



**Sub. H.B. 327\***

124th General Assembly

(As Reported by S. Judiciary on Criminal Justice)

**Reps. Latta, Goodman, Seitz, Reinhard, Lendrum, Willamowski, Schmidt, Aslanides, Fedor, Carano, Womer Benjamin, Buehrer, Coates, Manning, Schneider, Hartnett, Flowers, Calvert, Hughes, Carmichael, Reidelbach, Setzer, Clancy, McGregor, Niehaus, Distel, Cirelli, Latell, Salerno**

---

**BILL SUMMARY**

- Establishes a penalty for the existing prohibition contained in the offense of illegal processing of drug documents that prohibits knowingly making a false statement in any prescription, order, report, or record required by the Controlled Substances Laws or the Pharmacy/Dangerous Drugs Laws.
- Expands the circumstances in which the penalty for the offense of domestic violence is enhanced to also enhance the penalty when the offender *previously pleaded guilty to* certain offenses and when the offender previously has been convicted of or pleaded guilty to a violation of a law of the United States, a law of another state, or a municipal ordinance of a municipal corporation in another state that is substantially similar to certain Ohio offenses.
- Makes an offender ineligible for intervention in lieu of conviction if the offender is charged with corrupting another with drugs, a drug trafficking offense, illegal manufacture of drugs or cultivation of marihuana, or illegal administration or distribution of anabolic steroids and the offense is a felony of the fourth or fifth degree or a misdemeanor.

---

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

- Expands one of the factors used in sentencing an offender for a felony of the fourth or fifth degree to require the court also to consider whether the offender at the time of the offense was serving a prison term.
- Limits the circumstances in which the court must impose the shortest prison term authorized for an offense to exclude instances when the offender was serving a prison term at the time of the offense.
- Expands the definition of "repeat violent offender" to also include a person who at the time of the involved offense was serving a prison term for a specified offense.
- Expands the standard for requiring consecutive service of prison terms for multiple offenses to permit the imposition of consecutive sentences when one or more of the multiple offenses was committed while the offender was awaiting trial or sentencing, was under a community control sanction, or was under post-release control for a prior offense, and expands the standard to permit consecutive sentences to be imposed when there are multiple courses of conduct.
- Clarifies when an offender may file a motion for judicial release if the offender is serving a stated prison term of exactly ten years.
- Transfers to the Department of Rehabilitation and Correction the duty to determine if an offender is eligible for placement in a program of shock incarceration or is eligible for placement in an intensive program prison.
- Requires the APA to classify the termination of post-release control as favorable or unfavorable depending on the offender's conduct and compliance with the conditions of supervision and requires DRC, no later than six months after the bill's effective date, to adopt a rule establishing the criteria for the classification of a post-release control termination as "favorable" or "unfavorable."
- Includes in the statutorily specified list of factors that a sentencing court must consider as indicating that the offender is likely to commit future crimes that, at the time of committing the offense the offender had been unfavorably terminated from post-release control for a prior offense.
- Relocates a provision regarding the treatment of persons who commit new felonies while on parole or post-release control for a prior felony and modifies it by: (1) permitting the court to terminate the term of post-

release control as a result of the violation, (2) authorizing the court to impose community control sanctions for the violation, and (3) rephrasing portions of the provision.

- Extends from not later than July 1, 2001, to not later than July 1, 2002, the date the State Criminal Sentencing Commission must recommend to the General Assembly any necessary changes to the forfeiture statutes in the Criminal Code and the Motor Vehicles Law.
- Requires an applicant for a license to practice nursing as a registered nurse or as a licensed practical nurse who entered a nursing training program on or after June 1, 2003 and is applying for licensing by examination or who is applying for licensing by endorsement, or an applicant for a certificate to practice as a dialysis technician who entered a dialysis training program on or after that date, to request BCII to perform a criminal records check that includes an FBI check and to submit to the Board of Nursing the results of that check, as part of the application process.
- Requires the Board of Nursing to refuse to grant a license to practice nursing as a registered nurse or as a licensed practical nurse to a person who is required to request a criminal records check and whose check indicates that the person has pleaded guilty to, been convicted of, or has had a judicial finding of guilt for committing aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary, or a substantially similar law of another state, the United States, or another country.
- Requires the Board of Nursing to refuse to grant a certificate to practice as a dialysis technician to a person who is required to request a criminal records check and whose criminal record check indicates that the person has pleaded guilty to, been convicted of, or has had a judicial finding of guilt for committing aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary, or a substantially similar law of another state, the United States, or another country.
- Provides that, in general, the results of any criminal records check conducted pursuant to a request made under the bill by an applicant for a license to practice nursing or a certificate to practice as a dialysis



technician, and any report containing those results, are not public records for purposes of the Public Records Law.

- Provides that a temporary permit to practice nursing issued to a person who applies for licensing by endorsement expires at the earlier of 180 days after issuance or upon the issuance of a license by endorsement, and that it terminates automatically if the criminal records check completed regarding the applicant under the bill indicates that the applicant previously has been convicted of, pleaded guilty to, or had a judicial finding of guilt for, any of the offenses that disqualify an applicant for the issuance of a license.
- Expands the list of medications that a dialysis technician may administer, when ordered by a licensed health professional authorized to prescribe drugs to include oxygen when the administration of the oxygen has been delegated to the technician by a registered nurse.
- Specifies that, regarding the continuing education required for a dialysis technician who wishes to renew a certificate to practice, of the hours of continuing education completed during the period for which the certificate was issued, at least one hour of the education must be directly related to the statutes and rules pertaining to the practice of nursing in Ohio or the practice as a dialysis technician in Ohio.
- Expands the offense of "unauthorized use of property" to specifically prohibit knowingly gaining access to, attempting to gain access to, or causing access to be gained to any "cable service" or "cable system" without the consent of, or beyond the scope of the express or implied consent of, the owner of the cable service or cable system or other person authorized to give consent by the owner, and expands a related civil remedy to permit recovery of damages related to conduct in violation of the expanded offense.

