SUMMARY ANALYSIS

HB 7069 passed the House on April 30, 2019, as CS/SB 1656.

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.

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 is an implied repeal that results in abatement without a savings clause. Savings clauses prevent the doctrine of abatement from causing the dismissal of pending actions when a criminal statute is amended.

CS/SB 1656 creates a criminal savings statute. The bill provides:

- The common law doctrine of abatement does not apply to a reenactment or an amendment of a criminal statute;
- An act reenacting or amending a criminal statute is not an implied repeal;
- A definition for “criminal statutes;”
- A reenactment or an amendment operates prospectively unless expressly provided by the Legislature;
- A defendant in a pending case must receive the benefit of a penalty or punishment reduced by the Legislature; and
- The retroactive effect of a defense to a new or amended criminal statute is not limited in pending cases.

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

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

Subject to the Governor’s veto powers, the effective date of this bill is upon becoming a law.
I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Savings Clause

Government is prohibited from enacting *ex post facto* laws,\(^1\) which precludes retroactive application of a law which criminalizes actions that were legal when committed or increases a criminal penalty.\(^2\) 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\(^3\) have a statutory savings clause that limits retroactivity of changes to criminal and civil statutes.\(^4\) Florida is one of three states\(^5\) that have a constitutional savings clause.

The Savings Clause was added to the Florida Constitution in 1885\(^6\) 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.\(^7\) 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.\(^8\) 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.\(^9\) Accordingly, the Legislature was precluded from giving retroactive effect to the reduction of penalties, punishment, or forfeiture.\(^10\)

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.\(^11\) Under the common law, the repeal of a criminal statute resulted in abatement, or dismissal, of pending charges and appeals.\(^12\) 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.\(^13\)

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\(^1\) U.S. Const. art. 1, § 9, cl. 3.
\(^3\) 18 U.S.C. § 110.
\(^5\) *Id.* at 128 (New Mexico and Oklahoma also have constitutional savings clauses).
\(^6\) Art. X, s. 9, Fla. Const.
\(^7\) *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.”)
\(^8\) *Pondella Hall for Hire, Inc. v. Lamar*, 866 So.2d 719, 722 (Fla. 5th DCA 2004).
\(^9\) *Smiley v. State*, 966 So. 2d 330, 335 (Fla. 2007).
\(^10\) *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, supra note 2, at 129.
\(^11\) S. 775.01, F.S.
\(^12\) See *Higginbotham v. State*, 19 Fla. 557 (1882).
For example, in *Higginbotham v. State*, a defendant was indicted for assault with intent to murder.\textsuperscript{14} While the prosecution was pending, the law under which the defendant was indicted was repealed and replaced.\textsuperscript{15} The repeal was complete in its terms and there was no savings clause to make the repeal apply only prospectively.\textsuperscript{16} The Florida Supreme Court held that if the law prohibiting the offense was repealed, no further action could proceed under the repealed law.\textsuperscript{17} Accordingly, the conviction of the defendant was reversed and the defendant was discharged.\textsuperscript{18}

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.\textsuperscript{19} 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**

CS/SB 1656 creates a criminal savings statute and precludes the doctrine of abatement from applying to a reenactment or amendment of a criminal statute. The bill provides legislative intent to preclude:

- Application of the common law doctrine of abatment to a reenactment or an amendment of a criminal statute; and
- Construction of a reenactment or an amendment of a criminal statute as an implied repeal for the purpose of article X, section of the State Constitution.

The bill defines “criminal statute” to mean a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or defense to a crime, or providing for the punishment of a crime.

The bill also provides that, unless expressly provided by the Legislature or falling within two specified exceptions, the reenactment or amendment of a criminal statute operates prospectively and does not affect or abate:

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

The two specified exceptions to this provision are:

- The reduction of a penalty, forfeiture, or punishment in a criminal statute must be applied in a pending case; and

\textsuperscript{14} *Higginbotham*, 19 Fla. at 558.
\textsuperscript{15} *Id.* at 558-59.
\textsuperscript{16} *Id.* at 559-60.
\textsuperscript{17} *Id.* at 560.
\textsuperscript{18} *Id.* at 557.
\textsuperscript{19} *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.”).
• The retroactive effect of a defense to a new or amended criminal statute is not limited in a pending case.

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.

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.