

H.B. 86

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INTRODUCTION

Amended Substitute House Bill 86 was passed by the 129th General Assembly and signed by Governor Kasich on June 29, 2011. The effective date is September 30, 2011.

The following materials summarize changes brought by H.B. 86, most of which are beneficial, particularly for low level felony offenders.

As to how H.B. 86 will apply to pending cases or those whose cases have been through court, R.C. 1.58 provides:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

- (1) Affect the prior operation of the statute or any prior action taken thereunder;
- (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;
- (3) Affect any violation thereof or penalty, forfeiture, or punishment in respect thereto, prior to the amendment or repeal;
- (4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

R.C. 1.58(B) should make beneficial changes in the law available to those with pending cases, in particular third, fourth and fifth degree felonies, cases where a dollar amount determines the level of the offense, and cases involving crack cocaine.

DEGREE OF OFFENSE BY VALUE

Dollar amounts past which the degree of the offense steps up have been increased. Often this means more violations will remain misdemeanors. Within individual statutes it is not always clear whether these dollar amounts are linked to an actual loss or the value of the property. The increased limits clearly provide a basis for R.C. 1.58 claims in pending cases.

The following compilation is limited to H.B. 86 changes. Many of these statutes also contain other enhancement factors which have not been altered.

- 926.04 and 926.99(A)(2) -- Agricultural commodities handler's license requirement and penalties for violators who are insolvent and financially able to satisfy a claimant

- less than \$1,000 = M1

- \$1,000 - \$7,500 = F-5

- \$7,500 - \$150,000 = F-4

- More than \$150,000 = F-3

- 133.92 and 1333.99(G) -- Pyramid sales plan or program

- less than \$1,000 = M1

- \$1,000 - \$7,500 = F-5

- \$7,500 - \$150,000 = F-4

- More than \$150,000 = F-3

- 1716.99 -- Penalties for violations of charitable organization statutes

- Value of contributions:

- less than \$1,000 = M-1 of F-5 with prior

- \$1,000 - \$7,500 = F-5 or F-4 with prior

- \$7,500 - \$150,000 = F-4 or F-3 with prior

- More than \$150,000 = F-3

- 2909.03 -- Arson

- less than \$1,000 = M-1

- \$1,000 or more = F-4

- 2909.05 -- Vandalism

"Serious physical harm" now means loss in value of \$1,000 or more. [2909.05(F)(2).] This applies to damage to occupied structures and their contents, government property, and burial grounds. Below this value the offense may be criminal damaging or criminal mischief.

For culpability under Division (B), concerning physical harm to property used in trade or business, or government property, the value threshold is increased from \$500 to \$1,000. If the property is "necessary" to engage in the "profession, business, trade, or occupation" there continues to be no value limit.

- 2909.11 -- Determining property value or amount of physical harm

Jury findings with respect to value in arson and vandalism cases are restated in accordance with the increased thresholds set forth in R.C. 2909.03 and 2929.05.

- 2913.02 -- Theft

Basic theft:

- Less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- \$150,000 - \$750,000 = F-3
- \$750,000 - \$1,500,000 = F-2
- more than \$1,500,000 = F-1

Theft from an elderly person or disabled adult:

- Less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-4
- \$7,500 - \$37,500 = F-3
- \$37,500 - \$150,000 = F-2
- more than \$150,000 = F-1

- 2923.03 -- Unauthorized use of a vehicle

If the victim is elderly or a disabled adult and suffers a loss as a result of the unauthorized use:

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-4
- \$7,500 - \$37,500 = F-3
- more than \$37,500 = F-2

- 2913.04 -- Unauthorized use of property; computer, cable, or telecommunication property or service

Basic unauthorized use of property when committed for the purpose of devising or executing a scheme to defraud or obtain property or services:

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

Basic unauthorized use of property if the victim is elderly or a disabled adult

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-4
- \$7,500 - \$37,500 = F-3
- more than \$37,500 = F-2

Unauthorized use of computer, cable, or telecommunication property when committed for the purpose of devising or executing a scheme to defraud or obtain property or services, or for committing any other criminal offense:

- less than \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

Unauthorized use of computer, cable, or telecommunication property if the victim is an elderly person or disabled adult:

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-4
- \$7,500 - \$37,500 = F-3
- more than \$37,500 = F-2

- 2913.11 -- Passing bad checks

- Aggregate less than \$1,000 = M-1
- Aggregate \$1,000 - \$7,500 to single vendor = F-5
- Aggregate \$1,500 - \$7,500 multiple vendors = F-5

- Aggregate \$7,500 - \$150,000 = F-4

- more than \$150,000 = F-3

• 2913.21 -- Misuse of credit cards

- less than \$1,000 = M-1

- Aggregate \$1,000 - \$7,500 = F-5

- Aggregate \$7,500 - \$150,000 = F-4

- Aggregate over \$150,000 = F-3

• 2913.31 -- Forgery

Basic forgery when there is a loss:

- less than \$7,500 = F-5

- \$7,500 - \$150,000 = F-4

- more than \$150,000 = F-3

Elderly or disabled adults when there is a loss:

- less than \$1,000 = F-5

- \$1,000 - \$7,500 = F-4

- \$7,500 - \$37,500 = F-3

- more than \$37,500 = F-2

• 2913.32 -- Criminal simulation

When there is a loss to the victim

- less than \$1,000 = M-1

- Aggregate \$1,000 - \$7,500 = F-5

- Aggregate \$7,500 - \$150,000 = F-4

- Aggregate over \$150,000 = F-3

• 2913.34 -- Trademark counterfeiting

Cumulative sales price of goods or services to which a counterfeit trademark has been affixed:

- less than \$1,000 = M-1

- \$1,000 to \$7,500 = F-5

- \$7,500 - \$150,000 = F-4

- over \$150,000 - F-3

- 2913.40 -- Medicaid fraud

Value of property or services obtained:

- less than \$1,000 = M-1

- \$1,000 - \$7,500 = F-5

- \$7,500 - \$150,000 = F-4

- more than \$150,000 = F-3

- 2913.401 -- Medicaid eligibility fraud

Value of benefits paid:

- less than \$1,000 = M-1

- \$1,000 - \$7,500 = F-5

- \$7,500 - \$150,000 = F-4

- more than \$150,000 = F-3

- 2913.42 -- Tampering with records

Value of data or computer software involved in the offense or loss to the victim:

- less than \$1,000 = M-1

- \$1,000 - \$7,500 = F-5

- \$7,500 - \$150,000 = F-4

- more than \$150,000 = F-3

- 2913.421 -- Illegally transmitting multiple commercial electronic mail messages; Unauthorized access of computer:

Offense rises to a fourth degree felony when the loss to the victim or victims of the violation exceeds \$1,000 in one year's time, or when the aggregate value of property or services obtained by the offender in one year's time exceeds \$1,000.

