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.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL:	SB 1656
INTRODUCER:	Senators Lee and Rouson
SUBJECT:	Amendment of Criminal Statutes
DATE:	March 29, 2019
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Favorable**
2.	Erickson	Jones	CJ	**Pre-meeting**
3.			RC	

I. Summary:

SB 1656 creates a general savings statute for criminal statutes. Typically, a general savings statute prevents the repeal of a criminal statute from abating pending criminal prosecutions, unless the repealing act expressly provides for abatement. "Abatement" means no further prosecution for the criminal violation.

The bill defines a "criminal statute" as chs. 775-896, F.S., and any other law of this state which prohibits an act or omission and provides a criminal penalty, regardless of the degree of the offense.

The bill provides that any act of the Legislature reenacting, revising, or amending a criminal statute may not be considered a repeal of such statute for purposes of Article X, Section 9 of the State Constitution (Florida's constitutional savings clause), which prohibits applying the repeal of a criminal statute to any crime committed before such repeal if this retroactive application "affects prosecution."

The bill also states that, except as expressly provided in an act of the Legislature, the reenactment, revision, or amendment by law of an existing criminal statute operates prospectively and does not affect or abate:

- The prior operation of the statute or any prosecution or enforcement under the statute;
- Any 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.

The bill is effective upon become a law.

II. Present Situation:

Common Law Doctrines of Abatement and Retroactive Amelioration

"At common law, the unqualified repeal of a criminal statute resulted in the abatement[1] of all prosecutions which had not been made final."[2] "Abatement by repeal included a statute's repeal and re-enactment with different penalties. And the rule applied even when the penalty was reduced. To avoid such results, legislatures frequently indicated an intention not to abate *pending prosecutions* by including in the repealing statute a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated."[3] The absence of this "specific clause," which is referred to as a "savings clause," could result in actions contrary to legislative intent.[4] "To demonstrate that intent, a legislative body will rely upon an express savings clause and its progeny -- the general savings statute or the constitutional savings clause, or some combination of the three."[5] As a result of this savings legislation, there was a "shifting of the legislative presumption from one of abatement to one of non-abatement in the absence of contrary legislative intent."[6]

Retroactive ameliorations of penalties may be provided by law,[7] or otherwise construed to be authorized by some courts,[8] but "[t]he majority of general savings statutes do not account explicitly for ameliorative changes" and "[m]ost courts have interpreted this omission to eliminate the common law amelioration doctrine."[9] Until recently, Article X, Section 9 of the

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[1] "Abatement" means "no further prosecution for the [criminal] violation." *Landen v. U.S.*, 299 F. 75, 78 (6th. Cir. 1924).
[2] Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 121 (1972) (footnote omitted).
[3] *Bradley v. U.S.*, 410 U.S. 605, 607-608 (1973) (citations omitted) (emphasis provided by staff). Further, savings clauses addressed an anomaly resulting from the interplay between the common law abatement doctrine and the constitutional prohibition against ex post facto laws, which are prohibited by the U.S. Constitution and Florida's Constitution. *See* U.S. CONST. art. 1, s. 9, cl. 3 and FLA. CONST. art. I, s. 10. "For a criminal law to be ex post facto it must be retrospective, that is, it must apply to events that occurred before its enactment; and it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable." *Victorino v. State*, 241 So.3d 48, 50 (Fla. 2018) (citation omitted). The anomaly occurs when "the old statute in existence when the crime is committed is thereafter amended so as to increase the punishment, and there is no saving clause. The prosecution not reduced to final judgment is barred. This is so because the accused cannot be punished under the new law since to do so would be ex post facto, and he cannot be punished under the old law because it has been repealed without a saving clause." *In re Estrada*, 63 Cal.2d 740, 747 (1965) (citation omitted).
[4] "In the absence of a specific savings clause in the legislation that effectuates the repeal, the theory of abatement carries an obvious potential for injustice: the prospect that crimes committed before the effective date of a statutory amendment would go entirely unpunished even though (as evidenced by the terms of the new legislation) the legislature quite obviously had no intention of removing the conduct at issue from the ambit of criminal law." *State v. Carpentino*, 166 N.H. 9, 14 (2014).
[5] S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am J. Crim. L. 1, 6-7 (2009) (citations omitted).
[6] Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 127 (1972).
[7] *See, e.g.*, Ohio Rev. Code s. 1.58(B) ("[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended") and W.Va. Code s. 2-2-8 ("if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect").
[8] *See, e.g., People v. Oliver*, 1 N.Y.2d 152 (1956) (finding legislative intent for a retroactive amelioration, notwithstanding New York's general savings statute precluding such amelioration and the fact that retroactive application was not specified in the legislation).
[9] Eileen L. Morrison, *Resurrecting the Amelioration Doctrine: A Call to Action for Courts and Legislatures*, 95 Boston U. L. Rev. 335, 349 (footnotes omitted). "When a legislature engages in legislative retroactive amelioration, it attaches an

