

# ***Fiscal Note & Local Impact Statement***

*123<sup>rd</sup> General Assembly of Ohio*

**BILL:** Sub. S.B. 22

**DATE:** June 8, 1999

**STATUS:** As Passed by the Senate

**SPONSOR:** Sen. Johnson

**LOCAL IMPACT STATEMENT REQUIRED:** Yes

**CONTENTS:** Increased periods of incarceration for persons who commit state OMVI in violation of new “high-end” tiers of alcohol concentration, increase to a third degree felony the penalty for a second or subsequent OMVI conviction, and in certain circumstances eliminates the prohibition against imposing a jail stay for a misdemeanor violation consecutive to a prison term

## ***State Fiscal Highlights***

STATE FUND	FY 2000	FY 2001	FUTURE YEARS
<b>General Revenue Fund</b>			
Revenues	- 0 -	- 0 -	- 0 -
Expenditures	Increase up to \$180,000	Increase in range of \$440,000 to \$1.5 million	Increase in the range of \$440,000 to \$3.0 million

Note: The state fiscal year is July 1 through June 30. For example, FY 2000 is July 1, 1999 – June 30, 2000.

- Incarceration Costs.*** The bill’s penalty enhancements will increase the length of stays for around 80 annual prison-bound offenders, and, as a result, the Department of Rehabilitation and Correction’s (DRC) annual incarceration costs will rise by up to \$180,000 in the first year. Depending upon how courts respond to the bill’s more punitive sentencing structure, in subsequent fiscal years, DRC’s annual incarceration costs will rise from as little as \$440,000 upwards to around \$3.0 million.

## ***Local Fiscal Highlights***

LOCAL GOVERNMENT	FY 1999	FY 2000	FUTURE YEARS
<b>Counties</b>			
Revenues	-0-	-0-	-0-
Expenditures	Increase of at least several million dollars	Increase of at least several million dollars	Increase of at least several million dollars
<b>Municipalities</b>			
Revenues	-0-	-0-	-0-
Expenditures	Increase of at least several million dollars	Increase of at least several million dollars	Increase of at least several million dollars

Note: For most local governments, the fiscal year is the calendar year. The school district fiscal year is July 1 through June 30.



- “High-End” Tiers. The mandatory minimum period of local incarceration will double for offenders who violate the bill’s new “high-end” tiers of alcohol concentration. As a result, LBO believes counties and municipalities will experience an increase in annual incarceration costs of at least \$4.08 million, but we are unable to disaggregate how much of that fiscal burden will fall on counties versus municipalities. Furthermore, we believe that, given the limitations of this fiscal analysis, increased annual local incarceration costs will most likely be higher than \$4.08 million, but we are uncertain as to what that larger number might be at this time.
- Consecutive Sentences. Keeping in mind that the imposition of a consecutive sentence under the provisions of the bill will be at the discretion of the court, our best guess is that the additional annual incarceration costs for counties and municipalities will be considerably less than \$100,000.
- Charging Practices. It is possible that the bill may increase the cost of handling OMVI matters, particularly with respect to sanctioning and incarceration, such that local jurisdictions may opt to charge and convict under the Ohio Revised Code and less frequently utilize municipal ordinances. The practical effect of this would be to ship criminal cases, and their associated court cost and fine revenue and adjudication, prosecution, indigent defense (if applicable), and sanctioning costs from municipal and county courts to common pleas courts. This potential change in local OMVI charging patterns, however, would not, in our opinion, be a direct and immediate effect of the bill. How charging is done is a permissible local prerogative. It needs to be noted though, that the bill might in time over certain places alter that local calculus, thus triggering the transfer of handling some OMVI cases from municipalities to counties.

## **Detailed Fiscal Analysis**

### **Overview**

The bill contains at least four key features, as described below.

First, the bill modifies existing prohibitions that constitute the offense of OMVI by adding three new “high-end” tiers of alcohol concentration to the prohibitions and provides increased periods of incarceration for persons who commit the offense in violation of the new “high-end” tiers of alcohol concentration. The existing tiers that constitute the offense of OMVI as well as the three new high-end tiers of alcohol concentration that would trigger increased periods of incarceration are depicted in Table 1 immediately below.

