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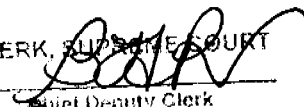
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IN THE

SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
By 
Chief Deputy Clerk

MICHAEL KEIRN,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 93,114

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

KAREN E. EHRLICH
Assistant Public Defender

Attorney for Michael Keirn

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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. 2

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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". 4

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PRELIMINARY STATEMENT

Petitioner will rely on the Preliminary Statement as stated in his initial brief.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely on his Statement of the Case and Facts

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.

POINT I

Except for the following, Petitioner will rely on his initial brief:

Petitioner rejects Respondent's secondary argument that this Court should adopt the reasoning in Gloster v. State, 703 So. 2d 1174 (Fla. 1st DCA 1997). The Gloster opinion makes no sense and adds to the confusion caused by section 322.34(1)(c), Florida Statute (1997).

The statute requires a "conviction" for the conduct to be punishable as a third degree felony. However, pursuant to the Gloster court, adjudication could be withheld, the individual placed on probation, and never be convicted if the probation is

successfully completed. Gloster, 703 So. 2d at 1176.

Petitioner asserts that the Gloster shows that the statute is unconstitutionally vague. In Point II of his Initial Brief Petitioner argued that the statute is void for vagueness. Applying Gloster the defect is apparent. Upon a withhold of adjudication would one year or five years of probation be imposed? The permissible punishment is one year for a first degree misdemeanor, and five years for a third degree felony. Section 775.082, Florida Statute (1997). If adjudication was withheld and more than one year probation imposed, a person with only two prior convictions would have been sentenced illegally. Further confusion would arise upon a revocation of probation where probation of one year or less had been imposed. Upon revocation of probation and adjudication of guilt could the court impose a sentence of up to five years?

The statute fails to provide persons of ordinary intelligence of due process required by the state and federal constitutions. See Kolendar v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

Based on the foregoing, Petitioner urges this court to hold the statute unconstitutional, and not to adopt the Gloster opinion.

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".

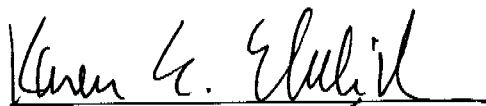
Petitioner will rely on his Initial Brief.

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,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600



Karen E. Ehrlich ✓
Assistant Public Defender
Florida Bar No. 724221

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Rochelle L. Kirdy, ✓ Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this 24th day of September, 1998.



Attorney for Michael Keirn