State Constitution (Florida's constitutional savings clause) expressly prohibited any repeal or amendment of a criminal statute that affected prosecution or punishment for any crime previously committed, and therefore, the Florida Legislature was "powerless to lessen penalties for past transgressions; to do so would require constitutional revision."[10]

Savings clauses have been described as "but a canon of statutory construction to aid in interpreting statutes to ascertain legislative intent" and "not an end in itself"[11] or as "intended only as a rule of construction, which must give way if the legislature has unambiguously expressed an intent contrary to the statutory 'default' position it establishes."[12] However, the "more favored view" in applying general savings statutes is to "construe the provisions not merely as 'rules of construction to be applied only to resolve a question of the legislative intent,' but as 'positive legislation which should be given effect as though they were incorporated into every future enactment involving a substantive right.'"[13]

The History of Florida's Constitutional Savings Clause

Florida and two other states have a constitutional savings clause.[14] However, prior to 1885, Florida did not have one. In 1885, Florida adopted Article III, Section 32 of the State Constitution. This constitutional amendment was the predecessor to Article X, Section 9 of the State Constitution.[15] Article III, Section 32 provided:

> The repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment.[16]

ameliorative amendment exception to the general savings statute to give retroactive effect to ameliorative sentencing changes[.]" S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am J. Crim. L. 1, 9 (2009) (footnote omitted). An example of a retroactive ameliorative change is retroactive application of a reduced penalty.

[10] Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 129 (1972).

[11] *State v. Cummings*, 386 N.W.2d 468, 471 (1986).

[12] *State v. Carpentino*, 166 N.H. at 14.

[13] *Iowa Dept. of Transp. v. Iowa Dist. Court for Scott County Supreme Court of Iowa*, 587 N.W.2d 781, 788 (1998), quoting 1A Norman J. Singer, *Sutherland Statutory Construction* s. 23.37, at 432 (5th ed.1993). A general savings statute can "save the necessity of the burdensome formality of attaching an identical saving clause to all repealing legislation." *State v. Shepherd*, 202 Iowa 437 (1926).

[14] Oklahoma and New Mexico. *See* OKLA. CONST. art. V, s. 54 and N.M. CONST. art. IV, s. 33.

[15] *State v. Watts*, 558 So.2d 994, 999 (Fla. 1990). It appears that at various times Florida had a general savings statute for criminal laws. *See Reynolds v. State*, 33 Fla. 301, 303 (Fla. 1894) (describing Section 2523, Rev. Stat.) and *Castle v. State*, 330 So.2d 10, 11 (Fla. 1976) (describing s. 775.12, F.S. (1973)).

[16] "The effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute, does not become effective, either as a repeal or as an amendment of such pre-existing statute, in so far as offenses are concerned that have already been committed prior to the taking effect of such repealing or amending law." *Raines v. State*, 42 Fla. 141, 145 (1900). "Courts have interpreted this section the same as its successor provision in the 1968 revision." *State v. Watts*, 558 So.2d at 999 n. 5.

