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OCT 7 1998

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

RICHARD E. AUSTIN, :

Petitioner, :

v. :

CASE NO. 93,274

STATE OF FLORIDA, :

Respondent. :

\_\_\_\_\_

ON DISCRETIONARY REVIEW  
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

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On direct appeal, the First DCA rejected Austin's argument that his conviction and sentence violate constitutional requirements of separation of powers. The court affirmed, citing to State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997). Austin v. State, 709 So. 2d 1389 (Fla. 1st DCA 1998).

SUMMARY OF THE ARGUMENT

Petitioner adopts and incorporates by reference the argument made in the initial brief in Gloster v. State, Fla. Sup. Ct. No. 92,235. For the reasons asserted in Gloster, §322.34(1)(c), Florida Statutes (1995), violates the constitutional requirement of separation of powers embodied in Article II, Section 3 and Article III, Section 1 of the Florida Constitution.

This issue may be raised initially on direct appeal because it concerns the facial validity of the statute.

## 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.

On this issue, this case is in a "pipeline" in which the lead case is Gloster v. State, Florida Supreme Court Case No. 92,235. Therefore, petitioner adopts and incorporates by reference the argument made in the initial brief in Gloster v. State, Fla. Sup. Ct. No. 92,235. For the reasons asserted in Gloster, § 322.34(1)(c), Florida Statutes (1995), violates the constitutional requirement of separation of powers embodied in Article II, Section 3 and Article III, Section 1 of the Florida Constitution.

Consequently, petitioner's conviction of felony DWLS must be reversed and the case remanded for further proceedings pursuant to the remaining valid provisions of § 322.34.

One distinction between this case and Gloster merits discussion. The issue was not raised below. Appellant maintains that the issue is, nonetheless, properly before the court because it concerns the facial validity of the statute, which may be raised for the first time on appeal. Harris v. State, 655 So. 2d 1179 (Fla. 1st DCA 1995). Every defendant facing the charge of felony DWLS may potentially plead *nolo contendere*. See Melton v.

State, 674 So. 2d 870 (Fla. 1st DCA 1996); Boykin v. Garrison, 658 So. 2d 1090 (Fla. 4th DCA), rev. denied, 664 So. 2d 248 (Fla. 1995) (trial court may not, as matter of policy, refuse to accept pleas of *nolo contendere*). A trial judge imposing the sanction for a defendant who has pled no contest determines whether the offense is a misdemeanor or felony merely through the imposition or withholding of adjudication. This violates the constitutionally required separation of powers, as argued in Gloster. Consequently, the provision is unconstitutional in all cases in which it may potentially be applied. Cf. Brown v. State, 629 So. 2d 841, 843 (Fla. 1994) (statute prohibiting sale of cocaine within 200 feet of public housing facility is unconstitutionally vague in all potential applications). Therefore, the issue was properly before the district court, and is properly before this court. Significantly, the district court merely cited to Gloster without identifying any defect of preservation.



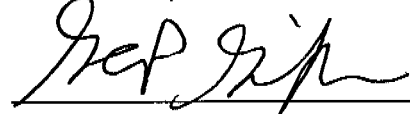
CONCLUSION

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 of appeal, declare § 322.34(1)(c), Florida Statutes, unconstitutional, and remand with directions consistent with this disposition.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to J. Ray Poole, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this 7<sup>th</sup> day of October, 1998.

Respectfully submitted  
& Served,



\_\_\_\_\_  
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RICHARD E. AUSTIN, :  
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CASE NO. 93,274

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APPENDIX

\*1389 709 So.2d 1389

23 Fla. L. Weekly D1326

**Richard E. AUSTIN, Appellant,**

v.

**STATE of Florida, Appellee.**

No. 97-2731.

District Court of Appeal of Florida,

First District.

May 27, 1998.

An appeal from the Circuit Court for Columbia County; E. Vernon Douglas, Judge.

Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, and J. Ray Poole, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

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

KAHN, MICKLE and DAVIS, JJ., concur.