

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 Judiciary

BILL: CS/SB 120

INTRODUCER: Judiciary Committee and Senator Hutson

SUBJECT: Offenses by Aliens Unlawfully Present in the United States

DATE: January 25, 2017

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|---------------|
| 1. | Davis | Cibula | JU | Fav/CS |
| 2. | | | ACJ | |
| 3. | | | AP | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 120 reclassifies five misdemeanor and felony offenses to the next higher degree and increases the severity ranking one level when the offense is committed by an alien who is unlawfully present in the United States.

The reclassification increases the maximum penalty that may be imposed for an offense as follows:

- A first degree misdemeanor, currently punishable by up to one year in jail, is reclassified as a third degree felony and the maximum penalty is 5 years in state prison;
- A third degree felony is reclassified as a second degree felony and the maximum penalty is 15 years in state prison;
- A second degree felony is reclassified as a first degree felony and the maximum penalty is 30 years in state prison; and
- A first degree felony is reclassified as a life felony and the maximum penalty is life imprisonment or a term of years not exceeding life imprisonment.

II. Present Situation:

“Alien”

An alien is defined in federal immigration law to mean any person who is not a citizen or national of the United States.¹ An alien is considered to be “unlawfully present” for purposes of future admissibility if he or she is present in the United States after the expiration of a period authorized by the Attorney General or is present without being admitted or paroled.²

Alien Inmates Currently Imprisoned in Florida

According to the Department of Corrections, on June 30, 2016, there were 4,754 confirmed alien inmates in Florida prisons.³ That figure represents 4.8 percent of the total inmate population.⁴ On June 30, 2015, one year earlier, the total was 5,061 and on June 30, 2014, the total was 5,221. Approximately 71.5 percent of confirmed alien inmates are serving sentences for which the primary offenses are violent crimes, 13 percent of primary offenses are property crimes, 12 percent of primary offenses are drug crimes, and the remaining 4 percent of primary offenses are classified as “other” offenses.⁵

As of June 30, 2016, Cubans represent the largest confirmed alien population with 1,655 inmates, or 34.8 percent of the population. Mexican aliens are second with 882 inmates, or 18 percent of the confirmed alien population.⁶

Constitutional Rights of Aliens

While it is clear that United States citizens enjoy all constitutional rights, the question often arises as to whether a non-citizen or alien is entitled to the same constitutional rights. The courts have held that once an alien enters this country the Fifth Amendment and Fourteenth Amendment protect them from being deprived of life, liberty, or property without due process of law. These protections extend to an alien “whose presence in this country is unlawful, involuntary, or transitory.”⁷

¹ 8 U.S.C. s. 1101(a)(3). A “national of the United States” means a citizen or person who, though not a citizen, owes permanent allegiance to the United States. 8 U.S.C. s. 1101(a) (21) and (22).

² 8 U.S.C. s. 1182 (a)(9)(B)(ii). “Admitted” is defined as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. 1101(a)(13)(A). The Attorney General is authorized to parole an alien into the United States temporarily under specified conditions provided by federal statute. 8 U.S.C. 1182(d)(5)(A).

³ Email from Brock Terwilleger, Legislative Analyst, Florida Department of Corrections (Jan. 17, 2017) (on file with the Senate Committee on Judiciary). According to a Department of Corrections analysis, an alien inmate is someone who does not have U.S. citizenship. Additional inmates are suspected of being alien inmates, but their status is uncertain until Federal Immigration and Customs Enforcement agents can complete their investigations. Department of Corrections, Senate Bill 120 Policy Analysis (Jan. 12, 2017) (on file with the Senate Committee on Judiciary).

⁴ Email from Brock Terwilleger, Legislative Analyst, Florida Department of Corrections (Jan. 18, 2017) (on file with the Senate Committee on Judiciary).

⁵ *Supra* at 3.

⁶ *Id.*

⁷ *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). For a discussion of additional constitutional rights of aliens or foreign nationals, see David Cole, *Are Foreign Nationals Entitled To The Same Constitutional Rights As Citizens?*, 25 T. Jefferson L. Rev 367 (2003).

Reclassification Statutes and Ranking Levels for Sentencing and Gain-Time Eligibility

The Florida Statutes contain several provisions in which the misdemeanor or felony degree of an offense is increased to the next higher degree. As such, a first degree misdemeanor is reclassified as a third degree felony or a third degree felony is reclassified as a second degree felony. The reclassification of a misdemeanor or felony increases the maximum penalty that may be imposed for the offense. For example, the maximum penalty for a third degree felony is 5 years incarceration in state prison.⁸ The maximum penalty for a second degree felony is 15 years' incarceration in state prison.⁹ When a third degree felony is reclassified to a second degree felony, the maximum penalty that may be imposed increases from 5 to 15 years in state prison.