- 2913.43 -- Securing writings by deception

Basic offense, value of property or obligation involved:

- less than \$1,000 = M-1

- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

Elderly person or disabled adult:

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-4
- \$7,500 - \$37,500 = F-3
- more than \$37,500 = F-2

- 2913.45 -- Defrauding creditors

Value of property involved:

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

- 2913.46 -- Illegal use of supplemental nutrition or WIC program benefits

Aggregate value of benefits involved:

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-4
- \$7,500 - \$150,000 = F-3
- more than \$150,000 = F-2

- 2913.47 -- Insurance fraud

Amount of claim that is false or deceptive:

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

- 2913.48 -- Worker's compensation fraud

Value of premium or assessments not paid, or value of services, property, or money stolen:

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

- 2913.49 -- Identity fraud

Basic offense, value of credit, property, services, debt, or other legal obligation involved in the course of conduct:

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-4
- \$7,500 - \$150,000 = F-3
- more than \$150,000 = F-2

Elderly person or disabled adult, value of credit, property, services, debt, or other legal obligation involved in the course of conduct:

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-3
- \$7,500 - \$150,000 = F-2
- more than \$150,000 = F-1

- 2913.51 -- Receiving stolen property

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

- 2913.61 -- Value of stolen property

Jury findings with respect to value in theft offense cases are restated in accordance with the increased thresholds set forth within Chapter 2913. Also applies to R.C. 1716.14(A)(1) violations. The aggregate value rules in Divisions (B) and (C) remain fundamentally unchanged.

- 2915.05 -- Cheating; corrupting sports

Cheating goes from an M-1 to a F-5 if the potential gain exceeds \$1,000, or with a prior.

- 2917.21 -- Telecommunication harassment

First offense when economic harm results:

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

Subsequent offenses when economic harm results:

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

- 2917.31 -- Inducing panic

If economic harm results:

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

- 2917.32 -- Making false alarms

If economic harm results:

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

- 2921.13 Falsification in theft offenses; To purchase firearms; To obtain concealed handgun permit

Value of property or services stolen:

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- more than \$150,000 = F-3

- 2921.41 -- Theft in office

Value of property or services stolen:

- less than \$1,000 = F-5
- \$1,000 - \$7,500 = F-4
- more than \$7,500 = F-3

- 2981.07 -- Interference with or diminishing forfeitable property

- less than \$1,000 = M-1
- \$1,000 - \$7,500 = F-5
- \$7,500 - \$150,000 = F-4
- More than \$150,000 = F-3

COCAINE OFFENSES

The long-standing definition of cocaine set forth in R.C. 2925.01(X) drew no distinction between powder and crack cocaine. H.B. 86 strikes the separate definition of "crack cocaine" that appeared as R.C. 2925.01(GG).

Similarly, R.C. 2925.03 and 2925.11 have been amended to eliminate the distinction between powder and crack, and other provisions to delete mention of crack. The penalties now provided are less than those previously applicable to crack but more than those previously applied to powder.

- Trafficking [2925.03(C)(4)]

- less than 5 grams: The default penalty is that for a F-5 or F-4 if near a school or juvenile. Whether by design or oversight R.C. 2929.13(C) applies, under which there is no presumption for or against prison. Logically the lowest level trafficking offense would be subject to mandatory community control when the next level offense is subject to R.C. 2929.13(B).

- 5-10 grams: F-4 and 2929.13(B) guides sentencing. If near a school or juvenile it is a F-2 and a prison sentence is presumed.

- 10-20 grams: F-3, prison presumed, or mandatory with two or more priors. F-2 with mandatory time if near a school or juvenile.

- 20-27 grams: F-2, mandatory time. F-1 with mandatory time if near a school or juvenile.
- 27-100 grams: F-1, mandatory time.
- more than 100 grams: 11 years of mandatory time.
- Possession [2925.11(C)(4)]
 - less than 5 grams: F-5. 2929.13(B) applies.
 - 5-10 grams: F-4. 2929.13(B) applies.
 - 10-20 grams: F-3. Prison presumed or mandatory with priors.
 - 20-27 grams: F-2, mandatory time.
 - 27-100 grams: F-1, mandatory time.
 - more than 100 grams: 11 years of mandatory time.

An ounce equals 28.345 grams, explaining the unusual break at 27 grams.

As to retroactivity, Section 3 provides that the amendments to sections 2925.01, 2925.03, 2925.05, 2925.11 and 2929.01(W) apply prospectively and to those entitled to the benefit of R.C. 1.58. They do not apply to individuals sentenced prior to the effective date of H.B. 86 for offenses involving marihuana, cocaine, or hashish.

OTHER DRUG OFFENSES

Within R.C. 2925.03 (trafficking in drugs) and 2925.11 (drug possession), except for cocaine, hashish and marijuana, the quantities at which the degree of the offense increases remain unchanged, but there are other changes guiding sentencing which must be checked offense by offense.

With respect to trafficking in marijuana, previously the top weight category began at 20,000 grams, a F-2 with a mandatory 8-year sentence. If near a school or a juvenile it was a F-1 with a 10-year sentence. Now for quantities between 20,000 and 40,000 grams the offense is a F-2 with the alternative of 5, 6, 7, or 8 year mandatory terms. From 40,000 grams upwards the offense is a F-2 with an 8-year mandatory sentence. From 20,000 grams upwards, if committed near a school or juvenile the offense remains a F-1 carrying the new 11 maximum as mandatory time. [2925.03(C)(3)(f) and (g).]

Revised penalties for trafficking in cocaine and possession are set forth in the cocaine offenses portion of this text. [See 2925.03(C)(4).]

Penalties for trafficking in larger quantities of hashish have been changed corresponding to changes with respect to trafficking in marijuana. Now there are separate provisions for 1,000 to 2,000 grams in solid form or 200 to 400 grams of liquid, and quantities above those amounts in either form. [See 2925.11(C)(7).]

For possession of marijuana and hashish, the top category has also been divided. Previously possession of 20,000 grams or more of marijuana, 1,000 grams of hashish in solid form, or 200 grams of hashish in liquid form was a F-2, with a mandatory time requirement. This remains the penalty up to 40,000, 2,000, or 400 grams. From there on up the offense remains a F-2 but the maximum sentence must be imposed as mandatory time. [2925.11(C)(3)(f) and (g); 2925.11(C)(7)(f) and (g).]

Section 3 of H.B. 86 provides changes in R.C. 2929.01(W), 2925.01, 2925.03, 2929.05 and 2929.11 apply prospectively and to those entitled to the benefit of R.C. 1.58. They do not apply to individuals sentenced prior to the effective date of H.B. 86.

BURGLARY -- 2911.12

H.B. 86 changes the organization of R.C. 2911.12, but does not appear to affect exposure under the alternative theories of culpability.

Previously Division (A)(4) proscribed trespassing in a permanent or temporary habitation when anyone other than an accomplice was present or likely to be present. A violation was a F-4.

Now trespassing in a habitation is proscribed by Division (B). The force, stealth or deception requirement is repeated. The offense remains a F-4.

The significance of the amendment is that violations of Division (A), which are tied to commission of other criminal offenses constitute the offense of "burglary" while a violation of (B) constitutes the offense of "trespass in a habitation where a person is present or likely to be present." This allows differential treatment of offenders under other portions of the sentencing statutes, for example, consistent with treatment of F-4 and F-5 offenders with respect to mandatory community control.

AGGRAVATED MURDER -- 2903.01

The list of predicate offenses for felony murder is expanded to include "trespass in a habitation when a person is present or likely to be present" to the existing list of "kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape."

The amendment appears linked to changes in the organization of the burglary statute, though all forms of burglary were included under the former language.

ESCAPE -- 2921.34

The escape statute now covers "supervised release detention:"

No person, knowing the person is under supervised release detention or being reckless in that regard, shall purposely break or attempt to break the supervised release detention or purposely fail to return to the supervised release detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement.

