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IN THE SUPREME COURT OF FLORIDA

Case No. SC2015-506
Eleventh Circuit No. 13-15874

JOSEPH PETER CLARKE and
BOBBY JENKINS

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

APPELLANT BOBBY JENKINS' INITIAL BRIEF ON THE MERITS

ON CERTIFICATION FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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INTRODUCTION

This Case comes before the Court on a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit (referred to herein as the "Eleventh Circuit"). Appellant Bobby Jenkins was the appellant in the Eleventh Circuit and the defendant in the United States District Court for the Southern District of Florida. Appellee, the United States (referred to herein as "the government"), was the appellee in the Court of Appeals, and the plaintiff in the United States District Court.

The record will be noted by reference to the document entry ("DE") number and page number of the record in the Southern District of Florida.

A copy of the Eleventh Circuit's opinion is attached as the Appendix to this brief.

STATEMENT OF THE CASE AND THE FACTS

Bobby Jenkins became the target of a reverse-sting operation after a confidential informant told a Miami-Dade Police Department detective that Jenkins "may be interested in committing a robbery." DE137:18; DE139:8; DE138:192-3. Jenkins participated in the scheme, along with co-defendant Joseph Peter Clarke, and was subsequently charged in the United States District Court for the Southern District of Florida with four counts of a five-count indictment. Count three, relevant here, alleged that Jenkins possessed a firearm and ammunition, after having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. § 922(g)(1). DE12:2.

Mr. Jenkins proceeded to trial, raising an entrapment defense. The government's proof on count three was based on a prior Florida case in which Mr. Jenkins pled guilty to to cocaine possession in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. The judgment from the prior case states that the defendant "has been found guilty of the charge . . . by the court upon entry of a guilty plea . . .

> and it appearing unto the court, upon a hearing of the matter, that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, and the Court being fully advised in the premises, it is thereupon ORDERED AND ADJUDGED that an adjudication of guilt be, and the same is hereby stayed and withheld.

> IT IS FURTHER ORDERED AND ADJUDGED that: the sentence be and hereby is SUSPENDED.

DE38-4.

Mr. Jenkins moved for judgment of acquittal on count three, arguing that the alleged prior offense did not qualify as a "conviction" under Florida law because adjudication had been withheld. DE139:46. The motion was denied pursuant to binding federal precedent. *See* DE139:46; DE98. Mr. Jenkins was convicted by the jury on each count in which he was charged, and sentenced to 300 months' (25 years') imprisonment. DE84, 145:30.

Mr. Jenkins appealed his conviction and sentence to the Eleventh Circuit. After oral argument, the Eleventh Circuit certified to this Court the following question:

> Florida law prohibits a person from "own[ing] or . . . hav[ing] in his or her care, custody, possession, or control any firearm . . . if that person has been . . . [c]onvicted of a felony in the courts of [Florida]." Fla. Stat. § 790.23(1). For purposes of that statute, does a guilty plea for a felony for which adjudication was withheld qualify as a "convict[ion]?

United States v. Clarke and Jenkins, 780 F.3d 1131, 1133 (11th Cir. 2015) (hereafter "*Jenkins*").

This Court has jurisdiction pursuant to Art. V § 3(b)(6), Fla. Const.

SUMMARY OF THE ARGUMENT

For over one hundred years, this Court has defined the term "conviction" to include the judgment and sentence of the court. Consistent with this long-established jurisprudence, this Court has twice stated that a "conviction" for purposes of Fla. Stat. § 790.23(1)(a) means the adjudication of the trial court. The Third District Court of Appeal has squarely so held, and the two other District Courts of Appeal which have addressed the statute agreed.

As this Court has explained, "the definition of conviction most consistently used by this Court . . . requires a judgment of the court adjudicating the defendant guilty." *State v. McFadden*, 772 So. 2d 1209, 1216 (Fla. 2000). When this Court has diverged from this definition, it has been in response to specific statutory language or other indications of legislative intent not present here.

Where a statute such as Fla. Stat. § 790.23(1) creates a criminal offense for which a prior conviction is an element, the prior adjudication of guilt is required. To hold otherwise would defeat the purposes of Fla. Stat. § 948.01, which allows sentencing courts to withhold adjudication if the "ends of justice and the welfare of society do not require" that the defendant suffer the consequences of a felony conviction. Furthermore, to dispense with the adjudication requirement in the absence of clear legislative intent would be contrary to the statutorily required rule of construing criminal statutes in the light most favorable to the accused.

