

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2015-506

UNITED STATES OF AMERICA,

Appellee,

- versus -

JOSEPH PETER CLARKE and
BOBBY JENKINS,

Appellants.

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

BRIEF FOR THE UNITED STATES

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RECEIVED, 05/11/2015 11:33:30 AM, Clerk, Supreme Court

Table of Contents

	<u>Page:</u>
Table of Contents	i
Table of Citations	ii
Introduction	1
Statement of the Case and the Facts	2
A. Bobby Jenkins’ State of Florida Felony Prosecution	2
B. Bobby Jenkins’ Federal Prosecution	2
C. Jenkins’ Eleventh Circuit Appeal	4
Summary of the Argument	6
Argument	
The Supreme Court Should Find A Plea of Guilty With Adjudication Withheld To Be A “Conviction” For Purposes of Florida Statute § 790.23.	7
A. The Text of the Florida Felon-in-Possession Statute	9
B. A Review of Florida Case Law	14
C. The Statute’s Purpose To Protect The Public	22
Conclusion	31
Certificate of Service	32
Certificate of Compliance	32
Service List	33

Table of Citations

<u>Cases:</u>	<u>Page:</u>
<i>Boykin v. Alabama</i> , 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).....	18, 25
<i>Burkett v. State</i> , 518 So.2d 1363 (Fla. 1st DCA 1988).....	21, 26
<i>Castillo v. State</i> , 590 So.2d 458 (Fla. 3d DCA 1991)	20
<i>Dickerson v. New Banner Institute</i> , 460 U.S. 103, 103 S. Ct. 986 (1983).....	23, 24, 25
<i>Elledge v. State</i> , 346 So.2d 998 (Fla.1977).....	18
<i>Ferguson v. State</i> , 379 So.2d 163 (Fla. 3d DCA 1980)	21
<i>Garron v. State</i> , 528 So.2d 353 (Fla. 1998).....	14, 19, 25
<i>Heart of Adoptions, Inc. v. J.A.</i> , 963 So.2d 189 (Fla. 2007).....	10

Table of Citations (Continued)

<u>Cases:</u>	<u>Page:</u>
<i>Krause v. Textron Financial Corp.</i> , 59 So.3d 1085 (Fla. 2011).....	9, 10
<i>Larimore v. State</i> , 2 So.3d 101 (Fla. 2008).....	9
<i>Lewis v. United States</i> , 445 U.S. 55, 100 S. Ct. 915 (1980).....	22
<i>Malcolm v. State</i> , 605 So.2d 945 (Fla. 3d DCA 1992).....	20
<i>McCrae v. State</i> , 395 So.2d 1145 (Fla. 1980).....	passim
<i>Muscarello v. United States</i> , 524 U.S. 125, 118 S. Ct. 1911 (1998).....	29
<i>Nelson v. State</i> , 195 So.2d 853 (Fla. 1967).....	23
<i>Pardo v. Florida</i> ,, 596 So.2d 665 (Fla. 1992).....	22
<i>Raulerson v. State</i> , 763 So.2d 285 (Fla. 2000).....	5, <i>passim</i>

Table of Citations (Continued)

<u>Cases:</u>	<u>Page:</u>
<i>Robinson v. State,</i> 373 So.2d 898 (Fla.1979).....	18, 25
<i>Smith v. Bartlett,</i> 570 So.2d 360 (Fla. 5th DCA 1990)	27
<i>State v. Gazda,</i> 257 So.2d 242 (Fla. 1971).....	5, 14, 16
<i>State v. McFadden,</i> 772 So.2d 1209 (Fla. 2000).....	14, 15
<i>State v. Menuto,</i> 912 So.2d 603 (Fla. 2d DCA 2005)	21
<i>State v. Snyder,</i> 673 So.2d 9 (Fla. 1996).....	passim
<i>United States v. Chubbuck,</i> 252 F.3d 1300 (11th Cir. 2001).....	4
<i>United States v. Clarke,</i> 780 F.3d 1131 (11th Cir. 2015).....	4, 5
<i>United States v. Grinkiewicz,</i> 873 F.2d 253 (11th Cir. 1989).....	4

Table of Citations (Continued)

<u>Cases:</u>	<u>Page:</u>
<i>United States v. Lopez-Hernandez,</i> 522 F. App'x. 908 (11th Cir. 2013).....	5
<i>United States v. Orellanes,</i> 809 F.2d 1526 (11th Cir. 1987).....	4
<i>United States v. Santiago,</i> 601 F.3d 1241 (11th Cir. 2010).....	4
<i>United States v. Willis,</i> 106 F.3d 966 (11th Cir. 1997).....	4, 29
<i>Velez v. Miami-Dade County Police Dep't,</i> 934 So.2d 1162 (Fla. 2006).....	10
<i>Weathers v. State,</i> 56 So.2d 536 (Fla. 1952).....	21

Table of Citations (Continued)

<u>Statutes & Other Authorities:</u>	<u>Page:</u>
18 U.S.C. § 921	3
18 U.S.C. § 922	3, 23
Fla. Stat. § 112.3173	11
Fla. Stat. § 322.34	11, 20
Fla. Stat. § 775.084	11
Fla. Stat. § 775.089	27
Fla. Stat. § 775.13	10, 11
Fla. Stat. § 775.14	5, 16
Fla. Stat. § 790.23	1, <i>passim</i>
Fla. Stat. § 921.141	17
Fla. Stat. § 943.0435	11
Fla. Stat. § 948.01	7, <i>passim</i>
Fla. R. Crim. P. 3.670	8
Fla. R. Crim. P. 3.701	12

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 (the “Eleventh Circuit”).

