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DATE: January 22, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 479
RELATING TO: Elderly/Disabled Adults/Exploitation
SPONSOR(S): Representatives Slosberg and Gannon
TIED BILL(S): none

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

- (1) JUDICIAL OVERSIGHT
 - (2) CRIME PREVENTION, CORRECTIONS & SAFETY
 - (3) COUNCIL FOR SMARTER GOVERNMENT
 - (4)
 - (5)
-

I. SUMMARY:

Florida criminal law currently prohibits "exploitation of an elderly person or disabled adult." The present statute of limitations for this crime varies from three to four years depending on the value of the assets stolen. HB 479 replaces this with a five-year statute of limitations, regardless of offense level. Like the general criminal statute of limitations, this new criminal statute of limitations is tolled during any time when the defendant is continuously absent from the state, or is within the state but has no reasonably ascertainable place of residence or employment. However, the new statute of limitations may only be tolled for a year on this basis, rather the three years currently provided for in the general criminal statute of limitations.

The Civil Remedies for Criminal Practices Act ("CRCPA") creates treble-damages civil causes of action for the theft-related crimes defined by the Anti-Fencing Act ("AFA"). AFA creates equitable civil remedies for those crimes, including state forfeiture and dissolution authority. CRCPA and AFA also establish a five-year statute of limitations for these civil actions, which is tolled during the pendency of, and up to two years after, any criminal proceedings arising out of the same facts. This bill provides that the statute of limitations on a civil case involving exploitation of an elderly person or disabled adult is the same as under CRCPA and AFA.

There are constitutional and other concerns regarding this bill. See Section V. Comments herein.

This bill does not appear to have a fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain: This bill extends statutes of limitations.

B. PRESENT SITUATION:

Criminal Law Regarding Exploitation of an Elderly Person or of a Disabled Adult.

Chapter 825, F.S., provides criminal penalties for certain actions constituting abuse, neglect, or exploitation of an elderly person or a disabled adult. Section 825.011(4), F.S., defines "disabled adult" to mean

a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living.

Section 825.011(5), F.S., defines "elderly person" to mean

a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

Section 825.103(1), F.S., provides that "exploitation of an elderly person or disabled adult" means:

(a) Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:

1. Stands in a position of trust and confidence with the elderly person or disabled adult;
or

2. Has a business relationship with the elderly person or disabled adult; or

(b) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or

permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent.

Section 825.101(11), F.S., defines "position of trust and confidence" with respect to an elderly person or a disabled adult, to mean the position of a person who:

- (a) Is a parent, spouse, adult child, or other relative by blood or marriage of the elderly person or disabled adult;
- (b) Is a joint tenant or tenant in common with the elderly person or disabled adult;
- (c) Has a legal or fiduciary relationship with the elderly person or disabled adult, including, but not limited to, a court-appointed or voluntary guardian, trustee, attorney, or conservator; or
- (d) Is a caregiver of the elderly person or disabled adult or is any other person who has been entrusted with or has assumed responsibility for the use or management of the elderly person's or disabled adult's funds, assets, or property.

Exploitation of an elderly person or disabled adult ("exploitation") is a first-degree felony if the funds, assets or property stolen are valued at \$100,000 or more,¹ a second-degree felony if valued between \$20,000 and \$100,000,² and a third-degree felony if valued at less than \$20,000.³

The general statute of limitations for criminal cases specifies that:

- "prosecution for a capital felony, a life felony or a felony that resulted in a death may be commenced at any time;"⁴
- a first-degree felony must be prosecuted within four years;⁵
- any other felony within three years;⁶
- a first-degree misdemeanor within two years;⁷ and
- a second-degree misdemeanor or noncriminal violation within one year.⁸

Thus, in general, the statute of limitations for exploitation is 4 years if the funds, assets or property stolen are valued at \$100,000 or more; and is 3 years if valued at less than \$100,000.

The general criminal statute of limitations is tolled "during any time when the defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work

¹ See s. 825.103(2)(a), F.S.

