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Withhold of Adjudication: What Everyone Needs to Know

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For the benefit of those of you who haven't thought about criminal law since law school, Florida judges have a special authority vested upon them to "withhold adjudication" in a criminal matter pursuant to F.S. §948.01. The statute provides the court with the ability to withhold adjudication after the imposition of a probation sentence without imposing upon the defendant a conviction and the collateral consequences that accompany a conviction.[1] This judicial election can have far-reaching implications not only in the criminal arena, but also in civil matters.

Many of us who regularly practice criminal law have traditionally viewed a withhold of adjudication as a logical compromise for the amicable resolution of criminal cases. In those cases, the defendant consents to the payment of fines and a term of probation in exchange for the state's acquiescence of a withhold of adjudication. Once the term of probation is successfully completed, the court is divested of jurisdiction and there is no adjudication of guilt.[2] F.S. §948.04 (2) provides that upon the termination of the period of probation, the probationer shall be released from probation and cannot be sentenced for the offense which probation was allowed. In these cases, withholds of adjudication have promoted judicial economy and leniency for uncharacteristic behavior by removing the conviction from the adjudicatory process. In the case of misdemeanors, withholds have allowed defendants to escape collateral consequences such as mandatory driver license revocations for drug convictions or points associated with traffic infractions. In the case of qualifying felonies, defendants escape the forfeiture of civil rights such as the right to vote, hold public office, and serve on a jury.[3] The effect of a withhold of adjudication has also had far reaching effect in practical application. For example, a person who has had the benefit of a withhold of adjudication could traditionally deny having a conviction, even when subject to deposition or while testifying in court.[4] In addition, defendants could safely check the "no" box on job applications when asked if they had ever been convicted of a criminal offense.

The benefit of the withhold has been the focus of attack in recent times. Specifically, limiting language has been written into a number of statutes that voids the advantage of the withhold provision. The most dramatic is the language in the DUI statute which expressly prohibits the court from withholding adjudication.[5] In addition, the sealing and expunction statutes also preclude the removal from the public record of a number of offenses regardless of the withholding of adjudication. The most notable offenses are those that involve acts of domestic violence. Other disqualifying charges include arson, aggravated assault and battery, illegal use of explosives, child and elderly abuse, hijacking and car jacking, kidnaping, homicide and manslaughter, sexual offenses, communications fraud, offenses by public officers or employees, robbery, burglary of a dwelling, stalking, and attempts or conspiracies to commit the underlying offenses.[6]

In 2004, the legislature promulgated F.S. §775.08435,[7] which precludes courts from applying withholds in capital, life, or first degree felonies and limits the application of withholds for second degree felonies by requiring either a written motion from the state attorney or express judicial findings made pursuant to F.S. §921.0026. This statute is in effect for all noncapital felony offenses committed after October 1, 1998. Under F.S. §921.0026, the court may consider mitigation to include the terms of a plea bargain, the defendant's minor role in the offense, the incapacity of the defendant to appreciate the criminal nature of his or her conduct; the defendant's need and amenability for specialized treatment for a mental disorder, the need for the payment of restitution, the victim's role in the incident; duress of domination over the defendant; the compensation of the victim prior to the identification of the defendant; the defendant's cooperation with the investigation, the unsophisticated manner of the isolated incident; and the youth of the defendant and the inability to understand the consequences of his or her actions. Interestingly, the statute specifically precludes the consideration of the defendant's intoxication and substance abuse or addictions.

Additionally, the case law has changed the way withholds are to be treated. The Florida Supreme Court has held that a guilty plea or verdict with a withhold of adjudication constitutes a conviction which could be considered as an aggravating circumstance in a capital sentencing proceeding.[8] The court's reasoning is that the word "convicted" as used in F.S. §921.141(5)(b) means a valid guilty plea or jury verdict of guilty for a violent felony; an adjudication of guilt is not necessary for such a "conviction" to be considered in the capital sentencing character analysis. Furthermore, the Florida Supreme Court has also held that the term "conviction" as used in the statute that provides for increased sanctions for a third conviction of driving with a suspended driver's license includes offenses for which adjudication was withheld.[9] The reasoning for this decision is that a common sense reading of the F.S. §322.34 indicates that the legislature intended the term "conviction" to mean a determination of a defendant's guilt by way of plea or verdict. Therefore, the court concluded that it is clear that the Florida Legislature intended that a conviction, for purposes of F.S. §322.34(1), is to include both adjudications and withholds, unless the disposition is made pursuant to F.S. §318.14 (10), which allows individuals cited with civil traffic infractions to elect traffic school in exchange for a withholding of adjudication and no assessment of traffic points.

