

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7069      PCB CRJ 19-02      Criminal Statutes  
**SPONSOR(S):** Criminal Justice Subcommittee, Fernandez-Barquin  
**TIED BILLS:**            **IDEN./SIM. BILLS:** SB 1656

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	10 Y, 4 N	Deatherage	Hall
1) Judiciary Committee	11 Y, 4 N	Deatherage	Poche

### SUMMARY ANALYSIS

Article X, section 9 (Savings Clause) was added to the Florida Constitution in 1885 and required the criminal statute in effect at the time a crime was committed to govern the sentence an offender received for a conviction of that crime. In November 2018, Florida voters passed Amendment 11, amending the Savings Clause. Prior to the amendment, the Savings Clause prohibited retroactive application of statutes or amendments that made a substantive change to a criminal law. The revision removed the word “amendment” so that only the repeal of a criminal law may not be retroactively applied. This change permits the legislature to retroactively apply an amendment to a criminal statute that decreases a criminal penalty.

In criminal law, absent a constitutional or statutory provision, the common law of crimes applies in Florida. Under the common law, the repeal of a criminal statute resulted in abatement, or dismissal, of pending charges and appeals. Some courts, including the United States Supreme Court, have held that an amendment to a criminal statute without a constitutional or statutory savings clause results in abatement because it is an implied repeal. Statutory savings clauses prevent the doctrine of abatement from resulting in the dismissal of pending actions when a criminal statute is amended.

HB 7069 creates a criminal savings statute and provides that reenactment, revision, or amendment of a criminal statute:

- Shall not be considered a repeal for the purposes of the Savings Clause;
- Applies prospectively, unless clearly expressed otherwise by the legislature; and
- Does not abate the prior operation of the statute, any violation of the statute based on any act or omission occurring prior to the effective date of the act, or any prior penalty, forfeiture, or punishment incurred or imposed under the statute.

The bill also applies the doctrine of incorporation by reference to any statute impacted by amendment to a criminal statute. This doctrine eliminates the need to reenact each statute that cross-references an amended criminal statute in future legislation.

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

The bill provides an effective date of upon becoming a law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Savings Clause

Government is prohibited from enacting *ex post facto* laws,<sup>1</sup> which precludes retroactive application of a law which criminalizes actions that were legal when committed or increases a criminal penalty.<sup>2</sup> Similarly, a savings clause limits retroactive application of an amendment or repeal to a criminal statute, and is found in statute or in a state constitution. Forty-two states and the federal government<sup>3</sup> have a statutory savings clause that limits retroactivity of changes to criminal and civil statutes.<sup>4</sup> Florida is one of three states<sup>5</sup> that have a constitutional savings clause.

The Savings Clause was added to the Florida Constitution in 1885<sup>6</sup> and required the criminal statute in effect at the time a crime was committed to govern the sentence an offender received for a conviction of that crime.<sup>7</sup> Generally, to determine whether a statutory amendment applies retroactively, a court must determine whether there is clear evidence of legislative intent to apply the statute retroactively. If so, the court then must determine whether retroactive application is constitutionally permissible.<sup>8</sup> Prior to November 2018, and because of the Savings Clause, Florida case law dictated that statutory changes could only apply retroactively if the change was procedural or remedial, and did not create a new right or take away a vested right.<sup>9</sup>

##### 2018 General Election- Amendment 11

Passed by Florida voters in November 2018, Amendment 11 amended the Savings Clause in article X, section 9 of the Florida Constitution. The approved revision removed the word “amendment” from the Savings Clause so that only the repeal of a criminal law may not be retroactively applied. This change permits the legislature to retroactively apply an amendment to a statute that decreases a criminal penalty.

##### Abatement

In criminal law, absent a constitutional or statutory provision, the common law of crimes applies in Florida.<sup>10</sup> Under the common law, the repeal of a criminal statute resulted in abatement, or dismissal, of pending charges and appeals.<sup>11</sup> Because a repeal effectively nullifies a law, under the doctrine of abatement the repealed law can no longer govern any pending prosecution or appeal. Accordingly, the doctrine of abatement provides that those pending actions are dismissed.<sup>12</sup>

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<sup>1</sup> U.S. Const. art. 1, § 9, cl. 3.

