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' REPLY BRIEF

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

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
Tracy Dreispul
Assistant Federal Public Defender
Florida Bar No. 0634621
Attorney for Bobby Jenkins
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone No. (305) 536-6900

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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).

The law of this State is clear, that a withheld adjudication does not qualify as a conviction for purposes of Fla. Stat. § 790.23. The crux of the government's argument seems to be that the statute is ambiguous; therefore, the Court is free to depart from prior rulings, and overturn the law of the State. *See* Gov. Br. at 22.

The are several problems with the government's argument. The first is that the legislature was not writing on a blank slate, but rather against the long-established history of this Court interpreting the term "conviction" to require an adjudication of guilt. The legislature is presumed to have known the law, and would not have departed from this settled understanding on a silent record. Second, a separate statutory provision governing the sale of firearms confirms that persons who have had adjudication withheld are neither convicted persons, nor are categorically prohibited from purchasing – and hence possessing – firearms under Florida law. Third, it is indisputable that the statute may reasonably be read in Mr. Jenkins' favor. Under the rule of lenity, this definition must prevail.

From a policy standpoint, the government has offered no convincing reason to upset the uniform rulings of the Florida courts, let alone the settled expectations of countless criminal defendants who have accepted the State's offer of withheld adjudications in exchange for guilty pleas. Wherefore, 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).

A. The legislature is presumed to have been aware of this Court's long-established jurisprudence.

Basic cannons of statutory construction confirm that a "convict[ion]" within the meaning of Fla. Stat. § 790.23(1) requires the adjudication of guilt. To begin, "the legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted." *Williams v. Jones*, 326 So. 2d 425 (Fla. 1975). The government is thus wrong to marginalize *Owens v. Barnes*, 24 Fla. 154, 4 So. 2d 650 (Fla. 1888), *State v. Smith*, 75 Fla. 473, 78 So. 530 (Fla. 1918), *Timmons v. State*, 97 Fla. 23, 119 So. 393(1929), and *Ellis v. State*, 100 Fla. 27, 129 So. 106 (Fla. 1930), because of their dates of decision. Gov. Br. at 15. These cases document a century-long commitment "to the doctrine that a legal conviction" requires the adjudication of guilt. *See State v. McFadden*, 772 So.2d

1209, 1214-15 (Fla. 2000) (quotation omitted). *See also* App. Br. at 6-8 (discussing same). The legislature is presumed to have been aware of this commitment when it enacted Fla. Stat. § 790.23.

The government culls five of this Court's cases and argues that "[m]ost" of those support its decision. *See* Gov. Br. at 14 (citing *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), *Raulerson v. State*, 763 So. 2d 285 (Fla. 2000), and *McFadden*). The government's carefully curated review does not prove its point.

First, *McFadden* held that a withheld adjudication does ***not*** qualify as a conviction for purposes of impeachment under the Florida Evidence Code. Furthermore, despite the government's nuanced suggestion, this Court in *McFadden* expressly found that "the definition of conviction ***most consistently used*** by this Court . . . requires a judgment of the court adjudicating the defendant guilty." *McFadden*, 772 So. 2d at 1216 (emphasis added).

Raulerson, *Gazda*, and *McCrae*, were discussed in *McFadden* as examples of cases where the Court departed from this general rule "in relation to a specific statute and its specific purpose as set forth by the Legislature"; *i.e.*, they are the exceptions to the rule. *See McFadden*, 772 So. 2d at 1209 & n.6. In *Raulerson*, the Court reviewed the relevant statutes and found that "the Legislature clearly

intended that the term 'conviction' as used in section 322.34(1) include both adjudications and withheld adjudications [for certain driving offenses], unless the disposition is made pursuant to section 318.14(10), Florida Statutes (1995)." 763 So. 2d at 290. In *Gazda*, the Court interpreted the Florida statute providing a limitations period on withheld sentences, and found that the term conviction was intended to simply mean the determination of guilt, and not require the adjudication of the court. 257 So. 2d at 244. *McRae* involves capital sentencing and, as discussed further *infra*, is entirely distinguishable from the case *sub judice*.

The government's fifth case, *Garron*, simply distinguished *McCrae* to hold that a plea of *nolo contendere* followed by a withheld conviction did not qualify as a conviction for purposes of capital sentencing. 528 So. 2d at 360. The government has either misread the case or else attempts to draw an affirmative conclusion from a negative premise. In either case, *Garron* does not support its argument.

Further still, as the examples cited in the government's brief confirm, when the Legislature wishes to omit the adjudication requirement, it knows how to do so. *See* Gov. Br. at 10-12 (citing, *e.g.*, Fla. Stat. 775.13 (1) ("As used in this section, the term 'convicted' means, with respect to a felony offense, 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. § 775.084(2) ("For

purposes of this section, the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction.")). *See also* Fla Stat. § 934.0435 (defining conviction, for purpose of sex offender registration, to encompasses juvenile adjudications of delinquency, as well as withheld adjudications).

