SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1870

SPONSOR: Criminal Justice Committee and Senator Clary

SUBJECT: Presentence Investigation Reports

DATE: March 29, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Cannon	CJ	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

Under current law, a trial court is permitted to order the Department of Corrections (DOC) to prepare a presentence investigation (PSI) report, which includes an offender's criminal, social, education, and economic history, for the purpose of assisting the court in determining the offender's sentence. The PSI is a non-public record which is only available to the court, counsel for the offender and state, and persons or agencies having a legitimate professional interest in the information. Victims cannot receive or review the PSI.

The committee substitute (CS) for SB 1870 would amend Florida Statutes to provide that the victim can receive a copy of the PSI, with certain confidential information redacted, from the DOC and/or the state attorney.

This CS substantially amends the following sections of the Florida Statutes: 921.231, 945.10, and 960.001.

II. Present Situation:

When a defendant has been found guilty or has pled no contest in a criminal case, the Department of Corrections may be ordered by the trial court to complete a presentence investigation (PSI) report. If the offender is found guilty of a first felony offense or a felony while under the age of 18 years old, the court may not impose a sentence, other than probation, without a PSI report. Fla.R.Crim.P. 3.710.

Contents of the PSI report

The report must include:

- a complete description of the situation surrounding the charged criminal activity, and the offender's description of the act, if he or she chooses to provide this information;

- the offender's sentencing status, e.g., whether the offender is on probation or is a first-time, habitual, or youthful offender, and the offender's prior record of arrests and convictions, along with any explanation given by the offender for the prior record;
- the offender's residence history, educational and employment background, monthly income, estimated debts, and social history, including family relationships, marital status, and interests;
- the offender's medical history, and if appropriate, his or her psychological evaluation;
- information about nonincarcerative environments to which the offender may be returned should the court not impose a jail or prison sentence;
- information about resources available to assist the offender;
- the PSI report drafter's views of the offender's motivations and an assessment of the offender's explanations for his or her criminal activity;
- a statement regarding the extent of the victim's loss or injury; and
- a disposition recommendation based on the appropriateness of treatment or supervision, the ability of the department to adequately supervise the offender in the community, and the existence of treatment which might assist the offender, but is not available in the community.

See s. 921.231, F.S.

Confidentiality and disclosure of the PSI report

Pursuant to both court rule and statute, an offender's PSI report is a non-public record which may not be inspected under ch. 119, Florida's Public Records Act. Fla.R.Crim.P. 3.712; s. 945.10, F.S. Furthermore, the courts have explained that statutorily a PSI contains both confidential and non-confidential information. *McClendon v. State*, 589 So.2d 353-354 (Fla. 1st DCA 1991). Section 945.10, F.S., provides that information concerning the offender's mental health, medical, and substance abuse records, and concerning a victim's statement and identity is confidential; whereas, s. 921.31, F.S., specifies that the portion of the PSI which addresses the basic classification and evaluation by the DOC is non-confidential.

Statute provides that a PSI may be released to the court, state attorney, defense counsel, and persons conducting legitimate research who sign a confidentiality agreement. s. 945.10(2), F.S. The subsection further provides that the PSI released to defense counsel may not include the victim's statement or address, or the statement or the address of a relative of the victim; however, the PSI provided to the state attorney and court may contain this information. Moreover, case law adds that any confidential information contained in the PSI, which is relied on by the trial court, must be released to a defendant in a *death penalty case*. *Gardener v. Florida*, 430 U.S. 349 (1977).

On the other hand, the court rules provide that the PSI may only be released to the sentencing and reviewing court, the parties, i.e., counsel for the state and the defense, as provided for in Fla.R.Crim.P. 3.713, and persons having a legitimate professional interest in the information. Fla.R.Crim.P. 3.713 provides that the trial court *may* disclose any part of the PSI to the parties, but that any information disclosed to one party must be disclosed to the other party. Moreover, the rule provides that the trial court *must* disclose any factual material, including but not limited to, the offender's education and employment history, prior record, and any mental or physical examinations. The purpose of this mandatory disclosure requirement is to enable the defendant to challenge any of the facts upon which the PSI is based. Again, it should be noted that case law requires that any confidential information contained in the PSI, which is relied on by the trial court, must be released to a defendant in a *death penalty case*.

