

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 1496

SPONSOR: Criminal Justice Committee and Senator Saunders

SUBJECT: Sentencing

DATE: March 23, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 1496 does the following:

- Provides without exception, that when criminal offenses are committed in one criminal episode or transaction and each require proof of an element the other does not, they are separate criminal offenses and multiple convictions and sentences are permissible;
- Enhances penalties if the court finds at sentencing that the defendant committed the charged offense for the purpose of furthering, benefiting, or promoting a criminal street gang;
- Ranks in level 6 of the offense severity ranking chart the offense of use of a computer to facilitate or solicit sexual conduct of or with a minor.

This CS substantially amends the following sections of the Florida Statutes: 775.021; 874.04; 921.0024; and 921.16.

II. Present Situation:

A. The Blockburger Test

Section 775.021, F.S., provides that when a criminal commits separate criminal offenses in one criminal transaction or episode and is adjudicated guilty, the criminal shall be sentenced separately for each offense. This provision codifies the test in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). “*Blockburger* provides that ‘where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional element that the other does not.’” *Khan v. State*, 704 So. 2d 1129, 1130 (Fla. 4th DCA 1998), quoting *Blockburger*, 284 U.S. at 304.

While codifying the *Blockburger* test, s. 775.021, F.S., provides three exceptions to this sentencing rule: offenses which require identical elements of proof, offenses which are degrees of the same offense as provided by statute, and offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

As a result of these three exceptions, courts have reversed convictions and sentences because offenses were separate under the provision codifying the *Blockburger* test and yet not separate on the basis of the exceptions provision. *See, e.g., Sirmons v. State*, 634 So. 2d 153 (Fla. 1994); *Khan, supra*; and *J.M., a Child v. State*, 709 So. 2d 157 (Fla. 1998). See also the following cases finding a double jeopardy violation for such dual convictions: *State v. Anderson*, 695 So.2d 309 (Fla. 1997); *State v. McDonald*, 690 So. 2d 1317 (Fla.2d DCA 1997); *Thompson v. State*, 650 So. 2d 969 (Fla. 1994); and *Thompson v. State*, 585 So. 2d 492 (Fla. 5th DCA 1991), *approved*, 607 So. 2d 422 (Fla. 1992).

B. Criminal Street Gang Sentencing Enhancement: Constitutionality

Section 874.04, F.S., provides for the enhancement of the degree of a crime if the offender was a member of a criminal street gang at the time of the commission of the offense. This provision was recently held to be unconstitutional by the Fifth District Court of Appeals because it does not require any nexus between the defendant's offense to be enhanced and the defendant's membership in a criminal street gang. *See O.C. v. State*, 23 Fla. L. Weekly D2465 (Fla. 5th DCA; November 6, 1998). Other states with similar statutes require a nexus between the offense and the defendant's gang membership. *See, e.g., People v. Gardeley*, 14 Cal. 4th 605, 59 Cal. Rptr. 2d 356, 927 P. 2d 713 (1997), in which the California Supreme Court upheld the constitutionality of California's statute which does require that the offense be "gang-related."

According to the Office of the Attorney General, this issue is currently before the Florida Supreme Court. The Office of the Attorney General anticipates that criminal street gang statutes will be an important tool for law enforcement in the upcoming efforts to address illegal drugs in Florida.

Section 921.0024, F.S. (1998 Supp.), which relates to the Criminal Punishment Code worksheet computations and scoresheets, provides for the multiplication of subtotal sentence points by 1.5 if the offender is convicted of the primary offense and is found to have been a member of a criminal street gang at the time of the commission of the primary offense pursuant to s. 874.04, F.S.

C. Computer Pornography Sentencing

Section 847.0135(2), F.S., prohibits a person from using a computer to facilitate, encourage, offer, or solicit sexual conduct of or with a minor.

Any person who violates this provision commits a third degree felony. Under the Criminal Punishment Code, a court could sentence a violator up to 5 years of imprisonment, which is the maximum penalty for a third degree felony.

Under the Code, the lowest permissible sentence is established by a calculation of total sentence points which are based, in part, on the offense severity ranking level of the current offense.

Computer solicitation of a minor for sexual conduct is not specifically ranked in s. 921.0022, F.S. (1998 Supp.), the offense severity ranking chart. Offenses which are not specifically ranked “default” to a level ranking prescribed under s. 921.0023, F.S. (1998 Supp.), based on their felony degree. An unranked third degree felony “defaults” to a level 1 ranking. Consequently, the computer solicitation offense is a level 1 offense, which means that the lowest permissible sentence would be a non-prison sentence (absent significant prior offenses).

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 1496 amends s. 775.021, F.S., to delete the three exceptions to the *Blockburger* test, which is codified in this section, thereby providing only for application of the *Blockburger* test concerning the conviction and punishment of separate offenses.

The effect of the amendment is that the section, provides without exception, that when criminal offenses committed in one criminal episode or transaction each require proof of an element the other does not, they are separate criminal offenses and multiple convictions and sentences are permissible.

The CS also amends s. 874.04, F.S., which provides for enhanced penalties for felonies and misdemeanors, or any delinquent act or violation of a law which would be a felony or misdemeanor if committed by an adult, if the court finds at sentencing that the defendant is a member of a criminal street gang. Reference to “a criminal street gang” is stricken and replaced with language that provides that the court at sentencing must find that the defendant “committed the charged offense for the purpose of furthering, benefiting, or promoting a criminal street gang.”

This amendment is apparently intended to overcome the constitutional problem that the Fifth District Court of Appeals, *see OC, supra*, found regarding an insufficient nexus between the offense and gang membership.

Similar changes are made to s. 921.0024, F.S. (1998 Supp.), as it relates to the Criminal Punishment Code scoresheet and that part of the worksheet key explaining the 1.5 sentence multiplier applied to the offender who has been convicted of the primary offense and is found to have been a member of a criminal street gang at the time of the commission of the primary offense pursuant to s. 874.04. F.S.

The CS also amends s. 921.0022, F.S. (1998 Supp.), to rank in level 6 of the offense severity ranking chart the offense of use of a computer to facilitate or solicit sexual conduct of or with a minor.

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 Estimating Conference has estimated that CS/SB 1496 will have an insignificant fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The changes to Florida law described in this analysis arise out of recommendations from a task force composed of attorneys in the Office of the Attorney General, prosecutors, law enforcement officials, and other interested parties.

VIII. Amendments:

None.