² See s. 825.103(2)(b), F.S.

³ See s. 825.103(2)(c), F.S.

⁴ Section 775.15(1)(a), F.S.

⁵ See s. 775.15(2)(a), F.S.

⁶ See s. 775.15(2)(b), F.S.

⁷ See s. 775.15(2)(c), F.S.

⁸ See s. 775.15(2)(d), F.S.

within the state.”⁹ However, this tolling cannot extend the period of limitations by more than three years.¹⁰

Finally, s. 775.15(3), F.S., provides that even if the criminal statute of limitations has expired,

a prosecution may still be commenced for:

(a) Any offense, a material element of which is either fraud or a breach of fiduciary obligation, within 1 year of after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself or herself a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than 3 years.

(b) Any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment, within 2 years from the time he or she leaves public office or employment, or during any time permitted by any other part of this section, whichever time is greater.

Civil Cause of Action for Exploitation.

The Florida Anti-Fencing Act (“AFA”)¹¹ defines various theft-related crimes (“theft”). It also creates civil causes of action for equitable relief with respect to these crimes, including the dissolution of business enterprises¹² and the forfeiture of criminal proceeds to the state.¹³ The Civil Remedies for Criminal Practices Act (“CRCPA”)¹⁴ creates civil causes of action for treble damages for these same crimes¹⁵ (as well as for others).¹⁶ Both acts provide a special statute of limitations for proceedings arising out of theft. Any such litigation may be commenced up to five years after the cause of action accrues.¹⁷

With respect to criminal proceedings, the five-year CRCPA/AFA “period of limitations does not run during any time when the defendant is continuously absent from the state or is without a reasonably ascertainable place of work within the state, but in no case shall this extend the period of limitation otherwise applicable for more than one year.”¹⁸ Finally, during one proceeding that alleges theft, and for two years following the end of that first proceeding, the statute of limitations is tolled with respect to any future proceeding arising, in whole or in part, out of the same facts as the first proceeding.¹⁹

⁹ Section 775.15(6), F.S.

¹⁰ *See id.*

¹¹ *See* ss. 812.012-812.037, F.S.

¹² *See* ss. 812.035(1)(b)-(e), F.S.

¹³ *See* s. 812.035(2), F.S.

¹⁴ *See* ch. 772, F.S.

¹⁵ *See* s. 772.11, F.S.

¹⁶ *See, e.g.,* s. 772.104, F.S. (civil cause of action for other “prohibited activities”); s. 772.12, F.S. (“Drug Dealer Liability Act”).

¹⁷ *See* s. 772.17, F.S. (CRCPA); s. 812.035(10), F.S. (AFA). Unlike AFA’s, the CRCPA statute of limitations refers only to civil actions. This appears to be because CRCPA also addresses several other crimes, other than those defined in AFA, which could potentially have their criminal statutes of limitations reduced if the CRCPA five-year statute of limitations applied to them. *See, e.g.,* s. 772.102(1)(a)13, F.S. (referencing ch. 782, F.S., relating to homicide). Conversely, AFA’s statute of limitations for equitable relief, unlike CRCPA’s for treble damages, also applies to suits under s. 812.081, F.S., for theft, embezzlement or unlawful copying of trade secrets. *See* s. 812.035(10), F.S.

¹⁸ *See* s. 812.035(10), F.S.

¹⁹ *See id.*; s. 772.17, F.S.

The general statutes of limitations for civil cases are provided in ch. 95, F.S. Suits for fraud,²⁰ or for any other intentional tort, must be brought within four years of when the cause of action accrues.²¹ This four-year statute of limitations applies to any intentional tort for which the legislature has not specified a different statute of limitations.

C. EFFECT OF PROPOSED CHANGES:

Criminal Law Regarding Exploitation of an Elderly Person or of a Disabled Adult.

