

Fiscal Note & Local Impact Statement

123rd General Assembly of Ohio

BILL: Sub. S.B. 107 (LSC 123 0491-2) **DATE:** September 21, 1999

STATUS: In House Criminal Justice **SPONSOR:** Sen. Latta

LOCAL IMPACT STATEMENT REQUIRED: Yes

CONTENTS: Modifies provisions of the Controlled Substance Law and Drug Abuse Law; modifies felony sentencing law; enhances penalties for certain aggravated vehicular homicide and aggravated vehicular assault offenders

State Fiscal Highlights

STATE FUND	FY 2000	FY 2001	FUTURE YEARS
General Revenue Fund			
Revenues	-0-	-0-	-0-
Expenditures	Factors increasing and decreasing costs, with the net effect uncertain	Factors increasing and decreasing costs, with the net effect uncertain	Increase of at least \$500,000, partially mitigated by savings of an uncertain amount

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

- DRC would experience an increase in annual incarceration costs, primarily due to longer prison stays for the following offenders:
 1. Approximately 120 aggravated vehicular assault and aggravated vehicular homicide offenders annually;
 2. At least 35 heroin offenders annually;
 3. A few offenders convicted of attempting drug law violations;
 4. A few drug trafficking offenders who fall exactly on penalty cut-off points;
 5. Some offenders who permit drug abuse.
- DRC would also experience a decrease in annual incarceration and post-release control supervision expenditures, primarily due to the following:
 1. Creation of a presumption in favor of treatment for community control violations involving drugs.
 2. Inmates would become eligible for judicial release after serving 4 of 5 years in prison, which could result in savings to DRC in future years.
 3. Allowing the Parole Board to shorten the length of supervision for offenders whose time on post-release control is discretionary.
 4. A few offenders may not receive prison time for providing money for drugs.
 5. A few offenders will not be prison-bound due to a rewriting of the 8th factor that provides guidance to judges on sentencing relative to committing crimes while under community control or probation.
 6. A few offenders convicted of failure to appear would spend less time in prison.



Local Fiscal Highlights

LOCAL GOVERNMENT	FY 1999	FY 2000	FUTURE YEARS
Counties			
Revenues	Negligible gain	Negligible gain	Negligible gain
Expenditures	Factors increasing and decreasing incarceration costs, with the net effect uncertain	Factors increasing and decreasing incarceration costs, with the net effect uncertain	Factors increasing and decreasing incarceration costs, with the net effect uncertain
Municipalities			
Revenues	Negligible gain	Negligible gain	Negligible gain
Expenditures	Negligible increase	Negligible increase	Negligible increase

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

- Counties could experience increases in prosecution, adjudication, and indigent defense expenditures associated with the penalty enhancements, which lengthen the common pleas trials for the following:
 1. Approximately 120 aggravated vehicular homicide and assault offenders annually;
 2. At least 35 heroin offenders annually;
 3. A few offenders convicted of attempting drug law violations; and
 4. A few drug trafficking offenders who fall exactly on penalty cut-off points.
 By virtue of enhancing penalties for these offenders, some additional fine revenue could be generated.

- County jails in jurisdictions that frequently use intervention in lieu of conviction may experience an increase in jail expenditures as some offenders would receive jail time who would not otherwise. County jails would likely experience a minimal increase in expenditures as a handful of offenders who provide money for drugs may be convicted as misdemeanants, rather than as felons and be sentenced to a prison stay.

- Counties would likely experience an increase in expenditures as a result of providing drug treatment for an unknown number of otherwise prison-bound offenders who violated community control.

- Counties may also experience an increase in criminal justice expenditures as some offenders who are currently charged with misdemeanor permitting drug abuse, and were adjudicated in municipal courts, shift to the common pleas system as they become fifth-degree felons under the bill.

- Municipalities may experience a negligible increases in case processing expenditures as a few offenders who provided money for drugs are charged with misdemeanor possession or trafficking charges as opposed to more serious felony charges that would land them in common pleas court. Some negligible additional fine revenue may be collected from these offenders as well.

Detailed Fiscal Analysis

This bill makes numerous changes to the state's controlled substance, drug abuse, and felony sentencing laws, the most substantial of which are discussed below. Factors triggered by the bill will drive annual state and county criminal justice expenditures up and down, making the bill's net fiscal effect uncertain.

Controlled Substances and Drug Abuse

The bill makes numerous changes to areas of the law concerning controlled substances and drug abuse, including various technical corrections that carry no substantive fiscal effect. The controlled substances and drug abuse provisions of the bill that we believe carry some discernible fiscal impact are as follows:

- Prior drug offenses
- Attempted drug offenses
- Drug trafficking
- Heroin penalties
- Contamination
- Providing money for drugs
- Illegal processing of drug documents
- Drug possession exceptions
- Treatment encouraged for drug abuse offenders
- Intervention in lieu of conviction
- Major drug offenders
- Permitting drug abuse
- Nuisance abatement

Prior drug offenses. The bill makes clear that prior drug offenses include substantially equivalent offenses (to include municipal and township ordinance violations, as well as state law violations). We believe this clarification reflects current practice in most jurisdictions. Thus, its statewide fiscal effect will be negligible.

Attempted drug offenses. The bill clarifies that an attempted drug offense drops to the next lower range of penalties. For example, an offender who purchased 5 or fewer grams of cocaine would be charged with a fifth-degree felony. An offender who attempted to purchase the same amount of cocaine would be charged with a first-degree misdemeanor. We believe that this clarification is consistent with local charging practices in most jurisdictions. Though offenders are rarely charged with attempts, it is very common for drug offenders to take a plea to the attempt, thus lowering the potential penalty relative to that for a possession or trafficking charge.

