

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 83 Offenses by Illegal Immigrants  
**SPONSOR(S):** Criminal Justice Subcommittee, Eagle and others  
**TIED BILLS:** IDEN./SIM. **BILLS:** CS/SB 120

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 5 N, As CS	Hall	White
2) Justice Appropriations Subcommittee	7 Y, 5 N	Smith	Gusky
3) Judiciary Committee			

### SUMMARY ANALYSIS

For certain offenses, Florida law provides for reclassification of the crime to the next higher degree and increases the offense severity ranking by one level. Examples of current offenses that are subject to reclassification provisions are crimes motivated by prejudice under s. 775.085, F.S., and assault and battery offenses against a law enforcement officer engaged in the lawful performance of his or her duties under s. 784.07, F.S. Florida does not currently authorize reclassification for an offense committed by a person who is unlawfully present in the United States.

The bill creates s. 775.0864, F.S., to reclassify five violent crimes to the next higher degree when the crime is committed by an alien who is unlawfully present in the United States. The offenses qualifying for the enhanced penalty under the bill are:

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

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

- A first degree misdemeanor is reclassified to a third degree felony;
- A third degree felony is reclassified to a second degree felony;
- A second degree felony is reclassified to a first degree felony; and
- A first degree felony is reclassified to a life felony.

The bill also enhances the offense severity ranking of a reclassified crime to one level higher than the normal ranking.

The bill would increase the prison population by an indeterminate amount.

The bill provides an effective date of July 1, 2017.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

###### *Alien Inmate Population in Florida*

Federal law defines the term “alien” to mean any person who is not a citizen or national of the United States.<sup>1</sup> Additionally, federal immigration law classifies an alien as “unlawfully present” when the alien is in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.<sup>2</sup>

The Florida Department of Corrections (DOC) maintains data related to the number of aliens<sup>3</sup> currently incarcerated in the state’s prison system. This data indicates that, as of June 30, 2016, there were a total of 4,754 confirmed alien inmates. Data regarding the number of alien inmates who are unlawfully present is not collected.<sup>4</sup>

###### *Reclassification of Offenses*

Florida’s statutes currently contain multiple offenses for which the degree of the offense is enhanced if specific circumstances are present. Such an enhancement results in the offense level of the crime increasing by one degree. For example, a third degree felony (typically punishable by a maximum of five years imprisonment and a \$5,000 fine<sup>5</sup>) is enhanced to a second degree felony (punishable by a maximum of 15 years imprisonment and a \$10,000 fine<sup>6</sup>).

For some statutes the enhancement is based upon the offender’s actions, while others base the enhancement on a certain classification of the victim. For example, s. 775.085, F.S., known as Florida’s “Hate Crimes” statute, reclassifies an offense to the next higher offense level if the commission of a crime “evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, or advanced age of the victim.” This enhancement is based on the offender’s action, while s. 784.07, F.S., reclassifies an offense based on the victim of the offense. Section 784.07, F.S., reclassifies assault and battery offenses against law enforcement officers and other specified officers or providers, who are engaged in the lawful performance of their duty at the time of the offense, to an offense level one degree higher.

###### *Consideration of Immigration Status in Criminal Sentencing*

While Florida allows reclassification based on certain offenses, no Florida court has ever considered the reclassification of a criminal offense based on a defendant’s immigration status.

In *State v. O.C.*,<sup>7</sup> 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.<sup>8</sup>

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<sup>1</sup> 8 U.S.C. § 1101(a)(3) (2015).

<sup>2</sup> 8 U.S.C. § 1182(a)(9)(B)(ii) (2015).

<sup>3</sup> DOC considers an inmate who does not have U.S. citizenship to be an “alien inmate”. FLORIDA DEPARTMENT OF CORRECTIONS, *Inmate Population, 2015-2016 Statistics*, [http://www.dc.state.fl.us/pub/annual/1516/stats/ip\\_alien.html](http://www.dc.state.fl.us/pub/annual/1516/stats/ip_alien.html) (last visited March 12, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> ss. 775.082 and 775.083, F.S.