---

## TABLE OF CONTENTS

Illegal processing of drug documents .....	6
Existing law.....	6
Operation of the bill .....	7
Domestic violence .....	7
Existing law.....	7
Operation of the bill .....	7
Intervention in lieu of conviction .....	8



Operation of the bill .....	8
Existing law.....	8
Felony sentencing.....	11
Sentencing guidelines for fourth or fifth degree felony .....	11
Default length of sentence for a felony .....	11
Definition of "repeat violent offender" .....	12
Consecutive prison terms .....	13
Judicial release .....	14
Operation of the bill .....	14
Existing law.....	14
Shock incarceration and intensive program prisons.....	15
Determination of eligibility.....	15
Unfavorable termination from post-release control.....	16
Authority of Adult Parole Authority to classify post-release control terminations .....	16
Sentencing factors for felonies.....	16
Operation of the bill .....	16
Existing law.....	16
Committing a new felony while on post-release control.....	17
Existing law.....	17
Operation of the bill .....	18
Duties of the State Criminal Sentencing Commission.....	19
Existing law.....	19
Operation of the bill .....	19
Nursing Law and Dialysis Technician Law--criminal records checks, duties, and training .....	19
Applications for licensure to practice as a registered nurse or as a licensed practical nurse--criminal records checks .....	19
Temporary permit to practice nursing, for an applicant for license by endorsement .....	21
Certification to work as a dialysis technician--criminal records checks and other criteria.....	22
Board of Nursing sanctions .....	23
Administration of medication by a dialysis technician .....	24
Dialysis technical continuing education.....	24
Unauthorized access to a cable service or cable system.....	25
Offense of "unauthorized use of property" .....	25
Civil action to recover damages for an R.C. 2913.041 violation .....	26

---

## CONTENT AND OPERATION

### Illegal processing of drug documents

#### Existing law

Under existing law, a person commits the offense of "illegal processing of drug documents" by doing any of the following (R.C. 2925.23(A) to (D)):<sup>1</sup>

(1) Knowingly making a false statement in any prescription, order, report, or record required by the Controlled Substances Laws or the Pharmacy/Dangerous Drugs Laws;

(2) Intentionally making, uttering, or selling, or knowingly possessing any false or forged: (a) prescription, (b) uncompleted preprinted prescription blank used for writing a prescription, (c) official written order, (d) license for a terminal distributor of dangerous drugs, or (e) registration certificate for a wholesale distributor of dangerous drugs;

(3) By committing the offense of theft, acquiring any: (a) prescription, (b) uncompleted preprinted prescription blank used for writing a prescription, (c) official written order, (d) blank official written order, (e) license or blank license for a terminal distributor of dangerous drugs, or (f) registration certificate or blank registration certificate for a wholesale distributor of dangerous drugs;

(4) Knowingly making or affixing any false or forged label to a package or receptacle containing any dangerous drugs.

Existing law does not contain a penalty for a violation of the prohibition described above in paragraph (1). If the offender violates a prohibition described above in paragraph (2)(b), (d), or (e) or paragraph (3)(b), (d), (e), or (f), illegal processing of drug documents is a felony of the fifth degree. If the offender violates a prohibition described above in paragraph (2)(a) or (c), paragraph (3)(a) or (c), or paragraph (4), illegal processing of drug documents is either of the following: if the drug involved is included in schedule I or II, and is not marihuana, a felony of the fourth degree, or, if the drug involved is included in schedule III, IV, or V or is marihuana, a felony of the fifth degree. The Felony Sentencing Law imposes no preference for or against a prison term on the offender. (R.C. 2925.23(F).)

---

<sup>1</sup> *These prohibitions do not apply to licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4725., 4729., 4731., and 4741. of the Revised Code. (R.C. 2925.23(E).)*

### **Operation of the bill**

The bill establishes a penalty for a violation of the existing prohibition against knowingly making a false statement in any prescription, order, report, or record required by the Controlled Substances Laws or the Pharmacy/Dangerous Drugs Laws (the prohibition in paragraph (1), above). The penalty is as follows: if the drug involved is in schedule I or II, and is not marihuana, the violation is a felony of the fourth degree, or, if the drug involved is a dangerous drug, is included in schedule III, IV, or V, or is marihuana, the violation is a felony of the fifth degree. The Felony Sentencing Law imposes no preference for or against a prison term on the offender. (R.C. 2925.23(F).)

### **Domestic violence**

#### **Existing law**

The existing offense of "domestic violence" contains three distinct prohibitions. It prohibits a person from:

- (1) Knowingly causing or attempting to cause physical harm to a family or household member.
- (2) Recklessly causing serious physical harm to a family or household member.
- (3) By threat of force, knowingly causing a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

A violation of any of the prohibitions is the offense of domestic violence. Generally, a violation of the third prohibition is a misdemeanor of the fourth degree, and a violation of either of the first two prohibitions is a misdemeanor of the first degree. But if the offender *previously has been convicted of* domestic violence, a violation of a municipal ordinance that is substantially similar to domestic violence, certain assault or menacing-related offenses involving a person who was a family or household member at the time of the violation, or a violation of a municipal ordinance that is substantially similar to one of those offenses involving a person who was a family or household member at the time of the violation, a violation of the third prohibition is a misdemeanor of the third degree, and a violation of either of the first two prohibitions is a felony of the fifth degree. (R.C. 2919.25.)

### **Operation of the bill**

The bill expands the circumstances in which the penalty for the offense of domestic violence is enhanced. Under the bill, the penalty also is enhanced when

the offender *previously pleaded guilty to* any of the offenses described in "Existing law." Under existing law, the penalty is enhanced only when the offender previously has been convicted of any of those offenses. The bill also expands the list of offenses that is relevant in determining the enhancement. Under the bill, the penalty also is enhanced when the offender previously has been convicted of (existing law) or pleaded guilty to (added by the bill) a violation of a law of the United States or another state or a municipal ordinance of a municipal corporation in another state that is substantially similar to the violations described in "Existing law." (R.C. 2919.25(D).)

### **Intervention in lieu of conviction**

#### **Operation of the bill**

Existing law, described below, permits a court in specified circumstances to grant "intervention in lieu of conviction" to a person charged with a criminal offense. The bill changes the eligibility requirements for intervention in lieu of conviction. Under the bill:

(1) An offender is ineligible if: (a) the offender is charged with corrupting another with drugs, a drug trafficking offense, illegal manufacture of drugs or cultivation of marihuana, or illegal administration or distribution of anabolic steroids, regardless of the degree of the offense (under existing law, an offender charged with one of those offenses is ineligible only if the charged offense is a felony of the first, second, or third degree), or (b) as under existing law, the offender is charged with a drug possession offense that is a felony of the first, second, or third degree. (R.C. 2951.041(B)(3).)