The Florida Supreme Court has discussed the origin of this savings clause:

> [In *Ex parte Pells*, 28 Fla. 67 (1891),] [w]e explained that article III, section 32 originated after the Court decided the case of *Higgenbotham v. State*, 19 Fla. 557 (1882). In *Higgenbotham*, the Court invalidated a conviction of assault with intent to commit murder because the assault statute was repealed after the crime was committed but before prosecution took place, and there was no savings clause in the statute to allow the then-pending prosecution to proceed. Under those circumstances, we reasoned, "no further proceedings can, after the repealing law takes effect, be taken under the law so repealed." *Ex parte Pells*, 28 Fla. at 73, 9 So. at 834. We then inferred that the people of Florida approved article III, Section 32, in 1885 to provide a constitutional savings clause, thereby negating the effect of the *Higgenbotham* holding. *See also Sigsbee v. State*, 43 Fla. 524, 529, 30 So. 816, 817 (1901).[17]

In 1968, Florida adopted Article X, Section 9 of the State Constitution, which was substantially similar to Article III, Section 32, and provided:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

In 2018, Florida adopted the following amendment to Article X, Section 9 of the State Constitution:

> Repeal ~~or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime ~~previously~~ committed <u>before such repeal</u>.

Revised Article X, Section 9 of the State Constitution only prohibits applying the repeal of a criminal statute to any crime committed before such repeal if this retroactive application "affects prosecution." The revised constitutional savings clause does not expressly prohibit retroactive application of a repeal that does not affect prosecution, a repeal that affects punishment, or an amendment of a criminal statute that affects prosecution or punishment.

The elimination of the expressed prohibition on certain retroactive applications is not a directive to the Legislature to retroactively apply what was formerly prohibited. As the Florida Supreme Court recently stated: "… [T]here will no longer be any provision in the Florida Constitution that would prohibit the Legislature from applying an amended criminal statute retroactively to pending prosecutions or sentences. However, nothing in our constitution does or will require the Legislature to do so, and the repeal of the prohibition will not require that they do so."[18]

Terms Used in Florida's Constitutional Savings Clause

For purposes of the constitutional savings clause, the Florida Supreme Court has defined the term "criminal statute" broadly: "In *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926), this Court provided the following definition for the words 'criminal statute': '[A]n act of the

[17] *State v. Watts*, 558 So.2d at 999.
[18] *Jimenez v. Jones*, 261 So.3d 502, 504 (Fla. 2018).

Legislature as an organized body relating to crime or punishment … defining crime, treating of its nature, or providing for its punishment.' *Id.*, 109 So. at 591."[19]

In regard to Article X, Section 9 of the State Constitution, the Florida Supreme Court does not appear to have ever clearly indicated whether a "criminal statute" also includes its parts or provisions and whether an amendment can "repeal" those parts or provisions. An amendment can modify a part or provision of a statute but it can also eliminate or nullify it. In several cases unrelated to Article X, Section 9 of the State Constitution, the Court and several Florida appellate courts have described amendments repealing or effectively repealing subsections or paragraphs of statutes.[20] However, courts do not always describe an amendment deleting a provision as a repeal or causing a repeal.[21]

If an amendment can repeal a part or provision of a criminal statute than questions may arise regarding retroactive applications of some amendments. Provided are three examples:

- *Retroactive application of an amendment that eliminates any criminal penalty attached to prohibited conduct*. Retroactive application of this type of amendment appears to "affect prosecution" because there is no longer any "crime" to prosecute.
- *Retroactive application of an amendment that eliminates some criminal penalties for a crime but does not decriminalize prohibited conduct.* An example of this type of amendment is an amendment that eliminates mandatory minimum terms or mandatory fines for drug trafficking but retains criminal penalties provided for the felony degree of the drug trafficking offense.
- *Retroactive application of an amendment modifying an element of an offense that is tied to the criminal penalty provided for that offense*. An example of this type of amendment is an amendment that increases the threshold amount for charging grand theft or charging drug trafficking. Applied prospectively, this type of amendment precludes charging offenders who do not meet the amended threshold, though they may have met the threshold under the law before its amendment. It is unclear if retroactive application of this type of amendment would

[19] *Smiley v. State*, 966 So. 2d 330, 337 (Fla. 2007).

