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IN THE

SUPREME COURT OF FLORIDA



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| MICHAEL KEIRN, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. 93,114 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner, Mr. Michael Keirn, was the defendant in the trial court and appellee on appeal to the Fourth District Court of Appeal. Respondent, the State of Florida, was the appellant in the district court and prosecution in the criminal division of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In this brief the parties will be referred to as they appear before the Court.

The symbol "R" will denote the Record on Appeal.

## STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with charges including a violation of section 322.34(1)(c) Florida Statute (1995), in that he drove a motor vehicle while his license was revoked or suspended, and he had two prior convictions for the same offense (R 3-4). Petition moved to dismiss the information on the basis that the statute contained an unconstitutional delegation of legislative power to the circuit court and the information failed to vest the circuit court with jurisdiction (R 21-37).

The rationale for the motion was that the statute required three convictions before driving with a suspended license could be a felony offense. Thus, where an information charged two prior convictions a felony was not charged. Additionally, an unconstitutional delegation of power existed because whether the offense was a misdemeanor or felony was dependant on whether the trial court judge withheld adjudication or convicted the defendant.

The trial court relied on State v. Santiago, 4 Fla. L. Weekly Supp. 220 (Fla. 17th Cir. St. Aug. 2, 1996), and granted the motion. After the order was reversed by the district court Petitioner sought discretionary review before this Court. Jurisdiction was accepted on July 22, 1998.

## SUMMARY OF THE ARGUMENT

### POINT I

In construing the felony driving with a suspended license statute, Section 322.34(1)(c), Florida Statute (1995), the district court failed to do so strictly and in favor of the accused. The appellate court concluded that all dispositions of a suspended license charge, except those made pursuant to s. 318.14(10) require a conviction. This requirement was not legislated and the inference that it is contained in the statute is incorrect.

A conviction and withhold of adjudication are distinct. The suspended license statute requires a "conviction" for increased penalties to apply, and three convictions before the offense is a felony. Thus, unless three "convictions" are alleged in the information a circuit court is without jurisdiction.

### POINT II

Assuming arguendo that this court rejects petitioner's argument that the legislature did not create an exception to the generally accepted definition of a "conviction", the statute is unconstitutionally void for vagueness. The common perception of "conviction" does not include a withheld adjudication. The district court stated that to determine the meaning of "conviction" in s.322.34 it was necessary to read that section along with other provisions of Chapter 322 and Chapter 318. State v. Keirn, 23 Fla. L. Weekly D1144, 1145 (Fla. 4th DCA May 6, 1998). A person of

ordinary intelligence can not be expected to engage in the district court's protracted analysis of unreferenced statutes in order to conclude that the commonly accepted meaning of conviction does not apply.

## ARGUMENT

### POINT I

**THE DISTRICT COURT FAILED TO STRICTLY CONSTRUE A PENAL STATUTE WHEN IT HELD THAT ALL DISPOSITIONS UNDER SECTION 322.34(1)(C) ARE A CONVICTION REGARDLESS OF ADJUDICATION, UNLESS ADJUDICATION WAS WITHHELD PURSUANT TO SECTION 318.14(10). FURTHER, THE COURT INCORRECTLY CONCLUDED THAT A CONVICTION INCLUDES A WITHHOLD OF ADJUDICATION. ALSO, BECAUSE THE STATUTE REQUIRES THREE CONVICTIONS FOR THE CONDUCT TO BE A FELONY, AN INFORMATION THAT ALLEGES ONLY TWO PRIOR CONVICTIONS DOES NOT VEST A CIRCUIT COURT WITH JURISDICTION. THERE IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO A COURT IF ITS DECISION WHETHER OR NOT TO ADJUDICATE DETERMINES IF CONDUCT IS A FELONY OR MISDEMEANOR.**

The information filed in Petitioner's case alleged that he committed a violation of section 322.34(1)(c) Florida Statute (1995), in that he drove a motor vehicle while his license was revoked or suspended, and he had two prior convictions for the same offense (R 3). Section 322.34(1)(c), provides in pertinent part:

> (1) Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, except persons defined in s. 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:
>
> (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.