(2) It is clarified that an offender who is charged with a drug possession offense that is a felony of the fifth degree or a misdemeanor does not need prosecutorial approval in order to be eligible for intervention in lieu of conviction. It is also clarified that the existing provision that makes certain persons charged with a drug possession offense ineligible for treatment in lieu of conviction unless the prosecutor who is handling the case recommends that the offender be eligible for it applies only when the drug possession offense charged is a felony of the fourth degree. (R.C. 2951.041(B)(4).) As under existing law, in order for an offender to be eligible for intervention in lieu of conviction, the court must make a finding that the offender does not have a disqualifying charge of either nature or any other existing disqualifying factor (R.C. 2951.041(B)).

#### **Existing law**

**Request for intervention.** Under existing law, if an offender is charged with a criminal offense and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior, the

court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction. If the court considers an offender's request, it must conduct a hearing to determine whether the offender is eligible and must stay all criminal proceedings pending the outcome of the hearing. It also must order an assessment of the offender for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan. (R.C. 2951.041(A)(1).)

**Eligibility for intervention.** Under existing law, an offender charged with a criminal offense is eligible for intervention in lieu of conviction if the court finds all of the following (R.C. 2951.041(B)):<sup>2</sup>

(1) The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention in lieu of conviction or any similar regimen, and is charged with a felony for which the Felony Sentencing Laws impose a preference against the imposition of a prison term (a fourth or fifth degree felony) or with a misdemeanor.

(2) The offense is not a felony of the first, second, or third degree, is not an offense of violence, is not aggravated vehicular homicide, aggravated vehicular assault, or state OMVI or a violation of a substantially similar municipal ordinance, and is not an offense for which a sentencing court is required to impose a mandatory prison term, a mandatory term of local incarceration, or a mandatory term of imprisonment in a jail.

(3) The offender is not charged with corrupting another with drugs, a drug trafficking offense, illegal manufacture of drugs or cultivation of marijuana, illegal administration or distribution of anabolic steroids, or a drug possession offense that is a felony of the first, second, or third degree (this is the first provision modified by the bill).

(4) The offender is not charged with a drug possession offense that is a felony of the fourth degree, or the offender is charged with a drug possession offense that is a felony of the fourth degree, and the prosecutor in the case has recommended that the offender be classified as being eligible for intervention in lieu of conviction (this is the second provision modified by the bill).

(5) The offender has been assessed by certain licensed, certified, or credentialed persons or facilities for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

---

<sup>2</sup> *This provision requires the court to affirmatively find the absence of the disqualifying criteria.*

(6) The offender's drug or alcohol usage was a factor leading to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.

(7) The alleged victim of the offense was not 65 years of age or older, permanently and totally disabled, under 13 years of age, or a peace officer engaged in the officer's official duties at the time of the alleged offense.

(8) If the offender is charged with tampering with drugs, the alleged violation did not result in physical harm to any person, and the offender previously has not been treated for drug abuse.

(9) The offender is willing to comply with all terms and conditions imposed by the court.

**Intervention.** Existing law provides that, if the court finds that the offender is not eligible or does not grant the offender's request, the criminal proceedings against the offender must proceed as if no request for intervention in lieu of conviction had been made.

If the court finds that the offender is eligible and grants the offender's request, the court must (1) accept the offender's plea of guilty and waiver of rights, (2) may stay all criminal proceedings and order the offender to comply with all terms and conditions imposed by the court, (3) must place the offender under the general control and supervision of the county probation department, the Adult Parole Authority, or another appropriate local probation or court services agency, and (4) must establish an intervention plan for the offender and set the terms and conditions of the intervention plan.

If the court finds that the offender has successfully completed the intervention plan, the court must dismiss the proceedings against the offender without adjudication of guilt. The dismissal is not a criminal conviction for purposes of any disqualification or disability imposed by law upon conviction of a crime. The court also may order the sealing of records related to the offense in question. If the offender fails to comply with any term or condition imposed as part of the intervention plan, the supervising authority for the offender promptly must advise the court of this failure, and the court must hold a hearing to determine whether the offender failed to comply with any term or condition imposed as part of the plan. If the court so determines, it must enter a finding of guilty and impose an appropriate sanction. (R.C. 2951.041(C) to (F).)

## Felony sentencing

### Sentencing guidelines for fourth or fifth degree felony

**Existing law.** Under existing law, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court generally is required to determine whether any of a list of specified factors apply. If the court finds that one or more of those factors applies and if the court, after considering other specified factors required in felony sentencing, finds that a prison term is consistent with the purposes and principles of sentencing and finds that the offender is not amenable to an available community control sanction, the court must impose a prison term upon the offender. Otherwise, the sentencing court must impose a community control sanction upon the offender. (R.C. 2929.13(B)(1) and (2).)

One of the factors the application of which the sentencing court generally must determine is whether the offender previously served a prison term (R.C. 2929.13(B)(1)(g)).

**Operation of the bill.** The bill revises the sentencing factor related to the offender's previous prison term to require the court, in sentencing an offender for a felony of the fourth or fifth degree, to determine whether *the offender at the time of the offense was serving*, or previously had served, a prison term (R.C. 2929.13(B)(1)(g)).

### Default length of sentence for a felony

**Existing law.** Generally, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender *and if the offender previously has not served a prison term*, the court must impose the shortest prison term authorized for the offense, unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others (R.C. 2929.14(B)).

**Operation of the bill.** The bill further limits the circumstances in which the court is required to impose the shortest prison term authorized for an offense. Under the bill, the court also is not required to impose the shortest prison term *if the offender was serving a prison term at the time of the offense*. (R.C. 2929.14(B).)

Thus, under the bill, generally, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court generally is required to impose the shortest prison term authorized for the offense, unless *one or more of the following applies*:

(1) *The offender was serving a prison term at the time of the offense (added by the bill), or the offender previously had served a prison term (existing law relocated).*

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

**Definition of "repeat violent offender"**

**Operation of the bill.** Existing law, described below, provides special sentencing provisions (including, in certain circumstances, an extra prison term) for persons convicted of a felony who are found to be "repeat violent offenders." The bill revises the definition of "repeat violent offender" so that, in addition to the persons to whom it currently applies, it also applies to a person who is serving at the time of the offense for which sentence is being imposed a prison term for one of the following offenses (R.C. 2929.01(DD)(2)(a)).

(1) Aggravated murder, murder, involuntary manslaughter, rape, the former offense of felonious sexual penetration, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(2) An offense under an existing or former law of Ohio, another state, or the United States that is or was substantially equivalent to an offense listed under the preceding paragraph and that resulted in the death of a person or in physical harm to a person.

**Existing law.** Under existing law, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification that the offender is a repeat violent offender, the court is required to impose a prison term from the range of terms authorized for the offense that may be the longest term in the range. If certain other criteria are met, the court is authorized to impose an additional prison term of 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years (R.C. 2929.14(D)(2)).

