

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 1656

INTRODUCER: Senator Lee

SUBJECT: Amendment of Criminal Statutes

DATE: March 22, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	<b>Favorable</b>
2.			CJ	
3.			RC	

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**I. Summary:**

SB 1656 creates a savings statute for criminal laws which provides that, unless expressly intended by the Legislature, an amendment, reenactment, or revision of a criminal statute does not affect or abate:

- The prior operation of the statute or any prosecution or enforcement under the statute;
- A violation of the statute based on any act or omission occurring prior to the effective date of the act; or
- A prior penalty, forfeiture, or punishment incurred or imposed under the statute.

In other words, the bill recognizes that the Legislature has the authority to amend criminal statutes in a way that retroactively effects the prosecution or enforcement of a criminal statute or that reduces penalties for prior violations of a statute. However, the bill provides that if the Legislature exercises this authority, it must expressly state its intent to apply an amendment retroactively.

**II. Present Situation:**

With the voter's approval of Amendment 11 on the 2018 general election ballot, Florida's constitutional savings clause in Article X, section 9 of the State Constitution was changed as follows:

SECTION 9. Repeal of criminal statutes.—~~Repeal or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime ~~previously~~ committed before such repeal.

Accordingly, the constitutional savings clause no longer prohibits statutory amendments that:

- Reduce a punishment for a crime committed before the amendment;
- Affect a prosecution for a crime committed before the amendment; or

- Repeal a punishment for a crime committed before the repeal.

### **Abatement**

The constitutional savings clause first appeared in a Florida Constitution in 1885. Court opinions interpreting the savings clause explain that its purpose was to prevent the repeal or amendment of a criminal statute from automatically nullifying its effect on pending cases.<sup>1</sup> This automatic nullification is sometimes referred to as “abatement.”<sup>2</sup> Accordingly, a savings clause prevents abatement, thus “saving” pending cases from the automatic nullification of a repealed or amended law.<sup>3</sup>

The savings clause appears to have been added to the Constitution to overrule an 1882 opinion by the Florida Supreme Court. In this opinion, the Court nullified a conviction for assault with intent to murder because the assault statute was repealed after the defendant committed the crime but before the prosecution occurred.<sup>4</sup> The fact that the assault statute had been replaced by a similar law made no difference.<sup>5</sup>

### **Remaining Restrictions on Retroactive Application of Amendments to Criminal Statutes**

Though Article X, section 9 of the Florida Constitution no longer prohibits retroactive application of amendments to criminal statutes, several other restrictions on the retroactive application of these amendments remain in place.

#### ***Ex post facto laws are prohibited***

Both the Florida Constitution and the United States Constitution prohibit the passage of an ex post facto law.<sup>6</sup> An ex post facto law would include a law that imposes a new or increased punishment on an act that occurred before the law took effect.<sup>7</sup>

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<sup>1</sup> See *State v. Watts*, 558 So. 2d 994, 999 (Fla. 1990) (discussing *Higginbotham v. State*, 19 Fla. 557, 559 (Fla. 1882)).

<sup>2</sup> See generally, *Holiday v. United States*, 683 A.2d 61, 66 (D.C. Cir. 1996).

<sup>3</sup> See *State v. Reininger*, 254 So. 3d 996, 999 (Fla. 4th DCA 2018)

<sup>4</sup> *State v. Watts*, 558 So. 2d 994, 999 (Fla. 1990).

<sup>5</sup> See *Higginbotham v. State*, 19 Fla. 557, 559 (Fla. 1882) (“It has been well settled by repeated decisions that if the law which created the offence is repealed, after the repealing law takes effect no further proceeding can be taken under the law so repealed, and this principle is held to apply to the proceedings in the appellate court upon appeal as well as to the court having original cognizance of the offence, and as well when the repeal took effect after the removal of the cause to the appellate court as before.” (citing *Wall v. State*, 18 Texas 682 (1857)).

<sup>6</sup> See FLA. CONST. art. I, s. 10; U.S. CONST. art. 1, s. 9, cl. 3.

<sup>7</sup> The Florida Supreme Court recently reiterated the 200-year-old categories of ex post facto laws as articulated by the United States Supreme Court:

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.

*Shenfeld v. State* 44 So. 3d 96, 100 (Fla. 2010) (citing *Calder v. Bull*, 3 U.S. 386, 390-91 (1798)).