In State v. Keirn, 23 Fla. L. Weekly D1144 (Fla. 4th DCA 1998), the Fourth District Court of Appeal held that a conviction

within the meaning of s. 322.34, Florida Statutes (1995), included a withhold of adjudication. The court wrote, "[b]ased on a reading of the applicable statutes in light of their historical development, we hold that a conviction under 322.34 occurs after a final disposition of a case, as a result of a trial or plea, without regard to the court's decision of adjudication of the defendant, unless the disposition is made pursuant to section 318.14(10), Florida Statutes (1995)." Keirn, 23 Fla. L. Weekly at D1144. The appellate court's conclusion was based completely upon inference. The suspended license statute does not provide that **all** dispositions of s. 322.34 offenses result in a conviction, unless they were pursuant to s. 318.14(10).

Petitioner contends that had the legislature intended **all** dispositions of suspended license cases result in convictions, regardless of whether a county or circuit court judge exercised its discretion and withheld adjudication, the legislature would have explicitly said so. The statute plainly requires a conviction. When the language of a penal statute is clear, plain and without ambiguity, effect must be given to it accordingly. Where the language used in a statute has a definite and precise meaning, the courts are without power to restrict or extend that meaning. [Citations omitted.] Graham v. State, 472 So. 2d 464, 465 (Fla. 1985).

While statutes are presumed constitutional, the rules of

statutory construction require penal statutes to be strictly construed. State v. Camp, 596 So.2d 1055 (Fla. 1992); Perkins v. State, 776 So. 2d 1310 (Fla. 1991). When a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. Scates v. State, 603 So. 2d 504 (Fla. 1992). This principle has been codified in Section 775.021(1), Florida Statute (1995), which provides, "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Thus, this statute must be construed within the framework of these competing principles - presumption of constitutionality versus strictly construed penal statutes.

The suspended license statute requires successive "convictions" for escalating penalties to apply. This statute, unlike the driving under the influence statute, does not require a mandatory adjudication by the trial court judge. Section 316.656(1), Florida Statute (1995), **Mandatory adjudication; prohibition against accepting plea to lesser included offense,** states in relevant part: "(1) Notwithstanding the provisions of s. 948.01, no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for and violation of section 316.193, for manslaughter resulting from the operation of a motor vehicle, or for vehicular homicide." Had the legislature also

intended mandatory convictions for violations of section 322.34 it knew how to explicitly achieve that result.

The district court's conclusion that a conviction and withhold adjudication are synonymous, and that a withhold adjudication, except pursuant to section 318.14(10), is prohibited by section 322.34 is incorrect. The court reached its conclusion by comparing the two sections. "To properly determine the meaning of the term "conviction" in section 322.34, it is necessary to read that section in conjunction with other provisions of Chapter 318 and Chapter 322...." Keirn, 23 Fla. L. Weekly at D1145.

Section 318.14 relates to noncriminal traffic infractions. The district court relied on 318.14(10) which provides in relevant part for the disposition of 322.34 charges, **only** when the suspension occurred due to a failure to appear, failure to pay a civil penalty, or failure to attend a driver improvement course. The disposition of those suspended license offenses may be made through the clerk of the court or operator of traffic violations bureau and result in a withheld adjudication. The statute is silent as to the disposition of all other charges of driving with a suspended license.

Section 318.14(11) provides that if adjudication is withheld pursuant to that section, such action is not a conviction. Based on these subsections the district court concluded that "[i]f a withhold of adjudication **generally** did not constitute a conviction,

then subsection (11) would have been unnecessary." [emphasis added] Keirn, at 1146. However, elsewhere in its opinion the district court took a contrary position as to what has been the generally accepted definition of "conviction". The court wrote, "[o]ver time, the most frequent construction of a statute's use of the term "conviction" has required a trial court's adjudication of the defendant's guilt after a plea or verdict." [citations omitted] Keirn at 1145.