Under existing law, "repeat violent offender" means a person about whom both of the following apply (R.C. 2929.01(DD)):

(1) The person has been convicted of or has pleaded guilty to, and is being sentenced for committing, for complicity in committing, or for an attempt to commit, aggravated murder, murder, involuntary manslaughter, a felony of the first degree other than one set forth in the Drug Laws, a felony of the first degree set forth in the Drug Laws that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person, or a felony of the

second degree that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person.

(2) Either of the following applies: (a) the person previously was convicted of or pleaded guilty to, and served a prison term for, any of the offenses listed above in paragraph (1) or (2) of "*Operation of the bill*," or (b) the person previously was adjudicated a delinquent child for committing an act that if committed by an adult would have been an offense listed above in paragraph (1) or (2) of "*Operation of the bill*," the person was committed to the Department of Youth Services for that delinquent act.

### *Consecutive prison terms*

The bill revises the standard for consecutive service of prison terms for multiple felonies to permit the court to require consecutive service of prison terms when the offender committed "one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a community control sanction, or was under post-release control for a prior offense (currently, the provision requires that "the multiple offenses" must have been committed when the offender was awaiting trial or sentencing, was under such a sanction, or was under post-release control for a prior offense). The result of this change is that the court may impose consecutive sentencing when the offender committed one or more of the offenses while the offender was not subject to one of the three conditions if at least one is subject to one of the three conditions. The bill also revises the standard to permit consecutive sentences to be imposed when there are multiple courses of conduct, not just a single course of conduct. (R.C. 2929.14(E)(4)(a) and (b).)

Thus, under the bill, if multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following (new language is in italics) (R.C. 2929.14(E)(4)):

(1) The offender committed *one or more* of the multiple offenses while the offender was awaiting trial or sentencing, was under a community control sanction, or was under post-release control for a prior offense.

(2) *At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses (a single course in existing law) of conduct adequately reflects the seriousness of the offender's conduct.*



(3) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

### **Judicial release**

#### **Operation of the bill**

Currently, as described below, the Revised Code states that offenders serving a stated prison term of exactly ten years are eligible for judicial release, but it does not specify when such an offender may file a motion for judicial release. The bill corrects this oversight. Under the bill, if the stated prison term is more than five years and *not more* than ten years and is an aggregate of stated prison terms that are being served consecutively and that were imposed for any combination of felonies of the fourth degree and felonies of the fifth degree, the eligible offender may file the motion after the eligible offender has served five years of the stated prison term. Similarly, if the stated prison term is more than five years and *not more* than ten years, the eligible offender may file the motion after the eligible offender has served five years of the stated prison term. (R.C. 2929.20(B)(1)(c) and (4).)

#### **Existing law**

Existing law provides that, upon the filing of a motion by an eligible offender or upon its own motion, a sentencing court may reduce an eligible offender's stated prison term through a judicial release. A person serving a stated prison term of *ten years or less* is eligible for judicial release if the stated prison term does not include a mandatory prison term or if the stated prison term includes a mandatory prison term and the person has served the mandatory prison term. Certain additional criteria must be met if an eligible offender is imprisoned for a felony of the first or second degree, or if an eligible offender committed an offense contained in the Drug Laws or the Controlled Substances Laws and for whom there was a presumption in favor of a prison term. If the court grants a motion for judicial release, the court must (1) order the release of the eligible offender, (2) place the eligible offender under an appropriate community control sanction, under appropriate community control conditions, and under the supervision of the probation department serving the court, and (3) reserve the right to reimpose the reduced sentence if the offender violates the sanction. (R.C. 2929.20(A), (B), (H), and (I).)

## **Shock incarceration and intensive program prisons**

### **Determination of eligibility**

**Existing law.** At the time of sentencing for a felony, existing law requires the court to determine if an offender is eligible for placement in a program of shock incarceration (under R.C. 5120.031) or is eligible for placement in an intensive program prison (under R.C. 5120.032). The court may: (1) recommend the offender, if eligible, for placement in a program of shock incarceration or in an intensive program prison, (2) disapprove placement of the offender in either program, regardless of eligibility, or (3) make no recommendation on placement of the offender. The court must give its reasons for its recommendation or disapproval. (R.C. 2929.14(K) and 2929.19(D).)

If the court determines that the offender is eligible for placement in such a program or prison and recommends placement, DRC may place the offender in the program or prison. If the court determines that the offender is eligible for placement in such a program or prison but does not make a recommendation, DRC may place the offender in such a program or prison, but it must give the judge prior notice of its intent and the judge may disapprove of its placement. (R.C. 5120.031 and 5120.032.)

**Operation of the bill.** The bill repeals the requirement that the court must determine if a felony offender is eligible for placement in a program of shock incarceration or an intensive program prison and transfers that duty to DRC. The court continues to have the authority to recommend the offender for placement in a program or prison of that nature, disapprove such a placement, or make no recommendation on placement of the offender. In no case may DRC place the offender in a program or prison of that nature unless DRC determines, as specified below, that the offender is eligible for the placement. If the court disapproves placement of the offender in a program or prison of that nature, DRC may not place the offender in any program of shock incarceration or intensive program prison. If the court recommends or disapproves placement, it must make a finding that gives its reasons for its recommendation or disapproval.

If the court recommends the offender for placement in such a program or prison and DRC determines that the offender is eligible for placement in such a program or prison, DRC may place the offender in the program or prison. If the court makes no recommendation on the placement of the offender and DRC determines that the offender is eligible for placement in such a program or prison, DRC may place the offender in such a program or prison, but it must give the judge prior notice of its intent, and the judge may disapprove of its placement. If DRC determines that the offender is not eligible for placement in such a program or prison, it may not place the offender in such a program or prison. (R.C. 2929.14(K), 2929.19(D), 5120.031(B)(1) and (C), and 5120.032(B)(1)(a).)



## *Unfavorable termination from post-release control*

### *Authority of Adult Parole Authority to classify post-release control terminations*

Under existing law, unchanged by the bill, "post-release control" means a period of supervision by DRC's Adult Parole Authority (APA) after a prisoner's release from imprisonment that includes one or more post-release control sanctions (R.C. 2967.01(N)).

The bill authorizes the APA to classify the termination of post-release control as favorable or unfavorable depending on the offender's conduct and compliance with the conditions of supervision. The bill also requires DRC, no later than six months after the bill's effective date, to adopt a rule that establishes the criteria for the classification of a post-release control termination as "favorable" or "unfavorable." The rule must be adopted in accordance with the Administrative Procedure Act. (R.C. 2967.16(B).)

