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*Bill Analysis*  
*Legislative Service Commission*

**Sub. S.B. 22\***  
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(As Reported by S. Judiciary)

Sen. Johnson

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**BILL SUMMARY**

- Provides increased periods of required incarceration for a person who is convicted of state OMVI in violation of a "prohibited concentration" prohibition and who has a concentration of .17 of one per cent or more by weight of alcohol in the person's blood, a concentration of .17 of one gram or more by weight of alcohol per 210 liters of the person's breath, or a concentration of .238 of one gram or more by weight per 100 milliliters of the person's urine.
- Increases to a felony of the third degree the penalty for a second or subsequent felony conviction of state OMVI.
- Provides that the existing prohibition against requiring a term of imprisonment for a misdemeanor to be served consecutively to a prison term imposed for a felony does not apply when the misdemeanor offense is state OMVI, driving under financial responsibility law suspension or revocation, driving without paying a license reinstatement fee, driving under license suspension or revocation, or driving under OMVI suspension or revocation and the felony offense is aggravated vehicular homicide, vehicular homicide, aggravated vehicular assault, state OMVI, or involuntary manslaughter involving the offender's operation of a motor vehicle with a prison term to be served in a state correctional institution, and authorizes the trial court in those circumstances to require the sentences to be served consecutively.

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\* *This analysis was prepared before the report of the Senate Judiciary Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

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## CONTENT AND OPERATION

### *Offenses of state OMVI and state OMVUAC--prohibitions and penalties*

#### *Existing law--state OMVI and state OMVUAC prohibitions*

*State OMVI.* R.C. 4511.19(A) sets forth the offense of "state OMVI." It prohibits a person from operating any vehicle, streetcar, or trackless trolley within Ohio if any of the following apply: (1) the person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, (2) the person has a concentration of .10 of one per cent or more by weight of alcohol in his or her blood, (3) the person has a concentration of .10 of one gram or more by weight of alcohol per 210 liters of his or her breath, or (4) the person has a concentration of .14 of one gram or more by weight of alcohol per 100 milliliters of his or her urine.

*State OMVUAC.* R.C. 4511.19(B) sets forth the offense of "state OMVUAC." It prohibits a person under 21 years of age from operating any vehicle, streetcar, or trackless trolley within Ohio, if any of the following apply: (1) the person has a concentration of at least .02 of one per cent but less than .10 of one per cent by weight of alcohol in his or her blood, (2) the person has a concentration of at least .02 of one gram but less than .10 of one gram by weight of alcohol per 210 liters of his or her breath, or (3) the person has a concentration of at least .028 of one gram but less than .14 of one gram by weight of alcohol per 100 milliliters of his or her urine.

*Existing law--penalties for state OMVI and state OMVUAC*

*State OMVI.* R.C. 4511.99(A) sets forth the sanctions for a conviction of state OMVI. The sanctions vary, depending upon the number of times within the preceding six years that the offender has been convicted of any specified *vehicle-related and alcohol-related offense* (see **COMMENT 1** for a listing of those offenses). In all cases, the sentencing court is required to impose a specified period of incarceration on the offender, that varies depending upon the number of prior convictions. The mandatory periods of incarceration are as follows (R.C. 4511.99(A)(1) to (4)):

(1) Except as described in paragraph (2), (3), or (4), below, state OMVI is a misdemeanor of the first degree, and the court must sentence the offender to a term of imprisonment of three consecutive days and may sentence the offender under the Misdemeanor Sentencing Law to a longer term of imprisonment. The court may suspend the mandatory three days of imprisonment in specified circumstances.

(2) Except as described in paragraph (4), below, if, within six years of the offense, the offender previously has been convicted of one alcohol-related and vehicle-related offense, state OMVI is a misdemeanor of the first degree, and the court generally must sentence the offender to a term of imprisonment of ten consecutive days and may sentence the offender pursuant to the Misdemeanor Sentencing Law to a longer term of imprisonment. As an alternative to the term of imprisonment, subject to a specified limitation, the court may sentence the offender to both a term of imprisonment of five consecutive days and not less than 18 consecutive days of electronically monitored house arrest (EMHA), with the cumulative total of both not exceeding six months.

(3) Except as described in paragraph (4), below, if, within six years of the offense, the offender previously has been convicted of two alcohol-related and vehicle-related offenses, the court must sentence the offender to a term of imprisonment of 30 consecutive days and may sentence the offender to a longer definite term of imprisonment of not more than one year. As an alternative to the term of imprisonment, subject to a specified limitation, the court may sentence the offender to both a term of imprisonment of 15 consecutive days and not less than 55 consecutive days of EMHA, with the cumulative total of both not exceeding one year.