As there is no explicit penalty statement concerning attempts in existing law, offenders could conceivably receive any penalty that is lower than the original possession or trafficking charge in the

process of bargaining. For example, an offender who was originally charged with purchasing 5 to 10 grams of cocaine would be initially facing a fourth-degree felony penalty. Since there is no guidance in existing law, that offender could conceivably plead to an attempt as a fifth-degree penalty, a first-degree misdemeanor, or any other lower charge. The overall effect of the clarification would likely be that a few drug offenders who are not pleading to an attempt at more than one penalty level below the original charge would receive tougher sentences than they would have otherwise. As a result, a few offenders will likely receive longer prison terms.

Drug trafficking. The bill adjusts language in drug trafficking law to “is less than” and “equals or exceeds.” For example, see the following table in which we have displayed the penalties for trafficking in marijuana, which, for the ease of presentation, excludes penalty enhancements for trafficking near a school or juvenile. Generally, trafficking in the vicinity of a school or juvenile results in a one penalty step enhancement.

Marijuana Trafficking			
Current Law	Bill	Penalty	Sentencing Guidance
Gift of 10 grams or less	Gift of 10 grams or less	Minor misdemeanor	Presumption against imprisonment
200 grams or less	<i>Less than</i> 200 grams	F5	Presumption against imprisonment
Exceeds 200 grams but does not exceed 1,000 grams	<i>Equals or exceeds</i> 200 grams but is <i>less than</i> 1,000 grams	F4	Presumption against imprisonment
Exceeds 1 kilogram but does not exceed 5 kilograms	<i>Equals or exceeds</i> 1 kilogram but is <i>less than</i> 5 kilograms	F3	Presumption against imprisonment
Exceeds 5 kilograms but does not exceed 20 kilograms	<i>Equals or exceeds</i> 5 kilograms and is <i>less than</i> 20 kilograms	F2	Presumption in favor of imprisonment
Exceeds 20 kilograms	<i>Equals or exceeds</i> 20 kilograms	F1	Mandatory 8 years imprisonment

Offenders who fall exactly on the penalty lines will experience higher penalties than they would otherwise for trafficking in marijuana, cocaine, crack, LSD, heroin, and hashish. In the case of trafficking in marijuana, as shown above, the offenders experiencing penalty enhancements would be those caught with exactly 200 grams, 1 kilogram, 5 kilograms, and 20 kilograms of marijuana.

Few offenders are expected to face charges with amounts that falling exactly on the penalty lines. Those that do fall on these lines will experience penalty enhancements, and receive longer prison sentences than they would have otherwise. As a result, the Department of Rehabilitation and Correction (DRC) will experience an increase in annual incarceration expenditures. By enhancing the penalties for these few offenders, the stakes of felony trials are raised in common pleas courts, which could make such cases more problematic to resolve and increase a county’s associated annual case processing costs related to prosecution, adjudication, and indigent defense.

Heroin penalties. Amended Substitute Senate Bill 2 of the 121st General Assembly attempted to raise penalties for heroin by moving away from the concept of unit doses to weights. Heroin, however, is generally packaged in more precisely-measured quantities called “bindles.” As a result of emphasizing weight over unit doses, Am. Sub. S.B. 2 lowered some heroin penalties. This bill - S.B. 107 - reinserts the notion of unit doses, which will likely have the effect of increasing heroin penalties.

In comparison to possession and trafficking in marijuana and cocaine, heroin offenses are relatively rare. Data from the Arrestee Drug Abuse Monitoring Program indicates that, in 1998, there were only a handful of drug sales and possession offenders testing positive for heroin and other non-cocaine opiate use in the Cleveland area.

The Office of Criminal Justice Services (CJS) provided LBO with information regarding arrests resulting from the actions of Ohio Drug Task Forces. This data includes only those arrests performed by those task forces receiving federal Drug Control Act funds, and it is uncertain if the task force arrests can be considered to be representative of all statewide drug arrests. This data indicates that from the period of time from July 1, 1997 through June 30, 1998, heroin arrests were 2 percent of overall arrests, and represented 1.7 percent of all opiate arrests (96 percent of all arrests made by the task forces were for cocaine and crack).

Uniform Crime Report data for Ohio in 1997 shows that there were 1,920 arrests for sale or manufacture of opium, cocaine and their derivatives (morphine, heroin, cocaine), and 10,209 arrests for possession of these drugs, for a total of 12,129. Based on CJS data and discussions with law enforcement, LBO assumes that the majority of these arrests concerned cocaine. If we assume, as was the case with drug task force data, that 1.7 percent of all opiate arrests would be for heroin, we estimate that there are about 206 arrests for heroin statewide in Ohio annually (.017 x 12,129 arrests = 206.2). Discussions with law enforcement indicate that the number of heroin arrests is growing, but these arrests still represent a relatively small portion of total drug possession and sale arrests (29,362 total drug arrests in Ohio in 1997, according to UCR data). DRC's FY 1998 commitment report showed that there were no offenders entering prison in FY 1998 with trafficking in heroin as the primary offense for which they had been incarcerated.

