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April 26, 2012

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 349 and Senate Bill 889

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 349 and Senate Bill 889, identical bills entitled "Criminal Law - Misdemeanor Possession of Child Pornography - Statute of Limitations." We write to discuss the application of the bills.

House Bill 349 and Senate Bill 889 create an exception from the one year statute of limitations for prosecution of a misdemeanor offense under Criminal Law Article § 11-208, which prohibits the possession of child pornography. Under the bills, "a prosecution for a misdemeanor offense under § 11-208 ... shall be instituted within 2 years after the offense was committed." The bills are silent with respect to application of the longer statute of limitations to crimes committed prior to the effective date.

It is clearly established that this change in the statute of limitations cannot constitutionally apply in cases where the one year statute of limitations had already run before the longer statute of limitations would take effect. *Stogner v. California*, 539 U.S. 607 (2003). As reflected in the *Stogner* case, however, many cases have held that a statute of limitations that has not yet run may be extended by the legislature. *Stogner*, 539 at 618-619.¹

¹ See *United States v. Madia*, 955 F.2d 538, 540 (8th Cir. 1992); *United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975); *State v. Morales*, 148 N.M. 305, 2010 N.M. LEXIS 302 (N.M. 2010); *State v. Aubrey*, 885 N.E.2d 251 (2008); *State v. Gum*, 153 P.3d 418, 423 (Ariz. App.2007); *State v. Duffy*, 6 P. 3d 453, 460 (Mont. 2000); *State v. Davenport*, 536 N.

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It is generally the case that a "statute is presumed to operate prospectively from its effective date, absent clear language to the contrary, or unless the manifest intention of the Legislature indicates otherwise." *Doe v. Roe*, 419 Md. 687, 702 (2011). An exception to this rule has been recognized for procedural statutes, that is, "those effecting a change in procedure only, and not in substantive rights." *Id.* Procedural statutes ordinarily apply to all actions whether accrued, pending or future, unless a contrary intention is expressed. *Id.* The same is true of remedial statutes. *Id.*

It appears to be the majority rule that extensions of criminal statutes of limitations will apply to offenses committed before the effective date of the extension, so long as the earlier statute of limitation had not expired by the time that the extension took effect. The reasoning applied in these cases, however, varies. Some courts have held that application of an extended statute of limitations to offenses occurring prior to the effective date is prospective, as it applies only to prosecutions instituted after the effective date. *See State v. Morales*, 148 N.M. 305, 2010 N.M. LEXIS 302 (N.M. 2010) ("Stated simply, the 1997 amendment is not retroactive in nature because it 'bar[s] only prospective prosecutions.'"); *State v. Schultzen*, 522 N.W.2d 833, 835 (Iowa 1994) ("The statute of limitations prospectively prohibits certain prosecutions, *i.e.*, those after six months following the victim's eighteenth birthday. The prosecution here was commenced well within that time."); *State v. Petrucelli*, 592 A.2d 365 (Vt. 1991) ("For a criminal wrongdoer, the attaching of rights and liabilities occur at different times. Liability is fixed at the time of the offense, but the right to freedom from prosecution is fixed at the time the statute of limitations in effect runs out."); *Commonwealth v. Harvey*, 542 A.2d 1027, 1029 (Super. 1988) ("by the express terms of the statute, the action or thing to which the new five year period applies is the commencement of a prosecution."); *Commonwealth v. Duffy*, 96 Pa. 506, 513, 1881 Pa. LEXIS 34 (1881) ("The word 'hereafter' in the act is connected with and qualifies, the expression, 'shall not be held barred,' &c.; that is, hereafter, when the Statute of Limitations is pleaded to an indictment for forgery it shall not be held barred if it shall have been brought

W. 2d 686, 688 (N. D. 1995); *State v. Schultzen*, 522 N.W.2d 833, 835 (Iowa 1994); *State v. Hirsch*, 511 N.W.2d 69, 77 (Neb.1994); *State v. Creekpau*, 753 P.2d 1139, 1144 (Alaska 1988); *State v. Hodgson*, 740 P.2d 848 (1987); *People v. Whitesell*, 729 P.2d 985 (Colo. 1986); *Rose v. State*, 716 S.W.2d 162 (Tex. App. 1986); *People v. Smith*, 171 Cal. App. 3d 997 (1985); *Andrews v. State*, 392 So. 2d 270, 271 (Fla. App. 1980); *People v. Massarella*, 400 N.E.2d 436, 442 (1979); *People v. Liebling*, 344 N.E.2d 520, 522 (1976); *People v. Anderson*, 292 N. E. 2d 364, 366 (Ill. 1973); *State v. Ferrie*, 144 So. 2d 380 (1962); *United States v. Haug*, 21 F. R. D. 22, 25 (N.D. Ohio 1957); *United States v. Kurzenknabe*, 136 F. Supp. 17, 23 (NJ 1955); *United States v. Fraidin*, 63 F. Supp. 271, 276 (D. Md. 1945); *People v. Amann*, 289 N.Y.S. 316, 320 (1936); *Commonwealth v. Duffy*, 96 Pa. 506, 514, 1881 Pa. LEXIS 34 (1881).

