ENACTMENT NEWS

Senate Bill 288

Criminal Justice Omnibus

Effective April 4, 2023

On January 3, 2023, Governor DeWine signed S.B. 288 (Sen. Nathan Manning) into law. The bill makes many changes to Ohio's criminal laws. The bill takes effect on April 4, 2023. It was passed by the Ohio Senate by a vote of 29-2 on November 30, 2022, and by the Ohio House on December 14, 2022 by a vote of 79-9. The Senate concurred in House amendments the same day by a vote of 29-1

Note that this is not an exhaustive list of all provisions found in SB 288. For the full bill text or the complete LSC Analysis, visit the SB 288 page on the General Assembly's website.

(Note also that HB 343, the Marsy's Law implementation act, goes into effect two days after SB 288, and amends some sections of the revised code that were also changed by SB 288. The HB 343 amendments were based on prior law, and not on the language as changed by SB 288, unintentionally resulting in some inconsistencies, specifically pertaining to who can inspect a sealed record as well as the types of criminal offenses that can be sealed or expunged and the timelines for holding sealing/expungement hearings.)

Sealing/Expungement

SB 288 makes many changes to sealing and expungement processes in Ohio. Prior law required an applicant for sealing to be an "eligible offender." The bill eliminates this term as well as its definition, and instead requires courts to determine instead whether the applicant is seeking to seal or expunge records of a conviction for an offense that is prohibited from sealing, and whether the application is made after waiting the proper length of time (see below).

In addition to making the determination as to offense eligibility and time eligibility, when considering an application for sealing or expungement, the court must also weigh the considerations found in existing law (whether there are criminal charges pending against the applicant, whether the applicant has been rehabilitated to the court's satisfaction, the reasons for any objection filed by the prosecutor or a victim, the interests of having the records sealed against the legitimate needs of the government to maintain those records).

Prohibited offenses

The following conviction records are ineligible for sealing or expungement:

- Any first- or second-degree felony, or more than two third-degree felonies
- Convictions under the Driver's License Law, license suspension/cancellation/revocation, the Traffic Law-Operation of a Motor Vehicle (include OVI), the Motor Vehicle Crimes Law, the Commercial Driver's License Law, and any substantially similar municipal ordinances
- Any felony offense of violence that is not a sexually oriented offense
- Convictions of a sexually oriented offense when the offense is subject to SORN requirements

- Convictions of an offense in which the victim was less than 13 years old, except for nonsupport (or contributing to the nonsupport) of dependents
- Convictions of domestic violence or of violating a protection order, or of a municipal ordinance that is substantially similar

*Waiting period for seeking **sealing***
SB 288 provides that an offender may apply to have a record of conviction or bail forfeiture sealed after waiting a certain length of time as follows:

- Three years after the offender's final discharge if convicted of one or more third degree felonies, provided none of the offenses are theft in office
- One year after the offender's final discharge if convicted of one or more fourth- or fifth-degree felonies or one or more misdemeanor offenses, provided none of the offenses is theft in office or a felony offense of violence (which is not eligible for sealing)
- Seven years after the offender's final discharge if the record includes one or more convictions of soliciting improper compensation to commit theft in office
- Six months after the offender's final discharge if convicted of a minor misdemeanor
- Regarding bail forfeiture sealing, at any time after the date on which the forfeiture was entered upon the minutes of the court or the journal, whichever occurs first
- If the offender was subject to SORN requirements, at the expiration of five years after the requirements have ended or are terminated by the court

Application and fees for sealing/expungement
The bill allows an offender to apply for application to the sentencing court or, if the offense was committed in another state or in federal court, in any common pleas court. The applicant can request to have the records of more than one case in a single application, subject to a fee of not more than $50, including local court costs. If the applicant presents a poverty affidavit the fee may be waived. Three-fifths of the fee collected is to be remitted to the state treasury, with the remaining two-fifths to the court's local funding authority.

Hearing on the application
The court must hold a hearing on the application to seal or expunge no less than 45 days, but no more than 90 days, from the date of the application's filing. Unchanged by the bill, the prosecutor may file an objection in writing to the court at least 30 days prior to the hearing.