Heroin is generally sold in unit doses called “bindles.” According to the Office of National Drug Control Policy, bindles are generally 1/10 of a gram to 1/20 of a gram. The federal Drug Enforcement Agency reports that bindles may weigh up to one gram. Discussions with local law enforcement indicate that bindles are generally 1/10 of a gram or smaller amounts. In some law enforcement jurisdictions, bindles may be sold or contained in groups of 10, called “bundles” (roughly equal to a gram). Anecdotal information from law enforcement narcotics squads indicates that most offenders charged with possession have smaller amounts, usually 1-3 bindles, and that traffickers may have one or more bundles.

Under the provisions of the bill, most offenders would still fall in the lowest category of heroin possession and trafficking charges. Under current law, possession of less than one gram of heroin (up to ten bindles if they weigh 1/10 of a gram or up to 20 bindles if they weigh 1/20 of a gram) is a fifth degree felony. The bill would add language prohibiting possessing or trafficking less than 10 unit doses under the fifth degree felony category. As shown in the table below, penalties are adjusted to include

both weights and unit doses. This table does not include the existing one-step penalty enhancements for trafficking heroin in the vicinity of a school or juvenile.

Heroin Penalties			
Current Law	Bill	Penalty	Sentencing Guidance
1 gram or less	Less than 10 unit doses or one gram	F5	Presumption against imprisonment
Exceeds 1 gram but less than 5 grams	Equals or exceeds 10 unit doses or 1 gram but less than 50 unit doses or 5 grams	F4	Presumption against imprisonment for possession/in favor for trafficking
Exceeds 5 grams but less than 10 grams	Equals or exceeds 50 unit doses or 5 grams but less than 100 unit doses or 10 grams	F3	Presumption in favor of imprisonment
Exceeds 10 grams but less than 50 grams	Equals or exceeds 100 unit doses or 10 grams but is less than 500 unit doses or 50 grams	F2	Mandatory imprisonment
Exceeds 50 grams but less than 250 grams	Equals or exceeds 500 unit doses or 50 grams but is less than 2,500 unit doses or 50 grams	F1	Mandatory imprisonment
Exceeds 250 grams	Equals or exceeds 2,500 unit doses or 250 grams	F1	Major Drug Offender - 10 years mandatory imprisonment plus optional 1 to 10 years

With the penalties outlined in this bill (S.B. 107) in the prior table, offenders possessing many unit doses of heroin would be subject to penalty enhancements. It is likely that most of the penalty enhancements would be experienced by heroin traffickers. As above, if we assume that 1.7 percent of all opiate arrests are for heroin offenses, based on the experiences of drug task forces, and apply this percent to the total number of opiate trafficking offenses captured by the 1997 UCR data, we estimate that under 35 heroin “trafficking” offenders annually could be subject to penalty enhancements ($1,920 \times .017 = 32.6$). This would be in addition to an unknown, and potentially larger, number of offenders “possessing” heroin who would be subject to heroin penalty enhancements.

At least 35 offenders annually will be likely to serve longer prison stays, which will increase DRC’s annual incarceration costs. By enhancing the penalties for these offenders, the stakes of felony trials are raised in common pleas courts, which could make such cases more problematic to resolve and increase a county’s associated annual case processing costs related to prosecution, adjudication, and indigent defense.

Contamination. Under existing statute, knowingly poisoning food or water is a first-degree felony. If death results, the offense is an aggravated first-degree felony, with a penalty of life imprisonment. Amended Substitute Senate Bill 2 eliminated aggravated felonies, but this aggravated felony was missed. This bill - S.B. 107 - leaves the life imprisonment penalty, and specifies that parole is possible after 15 years, which is not the case under current law. We believe that a conviction violating this offense is a very rare occurrence, and, as a result, any potential reduction in DRC’s annual incarceration costs that might occur due to paroling such offenders will be negligible.

Providing money for drugs. The use of this statute varies widely by jurisdiction, being used frequently in some areas and not at all in others. An unintended consequence of Am. Sub. S.B. 2 has been that some purchases of misdemeanor amounts of marijuana have been charged as serious felonies (F-1 to an F-3). The bill would require offenders to have provided money to buy at least a fourth-degree felony amount of drugs in order to be charged with the felony offense of providing money for drugs.

Under this provision of the bill, a few individuals who were formerly charged with serious felonies will most likely be charged with lesser felony or misdemeanor possession or trafficking offenses, which will shift some of those cases from common pleas courts to county and municipal courts. As a result, some annual county case processing costs will decrease, specifically those related to prosecution, adjudication, and indigent defense, as cases shift to municipal jurisdictions or become less problematic to resolve. Depending upon local charging practices, some municipalities will assume those case processing burdens and gain the associated court cost and fine revenue. Additionally, a few offenders will serve shorter prison terms or not even be sentenced to prison, which will cut DRC's annual incarceration and post-release control supervision costs. As the number of cases involved appears to few, these effect of these expenditure and revenue changes on the state and local governments will likely be negligible.

Illegal processing of drug documents/forging prescriptions. The bill clarifies that the penalty for illegally processing drug documents and forging prescriptions in a variety of circumstances are fifth-degree felonies. The clarification would apply in cases in which a person has been caught with blank prescription forms, but had not yet obtained the drugs. Under current law, the penalty in this circumstance is unclear. Illegal processing of drug documents appears to be a relatively common offense. In FY 1998, 58 offenders were sentenced to prison for this offense. According to the Franklin County Municipal Court Report for 1998, there were 50 charges filed with the court for illegal procurement of drug documents. It is uncertain at this time as to the number of cases that might be affected by this provision of the bill or how the penalties might differ.