[20] *See, e.g., In re Rogers' Estate*, 171 So.2d 428, 429-430 (Fla. 2d DCA 1965) (court noting that, in 1959, subsection (3) of s. 731.35, F.S., "the dower statute," was "repealed"); *State v. Lindsay*, 284 So.2d 377, 378 n. 1 (Fla. 1973) (Florida Supreme Court noting that ch. 72-179, L.O.F., "repealed Subsections (2) and (3) of Section 39.01"); *Smith v. Smathers*, 372 So.2d 427, 429 (Fla. 1979) (Florida Supreme Court holding that "Sections 13 and 66 of Chapter 77-175, Laws of Florida, are [constitutionally] invalid only to the extent they repeal the write-in voting procedure contained in Sections 99.203, 101.011(2), and 101.151(5)(a) and (b), Florida Statutes (1975)"*); L. Ross, Inc. v. R.W. Roberts Constr. Co., Inc.,* 466 So.2d 1096, 1097 (Fla. 5th DCA 1985) (footnote omitted), *approved*, 481 So.2d 484 (Fla. 1986) (court stating that "[t]his case involves the retroactive application of a statutory amendment which repealed a limitation in the amount of attorney's fees made recoverable by statute in certain actions"); *Clayton v. Willis*, 489 So.2d 813, 818 (Fla. 5th DCA 1986), *review denied*, 500 So.2d 546 (Fla. 1986) (court noting that "[i]n 1979, the legislature repealed subsection (c). Chapter 79–163, s. 10, Laws of Florida"); *State v. Richardson*, 915 So.2d 86, 89 (Fla. 2005) (Florida Supreme Court noting that in its previous decision it "held that the Legislature had effectively repealed the sequential conviction rule because the then current version of the statute, which had recently been significantly amended in 1988, did not contain the sequential conviction requirement"); *Image Data, L.L.C. v. Sullivan*, 739 So. 2d 725, 727 n. 6 (Fla. 5th DCA 1999) (court describing HB 1015 (1999) as "repealing subsections (5) and (6) of section 322.142, Florida Statutes"); and *Gabriele, v. Sch. Bd. of Manatee County*, 114 So.3d 477, 479 n. 1 (Fla. 2d DCA 2013) (court noting that "[t]he legislature repealed paragraphs (a), (b), and (c) of subsection (3) of section 1012.33 effective July 1, 2011. Ch. 2011–37, s. 19, at 504, Laws of Fla.").

[21] *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).

have a similar impact on pending prosecutions or uncharged offenses for acts committed before the effective date of the amendment.[22]

There is little guidance on what retroactive repeals "affect prosecution" in violation of Article X, Section 9 of the State Constitution, other than the Florida Supreme Court indicating that purely procedural changes do not "affect prosecution." The Court has construed the constitutional savings clause as "saving" substantive rights and liabilities. "Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights but only operate in furtherance of the remedy or conformation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes."[23] However, "a statute that achieves 'remedial purpose by creating substantive new rights or imposing new legal burdens' is treated as a substantive change in the law."[24]

III. Effect of Proposed Changes:

The bill creates s. 775.022, F.S., which is a general savings statute for criminal statutes. Typically, a general savings statute prevents the repeal of a criminal statute from abating pending criminal prosecutions, unless the repealing act expressly provides for abatement. "Abatement" means no further prosecution for the criminal violation.

Section 775.022(1), F.S., defines the term "criminal statute" as chs. 775-896, F.S., and any other law of this state which prohibits an act or omission *and* provides a criminal penalty, regardless of the degree of the offense.

The statutes relevant to the definition are those which prohibit an act or omission *and* provide a criminal penalty. This considerably narrows the scope of what a criminal statute may address when compared with the Florida Supreme Court's interpretation of the scope of a criminal statute.[25] Further, because the bill's definition of "criminal statute" requires such statute to prohibit an act or omission *and* provide a criminal penalty, criminal statutes which do not satisfy both conditions would not be addressed by s. 775.022, F.S. For example, a statutory chapter may prohibit conduct in one or more statutes and penalize violations of those statutes (or the chapter) in another statute.[26] Other examples include a statute which specifies what constitutes prima facie evidence of criminal intent[27] and a statute providing rules of evidence.[28]