Multiple charges, combination of eligible and ineligible offenses
The bill provides that when a person is charged with two or more offenses as a result of or in connection with the same act and the final disposition of one, and only one, of the charges is a conviction under any section of the Driver's License Law, the law regarding driver's license suspension, cancellation, and revocation, the Traffic Law-Operation of a Motor Vehicle (except OVI and physical control violations), and the Motor Vehicle Crimes Law, or a conviction for a municipal ordinance violation that is substantially similar to any of those laws, and if the records pertaining to all the other charges would be eligible for sealing in the absence of that conviction, the court may order that the records pertaining to all the charges be sealed. In such a case, the court cannot order that only a portion of the records be sealed. This provision does not apply if the person convicted of the offenses currently holds a commercial driver's license or commercial driver's license temporary instruction permit.

Sealing following pardon by governor
If a person has been granted by the governor a pardon upon conditions precedent or subsequent, in reviewing the offender's application for sealing, the bill provides that, along with the other considerations

for sealing outlined above, the court must also determine whether the conditions of the pardon have been met.

Expungement of records
Prior law allows for the records of only a limited number of offenses to be expunged (that is, destroyed, deleted, and erased, as appropriate, so that the record is permanently irretrievable). SB 288 greatly expands the availability of expungement by authorizing a person to apply for expungement in the same manner as sealing as described above, although subject to different waiting periods. Application for expungement may be made at the following times:

- If the offense is a misdemeanor, one year after the offender's final discharge
- If the offense is a minor misdemeanor, six months after the offender's final discharge
- If the offense is a felony, ten years after the time specified at which the person may file an application for sealing
- For bail forfeiture, three years after the date on which the forfeiture was entered upon the minutes of the court or journal, whichever occurs first

Unconditional pardons
Although the bill makes changes to sealing so that expungement of records is available in the same way as sealing, this is not true of Governor's unconditional pardons. In other words, a Governor can issue a writ requiring the sealing of records for an unconditional pardon but still cannot, despite SB 288, issue such a writ expunging records.

Grand Jury Inspection of Local Correctional Facility
Under current law, a grand jury is to inspect the local correctional facility 4 times a year and report on matters at that facility to the common pleas court, with a copy of the report to ODRC. The bill expressly authorizes inspections by grand juries of multicounty correctional centers.

"State of Emergency" Judicial Release
A person is considered a state of emergency qualifying offender if, during the inmate's prison term, the Governor declares a state of emergency that includes the area where the term is being served, and there is a direct nexus between the state emergency and the need for release of the inmate. For example, if the Governor declares another state-wide pandemic emergency and an inmate has health conditions that would put that inmate in greater risk by being in a congregate setting, the inmate is a "state of emergency qualifying offender." Being a "state of emergency qualifying offender" does not preclude eligibility for other forms of judicial or early release.

During a relevant state of emergency, a "state of emergency qualifying offender" may file a judicial release motion along the same timelines currently applicable for judicial release (which are based on the length of the prison term or terms). If the inmate's prison term either does not contain a mandatory prison term or the mandatory prison term has already been served, that inmate can apply for "state of emergency" judicial release at any time. Upon receipt of such a motion, the court may deny the motion without a hearing (but not with prejudice), may schedule a hearing on the motion, or may grant the motion without a hearing. When a court considers such a motion, the court must notify the prosecutor and the prosecutor must notify the victim.

If the court denies the motion without a hearing, it must enter a ruling within 10 days of the motion being filed or after it receives a response from the prosecuting attorney. Prior to the date of the hearing, ODRC is required to send an institutional summary report to the court and, if requested, to the prosecutor.

A court is to grant "state of emergency" judicial release if the court determines that the risk posed by incarceration to the inmate's health and safety (because of the nature of the state of emergency) outweigh the risk to public safety if the inmate were to be released. A court may not grant "state of emergency" judicial release to an inmate imprisoned for an F1 or F2 felony unless a "sanction other than a prison term" would adequately punish the offender, protect the public, and not demean the seriousness of the offense. If a court grants the motion for "state of emergency" judicial release, the court must also place the offender under a community control sanction, not to exceed 5 years and reserve the right to reimpose the reduced sentence if the offender violates the sanction.