### *General Restrictions on Retroactive Application of Statutory Changes*

As the Florida Supreme Court has repeatedly stated,

The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively.<sup>8</sup>

But even when the Legislature has expressly intended a statutory change to apply retroactively, the courts have disallowed it if it impairs vested rights, creates new obligations, or imposes new penalties.<sup>9</sup>

### **Definition of Terms used in the Amended Savings Clause**

The full meaning and effect of the changes to the constitutional savings clause is dependent on the meaning of its key terms. The term “criminal statute” is not defined in the Florida Constitution or in the statutes. However, in the context of the savings clause the Florida Supreme Court has long defined the term “criminal statute” as

an act of the Legislature as an organized body, defining crime, treating of its nature, or providing for its punishment. It is sufficiently broad and comprehensive as to include within its scope and meaning all those acts of the Legislature as an organized body which deal in any way with crime or its punishment.<sup>10</sup>

### **“Amendment” and “Repeal”**

Additionally, the terms “amendment” and “repeal” are not defined in the Florida Constitution or the statutes. Thus, the meaning of these terms is at least somewhat dependent on how they have been defined or described in case law. There, the courts have not always indicated that these words refer to mutually exclusive concepts. In fact, in some cases, the courts seem to use the words as functional equivalents—e.g., an “amendment” that “repealed” a statutory provision.<sup>11</sup> However, the courts do not *always* describe an amendment as a repeal, or as causing a repeal.<sup>12</sup>

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<sup>8</sup> *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (citing *Arrow Air, Inc. v. Walsh*, 645 So.2d 422 (Fla.1994); *Alamo Rent–A–Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla.1994); *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla.1961)); see generally, *Smiley v. State*, 966 So. 2d 330 (Fla. 2007) (indicating that these principles apply in the context of criminal law as well as civil law.).

<sup>9</sup> *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (citing *Alamo Rent–A–Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla.1994); *State v. Lavazzoli*, 434 So.2d 321 (Fla.1983); *Seaboard Sys. R.R. v. Clemente*, 467 So.2d 348 (Fla. 3d DCA 1985).

<sup>10</sup> *Washington v. Dowling*, 109 So. 588, 591 (Fla. 1926); see also, *Smiley v. State*, 966 So. 2d 330, 337 (Fla. 2007) (reaffirming the definition set forth in *Washington v. Dowling*).

<sup>11</sup> See, e.g., *L. Ross, Inc., v. R.W. Roberts Const. Co., Inc.*, 466 So. 2d 1096 (Fla. 5th DCA 1985) (stating, for example, “the legislative **amendment** of section 627.756, Florida Statutes (1983), which **repealed** the twelve and a half percent limitation on the amount of attorney’s fees recoverable from sureties under section 627.428, increased the substantive statutory obligation of the surety to pay attorney’s fees.” (Emphasis added)); *State v. Richardson*, 915 So. 2d 86 (Fla. 2005) (stating the Legislature had “effectively repealed” a provision when it substantially “amended” a statute and did not include the provision in the amended version.).

<sup>12</sup> See e.g., *Macchione v. State*, 123 So. 3d 114 (Fla. 2013) (describing various amendments to s. 836.10, F.S., including the deletion of language, without describing any of the changes as a repeal).

### III. Effect of Proposed Changes:

SB 1656 creates a savings statute for criminal laws which provides that, unless expressly intended by the Legislature, an amendment, reenactment, or revision of a criminal statute does not affect or abate:

- The prior operation of the statute or any prosecution or enforcement under the statute;
- A violation of the statute based on any act or omission occurring prior to the effective date of the act; or
- A prior penalty, forfeiture, or punishment incurred or imposed under the statute.

However, the bill provides that, if the Legislature intends to retroactively apply a reenactment, revision, or amendment of a criminal statute, it may do so by expressly stating its intent in the legislation. However, an amendment, revision, or reenactment of a criminal statute which has the effect of repealing it would likely exceed the Legislature's authority under the constitutional savings clause if the amendment, revision, or repeal affects prosecution for any crime committed before the amendment took effect.

The bill takes effect upon becoming a law.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

#### B. Public Records/Open Meetings Issues:

None.

#### C. Trust Funds Restrictions:

None.

#### D. State Tax or Fee Increases:

None.

#### E. Other Constitutional Issues:

None identified.

### V. Fiscal Impact Statement:

#### A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 775.022 of the Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.