Wherefore, Mr. Jenkins respectfully asks this Court to answer the certified question in the negative and clarify that Florida law does not consider a guilty plea followed by a withholding of adjudication to be a "conviction" for purposes of Fla. Stat. § 790.23(1).

ARGUMENT

The Court should answer the certified question in the negative and hold that a guilty plea for a felony for which adjudication is withheld does not qualify as a "convict[ion]" for purposes of Fla. Stat. § 790.23(1).

For over a century, Florida's highest courts have held that a "conviction" requires an adjudication of guilt, unless the Legislature specifically provides otherwise. Consistent with this well-established jurisprudence, and in the absence of any indication that the Legislature intended otherwise, this Court should answer the Eleventh Circuit's certified question in the negative and hold that a guilty plea for which adjudication is withheld does not qualify as a "conviction" for purposes of Fla. Stat. § 790.23(1)(a).[1]

A. <u>The"firmly established" law of this State is that a "conviction" requires an adjudication of guilt.</u>

"This court has so often expressed the opinion that the word 'conviction' includes the judgment of the court, as well as a plea or verdict of guilty, that such definition of the word as used in the statute or plea invoked to describe the effect of a former conviction in a subsequent case may be said to be firmly established."

[1]"Because this issue is one of statutory interpretation, review is de novo." *Hill v. Davis*, 70 So. 3d 572, 573 (Fla. 2011) (citation omitted).

State v. McFadden, 772 So. 2d 1209, 1215-16 (Fla. 2000) (quotation omitted) (holding that a guilty plea or verdict without an adjudication of guilt does not constitute a 'conviction' for purposes of impeachment under Fla. Stat. § 90.610).

In *McFadden*, the Court surveyed over one hundred years of jurisprudence, and noted that as far back as 1888, the Court "used a definition of conviction that included the judgment and sentence of the court" in construing a statute dealing with "conviction fees." *McFadden*, 772 So. 2d at 1214 (citing *Owens v. Barnes*, 24 Fla. 154, 157, 4 So. 2d 650, 561 (Fla. 1888)). In 1918, the Court again interpreted "conviction" to mean an adjudication of guilt in a statute prohibiting the sale of liquors to minors. *See McFadden*, 772 So. 2d at 1214 (citing *State v. Smith*, 75 Fla. 473, 475, 78 So. 530, 532 (Fla. 1918)). In 1929, "the Court held that when the State is alleging in an indictment that a defendant has previously been 'convicted' of committing the same crime as charged in the indictment, the prior 'conviction' must include a judgment of the court as well as a plea or verdict of guilty." *McFadden*, 772 So. 2d at 1214 (citing *Timmons v. State*, 97 Fla. 23, 27, 119 So. 393, 394 (Fla. 1929)). The following year, the Court stated that it was "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*.**" *Id.* at 1214-15 (quoting *Ellis v. State*, 100 Fla. 27, 29, 129 So. 106, 108 (Fla. 1930) (emphasis supplied by the Court)).

Among "more recent examples" of statutes requiring "the judgment of the court within the meaning of conviction", the court noted Florida's accessory before the fact statute, Fla. Stat. § 776.02; a statute disqualifying applicants for the transfer of automobile transportation brokerage license, Fla. Stat. § 323.31 (1959); the State's habitual offender statute, Fla. Stat. § 775.084(2) (1991); and, significantly, Fla. Stat. §790.23, prohibiting the possession of a firearm by a convicted felon. *See McFadden*, 772 So. 2d at 1215 n.5 (citing *Weathers v. State*, 56 So. 2d 536 (Fla. 1952), *Delta Truck Brokers Inc. v. King*, 142 So.2d 273 (Fla. 1962), *Overstreet v. State*, 629 So.2d 125, 125-126 (Fla. 1993), and *State v. Snyder*, 673 So.2d 9, 10 (Fla. 1996), respectively).

Consistent with this long and consistent jurisprudential path, it is commonly understood that a criminal defendant in Florida is not "convicted" where adjudication is withheld. *See United States v. Chubbuck*, 252 F.3d 1300, 1305 n.6 (11th Cir. 2001) ("defendants in Florida are routinely advised by practicing criminal defense lawyers, by state probation officers, by state prosecutors, and by judges, that when adjudication is withheld, they are not 'convicted' and accordingly do not lose their civil rights.") (citations omitted). Fla. Stat. § 948.01(2) codifies the procedural mechanism by which courts may accept findings or pleas of guilt without imposing convictions and states:

> 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 the defendant upon probation.