80% Release + Judicial Release

Separate from and independent of traditional judicial release, the director of ODRC may recommend in writing to a sentencing court that an inmate should be considered for judicial release. In order for this to happen, the inmate must be an "80% qualifying offender." SB 288 repeals the current 80% release mechanism, but retains its eligibility criteria for this type of judicial release.

If the Director of ODRC submits such a letter to a court, ODRC is required to also supply the prosecuting attorney with notice of the recommendation, an institutional summary report, and any other information that was provided to the court. ODRC is required to notify the victim. If the Director of ODRC submits such a letter to a court, the letter creates a rebuttable presumption in favor of release. The presumption can be overcome if, by a preponderance of the evidence, the prosecutor shows the legitimate interests of the government in confining the inmate outweigh the interests of the inmate in being released.

The court must conduct a hearing on a "80% qualifying offender" release and must enter a ruling within 10 days of the hearing. If the court grants judicial release for an "80% qualifying offender," the court must also place the offender under a community control sanction, not to exceed 5 years and reserve the right to reimpose the reduced sentence if the offender violates the sanction. If a court does not decide on a motion within 10 days of a hearing, the parole board is to facilitate the release.

Transitional Control Veto

Under existing law, the transitional control veto only applies to sentences of 2 years or shorter. SB 288 effectively eliminates the transitional control veto and still manages to add unnecessary complexity to the Revised Code by stating that the veto will apply only to sentences of less than a year or shorter.

Distracted driving

The bill modifies the existing texting-while-driving statute (R.C. 4511.204) to now prohibit operating a motor vehicle while "holding, or physically supporting with any part of the person's body" an electronic wireless communications device ("EWCD") (prior language more narrowly prohibited only texting). The offense, an unclassified misdemeanor, is now a primary offense, and an officer cannot stop a driver unless the officer observes the driver holding or physically supporting the EWCD. For the first six months after the bill's effective date, law enforcement may only issue warnings for violations of the offense.

The bill contains a list of exceptions to the prohibition, some found in prior law with modifications:

1. Using the device to contact, for emergency purposes, law enforcement, a hospital or health care provider, fire department, or other similar entity
2. A person driving a public safety vehicle using the EWCD in the course of the person's duties
3. Using the EWCD while the vehicle is stationary and outside the lane of travel, at a stop light, or while parked on a road due to a closure or emergency
4. Using the EWCD while held to the person's ear for the purposes of making or receiving a call, provided the person does not manually enter numbers into the device

5. Receiving wireless messages for navigation purposes or safety-related information (emergency, traffic, weather alerts), provided the person does not hold or support the device with any part of the body
6. Using the speaker phone function of the device, provided the person does not hold or support the device with any part of the body
7. Using the device for navigation purposes, provided the person does not manually enter numbers, letters, or symbols into the device and does not hold or support the device with any part of the body
8. Using a feature or function of the device with a single touch or swipe, provided the person does not manually enter numbers, letters, or symbols into the device and does not hold or support the device with any part of the body
9. Operating a commercial truck while using a mobile data terminal that transmits and receives data
10. Operating a utility service vehicle, or vehicle on behalf of a utility service, if the person is acting in response to an emergency, a power outage, or a circumstance that affects the health or safety of others
11. Using the EWCD in conjunction with the vehicle or device's voice-operated or hands-free functions, without the use of either hand (except to activate the function with a single touch or swipe), provided the person does not hold or support the device with any part of the body
12. Using technology that physically or electronically integrates the EWCD into the vehicle, provided the person does not manually enter numbers, letters, or symbols into the device and does not hold or support the device with any part of the body
13. Storing the EWCD in a holster, harness, or article of clothing on the person's body

A first-time violation carries a fine of up to $150 and two points assessed against the driver's license. A second offense within two years carries a fine of up to $250 and three points against the driver's license. A third and subsequent offense within two years carries a fine of up to $500, four points assessed against the license, and the court may impose a suspension of the driver's license. On a first offense, however, a driver may attend and successfully complete a distracted-driving safety course. Upon presenting evidence of successful completion of the course to the court, no fine or points will be assessed against the driver's license.