(4) If, within six years of the offense, the offender previously has been convicted of three or more alcohol-related and vehicle-related offenses, or if the offender previously has been convicted of state OMVI under circumstances in which it was a felony and regardless of when the violation and the conviction

occurred, the offense is a felony of the fourth degree. The court must sentence the offender in accordance with the Felony Sentencing Law and must impose as part of the sentence a mandatory term of local incarceration of 60 consecutive days under R.C. 2929.13(G)(1) if it is the offender's first felony state OMVI offense or a mandatory prison term of 60 consecutive days under R.C. 2929.13(G)(2) if it is the offender's second or subsequent felony state OMVI offense. Under the Felony Sentencing Law (R.C. 2929.13, 2929.14, 2929.15, 2929.16, 2929.17, 2929.18, and 2929.19): (a) if it is the offender's first felony state OMVI offense, the sentencing court, in addition to the mandatory term of local incarceration of 60 consecutive days, must fine the offender not less than \$750 and not more than \$10,000, may impose upon the offender one or more community residential sanctions under R.C. 2929.16 (including a term in jail of up to one year minus the mandatory 60 consecutive days) or nonresidential sanctions under R.C. 2929.17, not exceeding five years in cumulative duration, and cannot sentence the offender to a prison term, and (b) if it is the offender's second or subsequent felony state OMVI offense, the sentencing court, in addition to the mandatory 60-day prison term, must fine the offender not less than \$750 and not more than \$10,000, may impose upon the offender an additional prison term of 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, or 18 months (the range of prison terms normally available for fourth degree felonies) minus the 60 days imposed as the mandatory prison term, and may not sentence the offender to a community residential sanction under R.C. 2929.16 or nonresidential sanction under R.C. 2929.17. Under a series of criteria contained in R.C. 2929.13(B) that a sentencing court must apply in determining the sentence for an offender convicted of a felony of the fourth or fifth degree, the court generally is "directed" away from imposing a prison term, and the court may impose a prison term only if it makes specified findings related to the offender and the sentence; this "direction" does not apply regarding the mandatory prison term for repeat offense felony state OMVI, but apparently does apply regarding the imposition of any additional prison term on the offender.

Existing law provides many other sanctions for persons convicted of state OMVI. The full spectrum of existing state OMVI sanctions is reviewed in detail in **COMMENT 2**.

*State OMVUAC.* The penalties for state OMVUAC are reviewed in **COMMENT 3**.

### *Operation of the bill--modification of state OMVI prohibitions*

The bill adds three new "high-end" tiers of alcohol concentration to the prohibitions that constitute state OMVI. The new tiers prohibit a person from operating any vehicle, streetcar, or trackless trolley within Ohio if: (1) the person has a concentration of .17 of one per cent or more by weight of alcohol in his or

her blood, (2) the person has a concentration of .17 of one gram or more by weight of alcohol per 210 liters of his or her breath, or (3) the person has a concentration of .238 of one gram or more by weight of alcohol per 100 milliliters of his or her urine. The bill adjusts the existing tiers of prohibited concentrations by adding a "cap" to each of the tiers, with the amount of the cap equaling the concentrations covered by the new high-end tiers (R.C. 4511.19(A)(5) to (7) and (2) to (4)). The bill does not change the existing offense of state OMVUAC (R.C. 4511.19(B)).

Thus, under the bill, state OMVI prohibits a person from operating any vehicle, streetcar, or trackless trolley within Ohio if any of the following apply (R.C. 4511.19(A)--the bill's changes are italicized): (1) the person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, (2) the person has a concentration of .10 of one per cent or more *but less than .17 of one per cent* by weight of alcohol in his or her blood, (3) the person has a concentration of .10 of one gram or more *but less than .17 of one gram* by weight of alcohol per 210 liters of his or her breath, (4) the person has a concentration of .14 of one gram or more *but less than .238 of one gram* by weight of alcohol per 100 milliliters of his or her urine, (5) *the person has a concentration of .17 of one per cent or more by weight of alcohol in his or her blood*, (6) *the person has a concentration of .17 of one gram or more by weight of alcohol per 210 liters of his or her breath*, or (7) *the person has a concentration of .238 of one gram or more by weight of alcohol per 100 milliliters of his or her urine*.

**Operation of the bill--increase in offense classification for repeat felony state OMVI, other than under the new "high-end" alcohol concentration prohibitions**

The bill increases to a felony of the third degree the penalty for a second or subsequent felony conviction of state OMVI that is committed other than in violation of the new "high-end" tiers of alcohol concentration described in clauses (5) to (7) of the preceding paragraph (i.e., one that is committed in violation of clauses (1) to (4) of that paragraph) but does not change the mandatory prison term, the fine, or the criminal forfeiture to the state of the involved vehicle that currently is required for such a conviction or the current prohibition against imposing a community residential sanction or nonresidential sanction for such a conviction. Also, the bill does not change any of the penalty and sanction provisions regarding a first-time felony conviction of state OMVI that is committed other than in violation of the bill's new "high-end" tiers of alcohol concentration; under the bill, such a conviction remains a felony of the fourth degree. (R.C. 4511.99(A)(4).)