[2921.34(A)(3).] The objective appears to be allowing escape charges when there is not "detention" of the sort previously covered by the escape statute. Supervision by a Department of Rehabilitation and Corrections employee takes the place of more custodial forms of detention.

"Supervised release detention" is defined by R.C. 2921.34(D):

As used in this section, "supervised release detention" means detention that is supervision of a person by an employee of the department of rehabilitation and correction while the person is on any type of release from a state correctional institution, other than transitional control under section 2967.26 of the Revised Code or placement in a community-based correctional facility by the parole board under section 2967.28 of the Revised Code.

The vagueness of this definition may be calculated to give it broad application. While it does not make express reference to postrelease control the intent appears to be sanctioning absconding from supervision following release, including such new initiatives provided by H.B. 86 as early freedom gained through earned credit and risk reduction sentences.

The offense is a F-5, becoming a F-4 when the offense for which the offender was under supervision is a F-2 or higher. [2921.34(C)(3).]

CONSPIRACY -- 2923.01

Trespassing in a habitation when a person is present or likely to be present has been added to the list of predicate offenses.

DEFINITIONS SECTIONS

H.B. 86 makes no changes to R.C. 2901.01, the basic definitions section for the Criminal Code.

R.C. 2913.01, the definitions section within the theft chapter is changed only to add workers compensation fraud [2913.48] to the list of theft offenses under 2913.01(K), and to make a numerical correction concerning computer hacking under 2913.01(II)(2).

In relation to the offense of racketeering, within the definition of "corrupt activity" the threshold increases from \$500 to \$1,000 for some violations of R.C. 2907.32, the pandering obscenity statute. [2923.01(I)(2)(e) and (f).] R.C. 2923.01(T) also reflects a \$1,000 threshold in the calculation of aggregate retail value.

As set forth elsewhere, R.C. 2925.01, the definitions section for the drug offense chapter, has been amended to strike the separate definition of crack cocaine which previously appeared as subsection (W).

R.C. 2929.01, at the beginning of the sentencing chapter, has a few changes:

- (C) reflects the elimination of a distinction between powder and crack cocaine.
- (W) now defines offenders linked to 100 grams of cocaine in any form as major drug offenders. Formerly the threshold for powder was 1,000 grams.

- (BB)'s definition of "prison term" now includes risk reduction sentences.

SPEEDING

In Barberton v. Jenney, 126 Ohio St. 3d 5. 2010, the Supreme Court held:

A police officer's unaided visual estimation of a vehicle's speed is sufficient to support a conviction for speeding in violation of R.C. 4511.21(D) without independent verification of the vehicle's speed if the officer is trained, is certified by the Ohio Peace Officer Training Academy or a similar organization that develops and implements training programs to meet the needs of law-enforcement professionals and the communities they serve, and is experienced in visually estimating speed.

This is nullified by newly enacted R.C. 4511.091(C):

(C)(1) No person shall be arrested, charged, or convicted of a violation of any provision of divisions (B) to (O) of section 4511.21 or section 4511.211 of the Revised Code or a substantially similar municipal ordinance based on a peace officer's unaided visual estimation of the speed of a motor vehicle, trackless trolley, or streetcar. This division does not do any of the following:

(a) Preclude the use by a peace officer of a stopwatch, radar, laser, or other electrical, mechanical, or digital device to determine the speed of a motor vehicle;

(b) Apply regarding any violation other than a violation of divisions (B) to (O) of section 4511.21 or section 45211 of the Revised Code or a substantially similar municipal ordinance;

(c) Preclude a peace officer from testifying that the speed of operation of a motor vehicle, trackless trolley, or streetcar was at a speed greater or less than a speed described in division (A) of section 4511.21 of the Revised Code, the admission into evidence of such testimony, or preclude a conviction of a violation based in whole or part on such testimony.

(2) As used in this division, "peace officer" has the same meaning as in section 2935.01 of the Revised Code.

R.C. 2911.21(A) is the "reasonable and proper" speeding violation relating to driving conditions and the ability to stop within the assured clear distance. (B) through (O) of the speeding statute define a variety of further offenses, including exceeding prima facie or posted speed limits. R.C. 4511.211 concerns enforcement of posted speed limits in private residential areas.

INTERVENTION IN LIEU OF CONVICTION

Previously R.C. 2941.041 allowed intervention in lieu of conviction for many first-time felony offenders charged with non-violent fourth and fifth degree felonies when there was reason to believe drug or alcohol usage was a factor leading to the criminal activity. Nine eligibility factors had to be met. A request could be rejected without a hearing, but a hearing was required if the court was willing to consider the request. If the court granted the request, a guilty plea was entered,

further proceedings were stayed, and the defendant placed under the supervision of the probation department. If the terms of an intervention plan were met, the charge would be dismissed and sealing of the records was a possibility.

H.B. 86 expands eligibility to those who at the time of the offense "had a mental illness or was a person with intellectual disability and that the mental illness or status as a person with a mental disability and was a factor leading to the individual's criminal behavior." [2941.041(A)(1).] While the basic framework of the statute remains the same, considerable language has been added affecting requests premised on both substance abuse and mental condition.

For both substance abuse and mental health or disability applicants the application must now include a statement by the offender as to whether their condition was a factor leading to the offense. [2951.041(A)(1).]

Previous language required an assessment when a hearing was scheduled. A new paragraph under 2951.041(A)(1) now permits an assessment of substance abuse applicants by qualified programs or professionals. This may have been intended to encourage evaluations before the court decided whether or not to schedule a hearing. Though mental health or disability applicants are not included, seemingly it would be within the court's inherent power to order a comparable evaluation before deciding whether or not to schedule a hearing.

Though the language is ambiguous, R.C. 2951.041(B)(1) appears to extend eligibility to individuals with a prior non-violent felony conviction. It is unclear whether this requires a recommendation by the prosecutor that the offender be found eligible. [2951.041(B)(1).] The intent may have been that those with prior offense of violence convictions be eligible upon recommendation, as F-4 drug offenders could become eligible upon recommendation under former 2951.041(B)(4).

F-5 drug trafficking has been made an eligible offense. [2951.041(B)(2).]

The qualifications of those conducting the required substance abuse evaluation have been restated. Mental health or disability applicants must also be evaluated. [2951.041(B)(4) and (5).]

CODIFICATION OF STATE V. FOSTER AND STATE V. HODGE

House Bill 86 reinstates statutory language pertaining to imposition of consecutive sentences and codifies deletion of language pertaining to first offenders and maximum sentences.

When first enacted the S.B. 2 sentencing statutes called for judicial factfinding when (1) more than the minimum sentence was given to an individual who had not been to prison before, (2) when the maximum sentence was imposed, and (3) when consecutive sentences are imposed. In State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, these portions of S.B.2 sentencing statutes were held to violate the Sixth Amendment right to jury trial. Though the Supreme Court declared the offending provisions were severed, they continued to be included as those statutes were subsequently amended.

Subsequently, in Oregon v. Ice (2009), 555 U.S. 160, the U.S. Supreme Court found judicial factfinding in the context of consecutive sentences did not offend the Sixth Amendment. However, the Ohio Supreme Court found this did not revive portions of the S.B. 2 statutes pertaining to consecutive sentences. This was left to the General Assembly, and in the meantime, judges could impose consecutive sentences without making findings. State v. Hodge, 128 Ohio St. 3d 1, 2010-Ohio-6230.

The syllabus to State v. Foster is as good a way as any to identify the affected provisions.

