

**STORAGE NAME:** h2059a.cj

**DATE:** April 20, 1999

**HOUSE OF REPRESENTATIVES  
AS REVISED BY THE COMMITTEE ON  
CRIMINAL JUSTICE APPROPRIATIONS  
ANALYSIS**

**BILL #:** HB 2059

**RELATING TO:** Sentencing

**SPONSOR(S):** Committee on Crime and Punishment

**COMPANION BILL(S):** SB 1496 (s).

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) CRIME AND PUNISHMENT YEAS 6 NAYS 0
  - (2) CRIMINAL JUSTICE APPROPRIATIONS YEAS 9 NAYS 0
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

HB 2059 removes the exceptions contained in section 775.021(4)(b) to the rule that the intent of the legislature is to convict and sentence a defendant for each criminal offense committed in the course of a criminal episode. This will bring Florida law into conformity with federal law by clarifying that in order to avoid a double jeopardy violation, each offense that a defendant is convicted of must contain a statutory element that the other crimes do not. This test is more favorable to the prosecution than the current Florida law which places restrictions on this test.

The bill also clarifies 874.04 and 921.0024 relating to enhanced sentencing for criminal street gang members. The statute currently provides that upon a finding by the trial court that the defendant was a member of a criminal street gang at the time of the offense, the penalty for the crime can be enhanced. The bill provides that the penalty for an offense can be enhanced upon a finding by the trial court that the defendant committed the offense for the purpose of furthering, benefiting or promoting a criminal street gang. This change is intended to ensure that the courts will not interpret the statute as unconstitutionally limiting a defendant's freedom of association.

HB 2059 ranks the offense of use of a computer to facilitate or solicit sexual conduct with a minor as a level 6 offense. Previously, the crime was not listed on the offense severity chart and was therefore scored as a level one offense.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

**Intent of Legislature to Convict of Each Criminal Offense in Criminal Episode**

There is a violation of the Double Jeopardy provisions of the United States and Florida constitutions if a person is convicted of the same offense twice. "In determining the constitutionality of multiple convictions and sentences for offenses arising from the same criminal transaction, the dispositive question is whether the legislature intended to authorize separate punishments for the two crimes." M.P. v. State, 682 So.2d 79 (Fla. 1996). Section 775.021(4) provides that the intent of the legislature is to convict and sentence a defendant for each separate criminal offense committed in the course of one criminal episode. The statute also provides that the principle of lenity set forth in 775.021(1) is not to be used to determine legislative intent in this area. Offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleadings or the proof adduced at trial. This rule of construction codifies the holding of the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) that analysis of a double jeopardy issue is to be done by comparing the statutory elements of the crime to determine whether each offense contains an element that the other does not. State v. Maxwell, 682 So.2d 83, 84 (Fla.1996).

Section 775.021(4)(b) also provides the following exceptions to the rule of construction that the legislature intends that defendants be convicted and sentenced for each criminal offense committed in the course of a criminal episode:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

**Enhanced Penalties for Criminal Street Gang**

Section 874.04 provides that upon a finding by the trial court at sentencing that the defendant was a member of a criminal street gang at the time of the offense, the penalty for the offense may be enhanced. The definition section of the statute defines a criminal street gang as an organization or group of three or more persons who have a common name or identifying signs, colors, or symbols and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity. Sec. 874.03(1), Fla. Stat. Upon a finding by the trial court that a defendant is a member of a criminal street gang, the penalty for the offense shall be enhanced as follows:

- A misdemeanor of the second degree may be punished as if it were a misdemeanor of the first degree.
- A misdemeanor of the first degree shall be punished as if it were a felony of the third degree.
- A felony of the third degree may be punished as if it were a felony of the second degree.
- A felony of the second degree may be punished as if it were a felony of the first degree.
- A felony of the first degree may be punished as if it were a life felony.

Section 921.0024 provides that on the Florida Criminal Punishment Code worksheet, the score a defendant receives for the crime should be multiplied by 1.5 if a defendant is a criminal street gang member.

In O.C. v. State, 23 Fla.L.Weekly D2465 (Fla. 5th DCA November 6, 1998), the defendant was convicted of attempted aggravated battery. The State filed a motion to have the defendant declared a gang member for enhancement purposes pursuant to section 874.04, Florida Statutes.

The Fifth District held that the statute unconstitutionally limited freedom of association. The court found that the statute enhanced punishment based on gang membership without requiring that the gang membership be related to the charged crime and in effect, increased penalties based on association with other people who may or may not have committed unrelated criminal acts.

### **Use of Computer to Facilitate Sexual Conduct with a Minor**

Section 847.0135(2) prohibits the use of a computer to facilitate or solicit sexual conduct with a minor. The crime is not listed on the offense severity ranking chart of the Criminal Punishment Code. Sec. 921.00212. A third degree felony that is not listed on offense severity ranking chart is scored as a level one offense. Sec. 921.0023.