In some statutes, the enhancement is based upon the perpetrator's actions while in other statutes the enhancement is based upon the nature of the victim. For example, Florida's "hate crimes" statute, s. 775.085, F.S., reclassifies the degree of a misdemeanor or felony if the commission of the offense "evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status or advanced age of the victim." In contrast, under s. 784.07 F.S., dealing with assault or battery of a law enforcement officer or other specified officers, the offense is reclassified if the offense was committed upon the officer while he or she was engaged in the lawful performance of his or her duties.¹⁰

Several statutes that reclassify offenses also provide that, for sentencing purposes and determining gain time eligibility, the reclassified felony will be ranked one level above the ranking specified in the Criminal Punishment Code Offense Severity Ranking Chart.¹¹ This results in more points being assigned on the Offense Score of the Criminal Punishment Code Worksheet, which will likely result in the offender receiving a longer prison sentence.

Other States' Reclassification Statutes

At this time, no states are known to impose increased criminal penalties on crimes committed by a person who is unlawfully present in the United States. However, the Texas Legislature is considering a bill this session, SB 108, which increases the penalty for an offense if, at the time of the offense, the defendant was not a citizen or national of the United States and was not lawfully present in the country.

III. Effect of Proposed Changes:

Offenses

The bill increases criminal penalties for five violent crimes committed by aliens who are not lawfully present in the United States. The bill works by reclassifying the qualifying criminal

⁸ Section 775.082, F.S.

⁹ *Id.*

¹⁰ A few examples of additional enhancement statutes are s. 775.0845, F.S., wearing a mask while committing an offense; s. 775.0861, F.S., offenses against persons on the grounds of religious institutions; s. 775.0862, F.S., sexual offenses against students by authority figures; s. 775.0863, evidencing prejudice while committing an offense against a person with a mental or physical disability; s. 775.087, F.S., possession or use of a weapon or firearm; s. 775.0875, F.S., taking a law enforcement officer's firearm; and s. 794.023, F.S., sexual battery by multiple perpetrators.

¹¹ Sections 921.0022 and 921.0023, F.S.

offenses by one higher degree and increasing their severity ranking by one level. The classification degree and the severity rankings are used in existing statutory formulas to calculate minimum lengths of prison sentences.

The offenses qualifying for the enhanced penalty under the bill are:

- Sexual battery,
- Aggravated assault with a deadly weapon,
- Murder,
- The unlawful throwing, placing, or discharging of a destructive device or bomb, and
- Armed burglary.

Reclassification of Offenses

The bill provides that the misdemeanor or felony degree of the offense is reclassified as follows:

- A first degree misdemeanor is reclassified as a third degree felony;¹²
- A third degree felony is reclassified as a second degree felony;¹³
- A second degree felony is reclassified as a first degree felony;¹⁴ and
- A first degree felony is reclassified as a life felony.¹⁵

Sentencing and Gain-time Eligibility

For sentencing purposes and for determining incentive gain-time eligibility, a reclassified felony offense is ranked one level above the ranking specified in the Criminal Punishment Code.¹⁶ However, a first degree misdemeanor that is reclassified to a third degree felony is ranked in Level 2 of the offense severity ranking chart. Noncapital felonies are also ranked in the Criminal Punishment Code. The higher the offense ranking, the greater the number of sentence points that are assigned to calculate the lowest permissible sentence under the Criminal Punishment Code.

Effective Date

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹² A third degree felony is punishable by up to 5 years in state prison and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

¹³ A second degree felony is punishable by up to 15 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083.

¹⁴ A first degree felony is generally punishable by up to 30 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

¹⁵ A life felony is generally punishable by life imprisonment or a term of years not exceeding life imprisonment and a fine of up to \$15,000. Sections 775.082 and 775.083, F.S.

¹⁶ Section 921.0022, F.S., contains the Criminal Punishment Code Offense Severity Ranking Chart and s. 921.0023, F.S., contains the default provisions for offenses that are not listed in s. 921.0022, F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

While reclassification statutes have been upheld as constitutional by the courts, none of those statutes reclassified a criminal offense based upon the defendant's immigration status. The case law construing the most analogous statutes to the proposal in the bill are discussed below.

In *State v. O.C.*,¹⁷ the Florida Supreme Court determined that a penalty enhancement statute was unconstitutional and a violation of substantive due process. The statute subjected a defendant to an enhanced penalty based only upon the defendant's association with gang members. Because the statute punished gang membership without requiring a relationship or nexus between the criminal activity and gang membership, the statute, according to the Court, lacked a rational relationship to the legislative goal of reducing gang violence or activity. As a result, the Court determined that the statute failed to have a reasonable and substantial relation to a permissible legislative objective.