Drug possession exception. Under Am. Sub. S.B. 2, a drug in its original prescribed container constitutes a "defense" for possession offenses. However, if a prescription drug is placed in another container, this constitutes a possession offense. Under the bill, the exception will also apply even if the drug is not in the original container. As individuals are rarely charged with felony possession in this fashion, this provision will not generate any noticeable fiscal effect on the state or local governments.

Treatment encouraged for drug abuse offenders. Under existing law and practice, when a drug offender is under community control and violates the conditions of community control solely by using drugs, the presumption is for treatment, not imprisonment. The bill would expand this presumption to other offenders, and creates a presumption in favor of treatment for community control violations involving drugs. According to the Ohio Criminal Sentencing Commission, drug abuse violations are the most common reason for violating community control conditions.

It is generally a little-used provision of law in ORC 2929.13 (E) that states that an offender who failed a drug test while under community control should have one opportunity to receive treatment, if they have not previously failed treatment. The bill would expand this to all offenders.

As a result of this provision of the bill, rather than being sentenced to prison for a community control violation, some offenders will not go there, but will continue to be sanctioned locally instead. This outcome means that counties don't shed their offender sanctioning burden and DRC saves incarceration and post-release control supervision costs. The cost associated with this changed outcome is unclear as we do not know how many offenders will be affected.

Counties would likely experience an increase in expenditures as a result of providing drug treatment for an unknown number of otherwise prison-bound offenders who violated community control. The size of this increase will be dependent upon the number of offenders who would receive treatment instead of being returned to prison, and the type of treatment program, and whether the offender will be required to cover some or all of the treatment costs.

Intervention in lieu of conviction. Felony drug convictions can be avoided by some offenders by accepting treatment in lieu of conviction. When this occurs, a judge places the drug offender in treatment and the conviction is waived if the offender successfully completes the treatment. This practice is used frequently in some jurisdictions, and rarely in others. The bill narrows the eligibility of offenders who may go through treatment in lieu of conviction, terming it "intervention in lieu of conviction." Presumably, this means that some number of offenders rather than entering treatment will be sentenced to spend some time in jail and pay a fine. At this time, we do not know how many offenders might be affected by this provision of the bill.

Major drug offenders. The bill changes the definition of "major drug offender" to include offenders who plead guilty to possession or sale of 2,500 unit doses of heroin, or 500 grams of L.S.D. in liquid form. The definition of "major drug offender" already includes references to heroin by weight and unit doses of L.S.D. Major drug offenders receive 10 years' mandatory imprisonment plus an optional additional 1 to 10 years. Under the provisions of this bill, some offenders who would not otherwise be classified as major drug offenders will be so classified, adding to DRC's annual incarceration costs.

Permitting drug abuse. The bill provides for a penalty enhancement for permitting drug abuse. In existing law, permitting drug abuse is generally a first-degree misdemeanor, and becomes a fifth-degree felony if drug trafficking or corrupting another with drugs occurs *and* this violation was committed in the presence of a juvenile or in the vicinity of a school. Under the bill, the requirement that the violation was committed in the presence of a juvenile or in the vicinity of a school is removed, and permitting drug abuse becomes a fifth-degree felony if the offense involves drug trafficking or corrupting another with drugs. LBO anticipates that a substantial proportion of permitting drug abuse cases involve trafficking without children in the vicinity, and expects that many permitting drug abuse offenders would be subject to a penalty enhancement. At this time, it is unclear how many total offenders would be subject to this penalty enhancement, as the effect of this provision will largely vary by jurisdiction, based on the frequency of the use of this charge.

Nuisance abatement. The bill also allows that any premises or real estate that is involved in a permitting drug abuse offense constitutes a nuisance subject to abatement. Presumably, this provision and others in the bill dealing with "habitual resorts" of felony offenders would facilitate law enforcement designating such premises or real estate as nuisances or "habitual resorts," and would likely have the ultimate effect of increasing the number of nuisance abatements. Under current law, law enforcement officials use nuisance abatement law in order to close down such premises through the filing of civil actions in common pleas courts. Some negligible revenue could be gained by local governments through the auction of such properties and the collection of fines.

Sentencing and Sanctions

The bill makes changes to several areas of law concerning felony sentencing and sanctions, plus various technical corrections that carry no substantive fiscal effect. The provisions of the bill regarding sentences and sanctions that we believe carry some discernible fiscal impact are as follows:

- Presumption for imprisonment for firearms and violation of community control
- Jail time credit
- Boot camp
- Transitional control
- Judicial release
- Post-release control
- Failure to appear
- Pay-for-stay
- Victim restitution

Presumption for imprisonment for firearms and violation of community control. In existing law, there are eight factors for which the presence of any one may guide a judge to sentence an offender to prison. They are, according to ORC 2929.13 (B)(1), as described in the Ohio Criminal Sentencing Commission's Felony Sentencing Reference Guide:

1. Physical harm to a person;
2. Attempt, or actual threat of, physical harm to a person with a weapon;
3. Attempt, or actual threat of, physical harm to a person and prior conviction for causing such harm;
4. Offense related to public office/position held; position obligated offender to prevent it or bring those committing it to justice; or offender's reputation/position facilitated crime or likely to influence others;
5. For hire or organized criminal activity;
6. Sex offense;
7. Served prior prison term; and
8. Committed while offender was under community control.

The eighth factor was intended to cover crimes committed while the offender was under community control. The exact wording for this factor is: "the offender previously was subject to a community control sanction, and the offender committed another offense while under the sanction." This

wording has resulted in some ambiguity concerning whether the offense at hand is to be considered, or whether the factor refers to prior offenses. This factor also excluded offenses committed while on probation, a term that still applies to pre-Am. Sub. S.B. 2 offenders. This factor is clarified to state that the eighth factor is present when the crime for which the offender is being sentenced occurred while the offender was on community control or probation.