**Table 1: Tiers of Alcohol Concentration**

Category	Existing Tiers	“High-End” Tiers
Blood	Between .10 of 1% or more by weight of alcohol in blood	.17 of 1% or more by weight of alcohol in blood
Breath	.10 of one gram or more by weight if alcohol per 210 liters of breath	.17 of one gram or more by weight of alcohol per 210 liters of breath
Urine	.14 of one gram or more by weight per 100 milliliters of urine	.238 of one gram or more by weight per 100 milliliters of urine

Second, as previously noted, the bill also provides for increased periods of required incarceration for persons who commit OMVI in violation of these new “high-end” tiers of alcohol concentration. In Table 2 immediately below, we have summarized the key differences between the minimum periods of incarceration under existing OMVI law and the enhanced minimum periods of incarceration for persons in violation of the new “high-end” tiers created by the bill. Without getting into the nuances or complexities of the law that permit courts some flexibility in imposing alternative forms of punishment that may eliminate or minimize periods of incarceration, we have attempted to very simply summarize what we believe is the core difference between current law and the bill. In essence, for certain offenders, as the reader can plainly see, the bill will more or less double their lengths of incarceration, irrespective of whether a particular conviction involves a stay in a local jail or a state prison.

**Table 2: Periods of Incarceration**

Number of Convictions (in six-years)	Period of Incarceration (current minimum in days)	“High-Tiers” (required minimum in days)
First	3	6
Second	10	20
Third	30	60
Fourth or more	60 local (1 <sup>st</sup> time felony) or 60 prison (subsequent)	120 local (1 <sup>st</sup> time felony) 120 prison (subsequent)

Third, the bill enhances the existing penalty for a second or subsequent felony OMVI conviction. Under current law, a second or subsequent felony OMVI conviction is a fourth degree felony, which is punishable by a possible determinate prison term of 6-to-18 months. Although the general sentencing guidance in the case of a fourth degree felony is against imposition of a prison term, current law requires the imposition of a 60-day minimum prison term. The bill makes two changes to this penalty structure. It increases the penalty to a third degree felony, which is generally punishable by a possible determinate prison term of 1, 2, 3, 4, or 5 years and carries no explicit presumption for-or-against prison. And, in the case of offenders who violate the bill's new "high-end" tiers of alcohol concentration, the mandatory minimum prison term is doubled from 60 to 120 days.

Fourth, the bill creates an exception to existing law that requires a jail stay to be served concurrently with a prison term. Specifically, the bill carves out certain circumstances under which a jail stay for a misdemeanor violation may be imposed consecutive to a prison term, with the jail stay coming after the time in prison has been served. The circumstances under which this exception can be utilized by a sentencing court involve offenders who have served prison time for aggravated vehicular homicide, vehicular homicide, aggravated vehicular assault, felony OMVI, or involuntary manslaughter, and have also been convicted of a misdemeanor OMVI offense or driving without a valid driver's license as a result of a prior suspension or revocation.

## **State Expenditures**

The bill will increase the Department of Rehabilitation and Correction's (DRC) annual incarceration costs in two ways. First, the mandatory minimum prison term for an OMVI offender who violates the bill's new "high-end" tiers of alcohol concentration doubles from 60 days to 120 days. Second, and considerably more significant in a fiscal sense, is the enhancement from a fourth degree felony to a third degree felony the penalty for a second or subsequent felony OMVI offense.

**120-Day Mandatory Minimum.** From data provided by the Department of Rehabilitation and Correction (DRC), it seems pretty clear that this provision of the bill will affect very few offenders being sentenced to prison annually under the state's current OMVI law. Specifically, of the 160-plus OMVI offenders sentenced to prison from January 1, 1997 through February 28, 1999, all but three were serving lengths of stay that already meet or exceed the required 120-day minimum called for under the bill. The three offenders not sentenced to prison stays of 120 days or more were serving the 60-day mandatory minimum required under current law. Thus, depending upon their alcohol concentrations, the bill would have doubled the length of stay in prison from 60 days to 120 days for, at most, three offenders.

Thus, relative to its effect on the state's prison system, LBO believes that this provision of the bill will affect no more than a handful of prison-bound offenders annually by extending their lengths of stay by at least another 60 days. Given DRC's estimated FY 1999 GRF inmate per diem of \$50.17, LBO estimates that the annual increase in their incarceration costs associated with this longer prison stay for a couple of OMVI offenders will less than \$10,000.

**Third Degree Felony.** A fourth degree felony carries a possible determinate prison term of 6-to-18 months and a general presumption against prison. In the case of an offender's second or subsequent OMVI felony, current law requires a 120-day prison sentence, thus, in our minds at least, creating a presumption for prison in the case of certain repeat OMVI offenders. The bill enhances this penalty to a felony of the third degree, which carries a possible determinate prison term of 1, 2, 3, 4, or 5 years.

Data provided by DRC reveals that over a roughly two-year period of prison intake, 160-plus persons were committed for OMVI offenses, suggesting that annual intake for this offense totaled around 80. The average sentence length for those commitments was 11.8 months, with the actual distribution looking something like this: 58 received sentences less than 12 months, 57 received 12 month sentences, 13 received sentences of between 13 and 16 months, and 35 received sentences of 17 or 18 months.