The question certified is as follows:

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 the purposes of that statute, does a guilty plea for a felony for which adjudication was withheld qualify as a “convict[ion].”?

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 (the “District Court”). The United States was the appellee in the Eleventh Circuit, and the plaintiff in the District Court.

Record documents in the District Court record will be referred to as document entry (“DE”) and page number. A copy of the Eleventh Circuit’s opinion and all relevant District Court pleadings are included in the Appendix to this Brief.

Statement of the Case and the Facts

A. Bobby Jenkins' State of Florida Felony Prosecution

On April 3, 2008, Bobby Jenkins pled guilty to a Florida charge of possession of cocaine after he was found to have been in possession of 17 individually-wrapped crack cocaine rocks, a third degree felony. *State of Florida v. Jenkins*, Miami-Dade County Circuit Court Case No. F08-009553. As a result, Miami-Dade County Circuit Court Judge Reemberto Diaz entered an order entitled "Finding of Guilt and Order of Withholding Adjudication/Special Conditions." The order stated as follows:

It appearing to 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.

The order further stated that "the sentence be and hereby is SUSPENDED." *Id.*

B. Bobby Jenkins' Federal Prosecution

Approximately five years later, on April 30, 2008, Jenkins was arrested by United States' Alcohol, Tobacco, and Firearm ("ATF") agents. Jenkins and a co-conspirator, Joseph Peter Clarke, had conspired to commit a home invasion robbery of a cocaine stash house. When he was arrested, Jenkins was on his way to

the robbery armed with a loaded .40 caliber Sig Sauer pistol. He was charged in a five-count indictment in the United States District Court for the Southern District of Florida with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §922(g)(1), and with other charges related to the offense (DE12). Title 18 U.S.C. § 922(g)(1) makes it a federal crime for “any person . . . who has been convicted in any court[] of a crime punishable by imprisonment for a term exceeding one year” to possess a firearm or ammunition in or affecting interstate commerce.

What constitutes a conviction, for purposes of § 922(g), is determined in accordance with the law of the jurisdiction in which the predicate proceedings were held. 18 U.S.C. §921(a)(20) (“What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.”) (defining certain terms “[a]s used in” Title 18, Chapter 44, which includes § 922). Jenkins’ April 2008 Florida guilty plea was the predicate conviction for the § 922(g) charge.

After a jury trial, on October 11, 2013, Jenkins was found guilty of the § 922(g) charge and the related federal conspiracy drug charges. On December 18, 2013, the United States District Court sentenced him to a total of 300 months of imprisonment (DE111). Specifically, the court imposed a sentence of 120 months

for the § 922(g) charge, to be served concurrently with the sentences for the other counts of conviction. *Id.*

C. Jenkins' Eleventh Circuit Appeal

Jenkins appealed the judgment of conviction to the Eleventh Circuit Court of Appeals (the “Eleventh Circuit”), which resulted in the published opinion and the question certified to this Court. *United States v. Clarke*, 780 F.3d 1131 (11th Cir. 2015). He specifically appealed the § 922 conviction arguing that he was not a convicted felon, despite the fact that he had pled guilty to the prior Florida felony offense. He contended that the Florida offense was resolved by adjudication withheld, and cited decisions from several Florida intermediate appellate courts that had held that, for purposes of the *Florida* felon-in-possession statute, Florida Statute § 790.23, an adjudication withheld did not constitute a prior “conviction.”

In its response brief, the United States explained that the Eleventh Circuit has consistently interpreted Florida law to hold that a person who pleads guilty to a felony offense is a “convicted” felon, regardless of whether adjudication was withheld. The United States cited to *United States v. Orellanes*, 809 F.2d 1526 (11th Cir. 1987), and a succession of published and unpublished Eleventh Circuit decisions including *United States v. Grinkiewicz*, 873 F.2d 253, 255 (11th Cir. 1989); *United States v. Willis*, 106 F.3d 966, 968, 970 (11th Cir. 1997); *United States v.*

Chubbuck, 252 F.3d 1300 (11th Cir. 2001); *United States v. Santiago*, 601 F.3d 1241, 1246 (11th Cir. 2010); *United States v. Lopez-Hernandez*, 522 F. App'x. 908 (11th Cir. 2013).