Specifically, under the bill, if a person convicted of state OMVI other than in violation of the bill's new "high-end" tiers of alcohol concentration previously

has been convicted of state OMVI under circumstances in which the violation was a felony, regardless of when the prior violation and the prior conviction or guilty plea occurred: (1) the offender is guilty of *a felony of the third degree*, the sentencing court still must sentence the offender under the Felony Sentencing Law and impose as part of the sentence a mandatory prison term of 60 consecutive days of imprisonment, and the sentencing court still must fine the offender not less than \$750 and not more than \$10,000 (R.C. 4511.99(A)(4)(a)(ii) and (iii)), (2) under the Felony Sentencing Law, the sentencing court, in addition to the mandatory 60-day prison term, may impose upon the offender an additional prison term of *one, two, three, four, or five years (the range of prison terms normally available for third degree felonies)* minus the 60 days imposed as the mandatory prison term, and may not sentence the offender to a community residential sanction under R.C. 2929.16 or nonresidential sanction under R.C. 2929.17 (R.C. 2929.01(NN), 2929.13(A) and (G)(2), 2929.14(A)(3) and (D)(4), 2929.15(A)(1), 2929.18(B)(3), and 2929.19(C)(2)), and (3) all other existing provisions that require or authorize the sentencing court to impose a specified type of sanction for felony state OMVI (see **COMMENT 2(d)**) still apply regarding the offender (R.C. 4511.99(A)(4)).

The bill conforms numerous existing provisions to the above-described changes (R.C. 2929.13(A) and (G)(1), 2929.15(A)(1), 2929.16(A), 2929.17, 2929.19(C)(1), 4511.99(A)(4)(a)(i) and (iii), 5120.032(B)(2)(d), 5120.033, and 5120.161(D)).

By increasing the penalty for a second or subsequent felony state OMVI conviction to a felony of the third degree, the bill eliminates for that offense the application of the existing criteria contained in R.C. 2929.13(B) that a sentencing court must apply in determining the sentence for an offender convicted of a felony of the fourth or fifth degree, that generally "direct" a court away from imposing a prison term, and that require the court to make specified findings related to the offender and the sentence in order to impose a prison term. Instead, the existing criteria that a court must apply in determining the sentence for a felony of the third degree, unchanged by the bill, will apply in determining the sentence for an offender convicted of a second or subsequent felony state OMVI. Under those criteria, there is no presumption, preference, or "direction" for or against a prison term, and the court, in determining whether to impose a prison term, must comply with Ohio's general purposes and principles of sentencing specified in existing R.C. 2929.11 and with existing R.C. 2929.12. (R.C. 2929.13(C).)

**Operation of the bill--penalties for violations of new "high-end" alcohol concentration prohibitions**

The bill provides increased periods of required incarceration for persons who commit state OMVI in violation of the new "high-end" tiers of alcohol

concentration described above in clauses (5) to (7) of "*Operation of the bill-- modification of state OMVI prohibitions.*" It does not change any other sanction provided for a person who is convicted of state OMVI and who has a prohibited concentration of alcohol in his or her blood, breath, or urine that would be within one of the bill's new high-end tiers of alcohol concentration. (R.C. 4511.99(A)(5) to (8).)

Also, under the bill, the existing sanctions for state OMVI described in **COMMENT 2**, modified by the bill as described above in "*Operation of the bill-- increase in offense classification . . .*," apply only when the offender is convicted of state OMVI in violation of the prohibitions described in clauses (1) to (4) of the second preceding paragraph (R.C. 4511.19(A)(1) to (4) and (9) to (12)).

Under the bill, the sanctions for state OMVI committed in violation of the new high-end tiers of alcohol concentration are as follows:

(1) ***Generally.*** Except as provided in paragraph (2), (3), or (4), below, the offense is a misdemeanor of the first degree, and the court must sentence the offender to *a term of imprisonment of six consecutive days* and may sentence the offender under the Misdemeanor Sentencing Law to a longer term of imprisonment. In addition, the court must fine the offender not less than \$200 and not more than \$1,000.

The court may suspend three of the mandatory six consecutive days of imprisonment, if, in lieu of the suspended term, it places the offender on probation and requires the offender to attend a certified drivers' intervention program for three consecutive days and may suspend any part of up to three of the mandatory six consecutive days of imprisonment if it places the offender on probation for part of the up to three of the six consecutive days, requires the offender to attend a certified drivers' intervention program for the suspended portion, and sentences the offender to a term of imprisonment equal to the remainder of the six consecutive days that the offender does not spend at the program. The court may require the offender, as a condition of probation and in addition to the drivers' intervention program, to attend and complete treatment or education programs that the operators of the drivers' intervention program determine the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose any other conditions of probation it considers necessary.

The fine imposed is distributed in the same manner as is the fine for first offense state OMVI under existing law, as described in paragraph (a) of **COMMENT 2**. (R.C. 4511.99(A)(5).)

(2) **Second offense in six years.** Except as provided in paragraph (4), below, if, within six years of the offense, the offender previously has been convicted of one alcohol-related and vehicle-related offense, the offense is a misdemeanor of the first degree, and the court generally must sentence the offender to *a term of imprisonment of 20 consecutive days* and may sentence the offender pursuant to the Misdemeanor Sentencing Law to a longer term of imprisonment. As an alternative to the term of imprisonment, but subject to the limitation described below, the court may sentence the offender to *both a term of imprisonment of ten consecutive days and not less than 36 consecutive days of EMHA*. The ten consecutive days of imprisonment and the period of EMHA cannot exceed six months, and the ten consecutive days do not have to be served prior to or consecutively with the period of EMHA. In addition, the court must fine the offender not less than \$300 and not more than \$1,500.

