. Thompson, 756 F.Supp. 1492 (N.D.Fla. 1991), the court found that a *nolo contendere* plea without adjudication could not be used as a felony conviction to establish the federal offense of receiving firearms by a person previously convicted of a felony. The Court of Appeals for the Eleventh Circuit recently approved Thompson when it reversed a federal conviction of possession of a firearm by a convicted felon in United States v. Willis, 106 F. 3d 966 (11th Cir. 1997). The Thompson and Willis courts based their decisions on passages from two Florida Supreme Court opinions, Garron v. State, 528 So. 2d 353 (Fla. 1988), and State v. Gazda, 257 So. 2d 242 (Fla. 1971). The Garron court held that a *nolo contendere* plea is not a confession of guilt, and is therefore not tantamount to a conviction for purposes of an aggravating circumstance in capital sentencing proceedings. In Gazda, the court held that, for purposes of determining whether a sentence previously withheld upon conviction may subsequently be imposed,

> the term "conviction" means a determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court. It is important to distinguish a "judgment of conviction" which is defective unless it contains an adjudication of guilt.

257 So. 2d at 243-44.

Thus, for purposes of determining the elements of an offense and the punishment authorized therefor, a "conviction" is defined in Florida as an adjudication of guilt, verdict of guilt, or plea of guilty. This definition excludes a plea of *nolo contendere* without adjudication of guilt. Because the trial court ruled in his favor, the case against Gloster was dismissed without a plea. Had the issue been resolved against him, he doubtless would have pled no contest, reserving the right to appeal the denial of the motion to dismiss. Thus, short of an adjudication of guilt, he would not have a "conviction" for purposes of § 322.34(1)(c), Florida Statutes. This conclusion is consistent with the traffic court rules, which define a conviction under Chapter 322 as a "determination that a defendant has committed a traffic infraction ... unless adjudication is withheld..." Fla. R.Traf.Ct. 6.560. Though driving with a suspended license is a criminal offense, not an infraction, it is part of Chapter 322 and should therefore be applied consistently with other provisions therein. If adjudication is withheld, the offender has not been convicted.

**B. OPERATION OF COMPARABLE STATUTES**

The differences between this statutory provision and the two it most closely resembles, governing felony DUI and felony petit theft, reinforce the conclusion that a conviction requires

adjudication under § 322.34(1)(c). Because of similarities in the provisions, construction *in pari materia* is appropriate. See Smith v. Crawford, 645 So. 2d 513, 523 (Fla. 1st DCA 1994); V.C.F. v. State, 569 So. 2d 1364 (Fla. 1st DCA 1990) (statutes on related subject or object are construed *in pari materia* to reach compatible interpretations). Judge Kaplan compared the felony DWLS, felony DUI and felony petit theft provisions in State v. Santiago, 4 Fla. L. Weekly Supp. 220 (17th Cir. Aug. 2, 1996), to petitioner's knowledge the first published opinion on this issue.

Section 316.656(1), Florida Statutes, requires adjudication in DUI cases, leaving no judicial discretion to dictate the degree of the offense via the power to withhold or impose adjudication. Consistent with the recognition in Thompson, supra, of a "common perception" that one who has not been adjudicated guilty is not convicted, 756 F. Supp. at 1496, this provision creates an exception to the rule. Otherwise, the language of § 316.656(1) would be superfluous. Section 812.014(3)(c), defining felony petit theft, takes another tack around the common perception by defining the repetition of the offense as a felony regardless of whether it results in conviction.

As the circuit judge recognized in Santiago, the felony DWLS

provision is unconstitutional precisely because it is not written like either the felony DUI or felony petit theft provisions. The court there also recognized that the judiciary cannot rectify this error by rewriting the statute. Only by departing from the plain meaning of the provision, by abandoning precedent and by violating rules of strict construction and resolution of ambiguity in favor of the accused can the disparity be overcome and the constitutional defect in the statute be dissolved.