The Eleventh Circuit decisions relied upon this Court's opinion in *State v. Gazda*, a 1971 case which dealt with Florida Statute § 775.14, Florida's statute proscribing the limitations on withheld sentences. *State v. Gazda*, 257 So.2d 242 (Fla. 1971). Of the Florida Supreme Court cases at that time, *Gazda* was likely the most obvious choice for guidance on Florida's adjudication withheld provision. In *Gazda*, this Court ruled that "the term 'conviction' means determination of guilty by verdict of the jury or by plea of guilty, and does not require adjudication by the court." 257 So.2d at 244.

In its published opinion in Jenkins' appeal, the Eleventh Circuit recognized that several Florida Supreme Court cases have since considered the issue of whether an adjudication withheld is a "conviction" in the context of various statutes, and have come to different conclusions depending upon the particular statute. *United States v. Clarke*, 780 F.3d 1131 (11th Cir. 2015). None of these cases, however, had "squarely addressed" this issue in the context of the Florida felon-in-possession statute. *Id.* The Eleventh Circuit noted this Court's observation in *Raulerson v. State*, 763 So.2d 285 (Fla. 2000), that the term "conviction" 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.” *Id.*

The Eleventh Circuit concluded in Jenkins’ appeal that the question of whether a Florida guilty plea with adjudication withheld is a conviction for purposes of Florida law should properly be determined based upon the meaning of the term as used in Florida’s felon-in-possession statute. *Id.* The court also cited to its prior decision in *Chubbuck*, explaining that only a decision on the issue by the Florida Supreme Court interpreting Florida law could overrule Eleventh Circuit prior precedent. *Id.* at 1132. As a result, the United States must look to Florida Statute § 790.23, the Florida felon-in-possession statute, for the answer and seek a definitive statement from this Court regarding whether an adjudication withheld disposition, after entry of a guilty plea, is a conviction for purposes of Fla. Stat. § 790.23.

Summary of the Argument

This Court should rule that a guilty plea for a felony offense for which adjudication was withheld is a conviction for purposes of the Florida felon-in-possession statute. The Florida felon-in-possession law prohibits persons convicted of Florida felony offenses from possessing firearms. A defendant who, by his own admission in a Florida court, has pled guilty to a felony, properly falls within the parameters of the statute, regardless of whether adjudication was withheld

by the trial court during the sentencing phase of a criminal proceeding. A holding that a guilty plea with adjudication withheld constitutes a conviction for purposes of the Florida felon-in-possession statute is consistent with the plain meaning of the relevant statutes, finds considerable support in pertinent judicial authority, and would better serve the statutory purpose of protecting the public by preventing the possession of firearms by persons who have engaged in the type of conduct that the state legislature has deemed sufficiently serious to trigger the law's prophylactic ban. This Court should answer the Eleventh Circuit's certified question in the affirmative.

Argument

The Supreme Court Should Find A Plea of Guilty With Adjudication Withheld To Be A "Conviction" For Purposes of Florida Statute § 790.23.

Jenkins argues that a defendant who has admitted guilt before a Florida court to a Florida felony offense should not be considered to have been "convicted" of a felony for purposes of the Florida felon-in-possession statute, Fla. Stat. § 790.23, if adjudication is withheld. He bases his argument on lack of legislative intent and on the statutory purpose of Fla. Stat. § 948.01, the Florida statute which authorizes trial courts to withhold adjudication. Jenkins' argument should be rejected. The better view holds that a guilty plea with adjudication withheld constitutes a conviction for

purposes of the Florida felon-in-possession statute and is consistent with the plain meaning of the relevant statutes, finds considerable support in pertinent judicial authority, and would better serve the statutory purpose of protecting the public by preventing the possession of firearms by persons who have engaged in the type of conduct that the state legislature has deemed sufficiently serious to trigger the law's prophylactic ban.

In Florida, once a defendant has pled guilty, the trial court has the discretion to adjudicate a defendant guilty or to withhold adjudication pursuant to Florida Statute § 948.01 and Florida Rule of Criminal Procedure 3.670. Section 948.01 is part of Florida Statutes, Title XLVII Criminal Procedure and Corrections, and is entitled, "When court may place defendant on probation or into community control." The statute applies when a defendant "has been found guilty by the verdict of a jury, has entered a plea of guilty, or a plea of nolo contendere, or has been found guilty by the court trying the case without a jury." Fla. Stat. § 948.01(1). It provides that "[i]f it appears to the court upon a hearing of the matter that the defendant is not likely to again 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. In either case, the court shall

stay and withhold the imposition of sentence upon the defendant and shall place a felony defendant upon probation.” Fla. Stat. § 948.01(2). The statute, by its terms, permits the trial court to withhold the imposition of a sentence, even though the defendant has admitted guilt. *Id.* In addition, if the defendant has committed a felony, the trial court is required to place the defendant on probation. *Id.*

A. The Text of the Florida Felon-in-Possession Statute

The relevant portions of Florida Statute § 790.23 state as follows:

(1) It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been:

(a) Convicted of a felony in the courts of this state; ...

(2) This section shall not apply to a person convicted of a felony whose civil rights and firearm authority has been restored.

Fla. Stat § 790.23.