## B. EFFECT OF PROPOSED CHANGES:

### **Intent of Legislature to Convict of Each Criminal Offense in Criminal Episode**

The bill would remove the three exceptions to the rule that the legislature intends to convict and sentence a defendant for each criminal offense committed in the course of a criminal episode. The inclusion of the exceptions has created confusion in the law as to when offenses are separate. In Sirmons v. State, 634 So.2d 153 (Fla. 1994), the defendant was convicted of grand theft of an automobile and robbery with a weapon which arose from a single taking of an automobile at knife point. The Florida Supreme Court found that 775.021(4)(b)(2), barred the dual convictions because "both offenses are aggravated forms of the same underlying offense distinguished only by degree factors." Likewise, in State v. McDonald, 691 So.2d 1317 (Fla. 2nd DCA 1997), the defendant was convicted of obtaining property through use of forged credit card and grand theft. The court compared the statutory elements of the crimes and determined that each offense contained an element that the other did not. However, the court decided that the two offenses were degrees of the same offense and that a defendant could not be convicted of violating both provisions.

The elimination of the three exceptions will clarify the intent of the legislature that the Blockburger test be used to determine whether convictions for two or more offenses violates double jeopardy. The Blockburger test provides that in order to avoid a double jeopardy violation, each offense that a defendant is convicted of must contain a statutory element that the other crime does not. This test is more favorable to the prosecution than the current law which places restrictions on this test.

### **Enhanced Penalties for Criminal Street Gang**

The bill amends sec. 874.04 to provide that an offense can be reclassified upon a finding by the trial court that the defendant committed the offense for the purpose of furthering, benefiting or promoting a criminal street gang.

The bill also amends section 921.0024 to provide that if a defendant is convicted of an offense which was committed for the purpose of furthering, benefiting or promoting a criminal street gang, the points scored for the offense shall be multiplied by 1.5. These changes are intended to correct any potential constitutional problem in the existing statute by requiring a nexus between a defendant's gang membership and the offense for which the defendant is being sentenced. These changes would render the statute substantially similar to California's statute. The California Supreme Court has upheld the constitutionality of its statute. People v. Gardeley, 927 P.2d 713 (Ca. 1997).

### **Use of Computer to Facilitate Sexual Conduct with a Minor**

The bill would rank the crime of use of a computer to facilitate or solicit sexual conduct with a minor as a level 6 offense. This crime would have the same ranking as the crime of solicitation of a child, via a computer service, to commit an unlawful sex act which is prohibited by section 847.0135(3).

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?  
No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?  
No.
- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?  
No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?  
No.
- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?  
No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:
  - (1) Who evaluates the family's needs?  
N/A
  - (2) Who makes the decisions?  
N/A
  - (3) Are private alternatives permitted?  
N/A
  - (4) Are families required to participate in a program?  
N/A
  - (5) Are families penalized for not participating in a program?  
N/A
- b. Does the bill directly affect the legal rights and obligations between family members?  
No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

s. 775.021(4)(b), 874.04, 921.0024, 921.15, Florida Statutes.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Removes the exceptions to the rule of construction stating that the legislature intends to convict and sentence for each criminal offense committed in the course of a criminal episode.

Section 2: Provides for enhanced sentencing upon a finding by the trial court that the defendant committed the offense for the purpose of furthering, benefiting or promoting a criminal street gang.

Section 3: Ranks the crime of use of a computer to facilitate or solicit sexual conduct of or with a minor as a level 6 offense.

Section 4: Amends the Criminal Punishment Code relating to an offense committed for the purpose of furthering, benefiting or promoting a criminal street gang.

Section 5: Provides that the bill will take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has not yet met to determine the prison bed impact of this bill. However, it is anticipated that any fiscal impact would be insignificant.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The committee substitute does not require local governments to expend funds or to take any action requiring the expenditure of funds. Therefore, it is exempt from the provisions of Article VII, Section 18 of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce anyone's revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

When PCB 03 was workshopped on March 3, 1999, it contained the following provisions that are no longer part of the Bill:

- The proposed committee bill provided that the rule of construction contained in section 775.021(1) which states that when the language of a statute is susceptible to differing constructions, it shall

be construed in favor of the accused, does not apply to sentencing proceedings after a defendant has pled guilty or been found guilty.

- The proposed committee bill amended the Punishment Code to provide that points on a sentencing worksheet for possession of a firearm are to be assessed regardless of whether the defendant obtained the firearm before or during the commission of the felony.
- The proposed committee bill provides that all sentences, including enhanced sentences such as habitual offender sentences, shall be imposed consecutively if charged in separate informations or indictments and imposed concurrently if charged in the same information or indictment, regardless of whether the offenses occurred in a single criminal episode or multiple criminal episodes.

After the PCB was workshopped, these sections were removed and the provision ranking the crime of "use of a computer to facilitate or solicit sexual conduct of or with a minor" as a level 6 offense was added. The PCB was approved by the Committee on Crime & Punishment on March 18, 1999.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

HB 2059 passed out of the Criminal Justice Appropriations Committee on April 20, 1999 with one amendment. The amendment provides for a felony penalty for theft or reproduction of an examination administered by or through the Department of Education, State Board of Education, or Commissioner by any person 18 years of age or older.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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