How will these sentencing practices change, if at all, in light of the felony penalty enhancement? Our first response is that they will have to change because the sentencing structures are different. The minimum and maximum prison terms for a fourth degree felony are 6 and 18 months, respectively, and a sentencing court selects the number of months to be served from between that range. There is a general presumption against imposition of a prison term. The minimum and maximum prison terms for a third degree felony are 1 year and 5 years, respectively, and a sentencing court's only option is to select either 1, 2, 3, 4, or 5 years. Furthermore, there is no clear presumption for-or-against the imposition of a prison term. We believe, as a result, that lengths of stay for prison-bound offenders will increase.

At least two fiscal effect scenarios are possible, as described below

*Scenario 1.* Under scenario 1, one year will become the minimum for all prison-bound OMVI offenders. Of the roughly 80 annual prison-bound offenders, around 30 will receive one-year sentences whereas under current practice they are receiving sentences that range from six-to-eleven months. This sentencing effect will increase DRC's annual incarceration costs by about \$170,000. Another 30 annual prison-bound offenders are currently receiving a one-year sentence and they will continue to receive the same sentence under the bill, as we've assumed that sentencing courts in general will be reticent to jump from one-year to two-year prison terms. This leaves about 20 or so annual prison-bound offenders who are currently receiving sentences that fall in between one and two years. If one assumes that every one of these offenders will receive a two-year prison sentence under the bill, then DRC's annual incarceration costs will increase by an additional \$260,000. And since these offenders would already be serving more than one year, this additional annual incarceration cost would not actually hit until the second year of the bill's effective date. What we ignore here is the very real possibility that some sentencing courts that are imposing the maximum 18-month prison term, or close to it, will, as a result of the bill, impose much longer prison terms of 3, 4, or 5 years. The fiscal effect on DRC's annual incarceration costs under scenario 1 can be summarized as follows: in year one, incarceration costs increase by almost \$180,000, and in year two and annually thereafter, incarceration costs increase by close to \$440,000.

*Scenario 2.* Under scenario 2, we take the position that sentencing practices will change much more dramatically, as courts will impose the considerably longer prison terms available under a third

degree felony. If that happens, then the average length of sentence for the roughly 80 annual prison-bound OMVI offenders will triple from approximately 12 months to 36 months, or three years. If this happens, then DRC’s annual incarceration costs will increase over a three-year period in approximate amounts as follows: year 1 — \$180,000; year 2 — \$1.5 million; year 3 — \$3.0 million.

## Local Expenditures

**High-End Tiers.** The bill’s new “high-end” tiers of alcohol concentration will most likely dramatically increase annual incarceration costs for counties and municipalities, as lengths of stay in local jails will double given what we know about current OMVI sentencing practice around the state. How did we arrive at that conclusion?

Our starting point was with the number of persons who are convicted annually of OMVI violations. The Department of Public Safety provided us with those statewide numbers for calendar years 1992 through 1998. Unfortunately, at this time, we do not have any way that permits us to cleanly discern how many total OMVI convictions a given offender has. Based solely on very limited impressionistic evidence, however, we believe, and assume for the purposes of this fiscal analysis, that approximately 75 percent of those convicted annually of OMVI violations are first time offenders.

We next moved to levels of alcohol concentration. Based solely on conversations with a limited number of criminal justice practitioners, it seemed very reasonable for us to assume that at least 50 percent of those convicted of OMVI, if not more, would register levels of alcohol concentration placing them in the new “high-end” tiers created by the bill.

From there, we turned to investigating local sentencing practices so that we might be able to discern what effect the bill’s increased levels of incarceration could have on counties and municipalities. This was a considerably more problematic exercise, as there is no statewide database available that breaks out annual OMVI convictions telling us the number of times that those individuals have been convicted and what their lengths of stay were in local incarceration. Although more work needs to be done on this matter, our conversations with local criminal justice practitioners suggested a general pattern. One, however, has to be exceedingly cautious about generalizing with regard to local sentencing practices statewide from very limited data. That said, in the matter of first time offenders, we learned that in many local jurisdictions courts are waiving the current mandatory three-day minimum and requiring them to attend a certified drivers’ intervention program in lieu of local incarceration.

Taking all of this admittedly incomplete data into account, we generated a “minimalist” local incarceration effects scenario, which is displayed in Table 3 immediately below and assumes that 75 percent of annual OMVI offenders are first timers.