In a 2001 sentencing case, *Yemson v. United States*, the District of Columbia Court of Appeals noted that it would obviously be unconstitutional to treat a defendant more harshly than another defendant solely because of his or her nationality or alien status. But the court explained that its decision

does not mean . . . that a sentencing court, in deciding what sentence to impose, must close its eyes to the defendant's status as an illegal alien and his history of violating the law, including any law related to immigration. Indeed, "the sentencing court . . . must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."¹⁸

In 2008, the Indiana Court of Appeals in *Sanchez v. State*, upheld a trial court's finding that a defendant's status as an illegal alien was a valid sentencing aggravator. The Court also upheld a related finding that the defendant's illegal alien status reflected a disregard for the law.¹⁹ Although the case is not controlling law in Florida, it may be viewed as persuasive precedent.

¹⁷ *State v. O.C.*, 748 So. 2d 945 (Fla. 1999).

¹⁸ *Yemson v. United States*, 764 A.2d 816, 819 (D.C. 2001) (quoting *Wasman v. United States*, 468 U.S. 559, 563-564 (1984) (citing *Williams v. New York*, 337 U.S. 241, 247 (1949))).

¹⁹ *Sanchez v. State*, 891 N.E.2d 174 (Ind. 2008).

The question also arises as to whether Congress has preempted the field of immigration law to the extent that a state is not permitted to criminalize any activity involving aliens. In *De Canas v. Bica*, a 1976 decision, the U.S. Supreme Court held that federal immigration law does not inherently preempt state court jurisdiction over all matters involving immigration issues. The Court noted that it has never held that every state statute “which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power...”²⁰ This decision was rendered 10 years before Congress passed the Immigration Reform and Control Act of 1986 which was enacted for “combating the employment of illegal aliens.”²¹

In *Arizona v. United States*, a 2012 U.S. Supreme Court decision rendered after the Immigration Reform and Control Act, the Court noted that the current federal law was substantially different than it was when *De Canas* was decided. The Court said that “federal governance of immigration and alien status is extensive and complex.”²²

The *Arizona* Court also expounded on the federal preemption doctrine as it involves immigration law. Under the federal preemption doctrine, states are precluded from regulating conduct that Congress has determined must be regulated by federal law. Additionally, state statutes are preempted when they are in conflict with federal law. It is clear that the broad scope of federal immigration law significantly limits the power of states to regulate immigration. However, because of the absence of case law that addresses issues sufficiently similar to the issues raised by the bill, it is unclear whether this bill is preempted by federal law.

The Court noted that, “As a general rule, it is not a crime for a removable alien to remain present in the United States²³ and that removal proceedings are determined to be civil, not criminal, proceedings.”²⁴ Unlike the Arizona statute under review, the bill does not seek to detain aliens based upon a suspicion of their removability. Under this bill, aliens have been arrested and are being prosecuted for a state criminal offense.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

²⁰ *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

²¹ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

²² *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

²³ *Id.* at 2505.

²⁴ *Id.* at 2499.

C. Government Sector Impact:

The Office of Economic and Demographic Research has completed a preliminary estimate on the impact of SB 120 and has concluded that the bill will increase costs by an indeterminate amount. The Criminal Justice Impact Conference, which provides the final, official impact estimate that legislation has on prison beds, has not met to discuss the impact of the bill at this time.²⁵

The Department of Corrections' agency analysis lists the number of confirmed and suspected alien admissions in the prison system who are admitted for crimes specified in the bill. The Department further categorizes these inmates into two populations: Cuban-born inmates and non-Cuban-born inmates. This distinction has been necessary because, until recently, under federal immigration policies, most Cubans could not be considered unlawfully present in this country. The Department projects that by Year 3, the inmate population including Cuban-born aliens would be 31 inmates at a cost of \$180,022. By Year 3, the population without Cuban-born aliens would be 22 inmates at a cost of \$127,757.²⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends section 921.0022, Florida Statutes.

This bill creates section 775.0854, Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on January 24, 2017:

The committee substitute reduces the large number of offenses listed in the original bill to five offenses. Additionally, the original bill reclassified a second degree misdemeanor to a first degree misdemeanor. This provision was removed because there are no second degree misdemeanors included within the five offenses listed in the amended bill.

²⁵ Email from Matthew B. Hasbrouck, Ph.D., Office of Economic and Demographic Research (Jan. 13, 2017) (on file with the Senate Committee on Judiciary).

²⁶Department of Corrections, *Senate Bill 120 Fiscal Analysis*, (Jan. 12, 2017) (on file with the Senate Committee on Judiciary).

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