This Court has explained that its purpose in construing a statutory provision is to give effect to legislative intent, which is the polestar that guides statutory construction analysis. *Larimore v. State*, 2 So.3d 101, 106 (Fla. 2008). In determining legislative intent, the Court must first look at the plain language of the statute. *Krause v. Textron Financial Corp.*, 59 So.3d 1085, 1090 (Fla. 2011). Further, all statutory provisions must be given their full effect by the courts, and

related statutory provisions must be construed in harmony with one another. *Id.*; see also *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 199 (Fla. 2007). This Court has further explained that it is “without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.” *Velez v. Miami-Dade County Police Dep’t*, 934 So.2d 1162, 1164-65 (Fla. 2006).

Section 790.23, on its face, would appear to apply to anyone who was previously convicted of a felony in a Florida court but would not apply to a person, though convicted, if his or her civil rights and firearm authority have been restored. Thus, the statute would criminalize the possession of a firearm by anyone who had been denied that right of possession by the court. Having pled guilty to a felony offense after which adjudication was withheld, the question then is whether Jenkins had a lawful right to possess a firearm in Florida.

The term “conviction” is not expressly defined within the definitional section of Chapter 790, § 790.001. Florida statutes and rules, however, routinely define the term “conviction” to include a guilty plea with adjudication withheld. For example, Florida makes it a crime for “any convicted felon” to fail to register as prescribed by state law. Fla. Stat. § 775.13(5). The term “convicted” is defined within the statute to include “a determination of guilt which is the result of a trial or the entry of

a plea of guilty or nolo contendere, regardless of whether adjudication is withheld.” Fla. Stat. § 775.13(1); *accord, e.g.*, Fla. Stat. § 943.0435(1)(b) (similarly providing, for purposes of state law criminalizing failure to register as a sex offender, that the term “[c]onvicted” means that there has been a determination of guilt as a result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld”); Fla. Stat. § 775.084(2) (statute governing sentencing enhancements for habitual felony offenders, which provides that “[f]or the purposes of this section, the placing of a person on probation or community control without an adjudication of guilty shall be treated as a prior conviction”); *see also* Fla. Stat. § 112.3173(2)(a) (defining term “conviction” for purposes of state law stripping convicted government employees of certain rights and benefits to include “a plea of guilty”). Interestingly, Fla. Stat. § 322.34, which sanctions multiple convictions for driving with a suspended driver’s license was amended in 2010 to expressly provide that “conviction” does not include adjudication withheld with respect to only certain specified prior offenses, presumably leaving all other offenses in which adjudication was withheld as “convictions.”¹ Fla. Stat. § 322.34; 2010 Fla. Sess. Law. Serv. Ch 2010-223, HB 971.

¹ The excluded prior offenses appear to be those that would not affect the safety of the driving public such as failing to comply with a civil penalty, failing to attend school, if a minor, and other similar infractions.

Florida's sentencing guidelines define "conviction" as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended." Fla. R. Crim. P. 3.701, Sentencing Guidelines. Based upon the Florida sentencing guidelines, Jenkins stands convicted of a prior felony offense.

Granted, the fact that some Florida laws expressly define the term "conviction" to include withheld adjudication does not conclusively show that the term must be so interpreted in the context of the Florida felon-in-possession law. In fact, the argument could be made that the fact of the express inclusion of withheld adjudication in some statutory provisions suggests, by negative implication, that the Florida felon-in-possession statute, which includes no such express inclusion, does not include adjudication withheld offenses. It is at least reasonable, however, to consider how the state legislature defined the term in other statutes, and yet expressly excluded it in others, particularly when those statutes in which adjudication withheld offenses were included also attached consequences to prior convictions that affect public safety.

While a review of the legislative history of § 790.23 does not affirmatively resolve this issue, since adjudications withheld provisions were not discussed, it does not reveal any indication that the Florida Legislature intended that individuals

who were found to be guilty of a felony, but adjudication was withheld, should be excluded from the consequences of the felon-in-possession statute. The legislative history of Fla. Stat. § 948.01, which gives the court the authority to withhold adjudication, also fails to elaborate on the legal consequences of the decision.

The text of Fla. Stat. § 948.01(2) shows that the legislature intended the provision to relieve the defendant of the penalty for his offense, but there is no indication that it intended the defendant to be relieved of the non-punitive collateral consequences of his guilty plea, such as the state's felon-in-possession ban. Specifically, the statute reads that a court may withhold adjudication of guilty if "it appears to the court ... that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law." Fla. Stat. § 948.01(2). Florida's felon-in-possession law is not intended to punish the offender; instead, it serves an essential regulatory purpose of protecting the public by keeping firearms out of the hands of persons who have committed serious crimes. *State v. Snyder*, 673 So.2d 9, 11 (Fla. 1996)("Section 790.23 is intended to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities."). The plain language of the felon-in-possession statute and the adjudication withheld statute, read together, is consistent with the conclusion that

the legislature intended that a guilty plea, with adjudication withheld, constitute a conviction.