For more than a century, this Court has interpreted the term "conviction" to require an adjudication of guilt in the absence of an indication that the Legislature intended otherwise. It is not reasonable to assume, in interpreting the statute *sub judice* that the legislature intended to depart from this common definition without so indicating. *See McFadden*, 772 So.2d at 1216 ("[T]he Legislature was likely aware of the Florida Supreme Court's definition of 'conviction' when the Legislature enacted section 90.601(1)."") (citation omitted).

B. Florida law does not categorically prohibit the sale of firearms to individuals who have had adjudication withheld for felony offenses.

The government recognizes that "all statutory provisions must be given their full effect by the courts, and related statutory provisions must be construed in harmony with one another." Gov. Br. at 9-10 (citing *Krause v. Textron Financial Corp*., 59 So.2d 1085, 1090 (Fla. 2011)). It is significant, therefore, that a Florida statute regulating the sale and transfer of firearms treats persons who have had

adjudication withheld differently from those who have been convicted of felonies, and allows the former to purchase firearms under certain conditions.

Fla. Stat. § 790.065(2) requires the Department of Law Enforcement to conduct background checks upon request by licensed firearms dealers, and states, in relevant part:

> Upon receipt of a request for a criminal history record check, the Department of Law Enforcement shall, during the licensee's call or by return call, forthwith
>
> (a) Review any records available to determine if the potential buyer or transferee:
>
> 1. Has been convicted of a felony and is prohibited from receipt or possession of a firearm pursuant to s. 790.23;
>
> 2. Has been convicted of a misdemeanor crime of domestic violence, and therefore is prohibited from purchasing a firearm;
>
> 3. Has had adjudication of guilt withheld or imposition of sentence suspended on any felony or misdemeanor crime of domestic violence unless 3 years have elapsed since probation or any other conditions set by the court have been fulfilled or expunction has occurred; or
>
> 4. Has been adjudicated mentally defective or has been committed to a mental institution by a court or as provided in sub-sub-subparagraph b.(II), and as a result is prohibited by state or federal law from purchasing a firearm.

Fla. Stat. 790.065(2).

The statute thus differentiates between a potential buyer who "[h]as been convicted of a felony" Fla. Stat. 790.065(2)(a)1, and one who "[h]as had adjudication of withheld or imposition of sentence suspended on any felony . . .

crime of domestic violence". Fla. Stat. 790.065(2)(a)3. The latter phrase would have been superfluous, if the withheld adjudication were the lawful equivalent of a conviction for this purpose. Furthermore, subsection 790.065(2)(a)3, is the only subsection among the four that does not include language stating that the individual is legally prohibited from possessing or purchasing firearms. This confirms that that, so long as certain conditions are met, a person who has had adjudication of guilt withheld on a felony crime of domestic violence is ***not*** prohibited from possessing a firearm under Florida law.[1]

C. Criminal statutes must be strictly construed.

The government attempts to restrict the role of lenity in statutory interpretation, quoting language that the rule only applies in the case of a "grievous ambiguity or uncertainty." Gov. Br. at 29 (citing *Muscarello v. United States*, 524 U.S. 125, 139, 118 S. Ct. 1911, 1920 (1998)). The Court has more recently stated, however, that were there "any doubt" about the meaning of a statute, it would "invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates v. United States*, 135 S. Ct. 1074 (2015).

[1] It is further worth noting that the Legislature has expressed a strong public policy favoring the "constitutional right to keep and bear arms for lawful purposes." *See* Fla. Stat. § 790.25(4). While not addressing the statute directly, this is further evidence that the Legislature would not have intended Fla Stat. § 790.23 to take on an unnecessarily broad reading, without so stating.

Furthermore, "[i]n Florida, the rule is not just an interpretive tool, but a statutory directive." *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008) (citing Fla. Stat. § 775.021(1) (2007) ("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.")). "Any ambiguity or situations in which statutory language is susceptible to differing constructions ***must*** be resolved in favor of the person charged with an offense." *Id.* (quoting *State v. Byars*, 823 So.2d 740, 742 (Fla.2002) (emphasis in original; alteration omitted)). *See also id.* ("'One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter.'") (quoting *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla.1991)) (alteration omitted).

It is indisputable that the statute may be, and has been, reasonably interpreted to require the formal adjudication of guilt. The rule of lenity dictates that this definition continue to prevail. *See Byars*, 823 So. 2d at 742.

D. <u>The government's policy arguments do not justify departing from this Court's consistent jurisprudential path and upsetting settled expectations.</u>

The government's policy arguments similarly fail to carry the day. The government argues 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." Gov. Br. at 22 (citing *State v. Snyder*, 673 So.2d 9 (1996)). This begs the question, however, of whether Mr. Jenkins' past conduct fit this bill. The relevant time period for this inquiry was at the point of Mr. Jenkins' sentencing hearing in the underlying Florida case. The sentencing court, entrusted with the discretion to do so under Fla. Stat. § 948.01(2), made a specific finding "that the ends of justice and the welfare of society [did] not require that the defendant presently suffer the penalty imposed by law." *See* Fla Stat. § 948.01(2). The government's arguments regarding the facts of Mr. Jenkins' later Federal offense are irrelevant to this determination.[2]