The interpretation of this eighth factor has varied by jurisdiction. This provision of the bill would make it less likely for a few offenders to receive a presumption for imprisonment who had violated community control in the past. It is expected that a few offenders will not be committed to prison annually, which will generate a minimal decrease in DRC's incarceration expenditures.

The bill also adds a ninth factor - possession of a firearm. Under current law, possession of a firearm during an offense typically results in the imposition of a mandatory prison term. By not explicitly including possession of a firearm under the sentencing guidelines, it is possible than an offender committing a crime while in possession of a firearm could receive a conflicting presumption against imprisonment. By adding this factor, it is likely that a few offenders who do not currently receive prison terms will do so under the bill, which will generate a minimal increase in DRC's incarceration expenditures.

Jail time credit. Under current law, felons going to prison and misdemeanants sentenced to jail receive credit for time spent in jail while they await trial and sentencing. However, under current law, felons who are sentenced to jail are not explicitly given credit for jail time served. The bill gives credit for jail time imposed on felons. The Ohio Criminal Sentencing Commission reports that DRC is currently giving jail time credit (at an average jail time credit of 2.5 months). As this provision of the bill simply codifies DRC's existing practice, it carries no fiscal effect.

Boot camp. The bill expands provisions in law relating to boot camps to include all intensive program prisons, such as those that emphasize vocational and substance abuse training. Under current law and practice, judges may veto prison programs, including boot camps, which shorten prison terms. DRC sends notice to a judge regarding an offender's eligibility for boot camp, which the judge can veto. Judicial vetoes are used quite frequently.

The bill streamlines this process. Under the bill, when a judge sentences an offender, the judge may recommend, prohibit, or issue no recommendation for boot camp or intensive programming. DRC may only place offenders in these programs if there is a recommendation from the judge for this programming or no recommendation. DRC may not place an offender in a boot camp or intensive programming if the judge recommended against it. DRC must notify the judge if they deviate from that order, or describe the placement of the offender to the judge in a notice if the judge made no recommendation. Judges still retain the power to veto placements.

These provisions may reduce administrative costs to DRC by cutting down on the number of notices sent and by streamlining the screening process.

Transitional control. Judges currently have the ability to veto transitional control. The bill expands the length of time judges have to consider vetoes from 10 to 30 days. The bill also requires

DRC to send a warden's report accompanying the notice currently sent by DRC, similar to the reports currently prepared for judicial releases.

The Adult Parole Authority (APA) currently prepares warden's reports, which could be mailed with the notices currently distributed to judges with a minimal increase in postage costs. APA estimates that there are approximately 1,500 to 1,700 releases of offenders on transitional control annually that would require the mailing of warden's reports.

Judicial release. Current law specifies a timeline for an offender's eligibility for judicial release: offenders who are sentenced up to 5 years and offenders who are sentenced between 5 and 10 years. Those sentenced to prison for exactly 5 years were excluded from this eligibility as an oversight. Under the bill, those offenders will be eligible for judicial release after serving 4 of 5 years in prison.

The Ohio Sentencing Commission reports that approximately 3.5 percent of the offenders given prison terms annually receive five year sentences, which works out to roughly 360 offenders annually. Some of these offenders could receive judicial release earlier than they might currently be eligible. APA reports that there were 770 total judicial releases in FY 1998, which excludes offenders that would become eligible under the bill.

Presumably, this provision will reduce DRC's annual incarceration costs, but it wholly dependent upon how sentencing judges will react to this change. Given that the majority of the affected offenders under Am. Sub. S.B. 2 have not yet served the majority of their sentences that would make them eligible for judicial release, the fiscal effects are largely unknown at this time.

Post-release control. Post-release control is currently mandatory for some higher-level felonies, and discretionary for a portion of the remainder. In FY 1998, APA reports that there were a total of 2,583 offenders released under post-release control, and 2,258 offenders released without it. The majority of offenders released under post-release control are discretionary, and the proportion of discretionary releases are expected to decline in future years. Under existing law, the minimum period of supervision is one year for discretionary releases. Under the bill, the Parole Board may shorten this period of time. This will presumably reduce the post-release control supervision expenditures with at least several hundred offenders annually.

The bill also would explicitly restrict offenders under APA supervision from leaving the state. This provision would have no fiscal effect, as it codifies existing APA rules.

Failure to appear. Failure to appear is a relatively common offense, and is currently an unclassified felony. For failure to appear in a felony case, the penalty is currently 1 to 5 years' imprisonment and a fine of up to \$5,000. By not formally categorizing this offense, there is no threshold for judicial release and not sentencing guidance applicable to the offense. The bill classifies failure to appear as a fourth-degree felony (punishable by a determinate prison term of 6 to 18 months and/or a fine of up to \$5,000). Failure to appear in a misdemeanor case becomes a first-degree misdemeanor under the bill (punishable by a jail stay of up to 6 months imprisonment and/or a fine of up to \$1,000).

Most offenders who fail to appear are expected to receive up to one year imprisonment. In FY 1998, 41 offenders whose primary offense was failure to appear were committed to DRC. Under the provisions of the bill, a few offenders would receive less time in prison than they would otherwise have received, reducing DRC's annual incarceration costs.