The only Florida case construing the aforementioned statutes and the court rules is *Singletary v. Smith*, 23 Fla. L. Weekly D715 (Fla. 2d DCA March 11, 1998). In this case, the DOC gave the defense a PSI, from which the victims' statements were redacted, and gave the state an unredacted copy. On appeal, the Court ruled that the DOC should not release the confidential portions of the PSI to any party. Instead, the DOC should provide the trial court with an unredacted copy, and provide the defense and state identical copies in which all confidential information has been redacted. The court explained that then, pursuant to court rule, the trial court decides on a case-by-case basis whether any confidential information should be released, and noted that the court rule requires that any information disclosed to one party must be disclosed to the other. The court did not discuss the fact that statutorily the state is entitled to the victim's statements, while the defense is not.

Thus, under current law, the only conclusion which can be drawn is that: (1) in death penalty cases, the defense and the state may receive the PSI and any confidential information relied on by the court; and (2) in non-death penalty cases, the defense and the state may receive identical copies of the PSIs. The courts have not addressed whether the statute which allows the state access to confidential victim information, but which disallows the defendant to have this information can stand in the face of the court rule which requires that any PSI information released to one party must also be released to the other party.

Disclosure of PSI reports to victims

Given the strict legal limitations on PSI disclosure, Florida victims are not entitled to receive or review the PSI; however, at least five other states have legislation which permits victims to review or receive the PSI.

In Alabama, a law passed in 1995 which provides that the victim has the right to review a copy of the PSI, with the confidential information redacted, when the PSI is provided to the defendant or his counsel. Ala. Code s. 15-23-73 (1998). Idaho, likewise, allows the victim to review the PSI prior to sentencing, but adds that the victim must maintain the confidentiality of the PSI, and cannot disclose its contents to anyone, except the prosecutor and court. Idaho Code s. 19-5306 (1998). Alaska also allows a victim to review the PSI, upon request, but limits the review to: (1) the DOC's summary of the offense; (2) the defendant's version of the offense; (3) all statements and summaries of the victim; and (4) the DOC's sentence recommendation. Alaska Stat. s. 12.55.023 (1998); *See also* Mont. Code Ann. s. 46-18-113 (1997) (allowing the

prosecutor to disclose the contents of the PSI to the victim); Ariz. Rev. State. Ann. s. 13-4425 (allowing victim to receive a PSI report). There is no reported case law construing the validity, constitutionally or otherwise, of these statutes.

III. Effect of Proposed Changes:

If the CS is enacted, victims in Florida will be statutorily entitled to review a copy of the PSI. In order to accomplish this purpose, the CS amends s. 960.001, F.S. (Supp. 1998), which generally specifies a victim's legal rights, to provide that the state attorney, upon request, must permit a victim, a victim's parent or guardian if the victim is a minor, or the victim's next of kin in a homicide case to review a copy of the PSI, which excludes any confidential information pertaining to the offender's medical history, mental health, or substance abuse, or to another victim. Any person so reviewing the PSI must maintain the confidentiality of the report and must not disclose any of its contents, except during statements made to the court and state attorney. Furthermore, the CS amends s. 945.10, F.S., which specifies that a PSI is a confidential document, to cross-reference s. 960.001, F.S., so that it is clear that victims are exempted from the PSI's regular confidentiality protections.