As to first offenders and maximum sentences:

(1) Because R.C. 2914.14(B) and (C) and 2929.19(B)(2) require judicial factfinding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant, they are unconstitutional. (Apprendi v. New Jersey (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and Blakely v. Washington (2004), 542 U.S. 296, 124 S.Ct. 2532, 159 L.Ed.2d 403, followed.)

(2) R.C. 2929.14(B) and (C) are capable of being severed. After the severance, judicial factfinding is not required before a prison term can be imposed within the basic prison ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant. (United States v. Booker (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, followed.)

Language appearing in Divisions (B) and (C) is now deleted and subsequent divisions move up in alphabetic order.

Though it may be a poor substitute for presumptions in favor of minimum and against maximum sentences, R.C. 2929.11(A) has been amended, making it an objective of felony sentencing, "using the minimum sanctions that the court determines accomplish those purposes (i.e. punishment and protection of the community) without imposing an unnecessary burden on state or local government resources."

Regarding consecutive sentences the Foster syllabus states:

(3) Because R.C. 2929.14(E)(4) and 2929.41(A) require judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences, they are unconstitutional. (Apprendi v. New Jersey (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and Blakely v. Washington (2004), 542 U.S. 296, 124 S.Ct. 2532, 159 L.Ed.2d 403, followed.)

(4) R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. After the severance, judicial factfinding is not required before imposition of consecutive prison terms. (United States v. Booker (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, followed.)

State v. Hodge called for a demonstration of legislative intent to restore former factfinding requirements with respect to consecutive sentences. This was achieved in H.B. 10 by lining through the original language, then returning it verbatim. Reenacted R.C. 2929.14(C)(4) states:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to R.C. 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

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

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

In a similar manner, R.C. 2929.41(A) is reenacted. This was the basic provision concerning sentences being concurrent unless ordered consecutive.

Formerly, R.C. 2929.19(B)(2) required courts to provide reasoning supporting findings with respect to consecutive sentences. This has been deleted by H.B. 86.

Foster also found unconstitutional former R.C. 2929.14(D)(2)(b), concerning repeat violent offenders, and former R.C. 2929.14(D)(3)(b), concerning major drug offenders. These provisions called for judicial factfinding and were severed. Paragraph seven of the Foster syllabus allowed imposition of additional time without findings. The repeat violent offender division is now R.C. 2929.14(B)(2). It was amended following Foster, retaining factfinding requirements. It is not substantively affected by H.B. 86. The major drug offender provision, now R.C. 2929.14(B)(3), no longer includes the findings language of former 2929.14(D)(3)(b).

The sentencing appeals statute, R.C. 2953.08, has also been amended deleting some language in a manner consistent with codifying Foster's holdings.

With the deletion of R.C. 2929.14(B) and (C), former subsection (D), which set forth special rules concerning time on specifications, mandatory time, and other matters, becomes subsection (B). Statutes making reference to these provisions have been amended to now refer to R.C. 2929.14(B).

MANDATORY COMMUNITY CONTROL FOR SOME FOURTH AND FIFTH DEGREE FELONIES

Originally R.C. 2929.13 provided guidance to sentencing courts according to the degree of the offense. For the most part community control was favored for fourth and fifth degree felonies and prison for first and second degree felonies. The statute was neutral as to third degree felonies.

Over the years the statute was expanded to include further provisions relating to OVI, drug and sex offenders, and the use of GPS devices.

With H.B. 86, Division (B), pertaining to fourth and fifth degree felonies, has been amended to create a broad requirement of community control for those convicted of non-violent fourth and fifth degree felonies, including drug and theft offenses. Even if the sentencing court cannot identify an appropriate community control sanction, it must grant community control if the Department of Corrections has done so. This may keep people out of prison, but it may lead to more jail sentences.

Revised Division (B) retains language from the former version of the statute which created a presumption in favor of community control for low level felonies. This now appears under Subdivision (B)(2), where a list of factors including physical harm to persons, threats of harm, public office, position of trust, and working for hire or as part of a criminal enterprise override a presumption in favor of community control. Nor does that presumption apply to a list of sex offenses, armed offenders, those out on bond, on probation, parole or community control, offenses committed in a prison, or by those who have served time before.

This somewhat overlaps new Division 2929.13(B)(1)(b), which provides:

The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence if any of the following apply:

(i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.

(ii) The offender caused physical harm to another person while committing the offense.

(iii) The offender violated a term of the conditions of bond as set by the court.

(iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day-period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.

Subsection (c) is key to mandatory community control. It is no doubt intentionally vague as to the Department of Rehabilitation and Correction's discretion in identifying appropriate community control sanctions. What the department may provide is described as "the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court." The local county probation department would be an obvious choice. How the department is to assess suitability of possible community control sanctions is unstated. There is no explicit reference to R.C. 2929.11, concerning the objectives of felony sentencing, or to the seriousness and recidivism factors set forth in R.C. 2929.12. The Department is given the incentive of finding alternatives to prison by language added to 2929.11(A), calling for the use of minimal sanctions that do not impose an unnecessary burden on state and local government resources.

Mandatory community control is implemented as follows at the beginning of Division (B) of R.C. 2929.13:

(B)(1)(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence, the court shall sentence the offender to a community control sanction or at least one year's duration if all of the following apply:

(i) The offender has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

(iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

This appears to leave courts no discretion to sentence first offenders caught in possession of small quantities of drugs to prison, when the Department of Corrections is unwilling to receive them.

R.C. 2929.01 does not provide a definition of "an offense of violence that is a misdemeanor." Logically the category would include assault and domestic violence, but menacing and other offenses are problematic.

Though community control may be initially mandatory for many individuals, they still face imprisonment if its terms are violated. [R.C. 2929.13(B)(1)(d).]

ADJUSTMENT OF PRISON TERMS FOR FIRST AND THIRD DEGREE FELONIES.

The maximum prison term for a first degree felony has been raised to eleven years. [R.C. 2929.14(A)(1).]

Previously the court had a choice of one, two, three, four, or five year terms for third degree felonies. Off and on, as R.C. 2929.20 was amended, those receiving five year terms either had to wait four years before applying for judicial release, or never became eligible. Under H.B. 86 the basic terms have been changed, and for many offenders the maximum sentence is now three years.

According to R.C. 2929.14(A)(3)(a), the five year maximum continues for those convicted of:

- 2903.06 -- aggravated vehicular homicide; vehicular homicide; vehicular manslaughter
- 2903.08 -- aggravated vehicular assault; vehicular assault
- 2907.03 -- sexual battery
- 2907.04 -- unlawful sexual conduct with a minor

- 2907.05 -- gross sexual imposition

Also, if the offender has a prior for 2911.01 (aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary) or 2911.12 (burglary):

- 2911.02 -- robbery
- 2911.12 -- burglary

For these offenses the range of sentences is now 12, 18, 24, 30, 36, 42, 48, 54 or 60 months. A 54-month sentence allows applying for judicial release after two years. A 60-month sentence means a four-year wait. [2929.20(C)(2) and (3).]

For all other third degree felonies the range of prison terms is now 12, 18, 24, 30 or 36 months. [2929.14(A)(3)(b).]

NONSUPPORT -- 2919.21

The substantive offense of nonsupport remains the same. So do the penalties, but there is now a statutory "preference" that offenders be placed under community control:

Except as otherwise provided in division (G)(1)(b) of this section, the court in imposing sentence on the offender shall first consider placing the offender on one or more community control sanctions under section 2929.16, 2929.17, or 2929.18 of the Revised Code, with an emphasis under the sanctions or intervention for nonsupport, obtaining or maintaining employment, or another related condition.