Pursuant to this section, "a defendant who has adjudication of guilt withheld and successfully completes the term of probation imposed is 'not a convicted person." *McFadden*, 772 So. 2d at 1216 n.7 (citations omitted).

B. A defendant is not "convicted" within the meaning of Fla. Stat. § 790.23 where adjudication is withheld**.**

It is not surprising therefore, that every Florida court to have addressed the issue has agreed that a defendant is not a "convicted" person within the meaning of Fla. Stat. § 790.23(1) where adjudication has been withheld. As indicated above, this Court has twice stated that a conviction under Fla. Stat. § 790.23(1) means the adjudication of guilt. *See McFadden*, 772 So. 2d at 1215 n.5 (identifying "Possession of a Firearm by a Convicted Felon" as an example of "including the judgment of the court within the meaning of conviction") (citing *State v. Snyder*, 673 So. 2d at 11 (holding "that a defendant is convicted when adjudicated guilty in the trial court, notwithstanding the fact that the defendant has the right to contest the validity of the conviction by appeal or by other procedures")).

The Third District Court of Appeal has "squarely held" that a defendant who pled guilty to a felony where adjudication was withheld could not "be convicted of

unlawful possession of a firearm by a convicted felon based on such a withhold of adjudication." *Malcolm v. State*, 605 So. 2d 945, 948 (Fla. 3d DCA 1992) (citing *Castillo v. State*, 590 So. 2d 458, 461 (Fla. 3d DCA 1991) ("For purposes of this statute, we construe 'conviction' to mean an adjudication of guilt.")).[2]

The Second District Court of Appeal relied on *Malcolm* and *Castillo* in an opinion denying constitutional challenges brought by a former juvenile offender based on distinctions between § 790.23(1)(a) (applying to any person who was "[c]onvicted of a felony in the courts of this state"), and § 790.23(1)(b) (applying to any person "[f]ound, in the courts of this state, to have committed a delinquent act that would be a felony if committed by an adult and such person is under 24 years of age"). *See State v. Menuto*, 912 So.2d 603, 605-06 (Fla. 2d DCA 2005). The court stated: "For the purpose of section 790.23(1)(a), 'conviction' means 'adjudication of guilt'—a mere withhold of adjudication of guilt of the prior offense will not suffice.") (citing *Malcom*, 605 So.2d at 948, *Castillo*, 590 So.2d 458, and *Burkett v. State*, 518 So. 2d 1363 (Fla. 1st DCA 1988)).

[2]Because there is no interdistrict conflict on the matter, this decision is binding on all Florida trial courts. *See Pardo v. Florida*, 596 So. 2d 665, 666 (Fla. 1992) ("The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court. . . . Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts.") (citations and alteration omitted).

In *Burkett*, the First District Court of Appeal similarly defined conviction to include an adjudication, when it held that a defendant is "convicted" for purposes of Fla. Stat. § 790.23(1) "when he is adjudicated guilty in the trial court, notwithstanding the fact that he has the right to contest the validity of the conviction by appeal or by other procedures." 518 So. 2d at 1367 (footnote omitted). Every Florida court to have addressed the issue thus agrees that a withhold of adjudication does not result in a conviction for purposes of Fla. Stat. § 790.23(1). There is no debate on the issue within the State, which is likely why this Court has not heretofore been called upon to directly rule on the question. *See* Art. V § 3(b), Fla. Const. (establishing the Court's limited jurisdiction, which includes jurisdiction over any question "that is certified to be in direct conflict with a decision of another district court of appeal").

C. The general rule applies absent specific statutory language to the contrary.

"[A]lthough an adjudication of guilt is generally required for there to be a 'conviction,' that term as used in Florida law is a 'chameleon-like' term that has drawn its meaning from the particular statutory context in which the term is used." *McFadden*, 772 So.2d at 1215 (citations omitted). When "conviction" has been defined to require only a guilty plea or verdict, however, it has been done "in

relation to a specific statute and its specific purpose as set forth by the Legislature." *Id*.

For instance, this Court has recognized that a legislative exception was created under the sentencing guidelines in Fla. R. Crim. P. 3.701(d)(2) and Fla. Stat. § 921.001(5) (1997), which provide that "'[c]onviction' means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.'" *McFadden*, 772 So. 2d at 1215 (footnote omitted). *See also Montgomery v. State*, 897 So. 2d 1282, 1285 (Fla. 2005) (finding "clear and unambiguous" language indicating that "the Legislature wanted to include all determinations of guilt even where adjudication had been withheld" for purposes Fla. Stat. § 921.0021(2) (2002)). Likewise, in *Raulerson v. State*, 763 So. 2d 285 (Fla. 2000), the Court reviewed the "specific statutory language, definitions and legislative history" to find clear legislative intent to include unadjudicated offenses in a statute (Fla. Stat. § 332.34(1)) providing increased penalties for driving a motor vehicle with a canceled, suspended or revoked driver's license. *See McFadden*, 772 So. 2d at 1215 (citing *Raulerson*, 763 F.2d at 290).

