

# 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's 276 & 394

SPONSOR: Criminal Justice Committee and Senators Saunder and Klein

SUBJECT: Sentencing

DATE: January 20, 2000

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's 276 and 394 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 benefiting, promoting, or furthering the interests of a criminal street gang activity;
- 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.
- Ranks in level 6 of the offense severity ranking chart the offense involving a fourth or subsequent conviction of boating under the influence.

The CS substantially amends the following sections of the Florida Statutes: 775.021; 874.04; 921.0022; and 921.0024.

## 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, though offenses were separate under the provision of s. 775.21, F.S., codifying the *Blockburger* test, they were not separate on the basis of the exceptions provision of this section. *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 Florida Supreme Court in the case of *O.C. v. State*, Case No. 94,513 (Fla. September 16, 1999) (slip opinion). The Court held that this section “violates a defendant’s substantive due process rights because it subjects the defendant to conviction for a higher degree crime than originally charged, resulting in an increased penalty range, based solely upon a defendant’s ‘simple association’ with others, who may or may not be criminals.” Section 874.04, F.S., did not require any nexus between the particular criminal act and the gang membership. It “lacked a rational relationship to the legislative goal of reducing gang violence or activity. . . .” *Id.*

In reaching its holding the Florida Supreme Court noted the Fifth District Court of Appeal’s distinction between a California gang enhancement statute upheld by the California Supreme Court and s. 874.04, F.S. The California statute provided that a defendant’s sentence could be enhanced if the crime “was committed for the gang’s benefit and with the specific intent to assist in criminal conduct by gang members,” which was distinguishable from s. 874.04, F.S., which imposed an enhanced penalty for gang membership. *Id.*

Section 921.0024, F.S., 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., the offense severity ranking chart. Offenses which are not specifically ranked “default” to a level ranking prescribed under s. 921.0023, F.S., 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).

Similar to the rated computer solicitation offense, s. 327.35(2)(b), F.S., which provides that a fourth or subsequent conviction of boating under the influence is a third degree felony, is an unranked third degree felony and “defaults” to a level 1 ranking.

### III. Effect of Proposed Changes:

Committee Substitute for Senate Bills 276 and 394 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. As a result of the CS, the court at sentencing must find that the defendant “*committed the charged offense for the purpose of benefiting, promoting, or furthering the interests . . . of a criminal street gang. . .*” This amendment is intended to overcome the constitutional problem identified by the Florida Supreme Court in *O.C. v. State, supra*, by making the penalty enhancement contingent upon there being a criminal act committed for the benefit of a criminal street gang.

Similar changes are made to s. 921.0024, F.S., 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., 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, thereby eliminating the current ranking by “default” of this offense under s. 921.0023, F.S. The CS also ranks in level 6 the third degree felony offense in s. 327.35(2)(b), F.S., (fourth or subsequent BUI conviction) which is currently ranked in level 1 by “default.”

The act takes effect July 1, 2000.

**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:

Insignificant.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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