When the district court concluded that except for 318.(10) depositions, the disposition of **all** other suspended license cases would result in a conviction. The court reasoned:

> The adoption of subsection (11) evidences the legislative intent that all dispositions of driving under suspension charges amount to convictions under section 322.01(10), unless adjudication has been withheld pursuant to the procedures of section 318.14(10), for the three types of license suspensions enumerated in that section. . . . A disposition outside of the section 318.14(10) procedure, regardless of whether adjudication is withheld or imposed, is a "conviction" within the meaning of section 322.01(10), which can be used to habitualize under section 322.264(1)(d), Florida Statutes (1995), or for aggravation under 322.34.

Keirn, at 1146.

The above conclusion, that section 318.14(10) dictated the disposition of **all** other suspended license cases, represents an enormous leap based solely on inference. In State v. Wershow, this Court addressed construction of a penal statute. The Court wrote,

"Discussing generally the construction to be given penal statutes, this court, in Ex parte Amos, 93 Fla. 5, 112 So. 289 (1927), explicated:

> 'The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken. See Ex parte Bailey, supra [39 Fla. 734, 23 So. 552].'"

Wershow, 343 So. 2d at 608.

In the instant case the district court did not strictly construe the statute and included a restriction not within its letter. Section 322.34 does not prohibit a court from withholding adjudication. Section 322.34 does not reference s. 318.14. Had the legislature intended the far reaching act of the removal from all county and circuit court judges their discretion to withhold adjudication in suspended license cases it would have explicitly done so.

Chapter 322 defines "conviction" as follows:

> "Conviction" means a conviction of an offense relating to the operation of motor vehicles on highways which is a violation of this chapter or any other such law of this state or any other state, including an admission or determination of a noncriminal traffic infraction pursuant to s. 318.14, or a

> judicial disposition of an offense committed under any federal law substantially conforming to the aforesaid state statutory provisions.

Section 322.01(10).

There is nothing in this definition that would equate a "conviction" with a withheld adjudication. The requirement of a "judicial disposition" for a conforming federal offense is consistent with a trial court's adjudication of guilt. The language "an admission or determination of a noncriminal traffic infraction pursuant to s. 318.14", means that a noncriminal traffic infraction can be used against an offender who has committed a criminal offense contained in Section 322. This language does not include withheld adjudications. And, s.318.14(11) provides that a withheld adjudication and conviction are not the same.

When the legislature has intended an exception to the generally accepted and most frequent construction of "conviction", it has been explicit. In the context of driving under the influence, the legislature linked successive "convictions" with increased penalties. Section 316.193, Fla. Stat. (1995). Additionally, the legislature explicitly prohibited the trial court withholding adjudication of guilt, thus ensuring a resulting conviction. See Section 316.656(1), Fla. Stat. (1995). If a withheld adjudication constituted a conviction it would have been unnecessary for the legislature to prohibit a withheld adjudication. If the legislature had intended a mandatory

conviction for a violation of s. 322.34, petitioner expects that the legislature would have been explicit, as it was with the DUI statute.

Another explicit exception is found in the sentencing guidelines statute. Section 921.0011(2), which defines conviction for the purposes of sentencing guideline calculations specifically includes withheld adjudications. Again, if a conviction included a withheld adjudication it would have been unnecessary for the legislature to make the exception.

Carving out limited judicial exceptions of the meaning of "conviction" for different purposes breeds confusion. This confusion was addressed in Roberts v. State, 450 So. 2d 1126 (Fla. 4th DCA 1984). In Roberts , the Fourth District Court of Appeal refused to permit the impeachment of a witness with a finding of guilt where there was not also an adjudication by the trial court. In his specially concurring opinion, then Judge Anstead made the point that a conviction has historically required the judgment of the court, and warned against straying from the definition of conviction. He wrote, "[a]s the Supreme Court in Smith [Smith v. State, 75 Fla. 468, 78 So. 530, 532 (1918)], I would opt for the established and clear-cut legal meaning of conviction which includes adjudication. Adopting different meanings for the same word depending on the situation can only result in confusion and inconsistency in purpose and result when anyone uses the term."