In a footnote, *McFadden* identified two additional "[e]xamples of a definition in which an adjudication of guilt was not required": *McCrae v. State*, 395 So. 2d 1145, 1154 (Fla. 1980), dealing with capital sentencing, and *State v.*

Gazda, 257 So. 2d 242, 243-44 (Fla.1971), which construed the limitations period on sentencing for withheld adjudications provided by Fla. Stat. § 775.14.

Gazda was the case on which the Eleventh Circuit first relied for purposes of determining whether a defendant had a prior "conviction" within the meaning of the federal felon-in-possession statute. *See United States v. Orellanes*, 809 F.2d 1526, 1527 (11th Cir. 1987). As the Eleventh Circuit subsequently acknowledged, however, *Gazda* construed a "completely different statute," from the one at bar, and thus may not have provided the relevant analysis. *See Chubbuck*, 252 F.3d at 1305 ("It has become increasingly clear that perhaps our interpretation of Florida law was either in error or has since changed . . . ").[3]

With respect to Fla. Stat. § 790.23, there is no evidence of any legislative intent or special legislative purpose that warrants departing from standard definition of conviction, which includes the adjudication of guilt. *See McFadden*, 772 So. 2d at 1216 (finding "no basis to deviate from the definition of conviction most consistently used by this Court, which requires a judgment of the court adjudicating the defendant guilty"). Rather, the statute follows the general rule

[3] The Eleventh Circuit has therefore sought this Court's guidance in order to help overcome its own "prior precedent rule." *See Jenkins*, 780 F.2d at 1133 (certifying question to this Court "[i]n order to resolve the matter"); *Chubbuck*, 252 F.3d at 1305 n.7 ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong. . . . However, the prior precedent rule would not apply if intervening on-point case law from either this Court en banc, the United States Supreme Court, or the Florida Supreme Court existed.").

that "when the State is alleging in an indictment that a defendant has previously been 'convicted' . . . the prior 'conviction' must include a judgment of the court as well as a plea or verdict of guilty." *Id*. at 1214 (discussing *Timmons,* 97 Fla. at 27, 119 So. at 394). *See also McCrae*, 395 So. 2d at 1154 (rejecting defendant's analogy to the habitual offender statute, because "[t]he habitual offender statute creates a separate criminal offense that requires both (a) a determination of guilt by jury and (b) and adjudication of guilt by the court. . . . It is a new and separate criminal offense, and 'adjudication of guilt' is a necessary element of the offense.") (internal citations omitted)).

To hold otherwise would be defeat the purposes of Fla. Stat. § 948.01(2), which allows a sentencing court to withhold adjudication if it finds that "the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law." To impose criminal liability for a status offense such as being a felon in possession of a firearm, when the prior sentencing judge expressly found that such status is not warranted, would render meaningless the decision of the sentencing judge.

It must further be remembered that criminal statutes "are to be construed in a manner most favorable to the accused." *See Overstreet*, 629 So. 2d at 125 (citation omitted). *See also* Fla. Stat. § 775.021(1) ("The 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.”). Absent a clear indication that the Legislature intended to dispense with the usual requirement of adjudication – and there is none – the Court should hold that a guilty plea for which adjudication is withheld does not qualify as a “convict[ion]” for purposes of Fla. Stat. § 790.23.

CONCLUSION

For the foregoing reasons, Appellant Bobby Jenkins respectfully requests that this Court answer the Eleventh Circuit's certified question in the negative and hold that a guilty plea for a felony for which adjudication was withheld does not qualify as a "convict[ion]" for purposes of Fla. Stat. § 790.23(1).

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CERTIFICATE OF COMPLIANCE

This pleading complies with the requirements of the Florida Supreme Court Rules because it has been prepared in a proportionally spaced typeface using WordPerfect in 14 point, Times New Roman.

s/Tracy Dreispul
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CERTIFICATE OF SERVICE

I HEREBY certify that on April 22, 2015, I electronically filed the foregoing document with the Clerk of the Florida Supreme Court. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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Case No. SC15-506
Eleventh Circuit No. 13-15874

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