2017 SENATE JUDICIARY

SB 2218

2017 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2218
1/24/2017
27285

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	

Explanation or reason for introduction of bill/resolution:

Relating to the penalty for a class A misdemeanor.

Minutes: **Testimony attached #** 1

Chairman Larson called the committee to order on SB 2218. All committee members were present. **Chairman Armstrong** is testifying so **Senator Larson** is acting chair.

Senator Armstrong introduced and testified in support of the bill.
"This is a really simple bill. It changes the penalty from a class A Misdemeanor from one year in jail to 360 days in jail."

Sue Swanson, Immigration Attorney from Grand forks, testified in support of the bill. (see attachment 1)
"If someone is sentenced to 365 days as a state A Misdemeanor, it becomes an Aggravated Felony for immigration purposes."

Senator Armstrong: "Does that matter if the sentence is affectual or suspended?"

Sue Swanson: "That's a two-part answer. First of all, if it's a crime involving moral turpitude, then it's what is the maximum possible sentence that can be imposed? That will affect the ability for somebody to obtain certain types of relief in deportation proceedings. By changing this, it can affect whether somebody is even placed in deportation proceedings. The second part answer where I changed a little bit, is the sentence actually imposed? If the sentence imposes 365 days that becomes an Aggravated Felony for immigration purposes. It's automatically placed into deportation proceedings, it subjects the purpose to mandatory detention, there is no possibility of bond, and the ultimate result is there are many forms of reliefs, or ways they can keep somebody here in the USA and remain united with their family that they are no longer eligible for. I would also like to make this bill retroactive for any issues that may arise in the future, which I believe there will be."

Senator Myrdal: "What type of law are we talking about for immigrants?"

Sue Swanson: "I think some of the crimes we are looking at are theft crimes, fraud crimes, certain types of assaults, not aggravated assaults though. I don't want to minimize the act of the crime itself, but I want to emphasize that these crimes shouldn't have the detrimental effect of separating families."

Senator Armstrong: "Our state misdemeanors are being treated as felonies for immigration crime. That is the main focus of this bill, to change that, correct?"

Sue Swanson: "Exactly."

Jackson Lofgren, President of Association of Criminal Defense Lawyers, testified in support of this bill. No written testimony.

"This makes it clear to the Federal Government that our misdemeanors are our misdemeanors. We agree with Senator Armstrong and Sue Swanson regarding issues in this bill."

Chairman Larson: "When you say it has no effect whatsoever, I think it does have one, that is with a year and a day sentence, a person could be sentenced to prison rather than jail. Is that correct?"

Jackson Lofgren: "They take them no matter what."

Senator Armstrong: "How many times have you seen somebody get the absolute max on a class A Misdemeanor?"

Jackson Lofgren: "Out of 3000 cases, maybe 5? It's almost unheard of."

Senator Armstrong: "When I wrote this, I was just going to put 364 for in for the days, and then the DUI would be 360, do we remember why that is?"

Ken Sorenson, from the Attorney General's Office, answered the question for Jackson Lofgren: "Part of it was we had a number of sentencing courts who were using 360 days anyways. So we just said this is the number the judges have picked and so that is the number we are going to use."

Chairman Larson closed the hearing on SB 2118.

2017 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2218 Committee Work
2/7/2017
27983

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to the penalty for a class A misdemeanor.

Minutes: **No written testimony**

Chairman Armstrong began the discussion on SB 2218. All committee members were present.

No discussion on the bill at all, a motioned was made immediately.

Senator Myrdal motioned Do Not Pass. **Senator Nelson** seconded.

A Roll Call Vote was taken. Yea: 6 Nay: 0 Absent: 0.
The motion carried.

Chairman Armstrong carried the bill.

Chairman Armstrong ended the discussion on SB 2218.

Date:2/7/17
Roll Call Vote # 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2218

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☒ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Myrdal Seconded By Senator Nelson

Senators	Yes	No	Senators	Yes	No
Chairman Armstrong	X		Senator Nelson	X	
Vice-Chair Larson	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Chairman Armstrong

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2218: Judiciary Committee (Sen. Armstrong, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2218 was placed on the Eleventh order on the calendar.