Furthermore, *Snyder* did not involve a withholding of adjudication, and thus has little bearing on the issue *sub judice*. *See Snyder*, 673 So.2d at 10 ("Snyder was adjudicated guilty and sentenced to three and one-half years' imprisonment."). The government further borrows policy arguments from *Dickerson v. New Banner Institute*, 460 U.S. 103, 103 S. Ct. 986 (1983), without acknowledging that the case was legislatively overruled. Following *Dickerson*, the United States Congress

[2]Nonetheless, to provide a fair picture of events, it should be noted that Mr. Jenkins is an intellectually-disabled man who had no other felony convictions (adjudicated or otherwise), prior to becoming the target of a reverse-sting operation that has been criticized by courts around the country. *See United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011) ("We use the word 'tawdry' because the tired sting operation seems to be directed at unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them").

enacted "The Firearm Owners Protection Act", to provide that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. 921(a)(20). *See United States v. Orellanes*, 809 F.2d 1526, 1528 (11th Cir. 1987) (citing Senate Report No. 98-583, 98 Cong 2d Sess. 7 (1984)). Thus, the federal policy advocated in the government's brief was overridden by the express policy of respecting the State's determination of who may and may not possession firearms.

Florida law expressly provides that even persons convicted of felonies are not forever barred from possessing firearms, if they have had their civil rights "and firearm authority" restored. *See* Fla. 790.23(2). One obvious purpose of withholding adjudication is that the defendant is permitted to retain those rights in the first instance. *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).

Finally, the government draws a false analogy to the disparity that the *McCrae* Court foresaw if formal adjudication of guilt were required before violent offenses could be considered for capital sentencing purposes. Gov. Br. at 28-29. *McCrae* is entirely distinguishable. The defendant in *McCrae* pled guilty to assault

with intent to commit murder, and was "released on bail without adjudication of guilt, awaiting the completion of the presentence investigation report," at which time he committed the murder for which he was being sentenced. 395 So.2d at 1154. Thus, although the case at one point references "a withholding of adjudication," factually, there was no formal withholding of adjudication on the prior case. The sentencing had simply not yet occurred. *See id*.

More to the point, the Court assessed "the purpose of considering prior criminal conduct in the capital sentencing process," and found that it was "to ensure a proper character analysis to determine if the ultimate penalty of death should be imposed." *McCrae*, 395 So.2d at 1154. Given that purpose, the Court found that it was illogical that pleas of guilty to violent offenses should be treated differently based on whether adjudication was withheld. *McCrae*, 395 So.2d at 1154.

This case, by contrast, involves a well-understood part of the plea and sentencing process in Florida: the ability to avoid both the direct and collateral consequences of a felony conviction in exchange for a guilty plea. The withholding of adjudication provides meaningful benefits to defendants, including, in addition to the right to possess firearms, retaining the rights to vote and to serve on juries, and even forego having to disclose criminal convictions in job applications. It is part of the bargained-for exchange which a defendant may obtain though

negotiation. Having obtained and accepted different plea bargains, the defendants in the government's hypothetical are not similarly situated for the relevant purposes.

In the end, the government has offered "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". *See McFadden*, 772 So. 2d at 1216. Wherefore, 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).

CONCLUSION

For the reasons stated herein and in his Initial Brief on the Merits, 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).

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

s/ Tracy Dreispul
Tracy Dreispul
Assistant Federal Public Defender
Florida Bar No. 0634621
Attorney for Bobby Jenkins
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone No. (305) 536-6900

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
Tracy Dreispul
Florida Bar No. 0634621

CERTIFICATE OF SERVICE

I HEREBY certify that on June 1, 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.

s/Tracy Dreispul
Tracy Dreispul
Florida Bar No. 0634621

SERVICE LIST

Bobby Jenkins v. United States of America

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Supreme Court of Florida

Emily Smachetti
United States Attorney's Office
99 NE 4 Street
Miami, FL 33132
(305) 961-9295
Fax: (305) 536-7214
Email:
Emily.Smachetti@usdoj.gov

Kathleen Salyer
United States Attorney's Office
99 NE 4 Street
Miami, FL 33132
(305) 961-9130
Fax: (305) 536-7214
Email:
Kathleen.Salyer@usdoj.gov

Wifredo Ferrer
United States Attorney's Office
99 NE 4 Street
Miami, FL 33132
(305) 961-9100
Fax: (305) 536-7214
Email: usafls.2410@usdoj.gov

Lisette Marie Reid
United States Attorney's Office
99 NE 4 Street
Miami, FL 33132
(305) 961-9129
Fax: (305) 536-7214
Email: Lisette.Reid@usdoj.gov

Tracy Dreispul
Federal Public Defender's Office
150 W. Flagler Street, Suite 1500
Miami, FL 33130
(305) 536-6900
(305) 530-7120 - Fax
Email: Tracy_Dreispul@fd.org

Neal Gary Rosensweig
P.O. Box 814598
Hollywood, Florida 33081-4598
(954) 962-7720
Email:
nealrose@mindspring.com