<sup>6</sup> ss. 775.082 and 775.083, F.S.

<sup>7</sup> *State v. O.C.*, 748 So. 2d 945 (Fla. 1999).

<sup>8</sup> *Id.* at 950.

In a 2001 case from the District of Columbia, *Yemson v. United States*,<sup>9</sup> a defendant challenged the trial court's imposition of consecutive prison terms following a guilty plea to various fraud-related charges. The defendant, who was from Nigeria, had previously fled the country on separate occasions to avoid prosecution for other crimes. He had been rearrested and convicted of other charges in federal court, including illegal entry after deportation. The sentencing judge based his decision to impose sentence on the defendant's failure to appear for sentencing five years earlier; his lengthy record for many of the same charges; and his failure to accept responsibility for his actions.<sup>10</sup> The District of Columbia Court of Appeals affirmed, noting 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."<sup>11</sup>

In 2008, the Indiana Court of Appeals in *Sanchez v. State*,<sup>12</sup> citing *Yemson*, 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.<sup>13</sup>

*Yemson* and *Sanchez* involve the discretion of a judge to impose a particular sentence based on aggravating and mitigating circumstances, of which, illegal alien immigration status was held to be one such aggravator. Thus, while those cases approve of using a defendant's illegal alien status as a factor to be considered in sentencing, they do not involve an offense reclassification statute.

#### *Criminal Punishment Code, Offense Severity Ranking Chart*

In Florida, the Criminal Punishment Code uses a system that assigns point values to crimes based on the severity of the offense listed in the offense severity ranking chart.<sup>14</sup> These point values are used in conjunction with a Criminal Punishment Code scoresheet to calculate a sentencing score for felony offenders. The offense severity ranking chart is separated into 10 levels, ranked from least severe which are level one offenses, to most severe which are level 10 offenses. Each felony offense is assigned a level according to the severity of the offense.<sup>15</sup> If an offense is not specifically listed in the offense severity ranking chart, s. 921.0023, F.S., creates a default provision to assign a severity ranking based upon the degree of the felony. For example, a third degree felony not specifically ranked will be a level one offense for the purpose of computing the Criminal Punishment Code scoresheet.<sup>16</sup> Florida law specifies that reclassification of the degree of a felony offense, to provide an enhanced penalty, will not result in the offense becoming unlisted to subject it to the default provisions of s. 921.0023, F.S.

#### **Effect of the Bill**

The bill reclassifies five violent crimes to the next higher degree when the crime is committed by an alien who is unlawfully present in the United States. The offenses qualifying for the enhanced penalty under the bill are:

- Sexual battery, pursuant to s. 794.011, F.S.;
- Aggravated assault with a deadly weapon, pursuant to s. 784.021(1)(a), F.S.;
- Murder, pursuant to s. 782.04, F.S.;

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<sup>9</sup> *Yemson v. United States*, 764 A.2d 816 (D.C. 2001).

<sup>10</sup> *Id.* at 819

<sup>11</sup> *Id.* (citations omitted).

<sup>12</sup> *Sanchez v. State*, 891 N.E.2d 174 (Ind. Ct. App. 2008).

<sup>13</sup> *Id.* at 176-77.

<sup>14</sup> ss. 921.0022 and 921.0023, F.S.

<sup>15</sup> s. 921.0022, F.S.

<sup>16</sup> s. 921.0023, F.S.

- Unlawful throwing, placing, or discharging a destructive device or bomb, pursuant to s. 790.1615, F.S.; and
- Armed burglary, pursuant to s. 810.02(2)(b), F.S.

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

- A first degree misdemeanor<sup>17</sup> is reclassified to a third degree felony;<sup>18</sup>
- A third degree felony is reclassified to a second degree felony;<sup>19</sup>
- A second degree felony is reclassified to a first degree felony;<sup>20</sup> and
- A first degree felony is reclassified to a life felony<sup>21</sup>.