Finally, the bill requires law enforcement officers/agencies and the Attorney General to prepare reports of the race of all individuals charged with violating this new offense.

Strangulation
SB 288 creates the new offense of "strangulation," which is a prohibition against knowingly doing any of the following:

- Causing serious physical harm to another by means of strangulation or suffocation (defined in the bill as "any act that impedes the normal breathing or circulation of the blood by applying pressure to the throat or neck, or by covering the nose and mouth" – *A violation of this division is a second-degree felony*
- Creating a substantial risk of serious physical harm to another by means of strangulation or suffocation – *A violation of this division is a third-degree felony*
- Causing or creating a substantial risk of physical harm to another by means of strangulation or suffocation – *A violation of this division is a fifth-degree felony, except as follows*:
    - *If the victim is a family or household member, or is in a dating relationship with the offender, the offense is a fourth-degree felony on a first offense and a third-degree felony on a subsequent offense*
    - *If the victim is pregnant at the time of the offense and the offender knew the victim was pregnant, the offense is a third-degree felony*

Fraudulent assisted reproduction/assisted reproduction without consent
The bill enacts the criminal offense of fraudulent assisted reproduction and the civil action of assisted reproduction performed without consent, as outlined below.

Criminal action – fraudulent assisted reproduction
The new offense prohibits a health care professional, in connection with an assisted reproduction procedure, from knowingly doing any of the following:

- Using human reproductive material from the health care professional, a donor, or any other person while performing the procedure if the patient receiving the procedure has not expressly consented to the use of that material
- Failing to comply with the standards or requirements of laws governing non-spousal artificial insemination, including the terms of the required consent form
- Misrepresenting to the patient any material information about the donor's profile, including the following information that is, on request and to the extent the physician has knowledge of it, provided to the patient and, if married, her husband: (i) the donor's medical history, including any available genetic history of the donor and persons related to him by consanguinity, the donor's blood type, and whether he has an RH factor, (ii) the donor's race, eye and hair color, age, height, and weight (iii) the donor's educational attainment and talents, (iv) the donor's religious background, (v) or any other information that the donor has indicated may be disclosed; or the manner or extent to which any of the aforementioned will be used.

A violation of the offense is a third-degree felony. If a person violates the prohibition and the violation occurs as part of a course of conduct involving other violations of the prohibition on fraudulent assisted reproduction (involving either one or multiple victims), it is a second-degree felony. The court must notify any professional licensing board of the health care professional's conviction or guilty plea. The offense has a five-year statute of limitations, although prosecution that would otherwise be barred may be commenced within five years after the discovery of the offense by either the aggrieved person or the aggrieved person's legal representative.

Civil action - assisted reproduction procedure performed without consent/use of donor material without consent
The bill also establishes two civil causes of action:

1. For an assisted reproduction procedure performed without consent, and performed recklessly, brought by the patient on whom the procedure was performed or the patient's spouse, or by the child born as a result of the procedure; and
2. A civil action brought by the donor of human reproductive material against a healthcare professional who recklessly did both of the following:
    a. performed an assisted reproduction procedure using the donor's human reproductive material, and
    b. knew or reasonably should have known that the human reproductive material was used without the donor's consent or in a manner or to an extent other than that to which the donor consented.

A plaintiff who is successful in either civil action is entitled to reasonable attorney's fees and either compensatory and punitive damages or liquidated damages of $10,000. A plaintiff who is successful in an action for an assisted reproduction procedure performed without consent is also entitled to be reimbursed for the cost of the procedure.

Both civil actions carry a ten-year statute of limitations, although an action that would otherwise be barred may be brought not later than five years after the earliest date that any of the following occurs: (1) the discovery of evidence based on DNA analysis sufficient to bring the action against the health care

professional, (2) the discovery of a recording providing evidence sufficient to bring the action against the health care professional, or (3) the health care professional confesses and the confession is known to the plaintiff. If a person born as a result of an assisted reproduction procedure discovers any of the above evidence before the person reaches 21 years old, the five-year period begins when the person reaches 21 years of age.