2017 TESTIMONY

SB 2218

1/24/17 (1)

17.0851.0100

Sixty-Fifth
Legislative Assembly of North Dakota

SENATE BILL NO. 2218

TESTIMONY BY SUE SWANSON AND ANNA STENSON

Good morning, Chairman Armstrong, members of the senate judiciary committee

My name is Sue Swanson. I am an immigration attorney from Grand Forks, ND and have been an adjunct professor of immigration law at the UND law school for the past four (4) years. I have worked in the field of immigration law since 1999. With me today is Anna Stenson, an immigration attorney from Fargo, ND. We are here to testify in support of Senate Bill 2218 and to explain to you why there is a need to change the maximum possible sentence for a Class A misdemeanor from one (1) year to 360 days.

Immigration law is considered to be the second most complicated area of law in the US, the first being tax law. It is a statute driven practice in which the immigration practitioner is required to interpret foreign laws, federal law, state law in all 50 states, executive orders, government agency memorandums of interpretation, and many other agency rules and regulations. As an immigration practitioner, on any given day, I will work with five (5) to six (6) different government agencies such as the Department of Justice (DOJ) for deportation court, United States Citizenship and Immigration Services (USCIS), the Department of Labor (DOL), the Board of Immigration Appeals (BIA), Board of Alien Labor Certification (BALCA) – the appeals board for the Department of Labor, the Administrative Appeal Office (AAO) – the appeal agency for USCIS. I practice in at least four (4) different courts - Federal Court, State District Court, Municipal Court and Deportation Court. Just last week, to coordinate one client's case, I was on the phone for more than two (2) hours coordinating my client's case with Customs and Border Protection (CBP) know as Border Patrol, the Office of Chief Counsel (OCC) – the government attorney office for deportation court and Immigration and Customs Enforcement (ICE)/ ERO – the policing agency for immigration.

Unlike criminal law and other areas of law, immigration law is very rigid and is unforgiving. The consequences of immigration law actually starts in state criminal court when the defense attorney negotiates a plea deal with the state prosecutor. If the defense attorney fails to obtain immigration advice or obtains incorrect immigration advice, the final consequence of the criminal conviction can result in the client becoming deportable and/or inadmissible to the US and possibly subject to mandatory detention without the possibility of bond. For the defendant, this could mean permanent separation from their spouse and children, or deportation back to violent countries. I do not speak out of turn when I say to you that my clients' lives depend on me.

Before I speak specifically on why I am here today, I need to provide you a little background and education on the specific area of immigration law that is affected by Senate Bill 2218. A foreign national is "admissible" to the US at two different times. First, every time a foreign national physically enters the US, s/he must be "admitted" into the US. This occurs when the person

passes through customs. It does not matter if the person is a first time traveler to the US or if they have had a green card for 30 years. They must be "admitted" or they cannot enter. Second, a person is "admissible" to the US when they apply to become a Legal Permanent Resident (LPR), or as you may be familiar with, they apply for a green card.

There are certain actions that can make a client "inadmissible" to the US. One such action is if they are convicted of a "crime of moral turpitude" (CIMT). The average criminal attorney has not dealt with this term as it is a term that is most often seen only in the immigration law context. A crime involving moral turpitude does not have a specific definition. This is very important as it leaves many state convictions open to interpretation by the immigration judge to determine whether or not a person's conviction makes him/her inadmissible to and or deportable from the US. The most obvious crimes that involve moral turpitude are crimes involving theft and fraud.

When a person is inadmissible to the US, the person cannot leave the US and re-enter and cannot become a permanent resident. This means that someone who has had a green card for many years cannot leave the US to visit family in his/her home country without a fear of not being able to get back into the US. If they do come back and CBP notates their conviction, they will be taken into custody and placed into deportation proceedings.

If a person is convicted of a crime involving moral turpitude, with a possible punishment of one year, committed within their first five (5) years of entry into the US, they become deportable. The sentence imposed does not matter. In addition, if a person is convicted of two (2) crimes involving moral turpitude, at any time in their lifetime, they become deportable from the US and are subject to mandatory detention with no access to bond. The person can be detained for months. During that time, they cannot assist me, the attorney, in putting together a case for them to try to keep them in the US.

If a client is sentenced to one year or more, the client may have been convicted of an "aggravated felony" for immigration purposes. An aggravated felony is also a term unique to immigration law. For our purposes today, all you need to know about aggravated felonies is that they make the foreign national ineligible for almost all forms of "relief" from deportation proceedings. This means, there is very little I can do to keep them in the US. There is very little hope of myself and my colleagues being able to keep a person in the US and families united.