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[22] In *State v. Sampson*, 120 N.H. 251, 254 (1980), the New Hampshire Supreme Court noted that if the court adopted the defendant's theory that an amendment increasing the theft threshold should be retroactively applied to him, it "would not just be holding that the legislature intended to retroactively impose a less severe punishment for acts still criminal, but as in this case, to excuse the conduct altogether." In *Rushing v. State*, 192 So.2d 1113, 1116 (2016), a Mississippi appellate court stated that legislation's "new 'tiers' of punishment are inextricably tied to the new or amended elements of the offenses." "That is, we cannot retroactively apply the amendment to sentences without also retroactively applying the amendments to the elements of the offenses. For a defendant convicted of selling cocaine, we cannot determine which new sentencing range would apply without first determining how much cocaine the defendant sold." *Id.*

[23] *City of Lakeland v. Catinella*, 129 So.2d 133, 136 (Fla. 1961).

[24] *Smiley v. State*, 966 So.2d at 334, quoting *Arrow Air v. Walsh*, 645 So.2d 422, 424 (Fla. 1994).

[25] *See* "Present Situation" section of this analysis for a discussion of terms in the constitutional savings clause.

[26] *See, e.g.,* s. 320.57, F.S. (providing that any person convicted of violating any of the provisions of ch. 320, F.S., is, unless otherwise provided in the chapter, guilty of a second degree misdemeanor).

[27] *See, e.g.,* s. 810.12, F.S. (prima facie evidence of trespass).

[28] *See, e.g.,* s. 794.022, F.S. (rules of evidence regarding specified sex offenses).

Section 775.022(2), F.S., provides that any act of the Legislature reenacting, revising, or amending a criminal statute may not be considered a repeal of such statute for purposes of Article X, Section 9 of the State Constitution. However, this rule of construction only applies to a reenactment, revision, or amendment of a "criminal statute," as that term is defined in the bill, which means the rule of construction does not address criminal laws which do not prohibit an act or omission *and* provide a criminal penalty. Therefore, there remains a question whether an amendment can repeal a part or provision of a criminal law which does not meet both of these specified definitional requirements.

Section 775.022(3), F.S., states that, except as expressly provided in an act of the Legislature, the reenactment, revision, or amendment by law of an existing criminal statute operates prospectively and does not affect or abate:

- The prior operation of the statute or any prosecution or enforcement under the statute;
- Any 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.

As is the case with the previous rule of construction, this rule of construction only applies to a reenactment, revision, or amendment of a "criminal statute," as that term is defined in the bill, which means the rule of construction does not address criminal laws which do not prohibit an act or omission *and* provide a criminal penalty.

The exception to the prospectivity of criminal statutes is the Legislature providing for retroactive application by specifying such application in legislation. For example, the Legislature might indicate that the act is to be retroactively applied to cases in which judgment was not entered before the effective date of the act, or, regarding a mitigation of penalty, might indicate that the mitigation applies to offenders not sentenced before the effective date of the act. Of course, other designations regarding retroactivity could be applied, including retroactive applications to offenders sentenced before the effective date of the act. However, if the Legislature only indicates that an act be "retroactively applied," this leaves retroactive application open to interpretation, which would likely require the courts to determine who would receive the retroactive application.

The bill does not make any distinction between substantive changes to criminal statutes and procedural changes to criminal statutes. Therefore, the rules of construction provided in the bill should apply to both.

The bill is effective upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The 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, Section 18 of the State 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:

The bill is an act "relating to amendment of criminal statutes." This relating clause appears to be too narrow to embrace all provisions of the bill, which, in addition to amendments to criminal statutes, address repeals, revisions, and reenactments of criminal statutes. Staff recommends a broader, inclusive subject for the bill.

The definition of "criminal statute" in the bill specifically references chs. 775-896, F.S. However, even if these chapters currently incorporate most of the chapters contemplated as falling within the definition, chapters may be added or removed by future legislatures. Further, included with this specific reference is "any other law," so the definition really applies to any law. Unless the specific reference to chapters is deemed necessary to the definition, staff recommends removing the specific reference to chapters and the reference to "other laws" and substituting reference to "any law," or alternatively, "any statute."

The bill addresses revisions of criminal statutes. Staff cannot discern any substantive difference between an amendment and a revision. Amendments can revise laws. If there is no substantive difference between an amendment and a revision than the references to revisions are surplusage and staff recommends they be removed from the bill.

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.