<sup>2</sup> *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 120 (1972).

<sup>3</sup> 18 U.S.C. § 110.

<sup>4</sup> *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, *supra* note 2, at 127.

<sup>5</sup> *Id.* at 128 (New Mexico and Oklahoma also have constitutional savings clauses).

<sup>6</sup> Art. X, s. 9, Fla. Const.

<sup>7</sup> *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015) (“[T]he purpose of the ‘Savings Clause’ is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime.”)

<sup>8</sup> *Pondella Hall for Hire, Inc. v. Lamar*, 866 So.2d 719, 722 (Fla. 5th DCA 2004).

<sup>9</sup> *Smiley v. State*, 966 So. 2d 330, 335 (Fla. 2007).

<sup>10</sup> S. 775.01, F.S.

<sup>11</sup> See *Higginbotham v. State*, 19 Fla. 557 (1882).

<sup>12</sup> See *Commonwealth v. Marshall*, 11 Pick. 350 (Mass. 1831).

For example, in *Higginbotham v. State*, a defendant was indicted for assault with intent to murder.<sup>13</sup> While the prosecution was pending, the law under which the defendant was indicted was repealed and replaced.<sup>14</sup> The repeal was complete in its terms and there was no savings clause to make the repeal apply only prospectively.<sup>15</sup> The Florida Supreme Court held that if the law prohibiting the offense was repealed, no further action could proceed under the repealed law.<sup>16</sup> Accordingly, the conviction of the defendant was reversed and the defendant was discharged.<sup>17</sup>

Some courts, including the United States Supreme Court, have held that abatement also applies to an amendment without a savings clause because it is an implied repeal.<sup>18</sup> Such uncertainty about the effect given to an amendment may lead to an unpredictable application of the Savings Clause. A statutory savings provision is intended to prevent the harsh application of the doctrine of abatement.

### Incorporation by Reference

Currently, when a criminal statute is amended, the legislature must frequently reenact cross-referencing statutes. Reenacting the cross-referencing statutes updates those sections to include the changes made by the amendment to the criminal law. This technical requirement may result in multiple pages of statutory reenactments to accomplish this purpose.

### **Effect of Proposed Changes**

HB 7069 creates a criminal savings statute and provides that reenactment, revision, or amendment of a criminal statute:

- Shall not be considered a repeal for the purposes of the Savings Clause;
- Applies prospectively, unless clearly expressed otherwise by the legislature; and
- Does not abate the prior operation of the statute, any violation of the statute based on any act or omission occurring prior to the effective date of the act, or any prior penalty, forfeiture, or punishment incurred or imposed under the statute.

The criminal savings statute prevents the doctrine of abatement from applying to an amendment by declaring an amendment is not an implied repeal and only has prospective application, unless there is an express statement of retroactivity by the legislature.

The bill also applies the doctrine of incorporation by reference to any statute impacted by an amendment to a criminal statute. This doctrine eliminates the need to reenact each statute that cross-references an amended criminal statute in future legislation.

The bill is effective upon becoming a law.

## **B. SECTION DIRECTORY:**

**Section 1:** Creates s. 775.022, F.S., relating to effect of reenactment, revision, or amendment of criminal statutes; references in criminal statutes.

**Section 2:** Provides an effective date of upon becoming a law.

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<sup>13</sup> *Higginbotham*, 19 Fla. at 558.

<sup>14</sup> *Id.* at 558-59.

<sup>15</sup> *Id.* at 559-60.

<sup>16</sup> *Id.* at 560.

<sup>17</sup> *Id.* at 557.

<sup>18</sup> *Dorsey v. United States*, 567 U.S. 260, 272 (2012) (“Case law makes clear the word ‘repeal’ applies when a new statute simply diminishes the penalties that the older statute set forth.”); *United States v. Tynen*, 11 Wall. 88, 92 (1871) (“[I]f the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.”).

## II. 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.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2019, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment applied the doctrine of incorporation by reference to any statutes impacted by amendment to a criminal statute, thereby eliminating the need to reenact each statute in future legislation.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.