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/SBs 54 & 902

SPONSOR: Criminal Justice Committee and Senators Lee and Silver

SUBJECT: Criminal Law

DATE: March 4, 1999 REVISED: 3/24/99

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Erickson | Cannon | CJ | Favorable/CS |
| 2. | Mannelli | Hadi | FP | Fav/1amendment |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |

## I. Summary:

Committee Substitute for Senate Bills 54 and 902 prohibits the use of voluntary intoxication as a defense to a prosecution for any criminal offense. Voluntary intoxication may not be considered in determining the existence of a mental state that is an element of the criminal offense. However, if the defendant, outside the presence of the jury, proves to the court by a preponderance of the evidence that he or she did not know that a substance taken was an intoxicating substance, the court may allow the evidence to be submitted to the jury or considered by the court.

Committee Substitute for Senate Bills 54 and 902 also provides for the reclassification of any felony offense to the next, higher felony degree if the victim of the felony is related by lineal consanguinity to the defendant or if the victim is the defendant's legal guardian.

This CS creates the following sections of the Florida Statutes: 90.4051; 775.0852.

## II. Present Situation:

### A. Voluntary Intoxication

Florida's Evidence Code currently deems all relevant evidence to be admissible, except as provided by law pursuant to s. 90.402, F.S. Relevant evidence is defined as evidence that tends to prove or disprove a material fact. Relevant evidence has a tendency to establish a fact in controversy or to render a proposition more or less probable. *See Zabner v. Howard Johnson's Inc. of Florida*, 227 So.2d 543 (Fla. 4th DCA 1969).

However, not all relevant evidence is admissible in Florida. Relevant evidence may be excluded by Florida's Evidence Code, the Rules of Civil and Criminal Procedure, other acts of the United States Congress, or the Florida Legislature. Currently, there are several instances in which certain evidence is not admissible in Florida courts. For example, relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues,

misleading the jury, or needless presentation of cumulative evidence under s. 90.403, F.S. For this type of exclusion of evidence, the trial court must use its discretion to determine whether the probative value of relevant evidence outweighs any unfair prejudices or confusion by the fact-finder.

There are other instances where otherwise relevant evidence is inadmissible in Florida's courts. For instance, Florida recognizes a number of "privileged" relationships from which otherwise relevant information would be inadmissible in court. Examples of such privileges include attorney-client, husband-wife, communications to clergy, and psychotherapist-patient privileges. Each has its own unique requirements or qualifications to be deemed "privileged" communications and, thus, inadmissible in court. Hearsay evidence is also inadmissible evidence in court unless otherwise provided by statute pursuant to s. 90.802, F.S. Florida provides for exceptions to the hearsay rule in instances where it does not matter whether the declarant is available and in instances when the declarant is unavailable under ss. 90.803-.804, F.S.

Florida currently allows evidence of intoxication to be offered by a defendant as long as it is deemed relevant by the court. This means that a judge or jury could hear evidence of voluntary intoxication by a criminal defendant if it is relevant to an element of the crime charged, thereby being relevant to the defendant's defense to the crime. Therefore, when the state must prove *mens rea*, or criminal intent, because the crime charged is a specific intent crime or where the defendant's mental state is relevant, it is likely that the court would allow evidence as to voluntary intoxication to be admitted into evidence and considered by the fact-finder in rendering its verdict. *See Frey v. State*, 708 So.2d 918 (Fla. 1998).

The state of Montana enacted a law that required a jury to be instructed that a defendant's intoxicated condition could not be considered by the fact-finder in determining the existence of a mental state which is an element of the offense. This law was challenged by a criminal defendant as being in violation of the Due Process Clause of the United States Constitution. In *Montana v. Egelhoff*, the United States Supreme Court upheld the Montana law finding that the restriction on introducing evidence as to voluntary intoxication does not offend a fundamental right. *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996).

**B. Lineal Consanguinity**

Florida's Fourth District Court of Appeals, has used the definition of "lineal consanguinity" provided, and the distinction between "lineal consanguinity" and "collateral consanguinity" articulated, in *Black's Law Dictionary* (5th ed. 1979). *See In re Estate of Angeleri*, 575 So.2d 794, 795, n. 1 (Fla. 4th DCA 1991).

*Black's* defines "lineal consanguinity" as "that [blood relationship] which subsists between persons of whom one is descended in a direct line from the other, as between son, father, grandfather, and so upwards in the direct ascending line; or between son, grandson, great-grandson, and so downwards in the direct descending line."

*Black's* distinguishes "lineal consanguinity" from "collateral consanguinity," which it defines as which *Black's* defines as "that [relationship] which subsists between persons who have the same ancestors, but who do not descend (or ascend) one from the other."

An illustration of the difference provided by *Black's*: "father and son are related by lineal consanguinity, uncle and nephew by collateral consanguinity."

There are a variety of statutory provisions provided for reclassification of felony offenses to the next, higher felony degree based upon circumstances present during the commission of the offense (e.g., wearing a mask, s. 775.0845, F.S.) or when specified assaults or batteries take place against particular persons (e.g., battery on a law enforcement officer, s. 784.07, F.S. (1998 Supp.)).

Under the Criminal Punishment Code, the court may sentence up to, and including, the maximum penalty provided for the felony degree of the offense for which the defendant is being sentenced. In other words, for a third degree felony, the court may sentence the defendant to the maximum penalty for a third degree felony, which is 5 years; for a second degree felony, 15 years; for a first degree felony, 30 years; for a first degree felony punishable by life or a life felony, for the defendant's natural life. s. 775.082, F.S. (1998 Supp.)