### *Sentencing factors for felonies*

#### *Operation of the bill*

Existing law provides lists of factors that a court sentencing an offender for a felony must consider in imposing sentence. One of the lists, described below, specifies factors indicating that the offender is likely to commit future crimes. The bill includes in the statutorily specified list of factors that a sentencing court must consider as indicating that the offender is likely to commit future crimes that, at the time of committing the offense, the offender had been unfavorably terminated from post-release control for a prior offense (R.C. 2929.12(D)).

#### *Existing law*

Under existing law, the sentencing court must consider, among other things, statutorily described factors relating to the likelihood of the offender's recidivism.

The sentencing court must consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes (R.C. 2929.12(D)):

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a community control sanction, or under post-release control for an earlier offense.

(2) The offender previously was adjudicated a delinquent child, or the offender has a history of criminal convictions.



(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

The sentencing court must consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes (R.C. 2929.12(E)):

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

### **Committing a new felony while on post-release control**

#### **Existing law**

Under existing law, a parolee or releasee who has violated any condition of parole, any post-release control sanction, or any conditions that are imposed upon the releasee by committing a felony may be prosecuted for the new felony, and, upon conviction, the court must impose sentence for the new felony. In addition to the sentence imposed for the new felony, the court may impose a prison term for the violation, and the term imposed for the violation must be reduced by any prison term that is administratively imposed by the Parole Board or APA as a post-release control sanction. If the person is a releasee, the maximum prison term for the violation shall be either the maximum period of post-release control for the earlier felony minus any time the releasee has spent under post-release control for the earlier felony or 12 months, whichever is greater. A prison term imposed for the violation must be served consecutively to any prison term imposed for the new felony. If the person is a releasee, a prison term imposed for the violation, and a prison term imposed for the new felony, cannot count as, or be credited toward,

the remaining period of post-release control imposed for the earlier felony. (R.C. 2967.28(F)(4).)

### **Operation of the bill**

The bill relocates this provision and modifies it by (R.C. 2929.141 and repeal of 2967.28(F)(4)): (1) permitting the court to terminate the term of post-release control as a result of the violation, (2) authorizing the court to impose community control sanctions for the violation, and (3) rephrasing portions of the provision.

Specifically, under the bill, a "person on release" (i.e., a "parolee" or "releasee" under existing R.C. 2967.01 definitions) who by committing a felony has violated any condition of parole, any post-release control sanction, or any conditions that are imposed upon the person may be prosecuted for the new felony. Upon the person's conviction of or plea of guilty to the new felony, the court must impose sentence for the new felony, may terminate the term of post-release control if the person is a releasee, and may do either or both of the following for the person regardless of whether the sentencing court or another Ohio court imposed the original prison term for which the person is on parole or is serving a term of post-release control (R.C. 2929.141):

(1) In addition to any prison term for the new felony, impose a prison term for the violation. If the person is a releasee, the maximum prison term for the violation must be the greater of 12 months or the period of post-release control for the earlier felony minus any time the releasee has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation must be reduced by any prison term that is administratively imposed by the Parole Board or Adult Parole Authority as a post-release control sanction. In all cases, a prison term imposed for the violation must be served consecutively to any prison term imposed for the new felony. If the person is a releasee, a prison term imposed for the violation, and a prison term imposed for the new felony, do not count as, and cannot be credited toward, the remaining period of post-release control imposed for the earlier felony.

(2) Impose a community control sanction for the violation, to be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony.

If an offender is imprisoned for a felony committed while under post-release control supervision and is again released on post-release control, the maximum cumulative prison term for all violations is prohibited from exceeding half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the Parole Board, plus half of the total stated prison term of the new felony (R.C. 2967.28(F)(3)).



When a prisoner who has the period of post-release control terminated pursuant to the preceding provision, the APA, upon the recommendation of the superintendent of DRC's parole supervision section, may enter upon its minutes a final release and, upon the entry of the final release, must issue to the released prisoner a certificate of final release. (R.C. 2967.16(B)(1).)

The bill also makes cross-reference changes in relation to the relocation of the provision. (R.C. 5120.031(C)(2), 5120.032(B)(1)(b), 5120.033(C), and 5145.01.)

### **Duties of the State Criminal Sentencing Commission**

#### **Existing law**

Under existing law, the State Criminal Sentencing Commission must review all forfeiture statutes in the Criminal Code (R.C. Title 29) and the Motor Vehicles Law (R.C. Title 45) and, not later than July 1, 2001, recommend to the General Assembly any necessary changes to those statutes (R.C. 181.25(B)).

#### **Operation of the bill**

The bill changes the date the recommendations are due from July 1, 2001, to July 1, 2002 (R.C. 181.25(B)).

### **Nursing Law and Dialysis Technician Law--criminal records checks, duties, and training**

#### **Applications for licensure to practice as a registered nurse or as a licensed practical nurse--criminal records checks**

**Existing law.** Under existing law, an application for *licensure by examination* to practice as a registered nurse or as a licensed practical nurse must be submitted to the Board of Nursing in the form prescribed by rules of the Board. The application must include evidence that the applicant has completed requirements of an approved nursing education program and any other information the Board requires and be accompanied by an application fee. The Board must grant the license if the applicant passes an appropriate examination and the Board determines that the applicant has not committed any act that is grounds for disciplinary action, determines that an applicant who has committed such acts has made restitution or has been rehabilitated, or both.

Similarly, a person may apply for a *license by endorsement* by submitting to the Board an application that is to be accompanied by an application fee. The application must include evidence that the applicant holds a license in good standing in another jurisdiction granted after passing an approved examination and other information the Board requires. The Board must grant a license by

endorsement if the applicant is licensed or certified by another jurisdiction and the Board determines that all of the following apply:

(1) The educational preparation of the applicant is substantially similar to the minimum curricula and standards for nursing education programs in the Nursing Law;

(2) The examination, at the time it is successfully completed, is equivalent to the examination requirements in effect at that time for applicants who were licensed by examination in Ohio;

(3) The applicant has not committed any act that is grounds for disciplinary action, or determines that an applicant who has committed such acts has made restitution or has been rehabilitated, or both. (R.C. 4723.09.)

