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 118

SPONSOR: Governmental Oversight and Productivity Committee, Senator Fasano and others

SUBJECT: Plea Agreements

DATE: March 4, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Favorable
2.	Matthews	Lang	JU	Favorable
3.	White	Wilson	GO	Fav/CS
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 118 creates the "Officer Cheryl Seiden Act" that would prohibit a court from accepting a plea agreement reached between the state attorney and defendant if the agreement forbids a law enforcement, correctional, or correctional probation officer from appearing or speaking at a parole or clemency hearing. Where the crime victim is a law enforcement, correctional, or correctional probation officer, the bill would prohibit the state attorney and defendant from entering a plea agreement that restricts the victim/officer from appearing and providing a statement at the sentencing hearing.

The bill substantially amends section 921.143 of the Florida Statutes.

II. Present Situation:

Overview

A person charged with a crime has a right under the federal and state constitutions to a trial by jury. See *U.S. Const. Amend 6; Art. I, s. 22, Fla. Const.* However, nearly all criminal cases are disposed of by a plea agreement between the state, represented by the state attorney, and the criminal defendant. In such agreements, the criminal defendant waives his or her right to trial and, in exchange, the state generally makes concessions.

State attorneys are given the statutory authority to represent the state. ("Duties before court.-The state attorney shall appear in the circuit and county courts within his or her judicial circuit and prosecute or defend *on behalf of the state* all suits, applications, or motions, civil or criminal, *in which the state is a party*…." s. 27.02, F.S., emphasis added). They have the discretion to file cases or not file them, to file one charge or another, to send cases to diversion programs, and to take a case to trial or to enter into a plea arrangement. For example, the state attorney may drop

other charges against the defendant, recommend a specific sentence, allow the defendant to enter a plea to a lesser charge than the charge initially filed, or reach some other agreement with the defendant.

A plea agreement is viewed as a contract between the state and the defendant in a criminal case. The trial judge is not bound by a plea agreement, but generally follows it. Florida Rule of Criminal Procedure 3.172 governs the conduct of trial judges when accepting pleas. Since a defendant is giving up constitutional rights when he or she enters a plea, the trial judge is required to inquire whether the plea is voluntary and there is a factual basis for it. See *Fla.R.Crim.P. 3.172(a), (c)*. If the state and the defendant have reached an agreement and the trial judge does not concur, the plea may be withdrawn. See *Fla.R.Crim.P. 3.172(g)*. A defendant may also enter a plea to the crime charged and be sentenced by the trial judge without any agreement from the state.

Either the state or a defendant may file a motion to vacate or withdraw a plea under certain circumstances. See *Fla.R.Crim.P. 3.170; Fla.R.App.P. 9.140(b)(2)*. One such circumstance is the failure of either party to abide by the terms of the plea agreement.

Case Law

In *Lee v. State*, 501 So.2d 591 (Fla. 1987), the Florida Supreme Court held that a defendant must be permitted to withdraw a plea when a law enforcement officer makes an independent recommendation to the trial court that runs counter to the recommendation in the agreement entered into with the state attorney's office. In *Lee*, the defendant negotiated a plea agreement with the state attorney in which the state agreed not to recommend a specific sentence. *Lee*, 501 So.2d at 591-592. However, in a presentence investigation report submitted to the court prior to sentencing, an agent of the Florida Department of Law Enforcement recommended a sentence of incarceration. *Lee*, 501 So.2d at 592. The trial court did not allow Lee to withdraw his plea and the Supreme Court reversed the trial court. In holding that the trial court erred, the Supreme Court explained:

> The state's failure to adhere to the terms of a plea agreement even when the noncompliance is purely inadvertent constitutes good cause for withdrawal of a plea under [the Florida Rules of Criminal Procedure]. As noted by the United States Supreme Court … "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."
>
> The narrow issue presented in this case is whether a promise contained in a plea agreement that the "state" will recommend a given sentence binds only the state attorney's office or whether it also precludes other state agents, such as state law enforcement officers, from making sentencing recommendations contrary to the terms of the agreements.
>
> Under Florida Rule of Criminal Procedure 3.171, the prosecuting attorney represents the state in all plea negotiations. We agree … that *once a plea bargain based on a prosecutor's promise that the state will recommend a certain sentence*

> *is struck, basic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state's recommendation. Id.* at 592-593 (emphasis added; citations omitted).

Lee's rule that a law enforcement officer is an agent of the state was expanded to apply to probation officers in *Thomas v. State*, 593 So.2d 219 (Fla. 1992)("Clearly, a probation officer is an agent of the 'state,' notwithstanding the State's surprising assertion to the contrary."). In *Thomas*, the state agreed to "stand silent" at sentencing but, in the presentence investigation, a probation officer included information about the defendant's prior record and recommended a prison sentence. *Thomas*, 593 So.2d at 220-221. The court held that the probation officer was an agent of the state and that the state breached the agreement. Thomas was permitted to withdraw his plea. *Id*. at 221.

In *Lynn v. State,* 687 So.2d 39 (Fla. 5th DCA 1997), the court was faced with a situation much like the *Thomas* case discussed above, but reached a different result. In a plea agreement, the state agreed to recommend probation in a case of battery on a law enforcement officer. The recommendation was not approved by the victim/law enforcement officer who testified as to the facts of the battery at the sentencing hearing. The prosecutor stood by his recommendation of probation but the court sentenced the defendant to prison.

