

**Constitution Revision Commission
Judicial Committee
Proposal Analysis**

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

Proposal #: P 20

Relating to: MISCELLANEOUS, Repeal of criminal statutes

Introducer(s): Commissioner Rouson

Article/Section affected:

Date: December 11, 2017

	REFERENCE	ACTION
1.	<u>GP</u>	Favorable
2.	<u>JU</u>	Pre-meeting

I. SUMMARY:

The Proposal amends section 9 of Article X to provide that the repeal of a criminal statute shall not affect the prosecution of any crime committed before such repeal.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Savings Clause was added to the Florida Constitution in 1885 in response to a high profile criminal case in which a defendant charged with assault could not be prosecuted because the legislature repealed the assault statute and failed to “save” prosecutions for offenses committed before the repeal.¹ The Savings Clause prevents the legislature from making changes to substantive criminal laws, including sentencing laws, retroactive.

Currently, the Florida Constitution provides that the “Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.” Termed the “Ex Post facto” clause, the purpose of the 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.² In cases where a statute was found to be unconstitutional, the courts have allowed the amended statute to serve as the governing law in individual cases.³ The federal government is barred from passing ex post facto laws⁴ and in general,

¹ Information provided by Families Against Mandatory Minimums (FAMM) (on file with CRC staff). See *Higginbotham v. State*, 19 Fla. 557 (1882).

² *Horton v. Crosby*, 848 So.2d 504 (Fla. 3rd DCA 2003).

³ *Horsley v. State*, 160 So.3d (Fla. 2015).

⁴ US Const. Art I, s. 9, Cl. 3.

individual states are barred from passing ex post facto laws as well.⁵ However, the US Supreme Court has held that in some limited circumstances, states may pass ex post facto laws if they have a narrow application, and the “statute’s intent was to create a civil and nonpunitive regime.”⁶ One example of this is the requirement that convicted child sex offenders must register with the state.⁷

Most states and the federal government have Savings Clause statutes that limit retroactivity of changes to criminal and civil statutes.⁸ Some states have statutory provisions allowing for retroactivity when it is made explicit in new law.⁹ Florida is one of only 3 states (aside from New Mexico and Oklahoma) that have a constitutional savings clause.¹⁰ But the constitutions of New Mexico and Oklahoma prohibit retroactivity of repeals of criminal statutes.¹¹ Florida is the only state in which the constitution explicitly forbids retroactivity of amendments to criminal statutes.¹²

B. EFFECT OF PROPOSED CHANGES:

While the ex post facto clauses of the federal and state constitutions prevent new punishments “to a crime already consummated, to the detriment or material disadvantage of the wrongdoer,”¹³ there is no constitutional limitation on retroactive application of criminal legislation which mollifies criminal sanctions.¹⁴

The removal of “or amendment” and “or punishment” from the clause would only prevent the repeal of a criminal statute from affecting the prosecution of a crime. However, the removal of the punishment provision could allow courts to consider altering punishment in light of a statute being repealed or amended. For example, in 2014, the legislature amended drug sentencing laws.¹⁵ A defendant who committed certain drug offenses on June 30, 2014 would serve five times longer in prison as a defendant who committed that same offense one day later. A repeal of the Savings Clause will allow to the legislature to retroactively apply lesser sentencing to prisoners currently in prison.

⁵ US Const. Art I s. 10, Cl. 1

⁶ *Smith v. Doe*, 538 U.S. 84 (2003).

⁷ *Id.*

⁸ Information provided by proposal sponsor (on file with CRC staff).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). The classic definition of an *ex post facto* law appears in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis in the original): 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 offence, in order to *convict the offender*.

¹⁴ *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5103&context=penn_law_review (last visited 11/22/17).

¹⁵ See ch. 2014-176, L.O.F.

C. FISCAL IMPACT:

If the proposal is adopted by the voters, the legislature may apply new sentencing guidelines to prisoners currently incarcerated allowing an earlier release and possibly reduce expenses to the state..

III. Additional Information:

A. Statement of Changes:

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.