



Sub. H.B. 259*

126th General Assembly

(As Reported by S. Judiciary on Criminal Justice)

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BILL SUMMARY

- Renames the offense "harassment by an inmate" as "harassment with a bodily substance."
- Expands one of the prohibitions currently set forth in this renamed offense to prohibit any person, with knowledge that he or she is a carrier of certain viruses or infected with specified diseases and with intent to harass, annoy, threaten, or alarm another person, from causing or attempting to cause that other person to come into contact with a bodily substance.
- Expands this renamed offense to additionally prohibit a person, with intent to harass, annoy, threaten, or alarm a law enforcement officer, from causing or attempting to cause the law enforcement officer to come into contact with a bodily substance, irrespective of whether the offender is a carrier of or infected with specified diseases.
- Specifies that, if an offender who is convicted of a felony of the first degree, a felony of the second degree, a felony sex offense, or a felony of the third degree that is not a felony sex offense and in the commission of

** 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.*

which the offender caused or threatened to cause physical harm to a person has been or is sentenced to a prison term for the offense, regardless of whether the court imposed the prison term prior to, on, or after the bill's effective date, the failure of the court to notify the offender that the offender will be supervised under post-release control after the offender leaves prison or to include a statement of that fact in the offender's sentence does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender.

- Specifies that, if an offender who is convicted of or pleads guilty to a felony has been or is sentenced to a prison term for the offense, regardless of whether the court imposed the prison term prior to, on, or after the bill's effective date, the failure of the court to notify the offender that, if the offender is subjected to a period of post-release control after the offender's release from prison, the Parole Board may impose a prison term for a violation of supervision under the post-release control or to include a statement of that fact in the offender's sentence does not negate, limit, or otherwise effect the Parole Board's authority to so impose a prison term for a violation of that nature if the Board notifies the offender prior to the offender's release of the Board's authority to so impose a prison term.
- Requires the Parole Board, prior to the felon's release from prison, to notify each felon who is sentenced to prison and who will be under post-release control that the felon may be sent back to prison for violating the post-release control.
- Declares an emergency.

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CONTENT AND OPERATION

Harassment by an inmate (harassment with a bodily substance)

Existing law

Current law prohibits a person *who is confined in a detention facility*, with intent to harass, annoy, threaten, or alarm another person, from causing or attempting to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner. A violation of this prohibition is the offense of "harassment by an inmate," a felony of the fifth degree. (R.C. 2921.38(A) and (D).)

The offense of "harassment by an inmate" also is committed when a person who is *confined in a detention facility*, with knowledge that the person is a carrier of the virus that causes acquired immunodeficiency syndrome, is a carrier of a hepatitis virus, or is infected with tuberculosis and with intent to harass, annoy, threaten, or alarm another person, causes or attempts to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner. A violation of this prohibition is a felony of the third degree. (R.C. 2921.38(B) and (D).)

The prohibitions described in the preceding two paragraphs do not apply to a person who is hospitalized, institutionalized, or confined in a facility operated by the Department of Mental Health or the Department of Mental Retardation and Developmental Disabilities. The bill requires the court, on request of the prosecutor or the law enforcement authority responsible for the investigation of the violation, to cause a person who allegedly has committed a violation of either prohibition described in the preceding two paragraphs to submit to one or more appropriate tests to determine if the person is a carrier of the virus that causes acquired immunodeficiency syndrome or a hepatitis virus, or is infected with tuberculosis. If a court orders any test under this provision, the court must charge "the offender" with the costs of the test unless it determines that "the accused" is unable to pay, in which case the costs must be charged to the entity that operates the detention facility in which the alleged offense occurred. (R.C. 2921.38(D) and (E).)

Operation of the bill

The bill renames the offense described above under "Existing law" as the offense of "harassment with a bodily substance" (R.C. 2921.38(D)), expands one of the prohibitions, and adds an additional prohibition.

The bill expands current law's prohibition with respect to a person who has knowledge that he or she is a carrier of certain viruses or infected with specified diseases and commits harassment with a bodily substance by removing the requirement that the offense applies only if the offender is confined in a detention facility. Thus, the bill prohibits *any person*, with knowledge that the person is a carrier of the virus that causes acquired immunodeficiency syndrome, is a carrier of a hepatitis virus, or is infected with tuberculosis and with intent to harass, annoy, threaten, or alarm another person, from causing or attempting to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner. A violation of this prohibition remains a felony of the third degree. (R.C. 2921.38(C) and (D).)