**C. CRITIQUE OF RAULERSON**

In Raulerson, supra, the Fifth DCA held that § 322.34(1)(c) does not violate the constitutionally required separation of powers because a "conviction" as specified in the statute does not require adjudication of guilt. Both the majority and concurring opinions in Raulerson suffer substantial flaws. Both opinions rely on the excerpt in Gazda, quoted above, without taking stock of the fact that, by omission, the Gazda court exempted no contest pleas without adjudication from the definition of "conviction." Raulerson pled no contest. Id. at 339. As noted above, the felony DWLS prosecution against Gloster was dismissed without a plea; had the trial court ruled against him on a motion to dismiss, his plea would have been no contest, reserving the right to appeal the denial of the motion. Thus, he

faced the potential of punishment for a third-degree felony based on the trial court's determination to adjudicate him guilty following a plea of no contest.

The majority in Raulerson also quoted from Florida Rule of Criminal Procedure 3.702(d)(2), which defines a conviction as a determination of guilt resulting from plea or trial for purposes of the sentencing guidelines. This illustrates only that "conviction" has different definitions for different purposes. As noted above, the general rule is that a conviction connotes an adjudication of guilt. Also as noted above, the traffic rules exclude offenses for which adjudication has been withheld from the definition of conviction. Felony DWLS, though a criminal offense, is part of chapter 322, and the rules governing other provisions under that chapter have greater application in interpreting the statute than do the guidelines rules.

In his concurring opinion in Raulerson, Judge Harris took the position that though the felony DUI and felony DWLS statutes are written differently, they should be applied consistently for policy reasons. Id. at 341. Petitioner respectfully suggests that this is precisely the type of judicial legislation Judge Kaplan prudently declined to embrace in Santiago, supra. See generally, Brown v. State, 358 So. 2d 16, 20 (Fla. 1978) (courts

must not effectively rewrite enactment in an effort to uphold it). Judge Harris concludes:

> This is an appropriate case, as indicated by the majority opinion, in which to apply the supreme court's distinction between a conviction and an adjudication of guilt.

Id. at D2269. This is an apparent reference to Gazda, supra. However, the Raulerson court evidently did not recognize that no contest pleas without adjudications are not convictions even under Gazda, a significant oversight in light of Raulerson's plea of no contest.

**D. CRITIQUE OF KEIRN**

In State v. Keirn, 23 Fla. L.Weekly D1144 (4th DCA May 6, 1998), the court closely analyzed Chapters 318 and 322, Florida Statutes, as well as several traffic court provisions to conclude that a conviction under § 322.34 means a finding of guilt, regardless of adjudication. In petitioner's view, the Keirn court's invocation of the provisions of Chapter 318 to construe "conviction" contrary to the general Florida rule is unwarranted.

In Keirn, the court focused on § 318.14(10)(a), which provides for a withhold of adjudication for noncriminal traffic infractions under specified circumstances which are unavailable for the criminal offense of driving while license suspended under

§ 322.34(1). If adjudication is withheld for an offense prescribed in § 318.14, there is no conviction. § 318.14(11). The court also pointed to Florida Rule of Traffic Procedure 6.291(d), which provides that "elections" under section 318.14(10) -- the means by which to avoid adjudication -- are not convictions as the term is used in chapter 322. The court concluded:

> Given this construction of the term "conviction," the concern noted by the trial judge does not exist. Even if the judge in this case were to withhold adjudication on the driving while license suspended charge after a plea or verdict, such a disposition would still amount to a third "conviction" under section 322.34(1)(c), because it is a disposition outside of section 318.14(10).

Id. at 1147.

In petitioner's view, the flaws in this formulation stem from the rationale that § 318.14(10), which concerns noncriminal traffic infractions, also governs the criminal traffic infraction of driving while license suspended set out in § 322.34, Florida Statutes. Although the court pointed out that § 318.14 governs some criminal traffic infractions, these are set out in the provision and driving while license suspended under § 322.34 is not among them.