In addition to any other sentence it imposes, the court may require the offender to attend a certified drivers' intervention program. If the program's officials determine that the offender is alcohol dependent, they must notify the court, and the court must order the offender to obtain treatment through an authorized alcohol and drug addiction program, to be paid for by the offender.

The fine imposed is distributed in the same manner as is the fine for second offense state OMVI under existing law, and the existing vehicle immobilization provisions for second offense state OMVI apply, as described in paragraph (b) of **COMMENT 2.** (R.C. 4511.99(A)(6).)

(3) **Third offense in six years.** Except as provided in paragraph (4), below, if, within six years of the offense, the offender previously has been convicted of two alcohol-related and vehicle-related offenses, the court must sentence the offender to *a term of imprisonment of 60 consecutive days* and may sentence the offender to a longer definite term of imprisonment of not more than one year. As an alternative to the term of imprisonment, but subject to the limitation described below, the court may sentence the offender to *both a term of imprisonment of 30 consecutive days and not less than 110 consecutive days of EMHA*. The 30 consecutive days of imprisonment and the period of EMHA cannot exceed one year, and the 30 consecutive days do not have to be served prior to or consecutively with the period of EMHA. In addition to all other sanctions imposed, the court must fine the offender not less than \$500 and not more than \$2,500 and must require the offender to attend an authorized alcohol and drug addiction program, generally to be paid for by the offender.

The fine imposed is distributed in the same manner as is the fine for third offense state OMVI under existing law, and the existing vehicle immobilization

provisions for third offense state OMVI apply, as described in paragraph (c) of **COMMENT 2.** (R.C. 4511.99(A)(7).)

(4) Fourth or subsequent offense in six years or prior felony conviction. If, within six years of the offense, the offender previously has been convicted of three or more alcohol-related and vehicle-related offenses, and if sentence is not required to be imposed under the next paragraph, the offense is a felony of the fourth degree. The court must sentence the offender in accordance with the Felony Sentencing Law and must impose as part of the sentence a mandatory term of local incarceration of 120 consecutive days. The court may impose a sentence that includes a term of EMHA under R.C. 2929.17, provided that the term of EMHA cannot commence until after the offender has served the mandatory term of local incarceration. Under the Felony Sentencing Law, the court, in addition to the mandatory term of local incarceration of 60 consecutive days, may impose upon the offender one or more community residential sanctions under R.C. 2929.16 (including a term in jail of up to one year minus the mandatory 60 consecutive days) or nonresidential sanctions under R.C. 2929.17, not exceeding five years in cumulative duration, and cannot sentence the offender to a prison term. In addition to all other sanctions imposed, the court must fine the offender not less than \$750 nor more than \$10,000 and must require the offender to attend an authorized alcohol and drug addiction program, generally to be paid for by the offender. (R.C. 4511.99(A)(8)(a)(i) and (iii), 2929.13(A) and (G)(1), 2929.15(A)(1), 2929.16(A), 2929.17, 2929.18(B)(3), and 2929.19(C)(1).)

If the offender previously has been convicted of state OMVI under circumstances in which the violation was a felony, regardless of when the prior violation and the prior conviction or guilty plea occurred, the offense is *a felony of the third degree*. The court must sentence the offender under the Felony Sentencing Law and must impose as part of the sentence *a mandatory prison term of 120 consecutive days*. Under the Felony Sentencing Law, the court, in addition to the mandatory 120-day prison term, may impose upon the offender an additional prison term of *one, two, three, four, or five years (the range of prison terms normally available for third degree felonies)* minus the 120 days imposed as the mandatory prison term and may not sentence the offender to a community residential sanction under R.C. 2929.16 or nonresidential sanction under R.C. 2929.17. In addition to all other sanctions imposed, the court must fine the offender not less than \$750 and not more than \$10,000. All other existing provisions that require or authorize the sentencing court to impose a specified type of sanction for felony state OMVI (see **COMMENT 2(d)**) apply regarding the offender. (R.C. 4511.99(A)(8)(a)(ii) and (iii), 2929.01(NN), 2929.13(A) and (G)(2), 2929.14(A)(3) and (D)(4), 2929.15(A)(1), 2929.18(B)(3), and 2929.19(C)(2).)

Under the bill, the existing criteria that a court must apply in determining the sentence for a felony of the third degree, unchanged by the bill, will apply in determining the sentence for an offender convicted of a second or subsequent felony state OMVI. Under those criteria, there is no presumption, preference, or "direction" for or against a prison term and the court, in determining whether to impose a prison term, must comply with Ohio's general purposes and principles of sentencing specified in existing R.C. 2929.11 and with existing R.C. 2929.12. (R.C. 2929.13(C).)

The fine imposed under either of the above-described provisions is distributed in the same manner as is the fine for felony state OMVI under existing law, and the existing vehicle forfeiture provisions for felony state OMVI apply, as described in paragraph (d) of **COMMENT 2** (R.C. 4511.99(A)(8)).