The bill additionally prohibits a person, with intent to harass, annoy, threaten, or alarm a law enforcement officer, from causing or attempting to cause the law enforcement officer to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the law enforcement officer, by expelling the bodily substance upon the law enforcement officer, or in any other manner. A violation of this prohibition is a felony of the fifth degree. (R.C. 2921.38(B) and (D).)

The bill retains without substantive change the existing provision that exempts a person who is hospitalized, institutionalized, or confined in a Department of Mental Health or Department of Mental Retardation and Developmental Disabilities facility from the prohibitions set forth in R.C. 2921.38 and the existing provision that pertains to a court ordering tests to determine if a person who allegedly has committed a violation of any of the prohibitions is a carrier of the virus that causes acquired immunodeficiency syndrome or a hepatitis virus, or is infected with tuberculosis. Regarding payment for any tests so ordered by a court, the bill modifies the existing provision so that it specifies that the court must charge the offender with the costs of the test unless it determines that the accused is unable to pay, in which case the costs must be charged to whichever of the following is applicable: (1) if the alleged offense occurred in a detention facility, the entity that operates the detention facility in which the alleged offense occurred, or (2) if the alleged offense occurred outside of a detention facility, the law enforcement authority responsible for the investigation of the violation. These provisions will apply to current law's prohibition contained in the section that the bill expands, the additional prohibition that the bill enacts in the section, and current law's prohibition in the section that the bill does not change. (R.C. 2921.38(E) and (F).)

Post-release control, prison term for violating post-release control, and notification to offender

Background

Supreme Court decision in *Hernandez v. Kelly*. The Ohio Supreme Court, in its decision in the case of *Hernandez v. Kelly* (2006), ___ Ohio St.3d ___, 2006-Ohio-126, considered a case in which a convicted felon was released from prison upon completion of his sentence and was placed on post-release control for a period of five years. When the offender was sentenced to the prison term, the sentencing court did not notify him at his sentencing hearing that he would be subject to post-release control and did not incorporate post-release control into its sentencing entry. Subsequent to his release from prison, the offender committed offenses in Texas and the APA determined that he had violated conditions of his post-release control and imposed a prison sentence of 160 days for the violations. The offender filed a *habeas corpus* action in the Supreme Court, asserting that he was entitled to release from prison and from any further post-release control because the trial court did not notify him at his sentencing hearing that he would be subject to post-release control and did not incorporate post-release control into its sentencing entry. The Supreme Court agreed with the offender, granted the writ of *habeas corpus*, and ordered that he be released from prison and post-release control, holding that "(t)he Adult Parole Authority is not authorized to place an offender on post-release control and sanction the offender for violating the terms of that control in the absence of appropriate notification of post-release control by the trial court and incorporation of post-release control in its sentencing entry." See '**Existing law**,' below, for discussion of the statutory law that is the basis of the above court decision.

Operation of the bill

Failure to provide notice of mandatory post-release control or to include it in sentence--no effect on mandatory post-release control. The bill specifies that, if an offender who is convicted of or pleads guilty to a felony of the first degree, a felony of the second degree, a felony sex offense, or a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person has been or is sentenced to a prison term for the offense, regardless of whether the court imposed the sentence including the prison term prior to, on, or after the bill's effective date, the failure of the court to notify the offender that the offender will be supervised under post-release control after the offender leaves prison, to include in the judgment of conviction entered on the journal a statement that the offender will be so supervised, or to include a post-release control requirement in the sentence does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under R.C. 2967.28(B), which provides for

mandatory post-release control. (R.C. 2929.14(F), 2929.19(B)(3)(c), and 2967.28(B).)

Failure to provide notice of possibility of prison sanction for post-release control violation or to include it in sentence--no effect on authority for use of prison sanction. The bill also specifies that, if an offender who is convicted of or pleads guilty to a felony has been or is sentenced to a prison term for the offense, regardless of whether the court imposed the prison term prior to, on, or after the bill's effective date, the failure of the court to notify the offender that, if the offender is subjected to a period of post-release control after the offender's release from prison, the Parole Board may impose a prison term for a violation of supervision under the post-release control or a condition of post-release control imposed under R.C. 2967.131(B) or to include in the judgment of conviction entered on the journal a statement that the Parole Board may impose such a prison term for a violation of that nature does not negate, limit, or otherwise effect the authority of the Parole Board to so impose a prison term for a violation of that nature if, pursuant to a provision described below that the bill enacts, the Parole Board notifies the offender prior to the offender's release of the Board's authority to so impose a prison term. This provision applies regarding both persons who are under a period of mandatory post-release control and those who are under a period of discretionary post-release control. (R.C. 2929.19(B)(3)(e).)

Related to the provision described in the preceding paragraph, the bill requires the Parole Board, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under R.C. 2967.28, to notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in R.C. 2967.131(B) that is imposed on the prisoner, the Board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner (R.C. 2967.28(D)(1)).