Illegal use or possession of marijuana paraphernalia
With respect to the offense of illegal use or possession of marijuana drug paraphernalia, SB 288 makes the following changes:

- Specifies that arrest or conviction of this offense does not constitute a criminal record and need not be reported by the offender as such
- Eliminates a court's authority to suspend an offender's driver's license
- Removes the offense from the list of offenses that disqualifies an offender for ILC, and as a disqualification for certain categories of service, employment, licensing, or certification

Good Samaritan expansion
Existing law provides certain immunity for a person, not on community control or post-release control, from prosecution for a minor drug possession offense if the evidence for that prosecution was obtained as a result of the person seeking medical assistance or experiencing an overdose and needing medical assistance. The bill expands this Good Samaritan provision to also include immunity from prosecution for possessing drug abuse instruments, or use or possession of drug or marijuana paraphernalia. The bill also removes language excluding individuals on community- or post-release control from being eligible for this immunity.

Transfer of Juvenile to Adult Court
The bill enacts R.C. 2152.022 to clarify transfer of a "case" to adult court means transfer of all charges for which the court found probable cause. The further clarifies that the criminal court has jurisdiction over all counts that are transferred, and any count that is not transferred shall remain within the jurisdiction of the juvenile court to "be handled by that court in an appropriate manner" (R.C. 2151.23 & R.C. 2152.022). These changes were in response to *State v. Smith,* 2022-Ohio-274.

Speedy-trial timeline procedures
Existing law requires a person charged with a felony to be brought to trial within 270 days. Under the bill, if this does not happen, the court may release the person from detention and impose any terms or conditions on the release that it deems appropriate. Upon a motion made at or before the commencement of trial, but not sooner than 14 days before the person is eligible for the release described above, the charges against the person shall be dismissed with prejudice unless trial is commenced within 14 days after the motion is filed and served upon the prosecutor. If no motion is filed, the charges shall be dismissed with prejudice unless the person is brought to trial on those charges within fourteen days after it is determined by the court that the 270-day timeline has expired. The fourteen-day period may be extended at the request of the accused or on account of the fault or misconduct of the accused.

Youthful offender parole review
The bill modifies a current provision that requires a subsequent parole review not later than five years after the parole board denies a special parole review for someone who committed offenses as juveniles that resulted in a life without parole or equivalent sentence. The subsequent review and hearing will now be set in accordance with rules adopted by DRC in effect at the time of the denial. The bill also removes eligibility for the special parole review for youthful offenders who received parole for an offense committed before age 18 and subsequently violate parole as an adult from eligibility (R.C. 2967.132).

Juvenile Protection Order
The bill eliminates language regarding electronic monitoring of indigent respondents (R.C. 2151.34).

Menacing by Stalking Protection Order Fix
The bill addresses a drafting error in R.C. 2903.214, the Menacing by Stalking Protection Order statute, by clarifying that a parent or adult family member may seek a petition on behalf of their "family or household member," not the respondent's "family or household member," as stated in prior law.

Disturbing religious gathering
Existing law includes the offense of disturbing a public gathering (R.C. 2917.12). That offense prohibits a person, with purpose to prevent or disrupt a lawful meeting, procession, or gathering, from either doing any act which obstructs or interferes with the due conduct of such meeting, procession, or gathering, or making any utterance, gesture, or display which outrages the sensibilities of the group.

Generally, the offense is a misdemeanor of the fourth degree. SB 288 now provides that the violation becomes a first-degree misdemeanor if either of the following applies:

- The violation is committed with the intent to disturb or disquiet any group of people met for religious worship at a tax-exempt place of worship, whether the conduct is inside or outside the place the group is meeting, and disturbs the order and solemnity of the assemblage
- The violation is committed with the intent to prevent, disrupt, or interfere with a virtual meeting or gathering of people for religious worship, through use of a computer, computer system, telecommunications device, or other electronic device or system, or in any other manner

Repeat OVI offender specification prison term
Existing law establishes a mandatory prison term for a person charged with a fifth-offense-in-twenty-years specification as a repeat OVI offender. The bill provides that the mandatory prison term applies also if the person had previously been convicted of that specification, regardless of how much time has passed since the previous offenses.