Roberts, 450 So.2d. at 1127 (Anstead, J., specially concurring). In Smith, the court had construed "convicted" to mean the adjudication by the court of the defendant's guilt. The court wrote, "[w]hen the law speaks of 'conviction' it means a judgment, and not merely a verdict, which in common parlance is called a conviction." Id. at 532.

In Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997), review granted, 709 So. 2d 537 (Fla. 1998), the Fifth District Court of Appeal held s. 322.43 constitutional. The court relied on State v. Gazda, 257 So. 2d 242 (Fla. 1971), where this court construed "conviction" as used in Section 775.14 Florida Statute[1] to mean a determination of guilt.[2] Despite its interpretation of "conviction", the Gazda Court noted that the commonly held perception of a legal conviction included the judgment of the court. Id. at 243-244. The court quoted Ellis v. State, 100 Fla. 27, 30, 129 So. 106, 108 (1930), and wrote, "'This court is firmly committed to the doctrine that a legal conviction of crime includes

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[1] Section 775.14 states: "Limitation on withheld sentences. Any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld."

[2] In Gazda, the defendant had absconded following a plea of guilty and while awaiting sentencing in 1963. In 1971 he attempted to rely on s. 775.14 to avoid the imposition of sentence. Clearly, his position was absurd. Section 775.14 was enacted to protect defendants whose sentences had been withheld from the imposition of sentence many years later.

a judgment of the court as well as a plea or verdict of guilty.'" Gazda, at 243-244 n.1.

In Keirn, the Fourth District Court of Appeal declined to rely on Gazda. The court concluded that the "construction of the term 'conviction' was so driven by its statutory context, that the case is of limited precedential value for construing the term in differently worded statutes." Keirn, at 1145. However, the district court's analysis of the suspended license statute is also so driven by statutory context that it too is of limited precedential value and guidance concerning the definition of conviction.

Petitioner argues here, as he did in the district court that Gazda is unreliable. In Gazda the construction of "conviction" was based on outdated language that rendered the opinion of little value. In Gazda, the court relied on Sections 921.01 and 921.02 Fla. Stat., for a distinction between a "judgment of conviction" which the court reasoned required an adjudication of guilt, and a "conviction" which the court reasoned did not require an adjudication. The court based its conclusion on the word "convicted" in Section 921.02,[3] "Rendition of judgment" which read:

> If a defendant has been **convicted**, a judgment of guilty, and if he had been acquitted, a

[3] The other statute was Section 921.01, "Judgment Defined" - The term judgment as used in the criminal procedure law means the adjudication by the court that the defendant is guilty or not guilty."

> judgment of not guilty, shall be rendered in open court and entered on the minutes of the court. [Emphasis added.]

The statutes were in effect at the time of the trial court proceedings but had been repealed at the time of the opinion and were replaced by rules of criminal procedure. Gazda at 244. Section 921.02, Rendition of Judgment was replaced by new rule, Rule 1.670. The rule deleted the word "convicted" and replaced it with correct language pertaining to guilt and added language pertaining to the withhold of adjudication. Unfortunately, the court in Gazda did not note this particular change. The rule follows:

> If the defendant **is found guilty**, a judgment of guilty and, if he has been acquitted, a judgment of not guilty shall be rendered in open court and in writing, signed by the judge, filed; and, if in a court of record, recorded, otherwise entered on the court's docket. **However, the judge may withhold such adjudication of guilt if he places the defendant on probation.** [Emphasis added.]
>
> When a judge renders a final judgment of conviction, imposes a sentence, grants probation or revokes probation, he shall forthwith inform the defendant concerning his right of appeal therefrom, including the time allowed by law for taking an appeal.

Rule 1.670.

Subsequent to Gazda, further changes occurred. The subsequent changes illustrate that the Florida Rules of Criminal Procedure maintain a distinction between a conviction and withheld adjudication. Rule 1.670 was replaced by Rule 3.670 which

contained additional new language in the second paragraph which again shows that a "conviction" and withhold of adjudication are not synonymous. The relevant added language is highlighted:

> When a judge renders a final judgment of conviction, **withholds adjudication of guilt after a verdict,** imposes a sentence, grants probation, or revokes probation, the judge shall forthwith inform the defendant concerning the rights of appeal therefrom, including the time allowed by law for taking an appeal.