Pay-for-stay. Current law misstates that a sentencing judge may hold an offender liable under pay-for-stay to pay up to \$10,000 or the offender's ability to pay, whichever is "greater." Under the bill, reimbursement shall not exceed the total amount the offender is able to pay or the actual costs of the confinement. As sentencing judges appear to rarely use this sanctioning tool, we believe that this provision carries no discernible fiscal impact.

The bill also makes clear that a cumbersome financial sanctions hearing process is previously repealed. As these types of hearings were a relatively rare occurrence, their repeal will carry no discernible fiscal impact.

Victim restitution. Under existing restitution law, restitution is arguably available only for victims of non-property crimes. By removing references to "criminally injurious conduct," the bill would allow judges to order restitution for property crimes as well as violent crimes. By allowing these restitution issues to take place in a criminal trial, some number of civil suits seeking such restitution may not be filed or go forward.

Vehicular Assault and Homicide

Under existing law, generally:

- *Aggravated vehicular assault.* Aggravated vehicular assault is a fourth-degree felony (third-degree with prior offense) in which the offender "recklessly cause[s] serious physical harm to another person" (O.R.C. 2903.08). The number of these offenders sent to DRC is estimated to be fewer than forty annually, with an average time served of 1.8 years (15 months) out of a possible prison sentence of between six and eighteen months.
- *Vehicular homicide.* Vehicular homicide (O.R.C. 2903.07) involves causing the negligent death of another person, a first-degree misdemeanor. This offense is generally a fourth-degree felony with prior offenses. The Franklin County Municipal Court reported fifteen such cases in 1995.
- *Aggravated vehicular homicide.* Aggravated vehicular homicide (O.R.C. 2903.06) involves causing the reckless death of another person, a felony offense of the third or second degree, dependent upon prior offenses. Approximately seventy offenders convicted of aggravated vehicular homicide are imprisoned annually. The average time served for aggravated vehicular homicide offenders is 4.9 years. In discussion with common pleas judges, LBO concludes that the majority of cases involving alcohol fall into this category. In most cases, driving under the influence is viewed as a factor that satisfies the criteria for recklessness.
- *Involuntary manslaughter.* Additional offenders who cause vehicular deaths are charged with involuntary manslaughter. Involuntary manslaughter (O.R.C. 2903.04) involves causing the death of

another as the proximate result of committing a felony or misdemeanor. When death arises from the commission of a felony, this offense is generally a first-degree felony, punishable by a prison term of between 3 and 10 years. When death arises from the commission of a misdemeanor or minor misdemeanor, this offense is generally a third-degree felony, punishable by a prison term of between 1 and 3 years. As most traffic offenses are minor misdemeanors, most involuntary manslaughter cases arising from vehicular incidents are expected to be third-degree felony offenses.

Under the bill, generally:

- Minor traffic misdemeanors are explicitly excluded from the offenses that can lead to an involuntary manslaughter conviction. Offenders guilty of other traffic misdemeanors, such as driving under the influence, would still be eligible for involuntary manslaughter. Lifetime license suspension is to be imposed on such offenders.
- The existing aggravated vehicular homicide and vehicular homicide statutes are fused into one section. Cases involving reckless homicides become third-degree felony cases, which is the same as in current law. If the offender is driving under suspension, or has previously caused a traffic death, a mandatory prison term applies, and a license suspension of three years to life applies.
- Those who commit aggravated vehicular homicide stemming from operating a vehicle under the influence (OVI), would be subject to a mandatory prison term, and recklessness does not have to be demonstrated in such cases. This offense is a second-degree felony. If the person is driving under suspension, has been previously convicted of a vehicular death, or has a second felony OVI violation, then the offense is elevated to first-degree felony status. A lifetime license suspension would apply to these offenders.
- Offenders who cause death through negligence would be charged with vehicular homicide, which remains a first-degree misdemeanor. This offense becomes a fourth-degree felony with a mandatory prison term if the offender has a prior vehicular homicide, or is driving under suspension. The offense is a fourth-degree felony with a prior traffic assault. License suspensions apply to offenders with priors of both varieties.
- The vehicular assault statute is structured to parallel the vehicular homicide changes. Aggravated vehicular assault is changed to apply to both OVI offenders and reckless offenders. Under the bill, an OVI offender committing aggravated vehicular assault would receive a third-degree felony penalty with a license suspension. The offense becomes a second-degree felony with prior vehicular assaults or deaths, driving under suspension, or 3 prior OVI's in the preceding 6 years.
- Reckless vehicular assault is a fourth-degree felony with a license suspension applied. It is elevated to second-degree felony level with a license suspension if the offender has a record of prior vehicular assaults, deaths, or while driving under suspension.

These changes essentially consolidate existing language and provide penalty enhancements for offenders who are under the influence at the time of the vehicular assault or homicide. Generally, such offenders would receive a one-step penalty enhancement under the bill. While the bill creates no new

cases, the bill will increase expenditures to DRC for housing some aggravated vehicular assault and aggravated vehicular homicide offenders for longer periods of time.

Number of Cases

Available data indicates that vehicular assaults and homicides are fairly frequent occurrences; however, the number of such crimes involving being under the influence, and as such, subject to the bill's penalty enhancements, may be much smaller.

In 1998, in Franklin County Municipal Court, there were:

- 6 involuntary manslaughter charges filed (not all of which were traffic-related);
- 3 aggravated vehicular homicide charges;
- 22 vehicular homicide charges; and
- 3 aggravated vehicular assault charges.