[2919.21(G)(1)(a).] This sounds good, and in fact should be beneficial for individuals charged with misdemeanor nonsupport, including repeat offenders. But in felony nonsupport cases the additions to Division (G) may make it easier to send first time support deadbeats to prison than is the case for other individuals convicted of fourth and fifth degree felonies.

Elsewhere these materials describe new sentencing provisions making community control mandatory for many offenders convicted of fourth and fifth degree felonies. First offense nonsupport over an accumulated period of 26 out of 104 weeks is a fifth degree felony. It is not among the offenses excluded from mandatory community control, thus even if a court is reluctant, community control would be required if the Department of Rehabilitation and Correction provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

The problematic language is R.C. 2919.21(G)(2)(b)(i):

(b) The preference for placement on community control sanctions described in division (G)(1)(a) of this section does not apply to any offender to whom one or more of the following applies:

(i) The court determines that the imposition of a prison term on the offender is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.

This being a specific provision, it may take precedence over the general provisions within R.C. 2929.13(B). Consequently, even if the Department of Corrections identifies a community control sanction, the court may still assert it is entitled to impose a prison sentence.

MISDEMEANOR SENTENCING

Community Alternative Sentencing Centers

A sentence to a "community alternative sentencing center" has been added to the list of community residential sanctions set forth in R.C. 2929.26:

If the offender is an eligible offender, as defined in section 307.932 of the Revised Code, a term of sixty days in a community alternative sentencing center or a district community alternative sentencing center established and operated in accordance with that section, in the circumstances specified in that section, with one of the conditions of the sanction being that the offender complete in the center the entire term imposed.

Note the maximum term is sixty days and the apparent inability to shorten the initial term imposed.

R.C. 307.932 is the basic provision governing establishment and operation of community alternative sentencing centers. They may be established on a county or multi county basis and may be operated by a private contractor. They must be inspected and licensed by the Department of Rehabilitation and Correction. Centers are "detention facilities," and for OVI offenders a "jail," but they need not meet the standards for minimum security jails, local detention facilities, or residential units. [307.932(E).]

"Eligible offenders" includes misdemeanants and OVI offenders, whether under state law or municipal ordinance, except when a statute or ordinance specifies a mandatory jail sentence. [307.932(A)(2).] Further criteria are to be set by the center as to which offenders are eligible to be directly sentenced there. [307.932(C).] Following sentencing hearings offenders will be processed through the probation department to assure actual eligibility. [307.932(H)(4).] Work-release or release to perform community service is permitted. [307.932(H)(4)(c) and (d).] As may be relevant to escape charges and subsequent credit for time served, time spent outside the center for work is still under confinement. [307.932(H)(4)(e).]

Diversion

Though not limited to misdemeanor level offenses, merchants, libraries, museums and archival institutions may now establish diversion programs for persons suspected of "unlawful taking, criminal mischief or theft."

CONCURRENT PROBATION SUPERVISION

Those placed under community control sanctions by multiple courts, whether municipal courts, county courts, common pleas courts will now be supervised by a single probation department. This applies to multiple counties as well. The general rule is that "a concurrent supervision offender will be supervised by the court that imposed the longest possible sentence and shall not be supervised by any other court." [2951.022(B)(1).]

Concurrent supervision does not extend to probation and parole or other release supervised by the Department of Rehabilitation and Correction unless an agreement to this effect has been struck. [2951.022(A)(1)(c) and (F).]

When the multiple sentences are equal, supervision will be by the court where the offender lives. When felony and misdemeanor sentences are equal, supervision will be by the municipal court. Courts may agree to other arrangements and to transfer supervision. [2951.022(B)(2) through (4).]

Residential sanctions are served before supervision is consolidated. The supervising court calls the shots on the payment schedule for financial sanctions, and its conditions of supervision supersede conflicting terms. [2951.022(D).]

JUDICIAL RELEASE

There are now two forms of judicial release. Eligibility under R.C. 2929.20 is expanded and R.C. 2967.19 now allows the early release of inmates serving time on less serious offenses with judicial approval.

Upon Motion of the Offender or the Court - R.C. 2929.20

H.B. 86 makes judicial release more widely available. Under previous law eligibility for judicial release was limited to those serving stated (i.e. definite) prison terms of ten years or less. If the stated prison term included mandatory time, an inmate became eligible only after mandatory time had been served. If the sentence included mandatory time, such as on firearm specifications, the ten year cap on the total sentence still applied. Thus a person serving eight years on a first or second degree felony, plus three years on a firearm specification, was not eligible for judicial release.

Under H.B. 86 the ten year cap is gone. Now, "eligible offender" means any person who, on or after April 7, 2009, is serving a stated prison term that includes one or more nonmandatory prison terms." [2929.20(A)(1)(a).] "Nonmandatory prison term" means a prison term that is not a mandatory prison term." [2929.20(A)(2).] The hypothetical person serving time for a high level felony with a firearm specification becomes eligible once the time on the specification has been served. A person subject to a mandatory sentence for rape with a firearm specification would not be eligible for judicial release. But if there was also a consecutive sentence for kidnapping or burglary, eligibility would come after the mandatory time has been served. At some remote time this may help those serving sentences in excess of their life expectancy.

"Eligible offender" continues to exclude those serving a list of felonies committed while they held public office. This portion of the statute is unchanged except for insertion of a reference to April 7, 2009. [2929.20.]

The basic grant of authority to grant judicial release is slightly restated to reflect changes in Division (A)'s definitions: "On the motion of an eligible offender or upon its own motion, the sentencing court may reduce the eligible offender's aggregated nonmandatory prison term or terms through a judicial release under this section." [2929.20(B).]

Division (C) sets the time for filing motions for judicial release. H.B. 10 aids those with five year nonmandatory sentences, who had been left out of the immediately preceding version of the statute.

As before, time always begins to run from the time the offender is delivered to a "state correctional institution." If the sentence includes mandatory time, time runs from the date those terms expire. The date of eligibility is not tied to the level of the offense.

For aggregate terms of less than two years, the wait is thirty days. [2929.20(C)(1).] From two to less than five years the wait is 180 days. [2929.20(C)(2).] A special four-year rule has returned for five year sentences. [2929.20(C)(3).] For sentences greater than five years and up to ten years, the wait is five years. [2929.20(C)(4).] H.B. 86 adds a new rule for longer sentences - half the aggregate nonmandatory sentence, subject to a five year floor. [2929.20(C)(5).]

Returning to earlier hypotheticals, an aggravated robber with a sentence of eight years plus three more on a firearm specification must serve the three years on the spec., then half of the rest of his time. That would be four more years, but the five-year floor kicks in. Eligibility thus comes at eight years. A defendant doing consecutive ten year terms for rape, aggravated burglary and aggravated robbery is eligible after serving the ten year mandatory sentence for rape, plus half of the remaining twenty years. A vindictive sentence of eighty years of nonmandatory time might allow an eighteen year old judicial release before he is sixty, provided there isn't a substantial amount of mandatory time.

The balance of the statute covering procedure remains the same. Key points are the one hearing per applicant rule [2929.20(D)], the need to secure prison records, but not a presentence investigation [2929.20(G)], and the necessity of findings when judicial release is granted on high level offenses carrying a presumption in favor of imprisonment [2929.20(J)].