This bill provides a five-year statute of limitations in which to bring to criminal charges for exploitation of an elderly person or disabled adult ("exploitation"), regardless of offense level. This statute of limitations "does not run during any time when the defendant is continuously absent from the state or is without a reasonably ascertainable place of abode or work within the state," although the statute can only be tolled for one year on this basis.

Civil Cause of Action for Exploitation.

This bill further provides that the Anti-Fencing Act/Civil Remedies for Criminal Practices Act special statute of limitations for theft does not run during any civil, criminal or other proceeding for exploitation if the theft proceeding is based in whole or in part on the same facts as the exploitation proceeding. If this is the case, the statute of limitations as to the theft proceeding continues to be tolled for two years after the exploitation proceeding ends.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

²⁰ See s. 95.11(3)(j), F.S.

²¹ See s. 95.11(3)(o), F.S.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or take an action requiring expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

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

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Single-Subject Requirement

Article III, s. 6 of the Florida Constitution provides that “[e]very law shall embrace but one subject and matter properly connected therewith.” It is possible that a court might find that this bill violates that provision.

In *State v. Thompson*²² and *Heggs v. State*²³ the Supreme Court of Florida found that a bill containing both a criminal penalty and a civil cause of action violated the single-subject requirement. The Court has ruled that provisions of a bill must have a “natural and logical connection” in order to survive single-subject scrutiny.²⁴ A court might possibly find that, because this bill’s provisions relate entirely to exploitation, they have such a connection. Conversely, however, a court could also find that, because this bill intermingles criminal and civil statutes of limitations (which have been treated in fundamentally different ways, see below), it lacks such a connection and thus violates the single-subject requirement. In that case, the likely remedy would be for the court to strike down the entire statute.

Ex Post Facto Laws and Criminal Statutes of Limitations

Ex post facto laws are prohibited by both Art. I, s. 9 of the United States Constitution, and Art. I, s. 10 of the Florida Constitution. The Supreme Court of the United States first construed this prohibition over two hundred years ago in *Calder v. Bull*.²⁵ In his opinion in *Calder*, Justice Chase noted that the expression “*ex post facto*” “had been in use long before the revolution,”²⁶ and summarized what fell within the prohibition:

²² 750 So.2d 643 (Fla. 1999).

²³ 759 So. 2d 620 (Fla. 2000).

²⁴ *Chenoweth v. Kemp*, 396 So.2d 1122, 1124 (Fla. 1981) (quoting *Board of Public Instruction v. Doran*, 224 So.2d 693, 699 (Fla. 1969)).

²⁵ 3 U.S. (3 Dall.) 386 (1798).

²⁶ *Id.* at 391 (Chase, J.).

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.²⁷

In short, legislation may not retroactively alter substantive criminal law.²⁸ However, “[a] retrospective law that merely alters procedural rather than substantive matters, without increasing the punishment or changing the elements of the crime, is not an ex post facto law, even though it may work to the disadvantage of a criminal defendant.”²⁹

The Florida Supreme Court has ruled that criminal statutes of limitations are substantive rather than procedural.³⁰ Hence, a crime is governed by the statute of limitations in effect when it is committed.³¹ Exploitation committed before this bill’s effective date would therefore probably be governed by the current three-part, offense-level-specific criminal statute of limitations.

Court Rules and Civil Statutes of Limitations

Article V., s. 2(a) of the Florida Constitution provides that the “Supreme Court shall adopt rules for the practice and procedure in all courts.”

Florida courts protect their rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Florida Supreme Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.³² In 1991, the Court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaims was unconstitutional because it conflicted with an existing rule of civil procedure.³³

Essentially, the rule is that substance is legislative and procedure is judicial. In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure in this way:

The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." 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. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of

²⁷ *Id.* at 390 (Chase, J.).

²⁸ *See, e.g., Miller v. Florida*, 482 U.S. 423 (1987); *State v. Hootman*, 709 So.2d 1357 (Fla. 1998); *Gwong v. Singletary*, 683 So.2d 109 (Fla. 1996).