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within five years after the commission of the offence.”). In *Doe v. Roe*, 419 Md. 687 (2011), which involved the extension of a civil statute of limitation, the Court of Appeals stated that “there seems to us to be a cogent argument that could have been presented that the application of § 5-117 to Roe’s claims – not yet barred under the three year statute of limitations – is not a retroactive application of that statute,” noting “a sizable number of cases hold that applying a statute extending a limitations period to claims . . . not yet barred by the prior limitations period is not a retrospective application of that new limitations period – ‘because the suit was filed after the effective date of the statutory amendment.’” *Id.* at 699 n. 11.

Other courts have reached the same conclusion by characterizing statutes of limitation as procedural or remedial. See *State v. Gum*, 153 P.3d 418, 424 (Ariz. App. 2007) (“A statute is not impermissibly retroactive if it is merely procedural and does not affect an earlier established substantive right.”); *State v. Hirsch*, 511 N.W.2d 69, 78 (Neb. 1994) (“We have consistently held that a statute of limitations does not impair existing substantive rights but merely affects the procedure by which such rights may be enforced.”); *State v. Dufort*, 827 P.2d 192, 194 (Or. App. 1992) (“[S]tatutes of limitation are matters of legislative grace; they are a surrendering by the sovereign of its right to prosecute.”); *State v. Hodgson*, 740 P.2d 848, 668 (Wash. 1987) (“until the statute has run it is a mere regulation of the remedy . . . subject to legislative control.”); *Rose v. State*, 716 S.W.2d 162, 165 (Tex. App. 1986) (“statutes of limitations are construed as being acts of grace and as a surrender by the sovereign of its rights to prosecute at its discretion; they are considered acts of amnesty.”); *People v. Amann*, 289 N.Y.S. 316, 320 (1936) (“A mere change of procedure relating to the commencement of a criminal prosecution certainly confers no vested right upon a criminal relieving him of responsibility for his crime.”). Although no Maryland case has addressed the extension of statutes of limitation in criminal cases, the Court of Appeals applied this rationale to the extension of a statute of limitations in civil cases, finding that an extension of the statute of limitations for civil cases involving child abuse was remedial. *Doe*, 419 Md. at 703-704.

Still other courts have found legislative intent that an extended statute of limitations apply to offenses committed prior to the effective date of the extension, based either on the specific history of the statute before it, or applying a presumption that statutes of limitations should be so applied unless an intent to the contrary is clearly stated. See *State v. Skakel*, 888 A.2d 985, 1022 (Conn. 2006) (“For the reasons that follow, we conclude that, with respect to those criminal offenses for which the applicable preamendment statute of limitations period has not yet expired, an amendment to that statute of limitations is presumptively retroactive.”); *State v. Davenport*, 536 N. W. 2d 686, 689 (N.D. 1995) (history of this and prior amendments “demonstrate the intent to remedy an immediate problem.”); *Commonwealth v. Barger*, 524 N.E.2d 829 (Mass. 1988) (“it is not reasonable to assume

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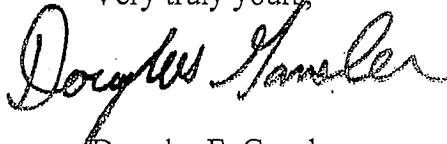
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that the Legislature intended to delay the application of the new ten-year statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment.”); *People v. Whitesell*, 729 P.2d 985, 986 (Colo. 1986) (“the General Assembly expressed a clear intent that its amendment of this statute of limitations insofar as it affects the offense of sexual assault on a child was intended to apply to all offenses not time-barred as of the effective dates of the amendatory legislation.”); *People v. Smith*, 171 Cal. App. 3d 997, 1003-1004 (1985) (“In view of the impressive array of established precedents approving application of extended limitations periods to crimes committed before the enactments, we believe the Legislature [acted] with the knowledge and purpose that the changes in the tolling provisions would apply uniformly to all felony actions not already time-barred.”).

Finally, some courts have concluded that an extension of a criminal statute of limitation should not be applied to offenses committed prior to the effective date. In general, these courts have based their decisions on the intent of the legislature. *United States v. Richardson*, 512 F. 2d 105, 106 (3d Cir. 1975); *State v. Merolla*, 686 P.2d 244, 246 (Nev.1984); *Martin v. Superior Court*, 135 Ariz. 99 (1983); *State v. Paradise*, 456 A.2d 305 (Conn. 1983). Some, however, have found that a statute of limitations is substantive and cannot be applied to offenses committed prior to the effective date. See e.g., *State v. Frech Funeral Home*, 448 A.2d 1037 (N.J. Super. 1982).

It is our view, based on the weight of decisions around the country, and the decisions of Maryland courts with respect to statutes of limitations in civil cases, that these bills would be given effect with respect to offenses committed prior to the effective date of the bills, but as to which the original statute of limitations had not run by that date.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Joseph Bryce
Karl Aro