(5) **Work release.** Except as described below, upon a showing that imprisonment would seriously affect the ability of a person convicted of state OMVI in violation of the new "high-end" tiers of alcohol concentration to continue employment, the court may authorize that the offender be granted work release from imprisonment after the offender has served the six, 20, or 60 consecutive days of imprisonment or the mandatory term of local incarceration of 120 consecutive days that the court is required to impose. No court may authorize work release during the six, 20, or 60 consecutive days of imprisonment or the mandatory term of local incarceration or mandatory prison term of 120 consecutive days. The work release cannot exceed the time necessary each day for the offender to commute to and from the place of employment and the place of imprisonment and the time actually spent under employment. An offender who is sentenced to a term of imprisonment followed by a period of EMHA is not eligible for work release until the period of EMHA. (R.C. 4511.99(A)(9).)

(6) **Use of treatment.** Notwithstanding any other provision of law: (a) a court is not permitted to suspend the consecutive days of imprisonment required to be imposed on a second or third time state OMVI offender who violates the new "high-end" tiers of concentration, (b) a court is not permitted to place a second-time, third-time, or fourth- or subsequent-time state OMVI offender who violates those new tiers in any treatment program in lieu of imprisonment until after the offender has served the required consecutive days of imprisonment, mandatory term of local incarceration, or mandatory prison term, (c) a court that sentences a fourth- or subsequent-time state OMVI offender who violates those new tiers cannot impose any sanction other than a mandatory term of local incarceration or mandatory prison term to apply to the offender until after the offender has served the required mandatory term, (d) a court that imposes a sentence of imprisonment and a period of EMHA on a second-time or third-time state OMVI offender who

violates those new tiers cannot suspend any portion of the sentence or place the offender in any treatment program in lieu of imprisonment or EMHA, and (e) except as specifically authorized by law, a court cannot suspend any part of the six consecutive days of imprisonment required for a first-time state OMVI offender who violates those new tiers or place such an offender in any treatment program in lieu of imprisonment until after the offender has served the six consecutive days of imprisonment. (R.C. 4511.99(A)(10).)

(7) ***EMHA limitations.*** Courts are prohibited from using the authorized alternative EMHA sentences for second-time and third-time state OMVI offenders who violate the new "high-end" tiers of alcohol concentration unless, within 60 days of the date of sentencing, the court issues a written finding that, due to the unavailability of space at the incarceration facility where the offender is required to serve the term of imprisonment, the offender will not be able to commence serving the term within the 60-day period following the date of sentencing. If the court issues such a finding, it may impose the authorized alternative EMHA sentence for second-time and third-time state OMVI offenders. (R.C. 4511.99(A)(12).)

#### **Conforming changes and cross-references**

The bill conforms the following existing provisions to the changes it makes in the offense of state OMVI and in the penalties for state OMVI, as described above:

(1) R.C. 2323.59(B), which, in a tort action involving a plaintiff who was operating a motor vehicle at the time of the occurrence of the alleged harm, establishes a presumption that a concentration of alcohol of a specified amount in the plaintiff's blood, breath, or urine had contained a concentration of alcohol that is a prohibited amount under state OMVI;

(2) R.C. 2929.01(Z)(2) and (KK), which, for purposes of the general Criminal Sentencing Law, include definitions of "mandatory prison term" and "mandatory term of local incarceration" as used in relation to state OMVI;

(3) R.C. 2929.23(A)(3)(c), which restates that a person convicted of fourth degree felony state OMVI for the first time is not eligible for EMHA during the period of mandatory local incarceration that must be imposed;

(4) R.C. 3793.10, which states that a driver's intervention program cannot be used as an alternative to a term of imprisonment for state OMVI offenders other than first offenders;

(5) R.C. 4503.233(A)(2), which governs the immobilization of a vehicle used in the commission of a repeat state or municipal OMVI offense and the impoundment of its license plates;

(6) R.C. 4507.164(B)(2) and (3), which also pertain to the immobilization of a vehicle used in the commission of a repeat state or municipal OMVI offense and the impoundment of its license plates, and to the criminal forfeiture to the state of a vehicle used in such an offense;

(7) R.C. 4511.191(N)(1), which provides for the establishment of county and municipal indigent drivers alcohol treatment funds and refers to the deposit into the funds of fine money imposed for state OMVI convictions;

(8) R.C. 5120.161(D), which refers to the jail sentence that may be imposed, in addition to the mandatory term of local incarceration, upon a person convicted of a fourth degree felony state OMVI offense for the first time.

**Serving a term of imprisonment for a misdemeanor consecutively to a prison term for a felony**

**Existing law**

R.C. 2929.41 provides that, except as described in the next paragraph or in specified provisions of the Felony Sentencing Law (R.C. 2929.14(E)) and the Sexually Violent Predator Sentencing Law (R.C. 2971.03(D) and (E)), a sentence of imprisonment must be served concurrently with any other sentence of imprisonment imposed by a court of Ohio, another state, or the United States. *In any case, a sentence of imprisonment for misdemeanor must be served concurrently with a sentence of imprisonment for felony served in a state or federal correctional institution.* (R.C. 2929.41(A).)

