

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: SB 120

INTRODUCER: Senator Hutson

SUBJECT: Offenses by Aliens Unlawfully Present in the United States

DATE: January 23, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	Pre-meeting
2.			ACJ	
3.			AP	

I. Summary:

SB 120 reclassifies certain violent 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 second degree misdemeanor, currently punishable by 60 days in jail, is reclassified as a first degree misdemeanor and the maximum penalty is one year in jail;
- A first degree misdemeanor 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

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).

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

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

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 and 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).

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 certain violent crimes committed by aliens who are not lawfully present in the United States. The bill works by reclassifying the qualifying criminal 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 broadly include "any offense that involves the use or threat of physical force or violence against another person." However, the bill also specifically includes assault, aggravated assault, battery, and felony battery as qualifying

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. If the offender is a habitual violent felony offender, the qualifying offenses include a number of violent felonies such as arson, sexual battery, and murder.¹²

Reclassification of Offenses

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

- A second degree misdemeanor¹³ is reclassified as a first degree misdemeanor;¹⁴
- A first degree misdemeanor is reclassified as a third degree felony;¹⁵
- A third degree felony is reclassified as a second degree felony;¹⁶
- A second degree felony is reclassified as a first degree felony;¹⁷ and
- A first degree felony is reclassified as a life felony.¹⁸

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.¹⁹ 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.

¹² Specifically, these offenses include an offense committed by a habitual violent felony offender if the court finds that the offender has previously been convicted of a felony or an attempt or conspiracy to commit a felony and the conviction was for arson, sexual battery, robbery, kidnapping, aggravated child abuse, aggravated abuse of an elderly person or disabled adult, aggravated assault with a deadly weapon, murder, manslaughter, aggravated manslaughter of an elderly person or disabled adult, aggravated manslaughter of a child, unlawful throwing, placing, or discharging of a destructive device or bomb, armed burglary, aggravated battery, or aggravated stalking.

¹³ A second degree misdemeanor is punishable by up to 60 days in county jail and a fine of up to \$500. Sections 775.082 and 775.083, F.S.

¹⁴ A first degree misdemeanor is punishable by up to one year in county jail and a fine of up to \$1,000. Sections 775.082 and 775.083, F.S.

¹⁵ 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.

¹⁶ 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.

¹⁷ 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.

¹⁸ A life felony is generally punishable by life imprisonment or a term of years not exceeding life imprisonment. Sections 775.082 and 775.083, F.S.

¹⁹ 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.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

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.*,²⁰ 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."²¹

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

²⁰ *State v. O.C.*, 748 So. 2d 945 (Fla. 1999).

²¹ *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))).

also upheld a related finding that the defendant's illegal alien status reflected a disregard for the law.²² Although the case is not controlling law in Florida, it may be viewed as persuasive precedent.

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*, however, 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..."²³

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

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.²⁴

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 \$127,757.²⁵

²² *Sanchez v. State*, 891 N.E.2d 174 (Ind. 2008).

²³ *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

²⁴ Email from Matthew B. Hasbrouck, Ph.D., Office of Economic and Demographic Research (Jan. 13, 2017) (on file with the Senate Committee on Judiciary.)

²⁵ Department of Corrections, *Senate Bill 120 Fiscal Analysis*, (Jan. 12, 2017) (on file with the Senate Committee on Judiciary).

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 Changes:

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

None.

B. Amendments:

None.