The Keirn court's incorporation of § 322.34 into § 318.14 by

implication does not comport with principles of statutory construction. Statutes are to be construed according to their plain meaning. State v. Perez, 531 So. 2d 961, 962 (Fla. 1988); Hamilton v. State, 645 So. 2d 555, 560 (Fla. 2d DCA 1994), approved in part, 660 So. 2d 1038 (Fla. 1995). Moreover, statutes must be strictly construed, and any ambiguity must be resolved in favor of the accused. §775.021(1), Fla. Stat.

The error in incorporating § 322.34 by implication led the Keirn court to reach the unwarranted conclusion that § 318.14(10) is the sole means to avoidance of a "conviction" under 322.34, despite that the trial judge retains the authority to withhold adjudication pursuant to § 948.01(2), Florida Statutes.

The extensive cross-referencing and nods to legislative intent of Keirn notwithstanding, there is no unambiguous mandate in these provisions to construe "conviction" under § 322.34(1)(c) in a manner that makes adjudication of guilt irrelevant. As recognized in Part I of the opinion in Keirn, absent statutory direction to the contrary, the withholding of adjudication following a plea of nolo contendere does not constitute a conviction under Florida law. Id. at D1145. See Garron v. State, supra.

**E. CRITIQUE OF GLOSTER**

In this case, the district court reasoned that no encroachment on legislative powers can occur under the § 322.34(1)(c), because the trial court never has an opportunity to treat the offense as a misdemeanor.

> ...[I]t becomes apparent that there are two possible alternatives when one charged with a violation of section 322.34(1)(c) has adjudication of guilt withheld and is placed on probation--either the term of probation will be successfully completed, in which event the defendant will not have been convicted at all; or probation will be revoked, in which case the defendant must be adjudicated guilty of a violation of section 322.34(1)(c) and sentenced accordingly. Treating the charge as a misdemeanor (as *Santiago* suggests) is simply not an available alternative.

State v. Gloster, 703 So. 2d 1174, 1176 (Fla. 1st DCA 1997).

The district court's perspective creates more problems than it solves. These problems arise from uncertainty over the sanction available to the trial court when it withholds adjudication of guilt. In its opinion, the court does not address the permissible duration of probation which may be imposed upon a withhold of adjudication. If probation of more than a year in duration is imposed, the offender will have received an illegal sanction, one which exceeds the permissible punishment for a first-degree misdemeanor. § 775.082(4)(a), Florida Statutes (1997). No felony punishment is authorized for a case in this

posture; the offense is a misdemeanor precisely because adjudication was withheld. Of course, the offender must at this point challenge the illegality of the sentence on direct appeal or be held to have waived it.

Additional uncertainty arises upon violation of probation of the duration of a year or less following a withhold of adjudication. May the trial court then, upon adjudication of guilt, impose a sentence of up to 5 years in prison? This uncertainty in the potential punishment for an offense deprives the offender of notice essential to due process of law under the state and federal constitutions. See generally, Kolendar v. Lawson, 461 U.S. 352 (1983); Grayned v. City of Rockford, 408 U.S. 104 (1972).

**F. CONCLUSION**

Section 322.34(1)(c) is an inartfully drafted provision which, unlike comparable statutes enhancing a third or subsequent misdemeanor into a felony, hinges the enhancement on adjudication of guilt. In the absence of any clear legislative directive to the contrary, a withhold of adjudication following a no contest plea is not a conviction in this context. Therefore, the authority of the trial judge to impose or withhold adjudication gives the judiciary the power to prescribe punishments reserved

by the constitution to the legislature.

## CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court, declare § 322.34(1)(c), Florida Statutes (1995) unconstitutional, and remand with directions to affirm the order of the trial court dismissing this case.

## SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mark Menser, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this 19th day of June, 1998.