B. A Review of Florida Case Law

A review of this Court's case law shows a number of decisions that address the issue of whether a guilty plea with adjudication withheld disposition is a conviction including *State v. Gazda*, 257 So.2d 242 (Fla. 1971), *McCrae v. State*, 395 So.2d 1145 (Fla. 1980), *Garron v. State*, 528 So.2d 353, 360 (Fla. 1998), and more recently *Raulerson v. State*, 763 So.2d 285 (Fla. 2000) and *State v. McFadden*, 772 So.2d 1209 (Fla. 2000). Most of these decisions *do* conclude that either an adjudication of guilt or a guilty plea with adjudication withheld constitute a conviction. While none of them addresses the issue in the context of the Florida felon-in-possession statute, their reasoning is instructive here.

First, Jenkins cites to *McFadden* repeatedly in his brief for the proposition 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." That is not *McFadden's* holding. In *McFadden*, this Court examined whether a defendant or witness may be impeached by a prior guilty plea, where the trial court has withheld adjudication in a prior offense. The

Court concluded that adjudication withheld offenses should not be considered “convictions” for that purpose. *Id.* at 1214.

In support of its holding, *McFadden* quoted Supreme Court cases from 1888, 1918, 1929, and 1930. *Id.* at 1215. None of these cases dealt with the issue within the context of a felon-in-possession statute and all were decided well before Fla. Stat. 948.01, the statute which authorized withholds, was even enacted. In addition, this Court recognized in *McFadden* that the term could well encompass guilty pleas in which adjudication was withheld, in certain statutory contexts. *Id.* at 1215-16 (“On the other hand, when we have defined ‘conviction’ as encompassing only a guilty plea or guilty verdict, we have done so in relation to a specific statute and its specific purpose as set forth by the Legislature” and, the term “conviction” in Florida “has drawn its meaning from the particular statutory context in which the term is used”).

McFadden’s sole mention of the felon-in-possession statute in footnote 5 is in reference to the holding in *State v. Snyder*, 673 So.2d 9 (Fla. 1996). *McFadden*, 772 So.2d at 1215. *Snyder* decided the question of whether an adjudication of guilt of a felony offense, which was pending on appeal, could be used to support a conviction for possession of a firearm by a convicted felon under Fla. Stat. § 790.23. The Court held that § 790.23 applied “following the adjudication of guilt 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.” *Id.* at 11. Contrary to the suggestion in the *McFadden* footnote, *Snyder* did not involve an adjudicated withheld disposition and made no mention of the adjudicated withheld issue. Neither *McFadden* nor *Snyder* decided the question before the Court today.

As previously discussed, in *State v. Gazda*, this Court held that for purposes of construing Florida’s Limitation on Withheld Sentences Statute, Fla. Stat. § 775.14, the term “conviction” means a determination of guilt either by jury verdict or by guilty plea, regardless of adjudication by a court. 257 So.2d at 244. This Court held that the defendant’s guilty plea was a “conviction,” even though he had not been sentenced. *Id.* Notably, the Court distinguished between a “judgment of conviction” and a “conviction” noting that only a “judgment of conviction” requires adjudication by the court, and that a “conviction” does not. *Id.*

In *McCrae v. Florida*, 395 So.2d 1145 (Fla. 1980), which is instructive in resolving this issue, this Court held that a guilty plea, after which adjudication was withheld, is a conviction for purposes of the state law authorizing the use of certain prior felony convictions as an aggravating factor supporting the imposition of the death penalty. The relevant statute provided that a court may impose the death penalty for a capital crime if it finds sufficient aggravating circumstances exist, as

enumerated in the statute, and that insufficient mitigating circumstances outweigh the aggravating circumstances. *Id.*; Fla. Stat. § 921.141(3). The law limited the relevant “aggravating circumstances” to an enumerated list, which included the fact that “[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.” *Id.*; Fla. Stat. § 921.141(5)(b).

The trial court in *McCrae* imposed a death sentence. That sentence listed only four aggravating factors. The first factor was that “[t]he Defendant was a self-convicted felon, pleading guilty to” a prior violent felony. 395 So.2d at 1150.

Like Jenkins, McCrae had plausible arguments to support his contention that “he had not been convicted of his prior offense . . . because the judge had not adjudicated him guilty.” 395 So.2d at 1154. The plain text of the applicable state statute did not define the term “conviction” and made no reference to withheld adjudications. *See id.* Thus, nothing in the text of the law compelled the conclusion that a guilty plea with adjudication withheld constituted a conviction for purposes of the statutory scheme. Nor did the court point to any legislative history supporting that conclusion. *See* 395 So.2d at 1154. Finally, a judicial construction of the statute authorizing treatment of a guilty plea with adjudication withheld as a conviction unquestionably had the effect of attaching a potentially severe punitive

consequence (indeed, the most potentially severe punitive consequence imaginable) to that prior disposition.

Notwithstanding those plausible arguments, the Florida Supreme Court unanimously rejected McCrae's argument, explaining:

In *Robinson v. State*, 373 So.2d 898 (Fla.1979), we held that a plea of guilty is an in-court confession and an agreement for the court to enter a judgment. We further cited with approval the decision of the *United States Supreme Court in Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), which stated: **“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.”** (Emphasis supplied.) These decisions recognize that once a plea of guilty has been accepted by a court, it is the conviction and the only remaining step is the formal entry of judgment and the imposition of sentence.