Finally, the CS names this act the, "Blair Benson Act." Blair Benson was murdered in Alabama in 1990, and during the trial for this case, his father, Frederick Benson, was surprised to learn that even though the defendant was permitted to review the PSI report, he could not. As a result, Mr. Benson successfully lobbied the 1995 Alabama Legislature to pass a law providing Alabama victims with the right to review the report, and is now working to obtain the same legislation in Florida.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The CS will expand the availability of non-public record PSIs to victims.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article V, Section 2(a), Florida Constitution, provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts...." While this same constitutional provision states that a rule may be repealed "by a two-thirds vote of the membership of each house of the legislature," the Legislature does not have "constitutional authority to enact any law relating to practice and procedure." *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204 (Fla. 1973). In determining whether a legislative enactment

encroaches on the Supreme Court's rule-making authority, the courts have drawn a "distinction between practice and procedure, which is regulated by the Supreme Court and substantive law which is regulated by the Legislature." *Id*.

"Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion." *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972)(Adkins, J., concurring). Further, "[t]he term 'rules of practice and procedure' includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution." *Id*. On the other hand, "substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property." *Id*.

For example, in *Huntley v. State*, 339 So.2d 194 (Fla. 1976), the Supreme Court dealt with the issue of whether the Legislature could enact a statute which provided that the trial court was required to obtain a PSI for all felony defendants, when Fla.R.Crim.P. 3.710 only required a PSI in cases involving first felonies or a felony offender under 18 years of age. The Court ruled that the Legislature could not because the exercise of judicial discretion in sentencing proceedings is a procedural matter properly determined by the court rules. *See also Rhynes v. State*, 312 So.2d 520 (Fla. 4th DCA 1975) (holding that the regulation of PSIs is a matter within the constitutional rule making power of the court).

Concerning the release of PSI reports, the Supreme Court adopted Fla.R.Crim.P. 3.712 in 1972. The rule provides that the only persons/entities to which a PSI shall be available are the sentencing and reviewing court, the parties, and persons or agencies with a legitimate professional interest in the PSI. The CS expands this availability to victims, and thus, the question of whether the Legislature is permitted to enact such a statute, when a court rule currently addresses this matter, is presented.

It can be argued that the Legislature is permitted to expand the availability of PSIs because such is substantive in nature. In other words, the Legislature is merely declaring that a victim has a right to this information, and is not telling the court how to proceed. Indeed, the Legislature, throughout the statutes, routinely determines what types of records and information are public and non-public or confidential and non-confidential. *See* ch. 119 (the chapter defining public records and providing that the Legislature may exempt certain records and information from public disclosure).

On the other hand, however, based on the *Singletary* case discussed in the Present Situation section, it appears that the courts often adhere to the court rules concerning PSIs. For example in *Singletary*, the court, without discussing the fact that the state is statutorily entitled to a victim's statement contained in the PSI, held that the DOC is only permitted to provide the state and the defense with redacted PSI reports, and that only the trial court, pursuant to the court rules, should determine whether to distribute confidential victim statements to the parties. If the *Singletary* rationale were followed, the CS's expansion of PSI availability could be invalidated as procedural.

Nonetheless, any provisions of this CS deemed "procedural" could serve to alert the court to the legislative intent and the public desire. *See Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992). Further, in the past the court has chosen, in certain cases, to simply adopt the procedural portions of a legislative enactment as a rule of court. *See Timmons v. Combs*, 608 So. 2d 1, 2 (Fla. 1992); *Kalway v. Singeltary*, 708 So. 2d 267, (Fla. 1998)(adopting statutory time limitations).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The CS should have no fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

When considering whether to provide victims with a PSI, several public policy questions are presented. Policy supporting the provision of this information includes: (1) enabling a victim to see how his or her statement to the presentence investigation officer is characterized to the court, so that the victim is fully informed of what information the sentencing court has, if and when the victim makes a statement to the sentencing court; and (2) enabling the victim to better understand the court's sentencing decision by knowing what information the decision was based upon. On the other hand, policy limiting the dissemination of the PSI includes the fact that the report discusses highly sensitive information which sometimes concerns the offender's family members, or consists of statements made by persons other than the offender.

VIII. Amendments:

None.