The defendant later sought either to have the plea agreement enforced or to withdraw his plea. The court found that since no objection was raised *prior to sentencing* the defendant must demonstrate that a "manifest injustice" had occurred. The court analyzed the application of both the *Lee* and *Thomas* cases and noted the following:

> The court is not bound by any agreement between the state and defendant as to the sentence to be imposed although the state's recommendation may have a persuasive effect. … We do not believe, however, that once the state enters into a plea agreement, facts should be withheld from the sentencing judge or that victims or other witnesses should be discouraged from informing the court of their feelings on the sentence to be imposed. … We do not read *Thomas* as requiring the state or the state's agents to mislead the sentencing court by supplying inaccurate or incomplete information once a plea bargain is reached; surely it only requires that a defendant be allowed to withdraw a plea if the state, including its agents, cannot carry out its obligations under the agreement when it comes time to present the terms of the agreement to the sentencing court. *Id.* at 41-42.

The court seems to have reached a result contrary to *Lee* and *Thomas* because in the *Lynn* case, although the victim/law enforcement officer was not in agreement with the state's sentencing recommendation, he did not seek to make his own recommendation to the court, therefore all agents of the state spoke with the same voice as to the recommendation. It was within the court's discretion to deviate from that recommendation and sentence the defendant accordingly.

Recently, in *Echevarria v. State,* 845 So.2d 340 (Fla. 3rd DCA 2003), the appellate court found the State in "serious, material, and inexcusable breach of its agreement not to oppose the appellant's parole applications in return for his completely satisfied promise to plead guilty to reduced charges and testify in trial against the co-defendant." *Id.* The prosecutor in the case who

originally entered into the plea agreement on behalf of the state opposed any breach of the plea agreement and insisted that it be honored. However, other individuals knowingly broke the state's promise. *See Id.* & n.2.

III. Effect of Proposed Changes:

Under the bill, a court may not accept a plea agreement that prohibits a law enforcement, correctional, or correctional probation officer from appearing and speaking at a parole or clemency hearing. A plea agreement may also not prohibit a law enforcement, correctional, or correctional probation officer or authorized representative from the officer's employing agency from appearing and providing a statement at the sentencing hearing when the officer is a victim in the case. Therefore, any plea agreement entered into by the defendant and the state from the effective date of this bill that binds the speech or conduct of a victim/officer at a *future* hearing for sentencing, or of an officer at a future parole or clemency hearing would be illegal and the court could not accept such plea.

The bill adopts the following definitions set forth in s. 943.10, F.S.:

- "Correctional officer" means, "any person who is appointed or employed full time by the state or any political subdivision thereof, or by any private entity which has contracted with the state or county, and whose primary responsibility is the supervision, protection, care, custody, and control, or investigation, of inmates within a correctional institution; however, the term 'correctional officer' does not include any secretarial, clerical, or professionally trained personnel."

- "Correctional probation officer" means, "a person who is employed full time by the state whose primary responsibility is the supervised custody, surveillance, and control of assigned inmates, probationers, parolees, or community controllees within institutions of the Department of Corrections or within the community. The term includes supervisory personnel whose duties include, in whole or in part, the supervision, training, and guidance of correctional probation officers, but excludes management and administrative personnel above, but not including, the probation and parole regional administrator level."

- "Employing agency" means, "any agency or unit of government or any municipality or the state or any political subdivision thereof, or any agent thereof, which has constitutional or statutory authority to employ or appoint persons as officers. The term also includes any private entity which has contracted with the state or county for the operation and maintenance of a nonjuvenile detention facility."

- "Law enforcement officer," means, "any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or

> auxiliary law enforcement officers but does not include support personnel employed by the employing agency."

It is not clear under the bill whether the officer who is a victim in the case is being allowed to appear and make a statement at the sentencing hearing in an official capacity or his or her role as a victim. Nothing in law currently keeps an officer who is a victim from appearing and making a statement as a victim at a sentencing hearing or any other crucial stage of the case. *See* s. 921.143(1), F.S. In fact any plea agreement that would have excluded an officer from appearing or speaking in his or her capacity as a victim at a sentencing hearing would have been per se illegal and unconstitutional under Article I, Section 16 of the Constitution of the State of Florida which provides that:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Chapter 960, F.S., is devoted to Victim Assistance, and requires the state attorney to develop and implement guidelines which are designed to fulfill the constitutional mandate.

The bill clarifies that nothing in the amended section (s. 921.143, F.S.) may be construed to impair a victim's statutory rights as set forth in ch. 960, F.S., or constitutional rights as stated in s. 16(b), Art. I of the Constitution of the State of Florida.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article V, s. 2, Fla. Const., provides that the Supreme Court "shall adopt rules for the practice and procedure in all courts." Just as the Legislature has the power to create substantive law, the court has the power to create rules of practice and procedure in the courts. The court has established rules regarding the acceptance of pleas in Florida Rule of Criminal Procedure 3.172. To the extent that this bill limits a trial judge's ability to accept or reject pleas, it can be argued that this bill violates the constitutional requirement that the Supreme Court make rules of practice and procedure in the courts.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

It is not clear what effect this provision may have on the state attorney's discretion and a defendant's willingness to enter into a plea agreement. Decisions are made by the state attorney to enter into plea bargaining in cases for many reasons which may or may not be approved of by officers involved in the case, or even the victim of the crime. Plea agreements can have provisions relating to the cooperation of the defendant in future investigations, provisions that the defendant enter drug or alcohol counseling, or provisions requiring the defendant make restitution to the victim.

Courts will be precluded from accepting plea agreements with illegal provisions as provided by the bill. However, the bill does not affect the court's discretionary authority to accept a plea from a defendant without any agreement from the state attorney. Based on the ruling in *Echevarria* and other cases, courts will not honor a plea agreement that it finds has been breached by the State, as to future actions (i.e., commenting, by letter, at the defendant's *future* parole hearing).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.