Government agencies have also embedded provisions within their employment regulations, which specifically indicate that a plea and a judgment, regardless of whether adjudication was withheld or not, is considered a conviction and may subject an employee to sanctions including termination.[10] Furthermore, entities outside Florida, including federal entities, do not recognize the withhold of adjudication since there are no parallel provisions. This effect is most dramatically manifested in federal prosecutions for felon in possession of a firearm where the withhold of adjudication of a Florida State felony may satisfy the predicate requirement of a felony conviction.[11] Curiously, the Southern District of Florida seems to repeatedly hold that a withhold is not a conviction which can be treated as a predicate for a felon in possession of a firearm under 18 U.S.C. §922.[12] Under the same reasoning, the criminal history calculation within the advisory federal sentencing guidelines calculates a withhold as a prior sentence for the assessment of criminal history points.[13] In addition, resident aliens may find themselves either deported or excluded from the United States because of felonies and certain misdemeanors that qualify as crimes of moral turpitude regardless of the withhold of adjudication.[14]

In response to these changes, many civil practitioners have modified the traditional discovery demands through the inclusion of questions regarding arrests, participation in

diversionary programs, and pleas of guilty or no contest. Many employers now ask if an applicant has been a defendant in a criminal proceeding regardless of adjudication or inquire whether an applicant has ever entered a plea of guilty or no contest or a determination by a court has been made in a case where the applicant was a defendant. Additionally, many people have recently found themselves unable to chaperone their children's school functions or even volunteer at the school bake sale because school board administrative regulations now include a provision that disqualifies volunteers due to "prior conduct" without mention of convictions. These restrictions emerge from the Drug Free Schools Act of 1986, as amended in 1989, which has been interpreted to limit the contact of individuals with prior drug-related offenses or addictions from participation in school activities. Many local school boards regard pleas of no contest, or nolo contendere, regardless of withhold of adjudication, as prior offenses.

Even The Florida Bar has nullified the intended benefits of the withhold provision. In the recently amended Rules Regulating The Florida Bar, lawyers were formerly only required to report felony "convictions" to the Bar. Rule3-7.2(e) now states that decisions entered on or after August 1, 2006, require attorneys to notify the executive director of The Florida Bar of such determination or judgment. Notice shall include a copy of the document(s) on which such determination or judgment was entered. Under the new rule, all criminal "determinations or judgments" must be reported.

So what does this really matter for law-abiding Joe Public? For starters, vice offenses such as open containers of alcohol on the beach or a heated argument during a divorce can now become a scar on a person's record which can affect his or her employment, insurance rates, or even his or her ability to perform volunteer services in the community. No more mulligans or do-overs. A momentary lapse of judgment can now be an issue for life.

This, of course, begs the question: What can Joe Public do? The first option is to defuse a criminal record by attempting to avoid the filing of charges by the state. The state attorney has the inherent power to determine if an information will be filed or an indictment sought. If counsel is successful in procuring a "no information," then no formal charges are filed which alleviates the withhold issue altogether. The second option is to consider possible alternatives to avoid a sentence. This may mean try the case, or it may mean some type of intervention program that results in a dismissal or a "no prosecution," or nolo prosequi, or it may mean a negotiated plea with concession, which allow for the withhold of adjudication. For example, the Second District Court of Appeal has held that adjudications can be withheld even if precluded by the statute if the court withholds adjudication pursuant to the Youthful Offender Act as codified in F.S. §958.04.[15]

The crucial factor for criminal practitioners is to inform the client of the possible legal consequences, as well as the collateral consequences, that they may face months, or even years, after the conclusion of the criminal case. Civil practitioners need to be aware of what is admissible and proper to accurately phrase and answer discovery demands and deposition questions. They must also analyze prior withheld sentences to determine if the underlying facts are admissible as evidence. For example, even though a withhold of adjudication may not be admissible as impeachment evidence of a conviction under F.S. §90.610, there may be a sufficient basis to admit the evidence as character evidence of other crimes, wrongs, or acts under F.S. §90.404(2). A little time reviewing the rules of evidence may make the difference between a line of inadmissible testimony as opposed to a masterfully crafted line of damaging evidence.