The bill provides that any offense reclassified is to be ranked one level above the ranking normally specified for the crime for the purpose of computing the Criminal Punishment Code scoresheet and determining incentive gain-time eligibility. For example, aggravated assault with a deadly weapon is ranked as a level six offense on the offense severity ranking chart. Thus, under the bill, if an unlawfully present alien offender commits the offense, it will be reclassified as a level seven offense for ranking purposes. The bill addresses only one misdemeanor offense, the unlawful throwing, placing, or discharging a destructive device or bomb, and specifies that the crime is reclassified to a third degree felony and ranked as a level two offense for sentencing purposes.

Additionally, s. 921.0022, relating to the offense severity ranking chart, is amended to include the newly created s. 775.0864, F.S., as one of the enumerated reclassification statutes that will not cause an offense to become unlisted so that it is subject to the default ranking provisions of s. 921.0023, F.S.

The bill provides an effective date of July 1, 2017.

#### B. SECTION DIRECTORY:

Section 1: Creating s. 775.0864, F.S.; relating to offenses against persons by unlawfully present aliens; reclassification.

Section 2: Amending s. 921.0022, F.S.; relating to the Criminal Punishment Code; offense severity ranking chart.

Section 3: Providing an effective date of July 1, 2017.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to have any impact on state government revenues.
2. Expenditures: The Criminal Justice Impact Conference (CJIC) met on March 2, 2017 and considered a broader version of this bill that reclassified any offense involving the use or threat of physical force or violence against another person when committed by an alien unlawfully present in the United States. The CJIC determined the bill would have increased the prison population by an indeterminate amount.. Although this bill applies to a narrower class of offenses, it is still anticipated to increase the prison population by an indeterminate amount.

<sup>17</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

<sup>18</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

<sup>19</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

<sup>20</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

<sup>21</sup> A life felony is generally punishable by life imprisonment or a term of years not to exceed life imprisonment and a fine of up to \$15,000. ss. 775.082 and 775.083, F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have any impact on local government revenues.
2. Expenditures: The bill may reduce the need for jail beds because it reclassifies a misdemeanor of the first degree, which could result only in a sentence to jail for less than one year, to a third degree felony, which result in a prison sentence.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: This bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.
2. Other: An issue that may arise is whether the bill is subject to preemption by federal law. In *De Canas v. Bica*,<sup>22</sup> 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....”<sup>23</sup> This decision was rendered 10 years before Congress passed the Immigration Reform and Control Act of 1986 and current federal law, which was enacted for “combating the employment of illegal aliens.”<sup>24</sup>

In *Arizona v. United States*,<sup>25</sup> 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.”<sup>26</sup>

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 States”<sup>27</sup> and that removal proceedings are determined to be civil, not criminal, proceedings.<sup>28</sup> Unlike the Arizona statute under review, the bill does not seek to detain unlawfully present aliens based upon a suspicion of their removability. Under this bill, unlawfully present aliens have been arrested and are being prosecuted for a state criminal offense.

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<sup>22</sup> *De Canas v. Bica*, 424 U.S. 351 (1976).

<sup>23</sup> *Id.* 355.

<sup>24</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 2499.

<sup>27</sup> *Id.* at 2505.

<sup>28</sup> *Id.* at 2499.

B. RULE-MAKING AUTHORITY: The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 15, 2016, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute (CS). The CS differs from the bill as filed in that the CS changes the qualifying offenses for which reclassification occurs if the offense is committed by an alien unlawfully present in the United States.

The bill originally applied to the following offenses: assault; aggravated assault; battery; felony battery; any offense listed in s. 775.084(1)(b)1., F.S.; or any offense that involves the use or threat of physical force or violence against another person.

The CS limits the application of reclassification to the following offenses: sexual battery; aggravated assault with a deadly weapon; murder; unlawful throwing, placing, or discharging of a destructive device or bomb; and armed burglary.

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