**Operation of the bill.** The bill additionally requires certain applicants for licensure by examination to practice nursing as a registered nurse or a licensed practical nurse, and all applicants for license by endorsement to practice as a registered nurse or a licensed practical nurse, to successfully complete a criminal records check in order to be licensed. Under the bill, when the Board is considering an application for licensure by examination to practice as a registered nurse or as a licensed practical nurse *that is submitted by an applicant who entered a prelicensure nursing education program on or after June 1, 2003*, or when the board is considering an application for licensing by endorsement *that is submitted by any applicant*, the Board must grant the license if: (1) the applicant meets the criteria for the particular method of licensing described under "**Existing law**" and (2) additionally, the criminal records check of the applicant that is completed upon request of the applicant (see below) by the Bureau of Criminal Identification and Investigation (BCII) and includes a check of Federal Bureau of Investigation (FBI) records and that BCII submitted to the Board indicates that the applicant has not been convicted of, has not pleaded guilty to, and has not had a judicial finding of guilt for committing aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary, or a substantially similar law of another state, the United States, or another country. (R.C. 4723.09(A) and (B) and 4723.28(N)(1).)

The bill also requires an applicant for licensure by examination or by endorsement to practice nursing to submit a request to BCII for a criminal records check of the applicant. The request must be on the form prescribed by BCII pursuant to existing R.C. 109.572(C)(1), not in the bill, be accompanied by a standard impression sheet to obtain fingerprints prescribed by BCII pursuant to existing R.C. 109.572(C)(2), not in the bill, and be accompanied by the fee prescribed by BCII pursuant to existing R.C. 109.572(C)(3), not in the bill. Upon receipt of the completed form, the completed impression sheet, and the fee, BCII

must complete a criminal records check of the applicant and, upon completion of the check, it must send the results to the Board. The applicant must ask the Superintendent of BCII to also request the FBI to provide the Superintendent with any information it has with respect to the applicant.

The results of any criminal records check conducted pursuant to a request made under this provision, and any report containing those results, are not public records for purposes of the existing Public Records Law (not in the bill) and cannot be made available to any person or for any purpose other than the following: (1) they may be made available to any person, for use in determining under the bill's provisions whether the individual who is the subject of the check should be granted a license to practice nursing as a registered nurse or as a licensed practical nurse or whether any temporary permit granted to the individual under this section has terminated automatically (see below), and (2) they may be made available to the individual who is the subject of the check or that individual's representative. (R.C. 4723.09(C) and 4723.28(N)(1).)

**Temporary permit to practice nursing, for an applicant for license by endorsement**

**Existing law.** Existing law provides that, if a person applies for license by endorsement to practice nursing as a registered nurse or as a licensed practical nurse, the Board may grant the applicant a nonrenewable temporary permit to practice as a registered nurse or as a licensed practical nurse if the Board is satisfied by the evidence that the applicant holds a current, active license in good standing in another jurisdiction. The temporary permit expires at the earlier of 120 days after issuance or upon issuance of a license by endorsement. (R.C. 4723.09(B).)

**Operation of the bill.** The bill modifies the duration of a temporary permit issued under this provision and provides for the earlier, automatic termination of such a temporary permit in specified circumstances. Under the bill, subject to earlier automatic termination as described below, the temporary permit expires at the *earlier of 180 days after issuance* (increased from 120 days) or upon the issuance of a license by endorsement. Further, under the bill, the temporary permit terminates automatically if the criminal records check completed by BCII regarding the applicant, as described above, indicates that the applicant previously has been convicted of, pleaded guilty to, or had a judicial finding of guilt for, any of the offenses that disqualify an applicant for the issuance of a license to practice nursing, as described above in "**Applications for licensure to practice as a registered nurse or as a licensed practical nurse--criminal records checks.**" An applicant whose temporary permit is automatically terminated is permanently prohibited from obtaining a license to practice nursing in Ohio as a registered nurse or as a licensed practical nurse. (R.C. 4273.09(B).)

**Certification to work as a dialysis technician--criminal records checks and other criteria**

**Existing law.** Existing law requires the Board of Nursing to issue a certificate to practice as a dialysis technician to a person who meets all of the following requirements (R.C. 4723.75(A)): (1) the person applies to the Board and includes the application fee, (2) the person is 18 years of age or older and possesses a high school diploma or high school equivalence diploma, (3) the person meets certain requirements established by the Board, and (4) the person demonstrates competency to practice as a dialysis technician.

**Operation of the bill.** The bill repeals the certification criterion described in (2) of the preceding paragraph (but see below). In addition to the remaining criteria, the bill requires a person who applies for a certificate to practice as a dialysis technician and who entered a dialysis training program on or after June 1, 2003, to successfully complete a criminal background check in order to be licensed. Under the bill when the Board is considering an application for certification to practice as a dialysis technician that is made by such a person, the Board must grant the certificate if: (1) the applicant meets the criteria described under "**Existing law**" other than the criterion described in (2) of that paragraph, and (2) additionally, the criminal records check of the applicant that is completed by BCII and includes a check of FBI records that BCII submits to the Board indicates that the applicant has not been convicted of, has not pleaded guilty to, and has not had a judicial finding of guilt for committing aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary, or a substantially similar law of another state, the United States, or another country. (R.C. 4723.28(N)(2) and 4723.75(A).)

The bill also requires an applicant for certification to submit a request to BCII for a criminal records check of the applicant. The request must be on the form prescribed by BCII pursuant to existing R.C. 109.572(C)(1), not in the bill, be accompanied by a standard impression sheet to obtain fingerprints prescribed by BCII pursuant to existing R.C. 109.572(C)(2), not in the bill, and be accompanied by the fee prescribed by BCII pursuant to existing R.C. 109.572(C)(3), not in the bill. Upon receipt of the completed form, the completed impression sheet, and the fee, BCII must complete a criminal records check of the applicant and, upon completion of the check, it must send the results to the Board. The applicant must ask the Superintendent of BCII to also request the FBI to provide the Superintendent with any information it has with respect to the applicant.

The results of any criminal records check conducted pursuant to a request made under this provision, and any report containing those results, are not public records for purposes of the existing Public Records Law (not in the bill) and



cannot be made available to any person or for any purpose other than the following: (1) they may be made available to any person, for use in determining under the bill's provisions whether the individual who is the subject of the check should be granted a license to practice nursing as a registered nurse or as a licensed practical nurse or whether any temporary permit granted to the individual under this section has terminated automatically (see below), and (2) they may be made available to the individual who is the subject of the check or that individual's representative. (R.C. 4723.75(C) and 4723.28(N)(2).)