Other OVI and traffic law changes
Underage OVI
Under existing law, unchanged by the bill, a person under the age of 21 can be convicted of OVI if there is *any* trace of alcohol in the person's blood, breath, or urine (as opposed to, for example, a BAC of .08 or above). The bill removes prior convictions of one of these underage OVI offenses as a penalty enhancement for certain other offenses and specifications.

Prison term for F3 OVI clarification
Prior law contained an inconsistency between Title 29 and Title 45 as to whether the maximum prison term for a third-degree felony OVI is 36 months or 60 months. The bill resolves this inconsistency by clarifying that the maximum possible prison term is 60 months.

Community alternative sentencing centers
The bill permits the use of community alternative sentencing centers for F4 OVI offenses.

Harmful intoxicants as drug of abuse
The bill includes "harmful intoxicants" in the definition of "drug of abuse" for purposes of OVI convictions. A "harmful intoxicant" is defined as any compound, mixture, preparation, or substance the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefaction, paralysis, unconsciousness, asphyxiation, or other harmful physiological effects, and includes, but is not limited to, any of the following:

- Any volatile organic solvent, plastic cement, model cement, fingernail polish remover, lacquer thinner, cleaning fluid, gasoline, or other preparation containing a volatile organic solvent;
- Any aerosol propellant;
- Any fluorocarbon refrigerant;
- Any anesthetic gas.
- Gamma Butyrolactone; or
- 1,4 Butanediol.

Driving-in-emergency affirmative defense
Existing law provides a list of driving-under-suspension offenses for which "driving in an emergency" is a permitted affirmative defense. SB 288 adds new offenses to that list: 1) driving under a 12-point suspension, and 2) driving under a suspension imposed for a specified juvenile or underage drinking- related offense, failure to appear in court, failure to pay a fine imposed by the court, or failure to comply with a child support order or with a subpoena or warrant issued by a child support agency.

Speeding violations – enhanced penalties
Under prior law, a violation of R.C. 4511.21 (speeding) is, generally, a minor misdemeanor. That penalty is enhanced to a fourth-degree misdemeanor if a person commits a speeding violation in a specified type of zone (school zone, business district, etc.) and the person "has not been previously convicted of or pleaded guilty to" a speeding violation. The statute, however, was silent as to the penalty for that offense when the person *does* have a prior speeding violation. This resulted in the unintended consequence of a person with no prior speeding violations who speeds in a special zone receiving a higher penalty (an M4) than someone who commits the same offense and *does* have prior speeding violations (defaulting to a minor misdemeanor). SB 288 corrects this oversight by eliminating the reference to past offenses when determining whether the enhanced M4 penalty applies to a person who speeds in a special zone.

The bill also does the following:
- Eliminates the statute of limitations for conspiracy, attempt, or complicity to commit murder or aggravated murder.
- Renames the offense of "petty theft" to "misdemeanor theft"
- Eliminates the mandatory prison term for gross sexual imposition when there is corroborating evidence (see *State v. Bevly,* 142 Ohio St.3d 41 (2015)).
- Decriminalizes the use/possession of fentanyl test strips
- Authorizes the use of CBCFs for Intervention in Lieu of Conviction
- Reduces the offense of underage drinking from an M1 to an M3
- Caps the fee a court may charge for applications for a Certificate of Qualification for Employment to $50 including local court fees
- Imposes the same restrictions on computer use by inmates in a county or municipal jail as those found in existing law on inmates in a DRC correctional institution
- Establishes a mandatory five-year prison term for aggravated vehicular homicide when the victim is a firefighter or an emergency medical worker
- Expands the statutory membership of the Attorney General's Elder Abuse Commission to include, among others, one representative of the Ohio judicial conference.