Upon Motion of the Department of Rehabilitation and Corrections - R.C. 2967.19

The Department may now petition trial courts to release eligible offenders who have served at least 80% of a stated prison term of one year or more. This is a counterpart to risk reduction sentences a court may elect to impose. The procedures set forth within R.C. 2919.19 generally correspond to procedures established for conventional judicial release.

Individuals serving time for the most serious offenses are "disqualified." These include aggravated murder, murder, voluntary and involuntary manslaughter, felonious assault, kidnapping, rape, aggravated arson, aggravated burglary and aggravated robbery. [2919.19(A)(2)(a).] First and second degree felony drug trafficking offenses and racketeering are disqualifying offenses.

[2919.19(A)(1)(e) and (f).] So are "prison term(s) imposed for any sexually oriented offense."
[2967.19(A)(1)(h).] Conspiracy, complicity, and attempts are included. [2967.19(A)(1)(b).]

Eligibility is delayed for individuals serving a "restricted prison term." This includes time on specifications, sentences for human trafficking, and first and second degree felony offenses of violence which are not "disqualifying offense."

This leaves eligible inmates doing time for most drug and theft offenses and lower lever burglaries and robberies.

DRC may apply for judicial release no sooner than 90 days before the 80% threshold will be reached. The inmate must have "commenced service" of the state prison term, meaning they are at a state institution. Nothing in the statute excludes jail time credit from calculation of eligibility, so some individuals may be eligible upon arrival. Since the statute bases calculation of eligibility on the "stated prison term" earned credit may not be applied to advance eligibility. In the event of consecutive sentences, "restricted terms" are counted as served first, then application may be made for release when at least 80% of the remaining time has been served. [2967.19(B) and (C).]

The statute does not require a presentence investigation, but DRC is required to forward an institutional summary report covering program participation and disciplinary action. [2967.19(D).] A copy of the petition must be sent to the prosecutor. Victims must be notified and notice of the petition must be posted on the department's database. [2967.19(E).]

A petition may be denied without a hearing, but a hearing is required if it is to be granted. Video conferencing equipment may be used. The offender may be represented by counsel. Conditions of release may be in accordance with conventional community control sanctions. Nothing is said about appeal, but logically an appeal would lie from erroneous calculation of eligibility or ineligibility. [2967.19(F) through (I).]

RISK REDUCTION SENTENCES

Risk reduction sentences allow some offenders to be released after serving at least 80% of their non-mandatory time. As with R.C. 2967.19 judicial release, discretion is afforded both the trial court and the Department of Rehabilitation and Corrections.

R.C. 2929.143 permits trial courts to recommend a risk reduction sentence, when appropriate, provided:

- The offense is not aggravated murder, murder, an offense of violence that is a felony of the first or second degree, a sexually oriented offense. Attempts, conspiracy, and complicity are included when a F-1 or F-2. This list is somewhat shorter than the list of disqualifying offenses under 2967.19.
- The term of incarceration does not consist entirely of mandatory time.
- The offender agrees to cooperate with the Department's assessment.
- The offender agrees to participate in programming or treatment ordered by the Department based on the assessment.

[2929.143(A)(1) through (4).] As with both forms of judicial release, earned credit does not advance eligibility. [2929.143(B).]

R.C. 5120.036(A) requires the Department of Rehabilitation and Corrections to provide risk reduction programming and treatment for inmates serving a risk reduction sentence. Division (B) calls for a "validated and objective assessment of the person's needs and risk of reoffending." The inmate will receive the benefit of the risk reduction sentence only if he agrees to participate in and successfully completes the assessment and recommended treatment and programming. [5120.036(B) and (C).]

Seemingly the ultimate sentence reduction within the discretion of the Department:

...the department shall release the offender to supervised release after the offender has served each mandatory prison term to which the offender was sentenced, if any, and a minimum of eighty percent of the aggregated nonmandatory prison terms to which the offender was sentenced.

[5120.036.] Earned credit does not advance eligibility for release. [2967.193.]

EARNED CREDIT

Prior to the enactment of S.B. 2 in 1996, R.C. 2967.19 governed time off for good behavior. Good time credit did not apply to reduce the maximum sentence, but did advance the parole eligibility date substantially. There was a distinction between prison time and reformatory time, with those serving a reformatory sentence becoming eligible after serving one third of their minimum or after thirty-six months. Those serving prison sentences had to serve two thirds of the minimum, but even those with lengthy consecutive sentences went to the board after ten and a half years. In a much stingier manner R.C. 2967.193 now allows reductions of one or five days per month for participation in qualifying programs, versus the single day per month under the previous S.B. 2 version of that statute.

Basic Credit

Qualifying programs included, "an education program, vocational training, employment in prison industries, treatment for substance abuse, or any other program developed by the department with specific standards set for performance by prisoners." Programs for treatment as a sex offender are no longer included. [2967.193(A).] Rules may specify criteria for awarding additional credit upon successful completion of a program or activity. [2967.193(B).]

Awards are provisional and may be denied. Infractions under prison rules can lead to withdrawal of previously earned credits. [2967.193(A).] There is an eight percent cap. [2967.191(A)(2).]

No credit may be earned against sentences of death, life without parole, or life, or for "a sentence for a sexually oriented offense that was committed on or after the effective date of this amendment." [2967.193(C)(2) and (3).] None may be earned if so specified within R.C. 2929.13 (guidance by degree of felony), R.C. 2929.14 (basic prison terms), or 2929.143 (risk reduction sentences).

If eligible, an inmate may earn one day of credit per month or five days, depending on how they are classified by R.C. 2967.193(D)(1) through (5).

According to R.C. 2967.193(D)(1) one day of credit may be earned by those convicted under:

- 2903.03 -- voluntary manslaughter
- 2903.04(A) -- basic involuntary manslaughter
- 2903.11 -- felonious assault
- 2903.15 -- permitting child abuse
- 2905.01 -- kidnapping
- 2907.24 -- soliciting after a positive HIV test
- 2907.25 -- prostitution after a positive HIV test
- 2909.02 -- aggravated arson
- 2909.09 -- vehicular vandalism
- 2909.10 -- railroad vandalism
- 2909.101 -- railroad crossing device vandalism
- 2909.26 -- possession of chemical, biological, radiological or nuclear weapons or explosive devices
- 2909.27 -- use of chemical, biological, radiological or nuclear weapons or explosive devices
- 2909.29 -- money laundering in support of terrorism
- 2911.01 -- aggravated robbery
- 2911.02 -- robbery
- 2911.11 -- aggravated burglary
- 2911.12 -- burglary
- 2919.13 -- breaking and entering
- 2919.151 -- partial birth feticide
- 2919.22 -- endangering children
- 2921.34 -- escape

- 2923.01 -- conspiracy
- 2923.131 -- possession of a deadly weapon while under detention
- 2923.162 -- discharge of firearm near prohibited premises
- 2923.32 -- racketeering
- 2925.24 -- tampering with drugs
- 2927.24 -- contaminating substance for human consumption
- A conspiracy or attempt to commit, or complicity in the commission of any of the above.
- A conspiracy or attempt to commit, or complicity in the commission of any other offense for which the maximum penalty is imprisonment for life.

Subdivision (D)(2) allows one day of credit per month to those convicted of a sexually oriented offense committed prior to September 30, 2011, continuing the treatment of such individuals under the previous version of the statute.