Respectfully submitted
& Served,

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# IN THE SUPREME COURT OF FLORIDA

ALBERT GLOSTER, :

Petitioner, :

v. : CASE NO. 92,235

STATE OF FLORIDA, :

Respondent. :

_____/

APPENDIX

*1174 703 So.2d 1174

23 Fla. L. Weekly D32

**STATE of Florida, Appellant,**
**v.**
**Albert Michael GLOSTER, Appellee.**

No. 96-4559.
District Court of Appeal of Florida,
First District.
Dec. 18, 1997.
Rehearing Denied Jan. 9, 1998.

Defendant was charged with driving while his driver's license was canceled, suspended, or revoked following two prior convictions for driving while license was canceled, suspended, or revoked. Defendant moved to dismiss. The Circuit Court, Escambia County, Kenneth L. Williams, J., granted motion. State appealed. The District Court of Appeal, Webster, J., held that statute providing that person who drives while driver's license is canceled, suspended, or revoked after two or more prior convictions for driving while license was canceled, suspended, or revoked is guilty of felony was not unconstitutional delegation of legislative power to judiciary.

Reversed and remanded with directions.

1. CRIMINAL LAW ⚖632.5
110 ----
110XX Trial
110XX(A) Preliminary Proceedings
110k632.5 Pretrial intervention or diversion.
Fla.App. 1 Dist. 1997.
Judge may withhold adjudication of guilt only if defendant is placed on probation. West's F.S.A. RCrP Rule 3.670.

2. CRIMINAL LAW ⚖982.1
110 ----
110XXIII Judgment, Sentence, and Final Commitment
110k982 Probation and Suspension of Sentence
110k982.1 In general.
Fla.App. 1 Dist. 1997.
Pursuant to statutory scheme governing probation and withholding of adjudication of guilt, defendant who has adjudication of guilt withheld and successfully completes term of probation imposed is not a convicted person. West's F.S.A. § 948.06(1); West's F.S.A. RCrP Rule 3.670.

3. AUTOMOBILES ⚖316
48A ----
48AVII Offenses
48AVII(A) In General
48Ak316 Creation and definition of offenses.

[See headnote text below]

3. CONSTITUTIONAL LAW ⚖61
92 ----
92III Distribution of Governmental Powers and Functions
92III(A) Legislative Powers and Delegation Thereof
92k59 Delegation of Powers
92k61 To judiciary.
Fla.App. 1 Dist. 1997.
Statute providing that person who drives while driver's license is canceled, suspended, or revoked after two or more prior convictions for driving while license was canceled, suspended, or revoked is guilty of felony was not unconstitutional delegation of legislative power to judiciary, despite contention that statute delegated to judiciary legislative power to determine whether conduct would be treated as misdemeanor or felony due to judicial power to withhold adjudication of guilt. West's F.S.A. § 948.06(1); West's F.S.A. RCrP Rule 3.670; F.S.1995, § 322.34(1)(c).

Robert A. Butterworth, Attorney General; Mark C. Menser, Assistant Attorney General, Tallahassee, for Appellant.

Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellee.

WEBSTER, Judge.

The state seeks review of an order dismissing an information charging a violation of section 322.34(1)(c), Florida Statutes (1995), because the trial court concluded that the statute unconstitutionally delegated legislative power to the judiciary. The state contends that the trial court's order was based *1175 upon flawed reasoning, and that the statute does not involve an unconstitutional delegation of legislative power to the judiciary. We agree and, accordingly, reverse.

To the extent relevant, section 322.34(1), Florida Statutes (1995), reads:

> (1) Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, ... 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 s. 775.082 or s. 775.083.
>
> (b) A second conviction is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (c) A third or subsequent conviction is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The state filed an information in which it charged (1) that appellee drove a motor vehicle upon the highways of this state on April 3, 1996, while his license or privilege to drive was canceled, suspended or revoked; (2) that, on that date, appellee had two previous convictions for driving while his license or privilege to drive was canceled, suspended or revoked; and (3) that, therefore, appellee was guilty of a violation of section 322.34(1)(c), Florida Statutes (1995). Appellee responded by filing a motion to dismiss, claiming that section 322.34(1)(c) is unconstitutional because it delegates to the judiciary the legislative power to determine whether conduct such as appellee's will be treated as a misdemeanor or a felony.