A sentence of imprisonment for a misdemeanor must be served consecutively to any other sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of the offense of pandering sexually oriented matter involving a minor under R.C. 2907.322, escape under R.C. 2921.34, or possession of a deadly weapon while under detention under R.C. 2923.131 (see **COMMENT 4**). When consecutive sentences of imprisonment are imposed for misdemeanor, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served cannot exceed 18 months. (R.C. 2929.41(B).)

### *Operation of the bill*

The bill, in specified circumstances, eliminates for misdemeanor state OMVI and misdemeanor driving under suspension or revocation offenses the existing prohibition against imposing a term of imprisonment imposed for a misdemeanor consecutively to a prison term imposed for a felony. Under the bill, a sentence of imprisonment imposed for a misdemeanor offense of state OMVI, driving under financial responsibility law suspension or revocation (R.C. 4507.02(B)(1)), driving without paying a license reinstatement fee (R.C. 4507.02(C)), driving under license suspension or revocation (R.C. 4507.02(D)(1)), or driving under OMVI suspension or revocation (R.C. 4507.02(D)(2)) must be served consecutively to a prison term that is imposed for a felony offense of aggravated vehicular homicide (R.C. 2903.06), vehicular homicide (R.C. 2903.07), aggravated vehicular assault (R.C. 2903.08), or state OMVI or for a felony offense of involuntary manslaughter (R.C. 2903.04) involving the operation of a motor vehicle by the offender and that is served in a state correctional institution, when the trial court specifies that it is to be served consecutively. When consecutive sentences of imprisonment and prison terms are imposed for one or more misdemeanors and one or more felonies under this provision, the term to be served is the aggregate of the consecutive terms imposed, and the offender must serve all terms imposed for a felony before serving any term imposed for a misdemeanor. (R.C. 2929.41.)

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### **COMMENT**

1. The following alcohol-related and motor vehicle-related offenses are the offenses the convictions of which are relevant for purposes of determining the sanctions to be imposed for a conviction of state OMVI: (a) state OMVI or state OMVUAC, (b) any municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or both, (c) a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, (d) involuntary manslaughter in a case in which the offender was subject to the sanctions described in R.C. 2903.04(D), (e) aggravated vehicular homicide, vehicular homicide, aggravated vehicular assault, or a municipal ordinance substantially similar to vehicular homicide in a case in which the jury or judge found that the offender was under the influence of alcohol, a drug of abuse, or both, or (f) a statute of the United States or of any other state or a municipal ordinance of a municipal corporation located in any other state that is substantially similar to state OMVI or state OMVUAC.

2. Under existing law, the sanctions for state OMVI are as follows (R.C. 4507.16(B) and (F) and 4511.99(A)):

(a) **Generally**. Except as described in **COMMENT 2(b)**, (c), or (d), below, the offense is a misdemeanor of the first degree, and the court must sentence the offender to a term of imprisonment of three consecutive days and may sentence the offender under the Misdemeanor Sentencing Law to a longer term of imprisonment. In addition, the court must fine the offender not less than \$200 and not more than \$1,000.

The court may suspend the mandatory three consecutive days of imprisonment, if, in lieu of the suspended term, it places the offender on probation and requires the offender to attend, for three consecutive days, a certified drivers' intervention program, and may suspend any part of the mandatory three consecutive days of imprisonment if it places the offender on probation for part of the three consecutive days, requires the offender to attend, for the suspended portion, a certified drivers' intervention program, and sentences the offender to a term of imprisonment equal to the remainder of the three consecutive days that the offender does not spend at the program. The court may require the offender, as a condition of probation, to attend and complete treatment or education programs that comply with minimum standards adopted pursuant to R.C. Chapter 3793., in addition to the required attendance at a drivers' intervention program, that the operators of the drivers' intervention program determine the offender should attend and to report periodically to the court on the offender's progress in the programs.

Of the fine imposed: (i) \$25 is paid to an enforcement and education fund established by the legislative authority of the law enforcement agency in this state that primarily was responsible for the offender's arrest, to be used for specified OMVI law enforcement and public information purposes, (ii) \$25 is deposited into the county or municipal indigent drivers alcohol treatment fund under the control of the sentencing court, and (iii) the balance is disbursed as otherwise provided by law. (R.C. 4511.99(A)(1).)

(b) **Second offense in six years**. Except as described in **COMMENT 2(d)**, below, if, within six years of the offense, the offender previously has been convicted of one alcohol-related and vehicle-related offense (see **COMMENT 1**), the offense is a misdemeanor of the first degree, and the court generally must sentence the offender to a term of imprisonment of ten consecutive days and may sentence the offender pursuant to the Misdemeanor Sentencing Law to a longer term of imprisonment. As an alternative to the term of imprisonment, but subject to the limitation described below, the court may sentence the offender to both a term of imprisonment of five consecutive days and not less than 18 consecutive days of electronically monitored house arrest (EMHA). The five consecutive days of imprisonment and the period of EMHA cannot exceed six months, and the five consecutive days do not have to be served prior to or consecutively with the period

of EMHA. In addition, the court must fine the offender not less than \$300 and not more than \$1,500.