Rule 3.670.[4] The amendments show a clear distinction between a "conviction" and withhold of adjudication, and a distinction between a finding of guilt and "conviction".

Additionally, the placement of Rule 3.670. **Rendition of Judgment** in the Rules of Criminal Procedure, demonstrates that the rule does not relate to a finding of guilt. The rule is contained in Section XIII, which is titled "Judgment", as opposed to Section XI which is titled "The Verdict".

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[4] The complete current rule 3.670, Rendition of Judgment, reads:

> If the defendant is found guilty, a judgment of guilty, and, if he has been acquitted, a judgment of not guilty, shall be rendered in open court and in writing, signed by the judge, filed, and recorded. However, the judge may withhold adjudication of guilt if the judge places the defendant on probation.
>
> When a judge renders a final judgment of conviction, withholds adjudication of guilt after a verdict of guilty, imposes a sentence, grants probation, or revokes probation, the judge shall forthwith inform the defendant concerning the right of appeal therefrom, including the time allowed by law for taking an appeal.

Reference to the word "conviction" in other contexts illustrates that a conviction is not synonymous with a finding of guilt or withheld adjudication. The word "convicted" as used in the statute prohibiting possession of a firearm by a convicted felon[5], requires a prior adjudication of guilt. In Castillo v. State, 590 So. 2d 458 (Fla. 3rd DCA 1991), the court reversed a conviction for possession of a firearm by a convicted felon because the defendant's previous adjudication had been withheld, therefore he was not a convicted felon.

The imposition of progressively harsher punishments for successive DUI convictions was addressed in Wooten v. State, 332 So. 2d 15 (Fla. 1976). There the court upheld the mandatory conviction statute which deprived a trial court of the discretion to withhold adjudication and avoid the harsher punishment required for the successive conviction. In Wooten, the distinction between a conviction and withheld adjudication was clear. This Court wrote, "[the statute] does not authorize stiffer punishment in the absence of a prior adjudication of guilt; previous entry of a judgment of conviction is the necessary precondition.". Id. at 17. Clearly, a withheld adjudication could not serve the same function as a conviction.

In an analysis of sentencing options in Thomas v. State, 356 So. 2d 846 (Fla. 4th DCA 1978), the court equated a "conviction"

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[5] Section 790.23 Florida Statute (1995).

with the adjudication of guilt by the court. "Withholding and suspension of adjudication and sentence means the court declines to convict (adjudicate guilty) the defendant or fine or imprison him until probation is tried." Id. at 847.

By the clear language of the suspended license statute, the conduct of driving with a suspended license does not become a felony offense until, or "upon", at least a "third conviction". Given this language, the trial court correctly determined that the third conviction was necessary to vest the circuit court with subject matter jurisdiction. The circuit court has jurisdiction over all felony offenses, and over all misdemeanor offenses arising out of the same circumstance as a felony which is also charged. The circuit court lacks subject matter jurisdiction over an information, which as written, only alleges a misdemeanor offense, and does not charge a felony offense. State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991); Christopher v. State, 397 So. 2d 406 (Fla. 5th DCA 1981); Wesley v. State, 375 So. 2d 1093 (Fla. 3rd DCA 1979). The jurisdiction of a circuit court in a criminal case is invoked by filing an information which properly and in good faith charges the commission of a crime cognizable in the court, and **jurisdiction is to be determined solely from the face of the information**.[Emphasis added.] Pope v. State, 268 So. 2d 173 (Fla. 2nd DCA 1972).

Here, felony conduct occurs only "upon" the third conviction.