DRC's Calendar Year 1997 Commitment Report showed that the following numbers of offenders entered the prison system for these relevant offenses:

- 77 offenders for involuntary manslaughter (the majority of which were not traffic related);
- 54 offenders for aggravated vehicular homicide; and
- 64 offenders committed for aggravated vehicular assault.

According to DRC's 1996 Time Served Report, inmates released during calendar year 1996 served the following average sentences for these offenses:

- Involuntary manslaughter (third-degree felony): 5.48 years
- Aggravated vehicular homicide (third-degree felony): 4.65 years
- Vehicular homicide (fourth-degree felony): 4.88 years
- Aggravated vehicular assault (fourth-degree felony): 1.84 years

LBO makes several assumptions in this analysis. Firstly, through discussions with county prosecutors and judges, LBO believes that the majority of offenders under the influence currently fall into the involuntary manslaughter, aggravated vehicular homicide, and aggravated vehicular assault categories. In many jurisdictions, being under the influence can be a sufficient condition to meet the requirements of the recklessness standard required for aggravated vehicular homicide and aggravated vehicular assaults. The bill would simply make explicit this practice, and may result in a few additional individuals going to prison who would not otherwise go, but we expect these numbers to be relatively small. Based on these discussions, LBO also concludes that the vast majority of offenders serving prison time for aggravated vehicular homicide and aggravated vehicular assault were under the influence at the time.

Secondly, LBO believes that the majority of offenders who would be subject to penalty enhancements and mandatory prison terms - aggravated vehicular homicide and aggravated vehicular assault offenders who were intoxicated at the time of the offense - are probably already serving prison time. These are generally fourth- and third-degree felony offenses, and LBO believes that causing serious injury or death while under the influence is generally dealt with seriously by the court system.

Based on DRC data, LBO assumes that there would be approximately 120 offenders annually that will fall into the categories subject to the bill's penalty enhancements (all aggravated assaults and homicides, plus a very small number of involuntary manslaughter offenders). This assumes that all cases of aggravated assaults and homicides involved alcohol. Discussions with the Ohio Criminal Sentencing Commission cause us to believe that the vast majority of offenders charged with aggravated vehicular assaults and homicides involve alcohol as the aggravating factor.

Aggravated vehicular assault is generally a fourth-degree felony under current law; under the bill, OVI offenders would be generally elevated to the third-degree felony level. According to DRC's 1996 Time Served Report, the average time served for aggravated vehicular assault is 1.84 years, and the average time served for all third-degree felonies is 1.84 years. However, offenders in this fourth-degree felony category currently serve, on average, almost one year more than other fourth-degree felony offenders. This observation causes us to assume that these offenders, if elevated to third-degree felony level, may serve up to an extra year in prison.

Aggravated vehicular homicide is generally a third-degree felony under current law; under the bill, OVI offenders would generally be elevated to second-degree felony status. According to DRC's 1996 Time Served report, the average time served for aggravated vehicular homicide is 4.65 years, and the average time served for all second-degree felonies is 5.56 years. This is a difference of 0.91 years. As there were 54 aggravated vehicular homicide commitments in CY 1997, up to 54 of these offenders would serve approximately an additional year in prison.

In conclusion, LBO assumes that there are approximately 120 offenders annually who would serve approximately an additional year in prison under the bill. If LBO assumes that the marginal costs of imprisonment to DRC are at least \$4,100 per year per inmate, then the initial costs to DRC would be at least \$500,000 annually.

Summary of State Effects: DRC would experience an increase in incarceration costs associated with those aggravated vehicular assault and aggravated vehicular homicide offenders who were under the influence at the time of the offense serving additional time in prison. LBO expects that the aggravated vehicular assault offenders would spend minimal additional time in prison, and that the aggravated vehicular homicide offenders subject to the provisions of the bill would spend approximately an additional year in prison. Overall, this is expected to represent an increase of at least \$500,000 annually. The Bureau of Motor Vehicles may experience minimal increases in administrative expenditures associated with changes in license suspension eligibility.

Summary of Local Effects: The bill creates no new offenses, and LBO assumes that these offenses are generally taken very seriously by courts under current practice. Despite the penalty enhancements, the affected offenders will remain in common pleas courts. As the "stakes" of these trials are raised by mandatory penalties and additional prison time, a few cases which may not otherwise have gone to trial will do so. However, we expect that any additional costs borne by counties as the "stakes" of imprisonment and mandatory penalties increases to be minimal.

Summary of Fiscal Effects

Below, we have attempted to summarize these fiscal effects upon the state and local governments.

State fiscal effects. Under the bill, DRC will experience changes in annual expenditures, the most notable of which are highlighted below.

Provisions that will or may increase DRC's annual incarceration and post-release control supervision expenditures:

- Approximately 120 aggravated vehicular assault and homicide offenders will spend an extra year in prison, at an annual cost of at least \$500,000 annually.
- A few offenders convicted of attempting drug law violations may receive longer prison sentences than they would have otherwise.
- A few offenders convicted of drug trafficking offenses that fall exactly on penalty amount cut-off points will receive longer prison sentences than they would have otherwise.
- Some heroin offenders will be subject to penalty enhancements under the heroin penalty restructuring component of the bill. The enhancements will likely apply to those offenders who possess many unit doses, likely traffickers. At least 35 offenders annually would likely experience penalty enhancements of one level, resulting in much longer prison stays.
- A few additional offenders will be sentenced to prison annually as a result of adding the presence of a firearm as a factor that negates guidance against prison.
- Some drug offenders may be classified as mandatory drug offenders who would not otherwise have been classified, adding to DRC's incarceration expenditures.
- Some offenders who permitted drug abuse will receive penalty enhancements. Under the bill, many offenders who are currently first-degree misdemeanants will be elevated to the status of fifth-degree felons.