There are currently statutory provisions that provide for enhanced penalties for commission of certain felonies on family members, such as a sexual battery by a person in familial or custodial authority to the victim. *See, e.g.*, s. 794.011(8), F.S. The First District Court of Appeals has stated that it regards "the legislature to have intended, by its use of the words, 'familial or custodial,' to include within the statute's proscriptions any person maintaining a close relationship with children of the ages specified in the statute, and who lived in the same household with such children." *Coleman v. State*, 485 So.2d 1342, 1345 (Fla. 1st DCA 1986). *See State v. Rawls*, 649 So.2d 1350, 1353 (Fla. 1994) ("Consanguinity and affinity are strong indicia of a familial relationship but are not necessary)."

There is also a provision in the Code that provides for a 1.5 multiplier to total offense points, when the primary offense is an act of domestic violence, committed in the presence of a child under the age of 16, who is a family member of the victim or the perpetrator.

There are also a number of crimes, such as child abuse, lewd and lascivious behavior upon or in the presence of a child under the age of 16, and sexual battery on a minor, that are most often committed upon family members.

Incest under s. 826.04, F.S., "renders felonious marriage or sexual intercourse with a person to whom a defendant 'is related by lineal consanguinity.'" *Hendry v. State*, 571 So.2d 94 (Fla. 2d DCA 1990).

## III. Effect of Proposed Changes:

### A. Voluntary Intoxication Defense

Committee Substitute for Senate Bills 54 and 902 prohibits evidence of voluntary intoxication to be considered by the fact-finder in determining the existence of a mental state that is an element of the criminal offense. In other words, the CS prohibits the use of voluntary intoxication as a defense to any criminal offense.

Committee Substitute for Senate Bills 54 and 902 allows a defendant, outside the hearing of the jury, to have an opportunity to prove to the court by a preponderance of the evidence that he or she did not know that a substance was an intoxicating substance when he or she consumed, smoked, inhaled, injected, or otherwise ingested the intoxicating substance. If so proven, the court may allow the evidence to be submitted to the jury or considered by the court.

Committee Substitute for Senate Bills 54 and 902 defines the term "intoxicating substance" as a "substance capable of producing intoxication." The term "intoxication" is defined as "a disturbance of physical or mental capacities resulting from the introduction of a substance into the body." By this definition, an intoxicating substance could include harmful substances that have not been classified as controlled substances, e.g. new "designer drugs" that have not been classified as controlled substances by rule or by law. The definition could also include lawfully prescribed medication, unless the defendant proved he or she did not know that the medication taken was an intoxicating substance.

Since the CS does not address involuntary intoxication, it appears that a defendant could still raise involuntary intoxication as a defense, e.g., the defendant claims that a drug was placed in his drink without his knowledge.

**B. Lineal Consanguinity**

Committee Substitute for Senate Bills 54 and 902 also provides that the penalty for any felony shall be reclassified as provided if the victim of the felony is related by lineal consanguinity to the defendant or if the victim is the defendant's legal guardian. The reclassification is as follows: a third degree felony is punishable as a second degree felony; a second degree felony is punishable as a first degree felony; a first degree felony is punishable as a life felony.

The CS does not specify that physical injury to the victim must be present; therefore, the CS appears to apply to all non-violent felonies, as well, if the victim is related to the defendant by lineal consanguinity or is the defendant's legal guardian.

The CS does not capture for felony reclassification all persons who are sentenced for sexual battery by a person in "familial or custodial authority," since the reach of this offense goes beyond such cases where the victim is related by lineal consanguinity to the perpetrator. The Florida Supreme Court has noted that "[i]n today's society, the parameters of the traditional family have become much less clearly defined. Many children live in situations involving broken homes, where multiple residences and step-parents or live-in partners are the norm." *Saffor v. State*, 660 So.2d 668, 670 (Fla. 1995).

The effect of the escalation of a felony under the Criminal Punishment Code is significant with respect to the maximum penalty. For example, the escalation of a first degree felony by one felony degree can mean the difference between 30 years and the remainder of the defendant's natural life.

Committee Substitute for Senate Bills 54 and 902 does not specifically indicate whether the law, as proposed, is to be read in tandem with other laws, and if so, how it effects sentencing of defendants for incest and for cases in which the victim and the perpetrator are related by lineal consanguinity, and a family relationship requirement is an element of the sentencing offense.

The CS takes effect on July 1, 1999.

## 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 provision of SBs 54 and 902 prohibiting voluntary intoxication as a defense in criminal cases is not expected to cause a significant adverse fiscal impact on either the state correctional system or on the judicial system.

However, according to the Criminal Justice Impact Conference (CJIC), the reclassification of a felony to the next higher degree if the victim is related to the defendant by lineal consanguinity or is the defendant's legal guardian has the potential for a significant, although indeterminate adverse fiscal impact.

The CJIC is unable to project the fiscal impact of CS/SB 54 & 902 with any precision because of the amount of discretion embedded in the Criminal Punishment Code, but the bill is likely to result in longer sentences for persons subject to its provisions. As an illustrative example, there were over 8,300 domestic violence felony arrests in 1997 where the crime was committed upon a parent, child, or sibling victim. The Department of Corrections further notes that there were 946 admissions for child abuse (mostly committed by family members or guardians); and 2,040 admissions for lewd, lascivious or indecent assault or act upon or in the presence of a child (mostly committed by family members or guardians).

By narrowing the range of offenses subject to reclassification, Amendment #1 by the Fiscal Policy Committee should mitigate a good deal of the adverse potential fiscal impact over the next five years.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Amendments:

#1 by Fiscal Policy:
Excludes from the felony reclassification provisions all non-forcible felonies, familial sexual battery, incest, other felonies in which lineal consanguinity is an element of the offense, and offenses in which the victim's relationship to the defendant would be subject to a greater penalty under another section of the statutes.