As stated above, the bill repeals an existing criterion for certification as a dialysis technician the provision that currently provides that the applicant for certification must be 18 years of age or older and possess a high school diploma or high school equivalence diploma. The bill relocates this criterion, though, as a criterion for enrollment in a dialysis training program. Under the bill, a person may not be permitted to enroll, and may not enroll, in a dialysis training program approved by the Board under existing law unless the person is 18 years of age or older and possesses a high school diploma or equivalence diploma. (R.C. 4723.74, and repeal of R.C. 4723.75(A)(2).)

### **Board of Nursing sanctions**

**Existing law.** Currently, for certain violations, the Board of Nursing may impose one or more of the following sanctions: *deny*, revoke, suspend, or place restrictions on any nursing license, certificate of authority, or dialysis technician certificate issued by the Board; reprimand or otherwise discipline a holder of a nursing license, certificate of authority, or dialysis technician certificate; or impose a fine of not more than \$500 per violation (R.C. 4723.28(B)). Among other violations, the sanctions may be imposed for conviction of, a plea of guilty to, a judicial finding of guilt of, a judicial finding of guilt resulting from a plea of no contest to, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice, any felony or of any crime involving gross immorality or moral turpitude, an act in another jurisdiction that would constitute a felony or a crime of moral turpitude in Ohio, or an act in the course of practice in another jurisdiction that would constitute a misdemeanor in Ohio (R.C. 4723.28(B)(3), (4), (6), and (7)).

**Operation of the bill.** Under the bill, the Board is required to refuse to grant a license to practice nursing as a registered nurse or as a licensed practical nurse to a person who entered a prelicensure nursing education program on or after June 1, 2003, and applied for licensure by examination to practice as a nurse or a person who applied for licensure by endorsement to practice as a nurse, if the criminal records check performed under the bill indicates that the person has pleaded guilty to, been convicted of, or has had a judicial finding of guilt for committing aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson,

aggravated robbery, or aggravated burglary, or a substantially similar law of another state, the United States, or another country. Similarly, the bill requires the Board to refuse to grant a certificate to practice as a dialysis technician to a person who entered a dialysis training program on or after June 1, 2003, and whose criminal record check indicates that the person has pleaded guilty to, been convicted of, or has had a judicial finding of guilt for committing offenses of that nature. (R.C. 4723.28(N).)

### **Administration of medication by a dialysis technician**

**Existing law.** Existing law provides that a dialysis technician may administer medication only as ordered by a licensed health professional authorized to prescribe drugs as defined in R.C. 4729.01 and in accordance with the standards established in rules adopted under R.C. 4723.79. Under this provision, a dialysis technician may administer only the following medications: (1) intradermal lidocaine or other single therapeutically equivalent local anesthetic for the purpose of initiating dialysis treatment, (2) intravenous heparin or other single therapeutically equivalent anticoagulant for the purpose of initiating and maintaining dialysis treatment, (3) intravenous normal saline, or (4) patient-specific dialysate, to which the person may add electrolytes but no other additives or medications. (R.C. 4723.72(C).)

**Operation of the bill.** The bill expands the list of specified medications that a dialysis technician may administer, when ordered by a licensed health professional authorized to prescribe drugs and in accordance with the standards established in rules adopted under R.C. 4723.79, to also include, in addition to the existing medications, *oxygen when the administration of the oxygen has been delegated to the technician by a registered nurse* (R.C. 4723.72(C)).

### **Dialysis technical continuing education**

**Existing law.** Existing law provides that a certificate issued to a person to practice as a dialysis technician expires biennially and must be renewed according to a schedule the Board establishes by rule. An application for renewal of a certificate must be accompanied by the renewal fee the Board adopts by rule. A certificate may be renewed only if, during the period for which the certificate was issued, the certificate holder satisfied the continuing education requirements established by the Board's rules. (R.C. 4723.77.)

**Operation of the bill.** The bill imposes a limitation on the types of education that satisfy the existing continuing education requirement for renewal of a certification as a dialysis technician. It specifies that, of the hours of continuing education completed during the period for which the certificate was issued, at least one hour of the education must be directly related to the statutes and rules

pertaining to the practice of nursing in Ohio or the practice as a dialysis technician in Ohio. (R.C. 4723.77.)

### **Unauthorized access to a cable service or cable system**

#### **Offense of "unauthorized use of property"**

**Existing law.** Existing law prohibits a person from: (1) knowingly using or operating the property of another without the consent of the owner or person authorized to give consent, or (2) knowingly gaining access to, attempting to gain access to, or causing access to be gained to any computer, computer system, computer network, telecommunications device, telecommunications service, or information service without the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, computer network, telecommunications device, telecommunications service, or information service or other person authorized to give consent by the owner. The affirmative defenses contained in R.C. 2913.03(C) are affirmative defenses to a charge of a violation of these prohibitions.

A violation of the prohibition described in clause (1) is the offense of "unauthorized use of property." Generally, that offense is a misdemeanor of the fourth degree, but in certain specified circumstances it is a misdemeanor of the first degree, a felony of the fifth degree, a felony of the fourth degree, a felony of the third degree, or a felony of the second degree. A violation of the prohibition described in clause (2) is the offense of "unauthorized use of computer or telecommunication property," a felony of the fifth degree.

**Operation of the bill.** The bill expands the prohibition that currently constitutes the offense of "unauthorized use of computer or telecommunication property" so that, in addition to the currently prohibited conduct, the prohibition also prohibits knowingly gaining access to, attempting to gain access to, or causing access to be gained to any "cable service" or "cable system" (see below) without the consent of, or beyond the scope of the express or implied consent of, the owner of the cable service or cable system or other person authorized to give consent by the owner. The bill renames the offense "unauthorized use of computer, cable, or telecommunication property," and it remains a felony of the fifth degree. The affirmative defenses contained in R.C. 2913.03(C) remain affirmative defenses to a charge of a violation of the prohibition. (R.C. 2913.04(B), (C), and (E).)

The bill expands the existing definitions of "services" and "gain access" that apply to R.C. Chapter 2913. to include references to cable services and cable systems, as defined in the bill. Under the bill, for purposes of R.C. Chapter 2913.: (1) "services" includes labor, personal services, professional services, public utility services, common carrier services, and food, drink, transportation, entertainment,

and cable television services *and, for purposes of R.C. 2913.04, includes cable services as defined in that section*, and (2) "gain access" means to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network, *or any cable service or cable system as defined in R.C. 2913.04*. (R.C. 2913.01(E) and (T).)