Provisions that will or may decrease DRC's annual incarceration and post-release control supervision expenditures:

- DRC may experience a minimal decrease in expenditures as a result of a couple of offenders sent to prison for contamination receiving parole when they might not otherwise have received it.
- DRC would experience a decrease in expenditures associated with a few individuals receiving reduced penalties under the restructured providing money for drugs statute.
- The bill presents a presumption in favor of treatment for community control violations involving drugs, rather than sending offenders back to prison. This may result in substantial savings in expenditures to DRC.
- The bill clarifies the 8th factor steering a judge toward a prison sentence relative to committing a crime while under community control or probation, which will result in a few offenders not being committed to prison annually.

- DRC would likely be able to reduce administrative expenditures through streamlining the process by which offenders become eligible for boot camps or intensive programming.
- Close to 400 inmates could be eligible annually for judicial release after serving 4 of 5 years in prison.
- The bill allows parole boards to shorten the length of APA supervision to be applied to discretionary releases, resulting in a decrease in expenditures.
- By classifying the offense of failure to appear, a few offenders would spend less time in prison than they otherwise would, decreasing expenditures.

Counties. Under the bill, counties would experience changes in annual criminal justice expenditures and revenues, the most notable of which are highlighted below.

Provisions that will or may increase expenditures:

- Providing drug treatment for an unknown number of otherwise prison-bound offenders who violated community control.
- A few offenders convicted of attempting drug law violations may be subject to penalty enhancements, raising the stakes of felony trials in common pleas courts and possibly increasing the prosecution, adjudication, and indigent defense costs needed to resolve the matter.
- A few offenders convicted of drug trafficking offenses that fall exactly on penalty amount cut-off points may be subject to penalty enhancements, raising the stakes of felony trials in common pleas courts and possibly increasing the prosecution, adjudication, and indigent defense costs needed to resolve the matter.
- Approximately 120 aggravated vehicular homicide and assault offenders will be subject to penalty enhancements, raising the stakes of felony trials in common pleas courts and possibly increasing the prosecution, adjudication, and indigent defense costs needed to resolve the matter.
- Some heroin offenders will be subject to penalty enhancements under the heroin penalty-restructuring component of the bill. At least 35 offenders statewide annually would likely experience penalty enhancements of one level, which raises the stakes of felony trials in common pleas courts and possibly increases the prosecution, adjudication, and indigent defense costs needed to resolve the matter.
- A handful of otherwise prison-bound offenders for marijuana purchases will most likely receive jail sentences instead.
- The bill tightens the restrictions for when intervention in lieu of conviction may be applied. Some jurisdictions may experience an increase in jail expenditures, as some offenders may receive jail time who would formerly have been eligible for intervention in lieu of conviction.
- Common pleas courts may experience a minimal increase in civil caseloads through additional nuisance abatement actions brought by law enforcement.

Provisions that will or may decrease annual county criminal justice expenditures:

- A decrease in prosecution, adjudication, and indigent defense expenditures associated with a few individuals receiving reduced penalties under the restructured providing money for drugs statute.
- Financial sanctions hearings are repealed under the bill. Since these hearings are not prevalent, this provision may result in a minimal decrease in expenditures in some jurisdictions.
- By broadening the victim restitution law to cover property crimes, some civil suits may be avoided.
- Some offenders who permit drug abuse who would otherwise have been sentenced to jail terms as first-degree misdemeanants will be shifted to the prison system.

Provisions that may increase annual county fine revenue:

- Penalty enhancements for some aggravated vehicular homicide and assault offenders, some heroin offenders, and a few offenders falling on the cutoff points for drug trafficking could result in negligible gain in the amount of fine revenue collected.
- Counties may also collect some additional revenue through the collection of fines and the auctioning off of property under the state's nuisance abatement law.

Municipalities. Under the bill, municipalities will experience changes in criminal justice expenditures and revenues, as noted below.

Provisions that will or may increase annual criminal justice expenditures:

- Case processing expenditures will increase negligibly, as a few offenders who provided money for drugs involving minimal amounts of marijuana are charged with misdemeanor possession or trafficking charges as opposed to more serious felony offenses.

Provisions that will or may decrease annual expenditures:

- A few civil suits may be averted by allowing judges to order restitution in criminal trials.
- Some misdemeanor offenders who permit drug abuse will be shifted to the common pleas system as felons.

Provisions that will or may increase annual revenue:

- As a result of some providing money for drug cases involving marijuana being shifted down to municipal courts, municipalities may experience a negligible increase in annual fine revenue collected.

Synopsis of Fiscal Changes

Relative to the preceding version of this bill, the substitute bill adds penalty enhancements for aggravated vehicular homicide and assault offenders who are under the influence at the time of the offense. Generally, these offenders will be subject to one-step penalty enhancements under the substitute bill, resulting in the following fiscal implications:

- Approximately 120 aggravated vehicular homicide and assault offenders will spend an extra year in prison, at an annual cost to the Department of Rehabilitation and Correction of at least \$500,000 annually.
- These enhancements raise the stakes of felony trials in common pleas courts and could increase the prosecution, adjudication, and indigent defense costs to counties needed to resolve the matter. Counties may also experience a negligible gain in the amount of fine revenue collected as a result of these penalty enhancements.

□ *LBO staff: Laura Bickle, Budget/Policy Analyst*

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