[1] Fla. R. Crim. P. 3.670.

[2] *See Thomas v. State*, 356 So. 2d 846, 847 (Fla. 4th D.C.A. 1978), *cert. denied*, 361 So. 2d 835 (Fla. 1978) ("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."); *United States v. Thompson*, 756 F. Supp. 1492, 1495 (N.D. Fla. 1991); *Davis v. State*, 623 So. 2d 579, 580 (Fla. 3d D.C.A. 1993) (However, once the "probationary period expires, the court is divested of jurisdiction over the probationer unless, prior to that time, the appropriate steps were taken to revoke or modify the probation."); *Purvis v. Lindsey*, 587 So. 2d 638, 639 (Fla. 4th D.C.A. 1991); *see also* Fla. Stat. § 948.04.

[3] *Snyder v. State*, 673 So. 2d 9 (Fla. 1996). Federal criminal charges for possession of a firearm by a convicted felon can be predicated upon a felony regardless of withhold of adjudication.

[4] *Brown v. State*, 787 So. 2d 136 (Fla. 4th D.C.A. 2001) (Court held it was improper impeachment to allude to felony cocaine possession case where adjudication had been withheld); *Martin v. State*, 791 So. 2d 1115 (Fla. 4th D.C.A. 2000) (Court held it was improper to deny post-trial release based on prior withhold of adjudication).

[5] *See* Fla. Stat. §§316.656, 784.07, and 893.135(3). *See also* Fla. Stat. §327.36 (other offenses for which a judge is prohibited from withholding adjudication include: boating under the influence which results in manslaughter); Fla. Stat. §775.087 (offenses for which a minimum mandatory term of imprisonment must be imposed under "10-20-Life"); Fla. Stat §§790.163, 790.164, 790.165, and 790.166 (offenses relating to weapons of mass destruction); Fla. Stat. §849.25 (bookmaking); Fla. Stat. §784.08 (assault or battery on a person over the age of 65); Fla. Stat. §784.07 (assault or battery on a law enforcement officer); Fla. Stat. §893.135 (drug trafficking).

[6] Fla. Stat. §806.01 (arson); Fla. Stat. §784.021 (aggravated assault); Fla. Stat. §784.045 (aggravated battery); Fla. Stat. §790.001(5) (illegal use of explosives); Fla. Stat. §827 (child abuse); Fla. Stat. §860.16 (hijacking); Fla. Stat. §787 (kidnapping); Fla. Stat. §782 (homicide and manslaughter); Fla. Stat. §§794, 800.04, 827.071, 787.025, 796.03, 825.1025, 847 (sexual offenses); Fla. Stat. §817.034 (communications fraud); Fla. Stat. §839 (offenses by public officers or employees); Fla. Stat. §812 (robbery and car jacking); Fla. Stat. §810.02 (burglary of a dwelling); Fla. Stat. §784 (stalking).

[7] H.B. 869 w/CS Adjudication of Guilt / S.B. 2552. Although the court may withhold adjudication for second and third degree felonies, the statute precludes withholding of adjudication if the defendant has a prior withhold of adjudication for an unrelated felony.

[8] *McCrae v. State*, 395 So. 2d 1145 (Fla. 1980).

[9] *Raulerson v. State*, 763 So. 2d 285 (Fla. 2000).

[10] The Pinellas County Employment Handbook indicates in Rule XXIV that an employee can be dismissed for the entry of a plea of guilty or nolo contendre to a misdemeanor or felony involving moral turpitude regardless of relation to employment and regardless of the withholding of adjudication.

[11] *United States v. Orellanes*, 809 F.2d 1526 (11th Cir. 1987).

[12] *See United States v. Gispert*, 864 F. Supp. 1193 (S.D. Fla. 1994).

[13] *United States v. Rockman*, 993 F.2d 811 (11th Circuit, 1993); *see also* U.S.S.G. §§4A1.1, 4A1.2(f), and 2K2.1.

[14] *See* 8 U.S.C. §1182; 8 U.S.C. 1227.

[15] *Sloan v. State*, 884 So. 2d 378 (Fla. 2d D.C.A. 2004).

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This column is submitted on behalf of the Criminal Law Section, Ann E. Finnell, chair, and Georgina Jimenez-Orosa, editor.

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