SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2552

SPONSOR: Criminal Justice Committee and Senator Villalobos

SUBJECT: Adjudication of Guilt

DATE: March 24, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.			JU	
3.			ACJ	
4.			AP	
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 2552 creates a new statute that prohibits a withhold of adjudication of guilt (a "withhold") for a capital felony, life felony, and first degree felony.

The new statute also prohibits a withhold for a second degree felony if the defendant has a prior withhold for a felony not arising from the same transaction as the current felony. If there is no such prior felony, the court can only withhold if it makes a written finding that a withhold is reasonably justified based on statutorily-specified factors for mitigating a Code sentence.

The new statute also prohibits a withhold for a third degree felony if the defendant has a prior withhold for a felony not arising from the same transaction as the current felony, unless the state attorney requests in writing a withhold or the court makes a written finding that a withhold is reasonably justified based on statutorily-specified mitigating factors. However, there cannot be a withhold of a third degree felony if the defendant has two or more prior withholds for a felony not arising from the same transaction as the current felony.

The CS also provides that the state may appeal from an order withholding adjudication in violation of the new statute (there is no provision for an appeal by a defendant, though a defendant can appeal an "illegal sentence" under current law).

The CS also repeals Florida Rule of Criminal Procedure 3.670 "to the extent that it is inconsistent with the provisions" of the bill.

This CS amends s. 924.07, F.S., and creates s. 775.08435, F.S.

II. Present Situation:

Relevant History

"Probation is a creature of statutory law, and the courts are, therefore, limited to the authority set out in the applicable statute" *Lynn v. State*, 398 So.2d 977 (Fla. 1st DCA 1981) (per curiam), review denied, 411 So.2d 383 (Fla. 1981), citing to *State v. Wilcox*, 351 So.2d 89, 91 (Fla. 2d DCA 1977) and *Brown v. State*, 302 So.2d 430 (Fla. 4th DCA 1974). *See Pickman v. State*, 155 So.2d 646 (Fla. 3rd DCA 1963), cert. denied, 164 So.2d 805 (Fla. 1964); *Ex parte Bosso*, 41 So.2d 322 (Fla. 1949).

In 1941, the Florida Legislature, consistent with the State Constitution, created in law a system of probation and parole. *See* ch. 20519, L.O.F. (1941). James T. Vocelle. Parole and probation in Florida. 16 Fla.L.J. (1944).

The 1941 law did not speak to withholding adjudication of guilt in the context of probation, which appears to be where it originated (staff found no case indicating that withholding adjudication of guilt has origins in common law or is viewed by the courts as an inherent power, though, as discussed, infra, deferring sentencing did have such a history). Section 948.01, F.S., addresses withholding adjudication of guilt or what is often referred to as a "withhold of adjudication." Describing an earlier version of this statute one Florida court remarked that "[w]ithholding and suspension of adjudication and sentence means the court declines to convict (adjudicate guilty) the defendant or fine or imprison him until probation is tried." *Thomas v. State*, 356 So.2d 846 (Fla. 4th DCA 1978), cert. denied, 361 So.2d 835 (Fla. 1978). The court further remarked that this could only be done in a felony case "when the defendant is put on probation." *Id.* "If the defendant successfully completes his probation he is not a convicted person but if the probation is violated the court may then adjudicate and sentence." *Id.*

"Prior to the passage, by the 1959 Legislature, of the present Section 948.01 an accused could be placed on probation, but only after a formal adjudication of guilt by the court." *Delaney v. State*, 190 So.2d 578, 580 (Fla.), appeal dismissed, 387 U.S. 426 (1967), overruled in part on other grounds, *Franklin v. State*, 257 So.2d 21 (Fla. 1971). *See* ch. 59-130, L.O.F. and ch. 61-489, L.O.F. The Florida Supreme Court remarked that the 1941 law empowered the courts "only to suspend the imposition of sentence and instead grant probation where the probable future conduct of the defendant, the ends of justice, and the welfare of society warrant that action." *Ex parte Bosso*, 41 So.2d 322, 324 (Fla. 1949).

Deferring imposition of sentencing "...had its origin in the common law courts of England at a time when the laws of England did not permit motions for a new trial grounded upon the insufficiency of evidence, or for alleged errors during the course of the proceedings." *Bateh v. State*, 101 So.2d 869, 871 (Fla. 1st DCA 1958), cert. discharged with opinion, 110 So.2d 7 (Fla. 1959). The English "trial courts assumed authority to temporarily suspend the imposition or execution of sentence by the issuance of a reprieve. Such a reprieve was only temporary and granted in the court's discretion for the accomplishment of some lawful purpose." *Id.* at 870-871 (footnotes and citations omitted).

In some jurisdictions in America, by repeated practice, the limitations that the English courts had placed on deferring imposition of sentence "became eroded and disregarded until the right to" indefinitely postpone the imposition of a sentence came to be a recognized 'inherent' power. The district court of appeal concluded in *Bateh* that the Legislature had, by enactment of the 1941 law on probation and parole, "limited the authority by which imposition of a sentence may be deferred." *Id*. at 873. In 1959, the Florida Supreme Court reached a similar conclusion in *Helton v. State*, 106 So.2d 79 (Fla. 1958) ("...[R]egardless of whether the practice as it existed in this state prior to 1941 was lawful, it is clear that since that date the power to suspend the imposition of sentence upon a convicted criminal can be exercised by a trial judge only as an incident to probation under the provisions of Ch. 948....").