395 So.2d at 1154.

Critical to this Court's analysis of the issue was its concern for the illogical result of treating guilty plea with adjudication withheld cases differently from adjudication of guilt cases, where the offense was serious, given that both dispositions contain an “unrefuted factual determination that the defendant [had] committed this prior criminal offense.” *Id.*

Further, in determining whether the death penalty should be imposed, a court must consider the various circumstances set forth in section 921.141. These circumstances aid the judge in establishing the overall character analysis of a defendant so that he may properly determine the appropriate sentence within the limits set forth in the law. *Elledge v. State*, 346 So.2d 998 (Fla.1977). Prior convictions of violent felonies

is an extremely important factor in the sentencing process. Given the purpose of this process, it is illogical that a plea of guilty to a serious offense involving violence that is disposed of by a sentence that includes a withholding of adjudication of guilt should be treated differently than a plea of guilty with court adjudication. Both contain an unrefuted factual determination that the defendant committed this prior criminal offense.

Id. at 1154.

Here, as in *McCrae*, the relevant state statute does not expressly define the term “conviction”; the practical effect of defining the term “conviction” to include withheld adjudications carried severe punitive consequences that may seem to be in tension with the purpose of the Florida statutory scheme authorizing withholds of adjudication; the defendant had admitted guilt of the prior criminal offense; and, perhaps most importantly, the purpose of the relevant state statute would be best served by construing the term “conviction” to include a guilty plea with adjudication withheld. *See infra*.

In *Garron v. State*, 528 So.2d 353, 360 (Fla. 1988), this Court again examined whether, in the context of the penalty phase of a murder trial, a guilty plea resolved by an adjudication withheld can be considered a prior conviction. The Court held that a guilty plea was “an absolute condition precedent before the lack of adjudication can be considered a conviction.” *Id.*

In *Raulerson v. State*, 763 So.2d 285 (Fla. 2000), this Court examined the term “conviction” for purposes of the Florida statute providing for increased sanctions for a third conviction of driving a motor vehicle with a canceled, suspended or revoked driver’s license. Like in *McCrae*, Fla. Stat. § 322.34(1) at that time did not specify whether withheld adjudications and adjudications of guilt were to be treated the same. Nevertheless, the Florida Supreme Court unanimously held that “the term ‘conviction’ as used in § 322.34(1) include[s] both adjudications and withheld adjudications in [those] cases, unless the disposition is made pursuant to a particular statutory provision expressly excluding such dispositions. *See id.* at 290, 293-94. After analyzing legislative intent and statutory structure, the Court concluded that both adjudicated and guilty plea with adjudication withheld prior offenses were convictions. *Id.*

Jenkins correctly points out in his brief that two Florida intermediate appellate courts have squarely ruled that a guilty plea with adjudication withheld is not a conviction for purposes of the Florida felon-in-possession statute. The Florida Third District Court of Appeals, has twice held that a guilty plea with adjudication withheld is not a conviction for purposes of the Florida felon-in-possession statute. *Malcolm v. State*, 605 So.2d 945, 948 (Fla. 3d DCA 1992); *Castillo v. State*, 590 So.2d 458, 461 (Fla. 3d DCA 1991). The Third District in *Castillo* came to that

conclusion, however, without employing any of the traditional tools of statutory interpretation or presenting any legal analysis. *Malcolm* simply followed *Castillo*. *Castillo* cited, without discussion, to a prior Third District case, *Ferguson v. State*, 379 So.2d 163 (Fla. 3d DCA 1980), where the court overturned a conviction for possession of a firearm by a convicted felon for sufficiency of the evidence, but did not elaborate on what evidence the government had failed to provide. *Castillo* further cited other decisions that only tangentially discussed adjudication withheld dispositions or did not discuss the provision at all. *Castillo* cited to *Burkett v. State*, 518 So.2d 1363, 1366 (Fla. 1st DCA 1988), for example, a case that answered the question whether a felony conviction, still pending on appeal is a conviction for purposes of the felon-in-possession statute. The only Florida Supreme Court case cited in *Castillo* was *Weathers v. State*, 56 So.2d 536 (Fla. 1952), a case in which the offender was adjudicated guilty. Finally, it is not clear from the facts presented in *Castillo* whether the withheld prior offense was in fact a guilty plea, or a plea of nolo contendere which would not carry the same legal consequences.

The Florida Second District Court of Appeals in *State v. Menuto*, 912 So.2d 603 (Fla. 2d DCA 2005), also held that a guilty plea with adjudication withheld is not a conviction for purposes of the Florida felon-in-possession statute, but simply relied on *Malcolm*, *Castillo*, and *Burkett* for authority. It is true, as Jenkins argues,

that an intermediate court of appeal is bound by decisions of other districts, if its own district has not considered the issue, *Pardo v. Florida*, 596 So.2d 665, 666 (Fla. 1992). This Court, however, is not so bound and can consider this issue anew.