**Table 3: LBO’s “High-End” Tiers Local Incarceration Effects Scenario**

Annual Average First Time OMVIs	Assumption of ½ offenders	Per Diem Charge	Minimal Additional Incarceration Days	Total Annual Cost
45,370	22,685	\$60.00	3	\$4,083,300

Given what we know at this time and our previously stated assumptions, LBO's best estimate is that the bill's new "high-end" tier provisions will increase annual local incarceration costs by at least \$4.08 million. What we are then reticent to even attempt at this time is to ascertain how that increased annual incarceration cost might be spread between counties and municipalities statewide. We do know that, relative to OMVI offenders, 60 percent are charged under state law, while the remainder, 40 percent, are charged for violating a municipal ordinance. We do not believe, however, that one can then make the inferential leap from charging data to conviction data and assume that 60 percent of the increased incarceration burden will fall on counties and 40 percent of the increased incarceration burden will fall on municipalities.

Let's walk the reader through the above table. First, we calculated the average number of offenders who were convicted annually of a first time OMVI violation between calendar years 1992 and 1998. If the reader steps further into the above table, we then have taken our assumption that 50 percent of those convicted of OMVI will register alcohol concentration levels that land them in the bill's new "high-end" tiers. Then, it became a matter of estimating what this would cost counties and municipalities given our belief that the bill will increase lengths of stay in local incarceration, given what we know at this time about various sentencing practices.

Currently, the average daily cost of incarcerating an offender in a local jail is around \$60, with the range running from as low as \$23 per day to as high as \$160 per day. We used that \$60 average to make what has to be seen as a low-ball calculation of the bill's effect on local incarceration costs. We assumed that every first timer would receive at least an additional three days of local incarceration.

We do feel compelled to offer a less clear, but possible, fiscal effect of the bill. It is possible that the bill may increase the cost of handling OMVI matters, particular with respect sanctioning and incarceration, such that local jurisdictions may opt to charge and convict under the Ohio Revised Code and less frequently utilize municipal ordinances. The practical effect of this would be to ship criminal cases, and their associated court cost and fine revenue and adjudication, prosecution, indigent defense (if applicable), and sanctioning costs from municipal and county courts to common pleas courts. This would mean that certain municipalities lose annual revenue, but they also reduce annual criminal justice expenditures, with the latter possibly more than offsetting the lost revenue. On the flip side, certain counties would gain annual revenue and experience annual criminal justice expenditure increases, with the additional revenue most likely not coming anywhere near covering a given county's increased cost of doing business. This potential change in local OMVI charging patterns, however, would not, in our opinion, be a direct and immediate effect of the bill. How charging is done is a permissible local prerogative. It needs to be noted though, that the bill might over time, in certain places, alter that local calculus, thus triggering the transfer of handling some OMVI cases from municipalities to counties.

**Consecutive Sentences.** Current law generally requires jail stays imposed for misdemeanor violations run concurrent with prison sentences for felonies, which in effect means an offender never really serves a jail stay as a prison sentence will consume all of the imprisonment time imposed by a sentencing court. The bill creates an exception to this general rule under which offenders who have served prison time for aggravated vehicular homicide, vehicular homicide, aggravated vehicular assault, felony OMVI, or involuntary manslaughter and have also been convicted of a misdemeanor OMVI offense or driving without a valid driver's license as a result of a prior suspension or revocation could

serve the prison and jail sentences consecutive to one another. The prison sentence would be served first followed then by any jail stay. Imposition of this consecutive mixed misdemeanor-felony term of imprisonment would be at the discretion of the sentencing court.

This provision of the bill will increase annual local incarceration costs for counties and municipalities, as some number of offenders will be required to serve time in jail following their release from prison. Given current sentencing practices, we believe that the pool of potentially affected offenders will initially be no more than 60 statewide and will rise over seven years to no more than 170. Further reducing that potentially affected statewide pool of offenders will be the fact that some number of them will not also have been convicted of a misdemeanor violation of the state's driver's license law, a number which we are unable to estimate at this time.

What then will be the annual incarceration cost of this provision of the bill for counties and municipalities statewide? Keeping in mind that the imposition of a consecutive sentence under the provisions of the bill will be at the discretion of the court, our best guess is that the additional annual incarceration costs for counties and municipalities will be considerably less than \$100,000.

## **Revenue Generation**

**State Effects.** LBO believes that the bill will have no direct and immediate fiscal effect on state revenues.

**Local Effects.** LBO believes that the bill will have no direct and immediate on municipal and county revenue. That said, as also previously discussed, the bill might, in time and in some places, alter existing charging practices relative to OMVI, thus moving the handling of some OMVI matters from municipalities to counties. If this were to happen, those municipalities would in effect surrender some amount of existing annual court cost and fine revenue and the counties in their jurisdictions would gain that revenue.

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