Both in his motion, and at the hearing on the motion, appellee relied exclusively upon the rationale set forth in *State v. Santiago,* 4 Fla. L. Weekly Supp. 220 (Fla. 17th Cir.Ct. Aug. 2, 1996). In *Santiago,* the circuit judge dismissed an information charging a violation of section 322.34(1)(c), concluding that the statute unconstitutionally delegated a legislative power to the judiciary. The gist of the judge's rationale is contained in the following paragraph:

> Because [section 322.34(1)(c) ] requires an adjudication of guilt for the conduct to be punishable as a felony, and because § 948.01, Fla. Stat., allows this Court to withhold adjudication of guilt, this Court has the unbridled discretion to make the Defendant's conduct a felony or a misdemeanor by simply exercising its discretion regarding the withholding of adjudication of guilt. The Legislature has the sole authority and responsibility to make the criminal laws, including classifying transgressions of the criminal law as either a felony or a misdemeanor. It is an unconstitutional delegation of the legislative power to grant to this Court the power to make the Defendant's conduct punishable as a felony or a misdemeanor by this Court exercising its discretion to withhold adjudication of guilt.

*Id.* at 221. In granting appellee's motion to dismiss, the trial court announced that it was adopting the rationale in *Santiago.* This appeal follows.

The flaw in the rationale employed in *Santiago* consists of the belief that, by withholding adjudication in a case where the defendant is charged with a violation of section 322.34(1)(c), the result will be that the defendant's conduct will be treated as a misdemeanor, rather than a felony. This appears to be based on a misperception regarding the effect of a decision to withhold adjudication of guilt.

[1] [2] Section 948.01(2), Florida Statutes (Supp.1996), is the source of the power to withhold adjudication of guilt. To the extent relevant, it reads:

> If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation.

***1176.** A judge may withhold an adjudication of guilt only if the defendant is placed on probation. Fla. R.Crim. P. 3.670. Section 948.06(1), Florida Statutes (1995), addresses the power of a court when it concludes that a defendant has violated the conditions of probation. Upon such a finding,

> the court may revoke, modify, or continue the

> probation ... or place the probationer into community control. If such probation ... is revoked, the court shall adjudge the probationer ... guilty of the offense charged and proven or admitted, ... and impose any sentence which it might have originally imposed before placing the probationer ... on probation....

Pursuant to this statutory scheme, a defendant who has adjudication of guilt withheld and successfully completes the term of probation imposed "is not a convicted person." *Thomas v. State,* 356 So.2d 846, 847 (Fla. 4th DCA), *cert. denied,* 361 So.2d 835 (Fla.1978). However, if probation is revoked, the defendant must be adjudicated guilty of the charged offense. § 948.06(1), Fla. Stat. (1995).

[3] Applying the foregoing statutory scheme to the issue at hand, it becomes apparent that there are two possible alternatives when one charged with a violation of section 322.34(1)(c) has adjudication of guilt withheld and is placed on probation--either the term of probation will be successfully completed, in which event the defendant will not have been convicted at all; or probation will be revoked, in which case the defendant must be adjudicated guilty of a violation of section 322.34(1)(c), and sentenced accordingly. Treating the charge as a misdemeanor (as *Santiago* suggests) is simply not an available alternative. Thus, it is clear that section 322.34(1)(c) does not have the effect ascribed to it in *Santiago,* and by the trial court below; and, therefore, does not involve an unconstitutional delegation of legislative power to the judiciary. *See Raulerson v. State,* 699 So.2d 339 (Fla. 5th DCA 1997) (rejecting, on somewhat different grounds, the contention that section 322.34(1)(c) involves an unconstitutional delegation of legislative power to trial courts). Accordingly, the order dismissing the information is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED and REMANDED, with directions.

LAWRENCE, J., and SCHEMER, JACK M., Associate Judge, concur.