Section 948.01, F.S., Rule 3.670, Fla.R.Crim.P., and Relevant Statutes

Section 948.01(1), F.S., provides:

> ... Any court of the state having original jurisdiction of criminal actions may at a time to be determined by the court, *either with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who 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*. If the court places the defendant on probation or into community control for a felony, the department shall provide immediate supervision by an officer employed in compliance with the minimum qualifications for officers as provided in s. 943.13. In no circumstances shall a private entity provide probationary or supervision services to felony or misdemeanor offenders sentenced or placed on probation or other supervision by the circuit court.

(Emphasis provided.)

Section 948.01(2), F.S., 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; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place the defendant upon probation*. However, no defendant placed on probation for a misdemeanor may be placed under the supervision of the department unless the circuit court was the court of original jurisdiction.

(Emphasis provided.)

Florida Rule of Criminal Procedure 3.670 provides that if a defendant is found guilty, a judgment of guilt shall be rendered in open court and in writing, signed by the judge, filed, and recorded. However, the judge may withhold adjudication of guilt if the judge places the defendant on probation. ("... [T]rial courts may withhold adjudication of guilt after a plea has been accepted or

a verdict of guilty has been rendered and place the defendant on probation provided that the requirements of section 948.01(2), Florida Statutes (1997) are met. *See also* Fla. R. Crim.P. 3.670." *State v. McFadden*, 772 So.2d 1209, 1211 (Fla. 2000), rehearing denied (2001). In that case the Court also remarked that "[t]he statutory authority for Rule 3.670 is found in s. 948.01(2), F.S." *Id.* at 1211 n.2.)

There are a number of offenses for which a judge is statutorily prohibited from withholding adjudication of guilt, including DUI manslaughter (s. 316.656, F.S.), boating under the influence which results in manslaughter (s. 327.36, F.S.), assault or battery on a law enforcement officer (s. 784.07, F.S.), offenses for which a minimum mandatory term of imprisonment must be imposed under "10-20-Life" (s. 775.087, F.S.), assault or battery on a person over the age of 65 (s. 784.08, F.S.), offenses relating to weapons of mass destruction (ss. 790.163, 790.164, 790.165, 790.166, F.S.), bookmaking (s. 849.25, F.S.), and drug trafficking. (s. 893.125(3), F.S.).

In Florida, a felony conviction impacts a person's civil rights such as the right to vote (Art. VI, s. 4 of the State Constitution; s. 97.041, F.S.). Generally, a withhold of adjudication is not a "conviction." "[A] defendant who has adjudication of guilt withheld and successfully completes the term of probation imposed 'is not a convicted person.'" *State v. Gloster*, 703 So.2d 1174, 1176 (Fla. 1st DCA 1997), decision approved, *Raulerson v. State*, 763 So.2d 285 (Fla. 2000), quoting *Thomas v. State*, 356 So.2d at 847. There are, however, specific statutory contexts in which a withhold is considered a conviction, e.g., a conviction for consideration as an aggravating circumstance in a capital sentencing proceeding, *McRae v. State*, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981), or a conviction for the purpose of increased sanctions for a third conviction of driving with a suspended license, *Raulerson, supra*.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 2552 creates s. 775.0845, F.S., which provides that, notwithstanding s. 948.01, F.S., the Court may not withhold adjudication of guilt (a "withhold") upon the defendant for:

- A capital felony, life felony, and first degree felony.

- A second degree felony if the defendant has a prior withhold for a felony not arising from the same transaction as the current felony. If there is no such prior felony, the court can only withhold if it makes a written finding that a withhold is reasonably justified based on statutorily-specified factors for mitigating a Criminal Punishment Code sentence.

- A third degree felony if the defendant has a prior withhold for a felony not arising from the same transaction as the current felony, unless the state attorney requests in writing a withhold or the court makes a written finding that a withhold is reasonably justified based on statutorily-specified mitigating factors. However, there cannot be a withhold of a third degree felony if the defendant has two or more prior withholds for a felony not arising from the same transaction as the current felony.

The CS also amends s. 924.07, F.S., to provide that the state may appeal from an order withholding adjudication in violation of s. 775.08435, F.S. (there is no provision for an appeal by a defendant, though a defendant can appeal an "illegal sentence" under s. 924.06(d), F.S.).

The CS also repeals Florida Rule of Criminal Procedure 3.670 "to the extent that it is inconsistent with the provisions" of the bill.

The bill takes effect July 1, 2004, except that the repeal of Florida Rule of Criminal Procedure 3.670 takes effect only if the bill passes by an affirmative vote of two-thirds of each house of the Legislature.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet reviewed the CS but did estimate that an identical House CS would not have a prison bed impact.

According to the Department of Corrections,

> The Bureau of Research and Data Analysis reports that as of December 31, 2003, there were 60,091 (out of 152,343) offenders on supervision that had adjudication withheld. Of these, 9,768 had adjudication withheld on more than three (3) different felony convictions.

VI. Technical Deficiencies:

None.

VII. Related Issues:

During January of 2004, the *Miami Herald* published a series of articles relating to withholds of adjudication. *See* http://www.miami.com/mld/miamiherald/news/photos/7788988.htm (articles published on January 25 – 28, 2004). According to the newspaper's review of Florida felony cases between 1993 and 2002, nearly 17,000 defendants received more than one withhold of adjudication. "A second chance turns into many," *Miami Herald* (January 27, 2004); (http://www.miami.com/mld/miamiherald/7807123.htm). The series of articles documented the details of a number of instances in which offenders received repeated withholds of adjudication. The newspaper claimed to have found more than 67,000 new crimes committed by offenders who had adjudication withheld for their first conviction. *Id.* According to the articles, withholds of adjudication are often used as a tool in plea bargaining a case.

VIII. Amendments:

None.