Declarations by General Assembly. The bill includes provisions in uncodified law that specify that (Section 3):

(1) The General Assembly declares that its purpose in amending R.C. 2929.14, 2929.19, and 2967.28 in the bill is to reaffirm that, under those sections as they existed prior to the bill's effective date: (a) by operation of law and without need for any prior notification or warning, every convicted offender sentenced to a prison term for a felony of the first or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense in the commission of which the offender caused or threatened to cause physical harm to a person always is subject to a period of post-release control after the offender's release from imprisonment, pursuant to and for the period of time described in R.C. 2967.28(B), and (b) by operation of law and without need for any prior notification or warning, every convicted offender sentenced to a prison term and

subjected to supervision under a period of post-release control after the offender's release from imprisonment always is subject to having the Parole Board impose in accordance with R.C. 2967.28 a prison term of up to one-half of the stated prison term originally imposed upon the offender if the offender violates that supervision or a condition of post-release control imposed under R.C. 2967.131(B).

(2) The General Assembly declares that it believes that the amendments to R.C. 2929.14, 2929.19, and 2967.28 made in the bill are not substantive in nature and merely clarify that those sections operate as described in paragraph (1), above, that the convicted offenders described in paragraph (1), above, always are subject by operation of law and without need for any prior notification or warning to a period of post-release control after their release from imprisonment and to having the Parole Board impose a prison term if they violate their supervision or a condition of post-release control as described in paragraph (1), above, and that the amendments to R.C. 2929.14, 2929.19, and 2967.28 made in the bill thus are remedial in nature.

(3) The General Assembly declares that it intends that the clarifying, remedial amendments to R.C. 2929.14, 2929.19, and 2967.28 made in the bill apply to all convicted offenders described in paragraph (1), above, regardless of whether they were sentenced prior to, or are sentenced on or after, the bill's effective date.

Existing law

Mandatory and discretionary post-release control; imposition of post-release control sanctions. Existing law provides that each sentence of a convicted criminal offender to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense (any violation of R.C. Chapter 2907. that is a felony), or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person includes a requirement that the offender be subject to a period of post-release control imposed by the Parole Board after the offender's release from imprisonment (hereafter, referred to as "mandatory post-release control"). Unless reduced by the Parole Board pursuant to a specified procedure for doing so, a period of mandatory post-release control is for one of the following periods: (1) for a felony of the first degree or for a felony sex offense, five years, (2) for a felony of the second degree that is not a felony sex offense, three years, and (3) for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to the mandatory post-release control provision described

in the preceding paragraph includes a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the Parole Board, in accordance with specified provisions, determines that a period of post-release control is necessary for that offender (hereafter, referred to as "discretionary post-release control").

Before the prisoner is released from imprisonment, the Parole Board must impose upon a prisoner who is subject to mandatory post-release control, may impose upon a prisoner who is subject to discretionary post-release control, and must impose upon a prisoner being released from a shock incarceration program or from an intensive program prison (under R.C. 5120.031(B)(2)(b) or 5120.032(B)(1)), one or more post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the Board imposes one or more post-release control sanctions upon a prisoner, the Board, in addition to imposing the sanctions, also must include as a condition of the post-release control that the person not leave the state without permission of the court or the person's parole or probation officer and that the person abide by the law. The Board may impose any other conditions of release under a post-release control sanction that it considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to provisions of the Felony Sentencing Law contained in R.C. 2929.16, 2929.17, and 2929.18. A post-release control sanction imposed under this provision takes effect upon the prisoner's release from imprisonment.

At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the prisoner, the Adult Parole Authority (the APA) of the Department of Rehabilitation and Correction (DRC) may review the prisoner's behavior under the post-release control sanctions imposed upon the prisoner. The APA may determine, based upon the review and in accordance with standards established by DRC, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. Unless the period of post-release control was imposed upon a prisoner subject to mandatory post-release control, the APA also may recommend that the Parole Board reduce the duration of the period of post-release control imposed by the court. If the APA recommends that the Board reduce the duration of control for an offense other than a felony of the first degree or felony sex offense, the Board must review the prisoner's behavior and may reduce the duration of the period of control imposed by the court. In no case may the Board reduce the duration of the period of control imposed by the court for a felony of the first degree or felony sex offense, and in no case may the Board permit the prisoner to leave the state without permission of the court or the prisoner's parole or probation officer. (R.C. 2967.28(A) to (D).)