The bill defines the following terms, for purposes of expanded R.C. 2913.04 (R.C. 2913.04(F)):

(1) "Cable operator" means any person or group of persons that does either of the following: (a) provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in that cable system, or (b) otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

(2) "Cable service" means any of the following: (a) the one-way transmission to subscribers of video programming or of information that a cable operator makes available to all subscribers generally, (b) subscriber interaction, if any, that is required for the selection or use of video programming or of information that a cable operator makes available to all subscribers generally, both as described in clause (a) of this paragraph, and (c) any "cable television service," as defined in existing R.C. 2913.01 (see **COMMENT**).

(3) "Cable system" means any facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service that includes video programming and that is provided to multiple subscribers within a community. "Cable system" does not include any of the following: (a) any facility that serves only to retransmit the television signals of one or more television broadcast stations, (b) any facility that serves subscribers without using any public right-of-way, (c) any facility of a common carrier that, under 47 U.S.C.A. 522(7)(c), is excluded from the term "cable system" as defined in 47 U.S.C.A. 522(7), (d) any open video system that complies with 47 U.S.C.A. 573, or (e) any facility of any electric utility used solely for operating its electric utility system.

### **Civil action to recover damages for an R.C. 2913.041 violation**

**Existing law.** Existing law provides that an owner or operator of a "cable television system" (see below) or other similar closed circuit coaxial cable communications system who is aggrieved by conduct that is prohibited by R.C. 2913.041(A) or (B) (see **COMMENT**) may elect to commence a civil action for damages in accordance with R.C. 2307.60 or 2307.61 or to commence a civil action under the provisions described in this part of the analysis in the appropriate municipal court, county court, or court of common pleas to recover damages and

other specified moneys described below from the persons who violated R.C. 2913.041(A) or (B). If the owner or operator elects to commence a civil action for damages and other specified moneys under this provision, the owner or operator must specify in its complaint which of the following categories of damages and other specified moneys the owner or operator seeks to recover from the persons who violated R.C. 2913.041(A) or (B): (1) full compensatory damages, punitive or exemplary damages if authorized by R.C. 2315.21, and the reasonable attorney's fees, court costs, and other reasonable expenses incurred in maintaining the civil action under this section, (2) damages equal to the actual loss suffered by the owner or operator as a proximate result of the conduct that violated R.C. 2913.041(A) or (B) and, in addition, damages equal to the profits derived by the persons who violated either or both of those divisions as a proximate result of the prohibited conduct, or (3) liquidated damages in an amount of not less than \$250 and not more than \$10,000, as determined by the trier of fact, for each separate violation of R.C. 2913.041(A) or (B) as described in division (D) of that section.

The trier of fact determines the amount of any compensatory damages to be awarded under clause (1), and the court determines the amount of any punitive or exemplary damages authorized by R.C. 2315.21 and the amount of reasonable attorney's fees, court costs, and other reasonable expenses to be awarded under that clause. The trier of fact determines the amount of damages to be awarded to the owner or operator under clause (2).

In a civil action under this provision, if an owner or operator of a cable television system or other similar closed circuit coaxial cable communications system establishes by a preponderance of the evidence that the persons who violated R.C. 2913.041(A) or (B) engaged in the prohibited conduct for the purpose of direct or indirect commercial advantage or private financial gain, the trier of fact may award to the owner or operator damages in an amount not to exceed \$50,000 in addition to any amount recovered pursuant to the provision.

A person may join a civil action under this provision with a civil action under R.C. Chapter 2737. to recover any property of the owner or operator of a cable television system or other similar closed circuit coaxial cable communications system that was the subject of the violation of R.C. 2913.041(A) or (B). A person may commence a civil action under this provision regardless of whether any person who allegedly violated either or both of those divisions has pleaded guilty to or has been convicted of a violation of either or both of those divisions or has been adjudicated a delinquent child for the commission of any act that constitutes a violation of either or both of those divisions.

As used in this provision, "profits" derived from a violation of R.C. 2913.041(A) or (B) are equal to whichever of the following applies: (1) the gross revenue derived from the violation by the persons who committed it, as established by a preponderance of the evidence by the owner or operator of the

cable television system or other similar closed circuit coaxial cable communications system who is aggrieved by the violation, (2) the gross revenue derived from the violation by the persons who committed it, as established by a preponderance of the evidence by the owner or operator of the cable television system or other similar closed circuit coaxial cable communications system who is aggrieved by the violation, minus deductible expenses and other elements of profit that are not attributable to the violation, as established by a preponderance of the evidence by the persons who committed the violation. (R.C. 2307.62.)

***Operation of the bill.*** The bill expands this provision to also permit an owner or operator of a "cable service" or "cable system" who is aggrieved by conduct that is prohibited by R.C. 2913.04(B), as amended by the bill to elect to commence a civil action for damages in accordance with R.C. 2307.60 or 2307.61 or to commence a civil action under the existing provisions described above to recover damages and other specified moneys described below from the persons who violated R.C. 2913.04(B). The bill modifies all of the existing procedural provisions described above, to conform to this expansion of the provision relative to violations of R.C. 2913.04(B). (R.C. 2307.62.)

---

## COMMENT

Existing R.C. 2913.041, not in the bill, prohibits a person from knowingly: (1) possessing any device, including any instrument, apparatus, computer chip, equipment, decoder, descrambler, converter, software, or other device specially adapted, modified, or remanufactured for gaining access to *cable television service*, without securing authorization from or paying the required compensation to the owner or operator of the system that provides the cable television service, or (2) selling, distributing, or manufacturing any device, including any instrument, apparatus, computer chip, equipment, decoder, descrambler, converter, software, or other device specially adapted, modified, or remanufactured for gaining access to *cable television service*, without securing authorization from or paying the required compensation to the owner or operator of the system that provides the cable television service. A violation of the first prohibition is the offense of "possession of an unauthorized device," a felony of the fifth degree. A violation of the second prohibition is the offense of "sale of an unauthorized device," a felony of the fourth degree. A person commits a separate violation of these prohibitions with regard to each device that is sold, distributed, manufactured, or possessed in violation of either prohibition. Existing R.C. 2913.01(S), unchanged by the bill, defines "cable television service" as any services provided by or through the facilities of any cable television system or other similar closed circuit coaxial cable communications system, or any microwave or similar transmission service used in connection with any cable television system or other similar closed circuit coaxial cable communications system.

---

## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	07-12-01	p. 803
Reported, H. Criminal Justice	01-15-02	p. 1231
Passed House (97-0)	01-16-02	pp. 1236-1237
Reported, S. Judiciary on Criminal Justice	02-27-02	p. 1523

h0327-rs.124/kl