Thus, an information that alleges only two convictions cannot charge a felony. As a result the trial court correctly dismissed the information. Had the suspended license statute been written like the driving under the influence, or theft statute[6] this problem would not exist. In those statutes, as is commonly the case with criminal statutes, the elements of the offense are defined and then penalties described. Here, the offense is not committed until the conviction occurs. This court is not empowered to rewrite a statute to cure an omission, or to add to a statute. Wyche v. State, 619 So. 2d 231 (Fla. 1993). The defect in this statute which renders it unconstitutional must be cured by the legislature.

The trial court also determined that where only two prior convictions are alleged, depending on how the trial court exercises it discretion to adjudicate or withhold adjudication, the trial court has the power to declare the conduct a felony or misdemeanor. This is an unconstitutional delegation of legislative power. The

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[6] The theft statute was previously written like the suspended license statute. However, in 1992, the statute was rewritten and the similar language which is before this court was eliminated. Appellee found no challenges to the theft statute as is before this court regarding the same language in the suspended license statute. However, despite no challenge, presumably the legislature recognized the defect and changed the language. The statute was rewritten, in pertinent part, to read "A person who **commits** petit theft and who has previously been convicted two or more times of any theft commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083." [Emphasis added] Section 812.014, Florida Statutes (1992 Supp.).

legislature is vested with the power to enact laws and declare what the law will be. Art. III, §1, Fla. Const.; B.H. v. State, 645 So. 2d 987 (Fla. 1994). The power to enact law includes the power to prescribe punishment. See Johnson v. State, 679 So. 2d 9 (Fla. 4th DCA 1996).

## POINT II

**IF "CONVICTION" IN S. 322.34(1)(c), FLA. STAT. (1995) MEANS A WITHHELD ADJUDICATION, THEN THE STATUTE IS UNCONSTITUTIONALLY VOID FOR VAGUENESS FOR ITS FAILURE TO DEFINE "CONVICTION".**

If this Court determines that a "conviction", as used in Section 322.34(1)(c), is synonymous with a withheld adjudication, the statute is void for vagueness. Whether a statute is unconstitutionally vague on its face is an issue that may be raised for the first time on appeal. Brown v. State, 629 So. 2d 841, 842 (Fla. 1994).

Section 322.34 does not define "conviction" to include a withheld adjudication. It is commonly accepted that a "conviction" does not include a withheld adjudication. See Smith, 78 So. at 532, (convicted means the adjudication by the court of the defendant's guilt); Ellis, 100 Fla. at 30, 129 So. at 108, ("This court is firmly committed to the doctrine that a legal conviction of crime includes a judgment of the court as well as a plea or verdict of guilty."); Wooten, 332 So. 2d 15, (where a conviction was a statutory precondition to stiffer punishment a withhold of adjudication did not serve the same purpose); Keirn, 23 Fla. L. Weekly at D1145, ("Over time, the most frequent construction of a statute's use of the term 'conviction' has required a trial court's adjudication of the defendant's guilt after a plea or verdict.").

Without statutory notice that a conviction includes a withheld

adjudication, the statute is unconstitutionally vague on its face for failure to adequately describe the conduct which comprises the elements of this offense. A person of ordinary intelligence can not be expected to engage in the protracted analysis of the district court of unreferenced statutes in order to conclude that the commonly accepted meaning of conviction does not apply.

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U. S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (citations omitted).

> It is a basic principle of due process that an enactment is void for vagueness if is prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on and ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)(footnotes omitted). If people of

ordinary intelligence must guess at the meaning of a statute or if they may differ in its applications, the statute violates due process. Connally v. General Construction Co., Inc., 269 U. S. 385, 391, 48 S. Ct. 127, 70 L. Ed. 322 (1926). In the construction of a penal statute against a vagueness attack, any "doubt should be resolved in favor of the citizen and against the state." Brown v. State, 629 So. 2d 841, 843 (Fla. 1994), citing State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977).

If this court determines that a "conviction" means a withhold of adjudication, the statute as written is unconstitutionally void for vagueness.

## CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Petitioner respectfully requests this Honorable Court to remand this cause with the appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this 10th day of August, 1998.

Karen E. Ehrlich
Attorney for Michael Keirn