Supervision while under post-release control; violation of post-release control sanction or release conditions. If a post-release control sanction is imposed upon an offender, under the provisions described above, the offender upon release from imprisonment is under the general jurisdiction of the APA and generally is supervised by the APA's Field Services Section through its staff of parole and field officers as if the offender had been placed on parole. If the offender upon release from imprisonment violates the post-release control sanction or any conditions that are imposed on the offender, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction is required to report the violation directly to the APA or to the APA's officer who supervises the offender. The APA's officers may treat the offender as if the offender were on parole and in violation of the parole.

If the APA determines that an offender released under post-release control has violated a post-release control sanction or any conditions described in R.C. 2967.131(A) imposed upon the offender and that a more restrictive sanction is appropriate, it may impose a more restrictive sanction upon the offender, in accordance with standards established by DRC, or may report the violation to the Parole Board for a hearing as described in the next paragraph. The APA may not, pursuant to this provision, increase the duration of the offender's post-release control or impose as a post-release control sanction a residential sanction that includes a prison term, but the APA may impose on the offender any other residential sanction, nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to provisions of the Felony Sentencing Law contained in R.C. 2929.16, 2929.17, and 2929.18.

The Parole Board may hold a hearing on any alleged violation by a prisoner of a post-release control sanction or any conditions that are imposed upon the offender. If after the hearing the Board finds that the offender violated the sanction or condition, it may increase the duration of the offender's post-release control up to the maximum duration authorized by law or impose a more restrictive post-release control sanction. *When appropriate, the Board may impose as a post-release control sanction a residential sanction that includes a prison term.* The Board must consider a prison term as a post-release control sanction imposed for a violation of post-release control when the violation involves a deadly weapon or dangerous ordnance, physical harm or attempted serious physical harm to a person, or sexual misconduct, or when the offender committed repeated violations of post-release control sanctions. The period of a prison term imposed as a post-release control sanction cannot exceed nine months, and the maximum cumulative prison term for all violations cannot exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence. The period of a prison term that is imposed as a post-release control sanction does not count as, or be credited toward, the remaining period of post-release control.

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 cannot exceed one-half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the Parole Board, plus one-half of the total stated prison term of the new felony. (R.C. 2967.28(F)(1) to (3).)

Sentencing court--provision of notice to offender and inclusion in sentence. The existing Felony Sentencing Law (R.C. 2929.11 to 2929.19) grants a court that is sentencing a person for a felony much discretion in imposing the sentence, but contains a series of rules and guidelines that the court must follow in exercising its discretion and imposing the sentence. In certain specified circumstances, the Law requires the sentencing court to impose a prison term on a convicted felon, but, in most cases, a prison term is not required. A sentencing court is required to conduct a sentencing hearing before imposing sentence on a convicted felon.

The Felony Sentencing Law provides that, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court must do all of the following: (1) impose a stated prison term, (2) notify the offender that, as part of the sentence, the Parole Board may extend the stated prison term for certain violations of prison rules for up to one-half of the stated prison term (this mechanism is named "bad time" and has been determined by the Supreme Court to be unconstitutional), (3) *notify the offender that the offender will be supervised under the post-release control provisions of R.C. 2967.28 after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree in the commission of which the offender caused or threatened to cause physical harm to a person (i.e., mandatory post-release control), (4) notify the offender that the offender may be supervised under the post-release control provisions of R.C. 2967.28 after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to the provision described in clause (3) (i.e., discretionary post-release control), (5) notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in clause (3) or (4), and if the offender violates that supervision or a condition of post-release control imposed under R.C. 2967.131(B), the Parole Board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender, and (6) require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in R.C. 341.26, 753.33, or 5120.63, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate*

that the offender did not ingest or was not injected with a drug of abuse (R.C. 2929.19(B)(3)).

The Felony Sentencing Law also provides that, if a court sentencing an offender for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender cause or threatened to cause physical harm to a person imposes a prison term on the offender, it must include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment in accordance with R.C. 2967.28(B), which provides for mandatory post-release control. If a court sentencing an offender for a felony of the third, fourth, or fifth degree that is not subject to the provision described in the preceding sentence imposes a prison term on the offender, it must include in the sentence a requirement that the offender be subject to a period of post-release control under R.C. 2967.28(C), which provides for discretionary post-release control, if the Parole Board determines that a period of post-release control is necessary. (R.C. 2929.14(F).)

Effective date

The bill includes an emergency clause, but specifies that its provisions regarding the offense of "harassment with a bodily substance," contained in R.C. 2921.38, are to take effect 90 days after the bill's effective date (Sections 4 and 5).

HISTORY

ACTION	DATE
Introduced	05-17-05
Reported, H. Criminal Justice	10-27-05
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Reported, S. Judiciary on Criminal Justice	---

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