Subdivision (D)(3) allows only one day of credit per month when the overall sentence includes a "stated prison term" for "a felony other than carrying a concealed weapon an essential element of which is any conduct or failure to act expressly involving any deadly weapon or dangerous ordinance."

Subdivision (D)(4), applies to those convicted of first and second degree felonies not covered by preceding portions of Division (D). One day of credit per month continues for those convicted before the effective date. Those convicted after September 30, 2011 may earn five days.

Subdivision (D)(5) applies the same rule to those convicted of third, fourth, fifth and unclassified felonies.

Unfortunately no provision was made to allow those already serving time to benefit from the increased allowance of earned credit. (D)(4) and (5) also make it clear that those still facing sentences for crimes committed before the effective date will not benefit.

Additional credit

The statute provides for additional credit for participation in a second program. The statutory language is ambiguous. It is not clear whether this applies to the monthly award of earned credit for both programs, or whether it is limited to bonus days that may be awarded upon completion of a program.

According to division (A), unless excluded from earned credit, and subject to the 8% cap:

...a person so confined who successfully completes two programs or activities of that type may, in addition, provisionally earn up to five days credit toward satisfaction of the person's stated prison term for the completion of the second program or activity. The person shall not be awarded any provisional days of credit

for the completion of the first program or activity for the successful completion of any program or activity that is completed after the second program or activity.

Division (B) states:

The department of rehabilitation and correction shall adopt rules that specify the programs or activities for which credit may be earned under this section, the criteria for determining productive participation in, or completion of, the programs or activities and the criteria for awarding credit, including criteria for awarding additional credit for successful program or activity completion, and the criteria for denying or withdrawing previously earned credit as a result of a violation of prison rules.

Finally, Division (D), which classifies inmates with regard to whether they will receive one or five days of credit, begins by stating:

This division does not apply to a determination of whether a person confined in a state correctional institution may earn any days of credit under division (A) of this section for successful completion of a second program or activity.

Generously construed, these provisions may allow one, two, five or ten days to be earned each month, plus bonus days upon program completion, subject to an 8% cap. Construction focusing on the word "completion" may limit the award to a monthly award plus some bonuses for completion of additional programs.

Other Matters

According to R.C. 2967.193(F) the court is required to give some sort of notice at the time sentencing in accordance with R.C. 2929.14(F)(3). But that provision does not appear in the final version of the 2929.14.

The postrelease control statute has been amended to require two weeks of GPS monitoring when an individual is released if he or she has sixty or more days of earned credit. [2967.28(D)(2).]

JUVENILE COMPETENCY

Previously neither the Juvenile Rules nor the Revised Code addressed competency of juvenile offenders to stand trial. H.B. 86 adds R.C. 2952.51 through 2952.59 to govern the determination of competency and disposition of those found incompetent.

According to R.C. 2152.51(A)(1), "A child is incompetent if, due to mental illness, intellectual disability, or developmental disability, or otherwise due to a lack of mental capacity, the child is presently incapable of understanding the nature and objective of proceedings against the child or of assisting in the child's defense."

The court or any party may move for a determination of competency. Juvenile traffic offender proceedings are excluded. [2152.52(A)(1).] There is a rebuttable presumption that juvenile offenders are competent. [2152.52(A)(2).] A child may be found incompetent without an evaluation if the parties so stipulate, or if there was a prior determination the child was incompetent and could not attain competency. [2152.53(B).]

Once a motion is made, the court has an initial period of fifteen days to decide how to go forward. It may: (1) make a finding of incompetency based on a past determination, (2) determine without a hearing that a competency evaluation is called for, or (3) conduct a hearing to determine whether one is in order. [2152.53.]

R.C. 2152.54 addresses who is qualified to conduct an evaluation. R.C. 2152.55 concerns the setting for the evaluation ("least restrictive" but safe), and materials to be furnished the evaluator. R.C. 2152.56 requires a written report and prescribes its contents. The report may not include an opinion on guilt or on sanity at the time of the offense. Nor may it contain the child's statements concerning details of the alleged offense. The report should address what might be done to offset limited impairment. If it is believed competency might be achieved, recommendations should be made as to how and where.

A report is to be submitted as soon as possible, with a deadline of 45 days. The same time limit applies to independently secured reports. Copies are to be circulated. Dissemination is restricted. Additional evaluation may be ordered. [2152.57.]

A competency hearing is to be conducted "not less than fifteen nor more than thirty days" after the reports are in. The court may take additional evidence or rely on its own observation of the child. Fifteen days are allowed for the court to make a written determination as to competency or incompetency, unless that time is extended. [2152.58.]

If the child is competent, delinquency proceedings may move forwards. [2152.59(A).] If the child is not competent, the court must determine whether competency may be attained within a period of time scaled to the seriousness of the offense charged, and whether or not the child will be in a "residential setting." If it appears competency can be obtained the court may order the child to participate in remedial services in the least restrictive, but appropriate setting. [See 2151.59(C) and (D).] R.C. 2152.59 goes on to address further developments, and calls for dismissal without prejudice if competency is not attained.

JUVENILE FIREARM SPECIFICATIONS

Adults convicted as unarmed accomplices of principals who were armed are subject to the same consecutive terms on firearm specifications as the principal offender. Cf. State v. Chapman (1986), 21 Ohio St. 3d 41. Prior to H.B. 86 so were juveniles committed to the Department of Youth Services. This could mean serving as much as three years.

Now many accomplices will face a consecutive term of no more than one year, provided the juvenile "did not furnish, use, or dispose of any firearm that was involved with the underlying delinquent act or with the other person's specification-related conduct." This applies to the following types of specifications:

- 2941.141 -- One year for possession of a gun while committing an offense.
- 2941.144 -- Six years for possession of an automatic or silenced firearm.
- 2941.145 -- Three years for brandishing, indicating possession, or using a firearm during the commission of an offense.

- 2941.146 -- Five years for discharging a firearm from a motor vehicle.

[2152.17(B)(1).] Juvenile accomplices may still receive terms of up to three years for the following types of specifications:

- 2941.1412 -- Discharging a firearm at a peace or corrections officer.
- 2941.1414 -- Specification that the victim of aggravated vehicular homicide was a peace officer or BCI investigator.
- 2941.1415 -- Specification that the victim of aggravated vehicular homicide had three or more priors for OVI.

[2152.17(B)(2).]

When a child is serving multiple consecutive terms on specifications they are to be aggregated, but the court may order judicial release after one year of the aggregate sentence has been served. [2152.22(D)(1)(1)(b).]

CHRONIC SCHOOL TRUANCY

Based on R.C. 2152.02(F)(2) chronic school truancy makes a child delinquent. Both adults and juveniles may be charged. In In re S.N.V., Franklin App. No. 09AP-432, the Tenth District Court of Appeals construed the use of "and" in former R.C. 2152.021(A)(2) to require both a parent and the child be charged with being a habitual or chronic truant. In the trial court only the child had been charged, leading to dismissal.

R.C. 2152.021(A)(2) has been amended to allow charging either the child, or the child and the parent, guardian, or other person having care of the child. The complaint against the parent must further invoke R.C. 3321.38.

JUVENILE BINDER

Formerly, according to R.C. 2151.023(H), once a juvenile was bound over for trial as an adult the juvenile court lost "jurisdiction to hear or determine the case subsequent to the transfer."