²⁹ 10 Fla. Jur. 2d Constitutional Law § 345 (1997) (citing *Miller*; *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995); *Dugger v. Rodrick*, 584 So.2d 2 (Fla. 1991)).

³⁰ *See Rubin v. State*, 390 So.2d 322 (Fla. 1980).

³¹ *See State v. Wadsworth*, 293 So.2d 345, 347 (Fla. 1974).

³² *See In re Connors*, 332 So.2d 336 (Fla. 1976).

³³ *See Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991).

individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The 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.³⁴

This "twilight zone" remains to this day, and causes in the analysis of many enactments a difficult determination of whether a matter is procedural or substantive.

Two recent rulings on the distinction between substantive law and rulemaking power have involved whether a civil statute of limitations is substantive law or a rule of procedure. In *Kalway v. Singletary*,³⁵ the Court upheld a thirty-day statute of limitations for the filing of an action challenging a prisoner disciplinary proceeding. In discussing the separation of powers issue, the Court said:

As a practical matter, the Court on occasion has deferred to the expertise of the legislature in implementing its rules of procedure. See, e.g., *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So.2d 195, 195 (Fla.1996) (noting that the need for juvenile detention shall be made "according to the criteria provided by law" and explaining that these "include those requirements set out in section 39.042, Florida Statutes (1995)"); *In re Family Law Rules of Procedure*, 663 So.2d 1049, 1086 (Fla.1995) (setting forth amended rule 12.740, which provides that all contested family matters may be referred to mediation, "[e]xcept as provided by law"). The setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts.³⁶

Two years later, the Legislature passed a statute of limitations applicable to postconviction death penalty cases as part of the Death Penalty Reform Act ("DPRA"). "Technically, habeas corpus and other postconviction relief proceedings are classified as civil proceedings."³⁷ In ruling the DPRA's statute of limitations unconstitutional, the Supreme Court declared: "we find that the DPRA is an unconstitutional encroachment on this Court's exclusive power to 'adopt rules for the practice and procedure in all courts.'"³⁸ The Court ruled that it has "exclusive authority to set deadlines for postconviction motions" under the rulemaking authority of Art. V, s. 2(a), Fla. Const.³⁹

If a court were to rule that the tolling of civil statutes of limitations by this bill is procedural rather than substantive, then the court might perhaps strike down the changes the bill makes to those statutes of limitations as an encroachment upon the judiciary's exclusive rulemaking power.

B. RULE-MAKING AUTHORITY:

None.

³⁴ *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

³⁵ 708 So.2d 267 (Fla. 1998).

³⁶ *Id.* at 269.

³⁷ *State ex rel. Butterworth v. Kenny*, 714 So.2d 404, 409 (Fla. 1998).

³⁸ *Allen v. Butterworth*, 756 So.2d 52, 54 (Fla. 2000).

³⁹ *Id.* at 62 (rejecting a comparison to the holding in *Kalway*).

C. OTHER COMMENTS:

It is unclear whether the “[n]otwithstanding” clause in this bill cancels the current applicability of the general criminal statute of limitations’ extensions, for fraud or breach of fiduciary duty and for misconduct in public office or employment, with respect to exploitation.

The new criminal statute of limitations in this bill can only be tolled for up to a year because of a defendant’s “continuous[] absen[ce] from the state, or [lack of a] reasonably ascertainable place of residence or employment.” The general criminal statute of limitations provides for tolling of up to three years on this basis.⁴⁰ Moreover, regardless of the amount of time, if continuous absence from the state is not a defendant’s fault, statutes of limitations are not tolled.⁴¹

Although this bill refers to a “civil action or other proceeding ... to punish, prevent or restrain any violation of this section,” the section that the bill amends, s. 825.103, F.S., does not establish a civil or administrative cause of action for exploitation.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

David L. Jaroslav, J.D.

Nathan L. Bond, J.D.

⁴⁰ See s. 775.15(6), F.S.

⁴¹ See *State v. Miller*, 581 So. 2d 641 (Fla. 2d DCA 1991).