The Immigration and Nationality Act (INA) provides a one-time exception to for crimes involving moral turpitude. This is called the "petty offense" exception. The petty offense exception provides a one-time waiver of inadmissibility only if the foreign national is convicted of a crime involving moral turpitude where the possible maximum sentence is less than one year AND the foreign national is sentenced to less than 180 days.

When a client faces a criminal charge that will make him/her inadmissible and/or deportable, it is an immigration attorney's task to work with the criminal defense attorney to try to craft a plea option that minimizes the possible negative immigration consequences. In 2009, the US Supreme Court, in the case *Padilla v Kentucky*, recognized the harsh immigration consequences some

criminal convictions create. The US Supreme Court's decision recognized that the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens and that it is required that the defendants counsel advise a client of the possible immigration consequences a plea offer or conviction carries. Due to the severity of possible consequences, the US Supreme Court called on prosecutors to work with defense attorneys to craft pleas that minimize negative immigration consequences.

Of importance, federal criminal law defines a Class A misdemeanor as having a maximum possible penalty of one year or less. A federal Class E felony has a term of imprisonment that begins at "more than one year." The Immigration and Nationality Act does not follow federal law. An aggregated felony for immigration purposes is classified as any offense, state or federal, in which a minimum sentence imposed is one year or more. As you can see, a one day difference in state sentencing can have a drastic consequence for the foreign client. The reduction may not sound like much, but is of significant consequence for immigration purposes. Because of the one-day overlap in sentences of exactly one year, many ND class A misdemeanors are deportable offenses even if they are relatively minor offenses and result in little to no jail time.

As currently defined under ND law, a state Class A misdemeanor can be treated as an aggravated felony for immigration purposes. Even though the client committed a misdemeanor offense under state law, under immigration law, immigration will treat the conviction as a felony, and this will drastically affect an individual's defenses in immigration court. This results in a disparate end consequence between US nationals and foreign nationals. This disparate end result is the exact issue that the US Supreme Court addressed in *Padilla v. Kentucky* in 2010. The US Supreme Court put the burden on state court systems to address the disparate results of state criminal convictions.

As an immigration practitioner, I see two issues that continue to arise when working with criminal defense attorneys and defendants. First, defense attorneys fail to advise their clients of the negative immigration consequences altogether, or they think they understand the complexity of immigration law and provide incorrect or incomplete advice. Many don't seek immigration assistance at all.

The second issue is that many prosecutors refuse to work with defense attorneys in crafting pleas that minimize immigration consequences. The defense attorney and prosecutor are often arguing apples and oranges. The prosecutor wants a conviction for a higher charge – i.e. a conviction for a class A misdemeanor rather than a class B misdemeanor. The defense attorney, working with an immigration attorney, isn't worried about whether his/her client is convicted of the higher charge, but rather, is looking at the possible maximum sentence amount for his/her client. Under the current law, in order to avoid a class A misdemeanor conviction and maintain the ability to qualify for the "petty offense exception," clients are forced to either plead to two (2) class B misdemeanors and or plead to a false charge. In other words, the statute under which the foreign national is convicted in no way relates to the actual criminal act the foreign national is accused of

committing. This results in either multiple convictions on the defendant's criminal record when there should have only been one conviction, or a "false conviction."

By changing the maximum possible sentence for a state Class A misdemeanor from one year (365 days) to 360 days, two major things are achieved. First, for a class A misdemeanor offense in ND, a foreign national will not be convicted of an aggravated felony for immigration purposes. If placed into deportation proceedings, the foreign national will be eligible to file for types of relief that will allow him/her to stay in the US and remain united with his/her families.

Two, it allows criminal defense attorneys to craft pleas with prosecutors that would allow their client to either plea to the actual criminal charge they are being charged with, resulting in more "true" convictions, and it will allow more foreign nationals to qualify for the petty offense exception and avoid deportation proceedings altogether.

I want to point out that this group has already previously decided this issue, but limited it to DUI charges. I ask that you expand your previous decision to include all class A misdemeanor convictions.

In addition, I ask that you make this change retroactive. By making the change retroactive, you will achieve judicial efficiency by closing the flood gates on post-conviction filings by criminal defendants that would be affected by the change. Secondly, changes in immigration law are always retroactive. For a foreign national, a safe-haven plea for immigration purposes entered into years ago, can disappear night with a change in immigration law. A conviction that previously did not have a negative immigration consequence can overnight become a deportable and/or inadmissible offense.