C. The Statute's Purpose To Protect The Public

This Court recognized in *Snyder* that the purpose of the felon-in-possession statute is to protect the public from individuals whose past conduct has shown them to be unfit to be entrusted with dangerous weapons. *State v. Snyder*, 673 So.2d at 11. *Snyder*'s discussion of the purpose of the Florida felon-in-possession statute is helpful to the analysis here. The Court explained that "Section 790.23 is intended to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities. *Id.* In deciding whether a prior conviction, pending on appeal at the time, could be used as a predicate offense for a conviction under the felon-in-possession statute, this Court cited to a United States Supreme Court case, *Lewis v. United States*, 445 U.S. 55, 67, 100 S. Ct. 915 (1980), which emphasized that "federal gun laws focus not on the reliability of the conviction but on the mere fact of conviction in order to keep firearms from potentially dangerous persons."

Furthermore, in assessing the legislative intent of Florida's felon-in-possession law, this Court in *Nelson v. State*, 195 So.2d 853, 855 (Fla. 1967), explained that the Florida law's purpose was like that of the federal felon-in-possession statute and, quoting a federal court decision, stated that "Congress sought to protect the public by preventing the transportation and possession of firearms and ammunition by those who, by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities".

In light of the similarities of purpose between the Florida felon-in-possession statute and the federal one, this Court must consider the United States Supreme Court's decision in *Dickerson v. New Banner Institute*, 460 U.S. 103, 103 S. Ct. 986 (1983). In *Dickerson*, the Court considered whether a defendant who had pled guilty to an Iowa state felony offense had been "convicted" of that crime within the meaning of 18 U.S.C. § 922(g), even though the defendant had never been adjudicated guilty. *See* 460 U.S. at 105, 107-08, 103 S. Ct. at 987-88, 989 (explaining that the state court had "deferred" entry of a formal judgment and placed [the defendant] on probation," and that the state court's "record with reference to the deferred judgment was expunged" "following a successfully served term of probation").

Notably, the Supreme Court held that the purpose of the federal felon-in-possession statute would be better effectuated by treating a guilty plea without adjudication as a conviction sufficient to trigger the prohibition on possessing firearms. In enacting the federal ban, the Court noted, “Congress sought to rule broadly - to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society.” 460 U.S. at 112; 103 S. Ct. at 991 (internal quotation marks omitted). Although “the term ‘convicted’ in 922(g) and (h) is not there defined,” the Court explained, it could find “no reason whatsoever to suppose that Congress meant that term to apply only to one against whom a formal judgment has been entered.” 460 U.S. at 112 n.6; 103 S. Ct. at 991-92 n.6. “Congress’s intent in enacting [the federal ban] was to keep firearms out of the hands of presumptively risky people.” *Id.* The Court ruled that the Iowa defendant fell into that category because he had pled guilty to a crime punishable by imprisonment for a term exceeding one year, the kind of crime that Congress considered “demonstrative of unreliability with firearms.” 460 U.S. at 113-14; 103 S. Ct. at 992.

Dickerson’s analysis, though not controlling with respect to the meaning of Florida law, is highly persuasive here. Moreover, the Supreme Court in *Dickerson* relied in part on broad language that has been expressly and repeatedly approved

(albeit in somewhat different contexts) by the Florida Supreme Court. Compare *Dickerson*, 460 U.S. at 112-13, 103 S. Ct. at 992 (“In some circumstances we have considered a guilty plea alone enough to constitute a conviction: A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction.”) (internal quotations omitted) with *McCrae*, 395 So.2d at 1154 (“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction.”) (quoting *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711 (1969)); accord *Garron v. Florida*, 528 So.2d 353, 360 (Fla. 1988) (same); *Robinson v. Florida*, 373 So.2d 898, 902 (Fla. 1979) (same).

Jenkins’ argument that including guilty pleas with adjudication withheld as prior convictions for purposes of Fla. Stat. § 790.23 would defeat the purposes of Fla. Stat. § 948.01 (Br. at 4), has no merit. Although the Florida Supreme Court has not definitively resolved this issue, the better view is that a state trial judge’s discretionary decision to withhold adjudication does not categorically exempt a defendant who has pleaded guilty to a felony offense from the reach of the state’s felon-in-possession law. Several considerations support that conclusion.

First, the plain text of the state law governing withheld adjudications does not purport to modify or constrain the reach of the felon-in-possession ban. As relevant here, that law provides:

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.

Fla. Stat. 948.01(2).

That text does not refer to Florida's felon-in-possession law or otherwise provide that a guilty plea with adjudication withheld may never be a "conviction" for purposes of that law.

Second, as noted previously, the primary intent of the felon-in-possession law is not to penalize the defendant; rather, it serves the "essentially regulatory purpose" of protecting the public by keeping firearms and other dangerous weapons out of the hands of those who have demonstrably committed serious crimes in the past. *See Burkett*, 518 So.2d at 1366. Thus, the trial court's discretionary determination not to impose a term of incarceration at the time of plea should not limit the later application of the felon-in-possession law.