In addition to any other sentence it imposes, the court may require the offender to attend a certified drivers' intervention program. If the program's officials determine that the offender is alcohol dependent, they must notify the court, and the court must order the offender to obtain treatment through an authorized alcohol and drug addiction program, to be paid for by the offender.

Of the fine imposed: (i) \$35 is paid to an enforcement and education fund established by the legislative authority of the law enforcement agency that primarily was responsible for the arrest of the offender, to be used for specified OMVI law enforcement and public information purposes, (ii) \$65 is paid to the political subdivision responsible for housing the offender during the term of incarceration, to be used to pay or reimburse incarceration costs incurred in housing state or municipal OMVI offenders and to pay for ignition interlock devices and EMHA equipment, (iii) \$50 is deposited into the county or municipal indigent drivers alcohol treatment fund under the control of the sentencing court, and (iv) the balance is disbursed as otherwise provided by law.

Regardless of whether the vehicle the offender was operating at the time of the offense is registered in the offender's name or in the name of another person, the court, in addition to all other sanctions and subject to an "innocent owner" exception, must order the immobilization for 90 days of the vehicle the offender was operating at the time of the offense and the impoundment for 90 days of its license plates. (R.C. 4511.99(A)(2).)

(c) ***Third offense in six years.*** Except as described in **COMMENT 2(d)**, below, if, within six years of the offense, the offender previously has been convicted of two alcohol-related and vehicle-related offenses, the court must sentence the offender to a term of imprisonment of 30 consecutive days and may sentence the offender to a longer definite term of imprisonment of not more than one year. As an alternative to the term of imprisonment, but subject to the limitation described below, the court may sentence the offender to both a term of imprisonment of 15 consecutive days and not less than 55 consecutive days of EMHA. The 15 consecutive days of imprisonment and the period of EMHA cannot exceed one year, and the 15 consecutive days do not have to be served prior to or consecutively with the period of EMHA. In addition to any other sanctions imposed, the court must fine the offender not less than \$500 and not more than \$2,500 and must require the offender to attend an authorized alcohol and drug addiction program, generally to be paid for by the offender.

Of the fine imposed: (i) \$123 is paid to an enforcement and education fund established by the legislative authority of the law enforcement agency that primarily was responsible for the arrest of the offender, to be used for specified OMVI law enforcement and public information purposes, (ii) \$227 is paid to the political subdivision responsible for housing the offender during the offender's term of incarceration, to be used to pay or reimburse incarceration costs incurred in housing state or municipal OMVI offenders and to pay for ignition interlock devices and EMHA equipment, and (iii) the balance is disbursed as otherwise provided by law.

Regardless of whether the vehicle the offender was operating at the time of the offense is registered in the offender's name or in the name of another person, the court, in addition to all other sanctions and subject to an "innocent owner" exception, must order the immobilization for 180 days of the vehicle the offender was operating at the time of the offense and the impoundment for 180 days of its license plates. (R.C. 4511.99(A)(3).)

(d) **Fourth or subsequent offense in six years, or prior felony conviction.**

If, within six years of the offense, the offender previously has been convicted of three or more alcohol-related and vehicle-related offenses, or if the offender previously has been convicted of state OMVI under circumstances in which the offense was a felony and regardless of when the violation and the conviction, the offense is a felony of the fourth degree. The court must sentence the offender in accordance with the Felony Sentencing Law and must impose as part of the sentence a mandatory term of local incarceration of 60 consecutive days if it is the offender's first felony OMVI offense or a mandatory prison term of 60 consecutive days if it is the offender's second or subsequent felony OMVI offense. If the offender is required to serve a mandatory term of local incarceration of 60 consecutive days, the court may impose a sentence that includes a term of EMHA, provided that the term of EMHA cannot commence until after the offender has served the mandatory term of local incarceration. In addition to all other sanctions imposed, the court must fine the offender not less than \$750 nor more than \$10,000 and must require the offender to attend an authorized alcohol and drug addiction program, generally to be paid for by the offender.

Of the fine imposed: (i) \$210 is paid to an enforcement and education fund established by the legislative authority of the law enforcement agency that primarily was responsible for the offender's arrest, to be used for specified OMVI law enforcement and public information purposes, (ii) \$390 must be paid to the political subdivision responsible for housing the offender during the offender's term of incarceration, to be used to pay or reimburse incarceration costs it incurs in housing persons for state or municipal OMVI convictions and to pay for ignition

interlock devices and EMHA equipment, and (iii) the balance is disbursed as otherwise provided by law.

Regardless of whether the vehicle the offender was operating at the time of the offense is registered in the offender's name or in the name of another person, the court, in addition to all other sanctions and subject to an "innocent owner" exception, must order the criminal forfeiture to the state of the vehicle the offender was operating at the time of the offense. If title to a motor vehicle that is subject to a criminal forfeiture order is assigned or transferred and existing R.C. 4503.234 applies, in addition to or independent of any other sanction, the court may fine the offender the value of the vehicle as determined by publications of the National Auto Dealer's Association. The proceeds from any fine so imposed must be distributed under existing R.C. 4503.234(D)(4). (R.C. 4511.99(A)(4).)