New section 2152.121 softens the effect of mandatory bindover of sixteen and seventeen year olds charged with the most serious offenses, or category two offenses committed with a firearm. It does not benefit juveniles who were bound over at the discretion of a juvenile court following a determination that they were not amenable to rehabilitation within the juvenile system. Nor does it benefit juveniles for whom bindover was mandatory who ultimately were convicted of or pleaded guilty to a mandatory bindover offense. For those who do benefit under R.C. 2152.121 the result is likely to be a "serious youthful offender" sentence pursuant to R.C. 2152.13.

H.B. 86 does not eliminate mandatory bindover. R.C. 2152.10 is not affected and amendments to 2152.12 are primarily adjustments to incorporate 2152.121 into bindover procedures. R.C. 2152.121 applies to:

- 2152.12(A)(1)(a)(i) -- Sixteen and seventeen year olds charged with delinquency premised on aggravated murder, murder, attempted aggravated murder, or murder, when there is probable cause.
- 2152.12(A)(1)(b)(ii) -- Sixteen and seventeen year olds charged with delinquency premised on a category two offense [see 2152.02(CC)] where 2152.10(A)(2)(b) requires mandatory transfer, and when there is probable cause.

It does not apply to:

- 2152.12(A)(1)(a)(ii) -- Fourteen and fifteen year olds eligible for mandatory transfer pursuant to 2152.10.
- 2152(A)(1)(b)(i) -- Sixteen and seventeen year olds charged with delinquency premised on a category two offense where 2152.10(A)(2)(a) requires mandatory transfer.
- 2152.12(A)(2)(a) -- Juveniles previously boundover and convicted of a felony. [Also see 2152.02(B)(5).]
- 2152.12(A)(2)(b) -- Juveniles who in their home state would be subject to prosecution as an adult.
- 2151.12(B) -- Discretionary bindover of children fourteen and older.

R.C. 2152.121 does not begin with plain language stating that a verdict or plea to a mandatory bindover offense is essential to keep a case from returning to the juvenile court. Instead, when the transferee from juvenile court arrived pursuant to one of the two designated sections within the bindover statute, and a conviction of some sort is obtained, the common pleas court judge must determine whether the offense on which conviction was obtained would itself have required mandatory transfer under 2152.12(A) or permitted discretionary transfer under 2151.12(B). [2152.121(B)(1).]

If the offense for which conviction was obtained would have required mandatory bindover, "the court shall impose sentence upon the child under Chapter 2929. of the Revised Code." [2152.121(B)(4).]

If the general division judge determines mandatory transfer was not required and discretionary transfer was not permitted, the case goes back to the juvenile court "which shall impose one or more traditional juvenile dispositions upon the child under sections 2152.19 and 2152.20 of the Revised Code. [2152.121(B)(2).]

If the general division judge determines that the charge on which conviction resulted would not have required mandatory transfer, but would have allowed discretionary transfer the judge is required to impose a proper sentence pursuant to the adult criminal code. But that sentence must be stayed pending further proceedings.

Once the adult sentence has been imposed and stayed further proceeding must take place back in juvenile court. R.C. 2152.121(B)(3) allows some latitude as to the course these may follow.

R.C. 2152.121(B)(3)(a) calls upon the juvenile court to impose a serious youthful offender sentence pursuant to R.C. 2152.13(D)(1). The language of this provision has not been changed by H.B. 86. The juvenile court is to "consider and give preference to" the sentence imposed and stayed by the adult court. Though a hearing is not expressly required by the language of R.C. 2152.121(B)(3)(a), due process and the juvenile rules imply a right for the parties to be heard.

Once the serious youthful offender sentence is imposed the adult court is to be notified. Its sentence terminates and records maintained by the court and other agencies are to be expunged. [2152.121(B)(3)(a).]

Upon transfer of jurisdiction back to the juvenile court:

...the prosecuting attorney in the case may file a motion in the juvenile court that objects to the imposition of a serious youthful offender dispositional sentence upon the child and request that the sentence imposed upon the child (by the adult court) be invoked.

[2152.121(B)(3)(b).] No time is specified for the filing of this motion. The final paragraph of subdivision (B)(3)(b) implies it is to be done before the court proceeds to impose a SYO sentence.

If the prosecutor files a motion a hearing is required to determine whether the juvenile is amenable to care or rehabilitation within the juvenile system or whether community safety requires only adult sanctions. Language in the opening paragraph preceding subdivisions (a) and (b) states: "In no case may a child waive a right to a hearing of the type described in division (B)(3)(b) of this section, regarding a motion as described in that division by the prosecuting attorney in that case." This would seem to imply that a juvenile who is content with the penalty he received in adult court could waive his right to have his case remanded to the juvenile court, where he might face a more severe SYO sentence.

Following the hearing, if the judge grants the prosecutor's motion, the case goes back to the adult court. If the motion is denied the juvenile court is to proceed and impose a SYO sentence.

SEX OFFENDERS

Name Changes

R.C. 2717.01(A) now requires applicants for a name change to disclose "whether the applicant has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for identity fraud or has a duty to comply with section 2950.04 or 2950.041 of the Revised Code because the applicant was convicted of, pleaded guilty to, or was adjudicated a delinquent child for having committed a sexually oriented offense or child-victim oriented offense."

In either event, Division (C) prohibits ordering a name change. With respect to those convicted of identity fraud, an exception is made for individuals whose conviction has been reversed on appeal. No such exception is made for sex offenders, but a reversal would lift the obligation to register, thus allowing a name change.

Possession of Photographs of Victims -- 2950.17

It is now a first degree misdemeanor for a convicted sex offender, child-victim oriented offender, or their delinquent equivalents, to possess a picture of the victim while serving prison time or other term of confinement. The same applies to delinquents.

For child victim offenders or delinquents, it is also an M-1 to possess a photo of any minor child while serving time.

CORRECTIONS

Certificates of Achievement and Employability

The Department of Rehabilitation and Correction is to establish a certificate of achievement and employability program. This is to promote successful completion of vocational training programs. In advance of release an eligible inmate may apply for a "certificate of achievement and employability." This will, or at least may, offset Revised Code and Administrative Code provisions disadvantaging those with convictions, and promote hiring by employers who might reject those with records. [2961.21 through 24.]

Halfway Houses

R.C. 2967.14 now refers to "prisoner(s) otherwise released from state correctional institution(s)" as well as parolees and releasees, and to "reentry centers" as well as halfway houses. Payment rates are no longer based of average daily costs at full occupancy.

Documentation

R.C. 5120.113 directs the Department of Rehabilitation and Correction to prepare written reentry programs for inmates not unless they are on death row serving life without parole, or are expected to serve thirty days or less.

The department is also directed to develop a "single validated risk assessment tool for adult offenders." This is to be used by courts, probation departments, correctional facilities and the parole board. Employees of these entities must be trained in the use of the form. [5120.114.]

Potential Parole of Aged Inmates

Section 10 of H.B. 86 directs the Department of Rehabilitation and Correction to review the cases of all inmates who: (1) are sixty-five or older, (2) eligible for parole, and (3) have already had a statutory first parole consideration hearing. This must be done within ninety days of enactment, meaning by the end of December 2011.

The department is to send a report to the leadership of the General Assembly "that summarizes the findings of its review and that explains why each of those inmates has not been paroled or otherwise released from custody of the Department."

More significantly, the chairman of the parole board is to present these cases to the board which by majority vote may elect to rehear the inmate's case.