Jenkins proved himself to be unfit to possess firearms. He was arrested in possession of a loaded .40 caliber Sig Sauer pistol on his way to commit an armed robbery (DE137:166, 171-73; DE138:18-21). He told a government informant during a recorded conversation that he had recently committed another armed robbery, that he had an AR-15 assault rifle, and that he wanted this robbery to "get

bloody” (DE137:86-88; Govt. Exh. E7, E8, E15). The assault rifle was found on the floor of the vehicle in which Jenkins was arrested (DE138:18-21).

Third, even if the state’s felon-in-possession law were punitive rather than regulatory, that would not preclude its application to a person who has pled guilty to a felony offense. As discussed previously, Florida law attaches a broad range of punitive and quasi-punitive consequences to a guilty plea with adjudication withheld. For example, Florida law requires the payment of restitution by defendants regardless of adjudication of guilt. Fla. Stat. § 775.089(8) (governing duty of a convicted defendant to pay restitution); *Smith v. Bartlett*, 570 So.2d 360, 361 (Fla. 5th DCA 1990) (“We hold that one who pleads guilty or is found guilty by a jury has been ‘convicted’ under the provisions of section 775.089(8) even in the absence of an adjudication.”).

Fourth, the state statute governing withheld adjudications does not provide that a defendant who is unlikely to recidivate shall receive a withheld adjudication. Instead, the law gives a trial judge who believes a defendant is not likely to engage in future criminality plenary discretion “to **either** adjudge the defendant to be guilty **or** stay and withhold the adjudication of guilt.” Fla. Stat. § 948.01(2) (emphasis added). In other words, state law expressly authorizes the trial judge to adjudicate a defendant guilty of a felony offense even if the judge finds that the defendant is not

likely to engage in criminal conduct and that the public interest would not be served by sentencing the defendant to a term of incarceration. Jenkins does not and cannot deny that an adjudication of guilt suffices to establish a “conviction” within the meaning of § 790.23. *See Snyder*, 673 So.2d at 10. Accordingly, the applicability of the state felon-in-possession law does not turn on the sentencing judge’s prediction “that the defendant is not likely again to engage in a criminal course of conduct.”

Jenkins’ interpretation of § 790.23 would give rise to the following illogical scenario suggested by this Court in *McCrae*, 395 So.2d at 1154: Two defendants with the same background commit the same crime and plead guilty to the same felony charge; in both cases the sentencing judge finds 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”; both defendants are placed on probation and successfully complete the probationary period; but adjudication is withheld, as is the trial judge’s prerogative, in only one of the two cases. Under Jenkins’ interpretation of § 790.23, one defendant would be subject to the felon-in-possession law, but the other would not, even though both have been sentenced to probation, have successfully completed the probationary period, and have been judicially

determined to pose the same risk of recidivism. This result would serve no identifiable purpose, and is not compelled by the plain text of the applicable statutes. A determination that a guilty plea invokes the application of the state's felon-in-possession ban enforces the law based upon objective facts and sensibly errs on the side of public safety.

The government's position does not preclude Florida from giving effect to a state rehabilitative scheme under which individuals may successfully complete a probationary period. Applicable Florida law holds that a plea of *nolo contendere* to a state felony offense where adjudication was withheld does not constitute a conviction within the meaning of § 922(g). *United States v. Willis*, 106 F.3d 966, 969 (11th Cir. 1997)(“According to [the Florida Supreme Court's decisions in] *Thompson* and *Garron*, as well as *Gazda*, a conviction under Florida law requires either an adjudication of guilt or a guilty plea.”).

Finally, Jenkins suggests that the criminal statutes involved here should simply be construed in the manner most favorable to the accused (Br. at 14). That remedy, however, only applies when there remains “a grievous ambiguity or uncertainty” in the statute, after the court has employed the traditional tools of statutory interpretation of considering the text, structure, history and purpose of the statute. *Muscarello v. United States*, 524 U.S. 125, 139, 118 S. Ct. 1911, 1920

(1998). Certainly the meaning of the term “conviction” in this context is no more ambiguous than it was when considered by this Court in *McCrae* and *Raulerson*, where this Court construed the term to include a guilty plea with adjudication withheld.

In sum, Florida’s felon-in-possession statute does not exclude individuals who have pled guilty to felony offenses. Given this Court’s statement in *Snyder* that “Section 790.23 is intended to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities,” individuals who have pled guilty to felony offenses, regardless of whether the trial court exercised its discretion not to impose punitive sanctions, should be deemed convicted.

Conclusion

For the foregoing reasons, the United States requests that this Court answer the Eleventh Circuit's certified question in the affirmative.

Respectfully submitted,

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Certificate of Service

I hereby certify that I electronically filed the foregoing document with the Clerk of the Florida Supreme Court this 11th day of May, 2015, and that, on the same day, the foregoing brief was electronically filed on Assistant Federal Public Defender Tracy Dreispul, Esq. and on all counsel of record identified on the attached Service List.

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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 Microsoft Word 2010, 14-point Times New Roman.

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Ab

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Bobby Jenkins v. United States of America

**Case No. SC15-506
Lower Tribunal No. 13-15874**

Supreme Court of Florida

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**Case No. SC15-506
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