(e) **Work release.** Except as described below, upon a showing that imprisonment would seriously affect the ability of a convicted state OMVI offender to continue employment, the court may authorize that the offender be granted work release from imprisonment after the offender has served the three, ten, or 30 consecutive days of imprisonment or the mandatory term of local incarceration of 60 consecutive days that the court is required to impose. No court may authorize work release during the three, ten, or 30 consecutive days of imprisonment or the mandatory term of local incarceration or mandatory prison term of 60 consecutive days. The work release cannot exceed the time necessary each day for the offender to commute to and from the place of employment and the place of imprisonment and the time actually spent under employment. An offender who is sentenced to a term of imprisonment followed by a period of EMHA is not eligible for work release until after the period of EMHA. (R.C. 4511.99(A)(5).)

(f) **Use of treatment.** Notwithstanding any other provision of law: (i) a court is not permitted to suspend the consecutive days of imprisonment required to be imposed on a second- or third-time state OMVI offender, (ii) a court is not permitted to place a second-time, third-time, or fourth or subsequent-time state OMVI offender in any treatment program in lieu of imprisonment until after the offender has served the required consecutive days of imprisonment, mandatory term of local incarceration, or mandatory prison term, (iii) a court that sentences a fourth- or subsequent-time state OMVI offender cannot impose any sanction other than a mandatory term of local incarceration or mandatory prison term to apply to the offender until after the offender has served the mandatory term of local incarceration or mandatory prison term required to be imposed, (iv) a court that imposes a sentence of imprisonment and a period of EMHA on a second-time or third-time state OMVI offender cannot suspend any portion of the sentence or place the offender in any treatment program in lieu of imprisonment or EMHA,

and (v) except as specifically authorized by law, a court cannot suspend the three consecutive days of imprisonment required for a first-time state OMVI offender or place such an offender in any treatment program in lieu of imprisonment until after the offender has served the three consecutive days of imprisonment. (R.C. 4511.99(A)(6).)

(g) **EMHA limitations.** Courts are prohibited from using the authorized alternative EMHA sentences for second-time and third-time state OMVI offenders unless, within 60 days of the date of sentencing, the court issues a written finding that, due to the unavailability of space at the incarceration facility where the offender is required to serve the term of imprisonment imposed upon the offender, the offender will not be able to commence serving the term within the 60-day period following the date of sentencing. If the court issues such a finding, it may impose the authorized alternative EMHA sentence for second-time and third-time state OMVI offenders. (R.C. 4511.99(A)(8).)

(h) **Driver's license suspensions.** The trial judge of any court of record and the mayor of a mayor's court, in addition to or independent of all other penalties, generally must revoke the driver's or commercial driver's license or permit or nonresident operating privilege of any person who is convicted of state OMVI or a violation of a substantially equivalent municipal ordinance, or suspend it as follows: (i) except as described in (ii), (iii), or (iv), below, the judge or mayor must suspend the license, permit, or privilege for not less than six months nor more than three years, (ii) subject to clause (iv), below, if, within six years of the offense, the offender has been convicted of or pleaded guilty to one alcohol-related and vehicle-related offense, the judge must suspend the license, permit, or privilege for not less than one year nor more than five years, (iii) subject to clause (iv), below, if, within six years of the offense, the offender has been convicted of two alcohol-related and vehicle-related offenses, the judge must suspend the license, permit, or privilege for not less than one year nor more than ten years, and (iv) if, within six years of the offense, the offender has been convicted of three or more alcohol-related and vehicle-related offenses, or if the offender previously has been convicted of state OMVI under circumstances in which it was a felony and regardless of when the violation and the conviction or guilty plea occurred, the judge must suspend the license, permit, or privilege for a period of time set by the court but not less than three years, and the judge may permanently revoke the license, permit, or privilege. The court may grant the offender occupational driving privileges, after the offender has served a specified period of the suspension imposed. (R.C. 4507.16(B) and (F).)

3. Existing R.C. 4511.99(N) sets forth the penalties for state OMVUAC. It provides that, in general, state OMVUAC is a misdemeanor of the fourth degree.

But if, within one year of the offense, the offender has been convicted of an alcohol-related and vehicle-related offense, it is a misdemeanor of the third degree. In addition to or independent of all other penalties, the offender's driver's or commercial driver's license or permit or nonresident operating privilege is suspended for not less than 60 days and not more than two years.

4. The language of R.C. 2929.41(A) and (B) pertaining to consecutive service of sentences involving a misdemeanor appears to be somewhat inconsistent. In *State v. Butts* (1991), 58 Ohio St.3d 250, the Ohio Supreme Court considered the application of R.C. 2929.41, as it existed prior to July 1, 1996, in a case in which a trial court sentenced an offender convicted of a misdemeanor to a six-month term of imprisonment and specified that the term was to be served consecutively to another term that was imposed for a felony. The Court held that the consecutive service of the sentence was impermissible, because R.C. 2929.41(A) required that a sentence imposed for a misdemeanor conviction must be served concurrently with any felony sentence. The misdemeanor-related language of R.C. 2929.41(A) has not been changed since the *Butts* decision.

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-99	p. 29
Reported, S. Judiciary	---	---

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