Note from the Attorney General's Office:

1976 Op. Att'y Gen. No. 76-059 was clarified by
1977 Op. Att'y Gen. No. 77-067.

OPINION NO. 76-059

Syllabus:

When a court imposes a sentence of actual incarceration under the provisions of the Drug Abuse Control Act of 1975 without specifying a maximum or minimum sentence in accordance with R.C. 2929.11, then the period of actual incarceration serves as the minimum term, and the maximum sentence is that which has been prescribed in R.C. 2929.11 for the degree of the offense for which the defendant stands convicted. Accordingly, the Department of Rehabilitation and Corrections is not required automatically to release an offender convicted of a drug offense when the period of actual incarceration has been served.

To: George F. Denton, Director, Ohio Dept. of Rehabilitation and Corrections, Columbus, Ohio

By: William J. Brown, Attorney General, August 24, 1976

I have before me your request for my opinion, which asks:

> "When a court imposes a sentence of 'actual incarceration' without specifying a minimum or maximum sentence under the new Drug Abuse Control Act of 1975, how is the sentence to be set forth in the records of the correctional institution to which the offender is ordered to be imprisoned?"

Your request is prompted by questions which have been raised by a few members of the legal community concerning the correct interpretation of the requirement of "actual incarceration" contained in the new drug law. Arguments have been made that the new concept of actual incarceration supercedes the general indeterminate sentencing provisions of the criminal code of 1974, and constitutes a definite and maximum sentence. It is argued that after an offender serves the period of actual incarceration, the Department of Rehabilitation and Corrections must automatically release the offender. These arguments are clearly incorrect.

For the reasons discussed below, the period of actual incarceration is the minimum term of an indeterminate sentence and the maximum term is that specified in R.C. 2929.11 for the degree of felony of the offense. After an offender has served the period of actual incarceration, the Adult Parole Authority determines whether and when an offender will be released before serving the maximum term specified for the degree of felony.

Ohio's new Drug Abuse Control Act of 1975, Am. Sub. H.B. 300, became effective July 1, 1976. Among other things, this law establishes new penalties for drug offenses and conforms the drug law to the provisions of the new criminal code which became effective on January 1, 1974. The new criminal code adopted in 1973 did not revise Ohio's drug laws.

Under prior drug law, drug offenses had high minimum and maximum sentences. As an example, sale of a narcotic (heroin) (R.C. 3719.20(B)) had a penalty of twenty to forty years. R.C. 3719.99(F). However, a person convicted of sale of heroin could be granted probation, shock probation, shock parole, or parole. R.C. 2947.061, 2951.02, 2967.31 and 2967.13. Thus, there was no legal requirement that such an offender be incarcerated for any period, much less the minimum term of 20 years.

As already noted, H.B. 300 provides new penalties for drug offenses. All felony drug offenses in H.B. 300 are assigned to one of the four degrees of felonies defined in R.C. 2929.11 of the new criminal code of 1974. It was necessary to classify felony drug offenses into one of the four degrees of felonies because the provisions in the criminal code of 1974 on sentencing (e.g., R.C. Chapters 2929 and 2967) are based upon such a classification. Moreover, the maximum term of a sentence is determined by the degree of the felony.

For three selected, especially harmful drug offenses these new penalties include a period of "actual incarceration." This is defined in R.C. 2925.01(D):

> "(D) 'Actual incarceration' means a person is required to be imprisoned for the stated period notwithstanding any contrary provisions for suspension of sentence, probation, shock probation, parole, and shock parole. An offender serving actual incarceration is eligible for time off for good behavior pursuant to Section 2967.19 of the Revised Code if confined in a state penal institution, or pursuant to criteria established by the adult parole authority pursuant to division (E) of Section 2967.01 of the Revised Code if confined in a state reformatory institution, which in either case shall be calculated on a minimum term which is the period of actual incarceration."

Thus, under the new drug law, for these offenses an offender must actually spend a period of time, specified in each offense, incarcerated. The offender convicted of a drug offense requiring a period of actual incarceration may not be released from prison earlier by virtue of provisions for probation, shock probation, shock parole, or parole.

The three offenses requiring actual incarceration are corruption of another with drugs, R.C. 2925.02, trafficking in bulk amounts of drugs, R.C. 2925.03, and theft of drugs, R.C. 2925.21.

In Swisher and Young, Drug Abuse Control (Ohio State Bar Foundation, 1976) at pp. 313-319, it is concluded that actual incarceration supercedes all of the indeterminate sentencing provisions of the criminal code of 1974 and provides a definite term constituting the entire prison term rather than the minimum term of an indeterminate sentence. If that conclusion were correct, a person convicted of one of the three serious drug offenses would be automatically released from prison after serving only the period of actual incarceration. For example, a person convicted of sale of a bulk amount of heroin would automatically be re-

leased after 26 months in prison (length of actual incarceration less good time) and pay no fine while a person merely using heroin could remain in prison up to 5 years (less good time) and be fined $2,500. (Use of heroin is a felony of fourth degree, R.C. 2925.11(C)(1). It would also result in a person convicted of selling more than 3 times a bulk amount of marihuana (600 grams) being automatically released after 10 months but a person selling less than a bulk amount of marihuana (less than 200 grams) could remain in prison for 5 years and be fined $2,500. (Sale of less than bulk amount is a felony of fourth degree, R.C. 2925.03 (E)(1).

These conclusions as to actual incarceration are incorrect for several reasons.

First, by the words of the law, the legislature clearly indicated that the period of actual incarceration was the minimum term in an indeterminate sentence during which period an offender could not be released under provisions elsewhere in the criminal code for suspension of sentence, probation, shock probation, parole and shock parole. Each drug offense (R.C. 2925.02, 2925.03, and 2925.21) which carries a sentence of actual incarceration is also classified into one of the four degrees of felonies established in R.C. 2929.11.

R.C. 2929.11(A) provides:

> "Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder, shall be imprisoned for an indefinite term and, in addition, may be fined. The indefinite term of imprisonment shall consist of a maximum term as provided in this section and a minimum term fixed by the court as provided in this section."

Classification of a drug offense into one of the degrees of felonies would be a superfluous legislative exercise if, as has been argued, actual incarceration is a definite sentence superceding the indeterminate sentencing provisions.

R.C. 2929.11(B) establishes the minimum and maximum terms for each degree of felony. In specifying the degree of felony for each drug offense the legislature made it clear that the provisions of R.C. 2929.11 still apply. The period of actual incarceration required by H.B. 300 merely serves as the minimum term in an indeterminate sentence.

The definition of actual incarceration itself makes it clear that it is a minimum, not maximum, term. R.C. 2925.01(D) provides in part:

> "An offender serving actual incarceration is eligible for time off for good behavior. . . which. . . shall be calculated on a minimum term which is the period of actual incarceration." (Emphasis added.)

It is clear that the legislature, in mandating actual incarceration, did not establish it as a definite sentence but

only as a minimum period of time that, less certain good time, must be served.

Further evidence that actual incarceration is intended to serve as a minimum sentence, and not a definite sentence, is found in R.C. 2951.04, creating a special type of probation under which eligible offenders may obtain treatment for drug addiction. Section R.C. 2951.04(C) provides in pertinent part:

> "If the court finds that an offender is eligible for conditional probation, the court may suspend execution of the sentence imposed after completion of any period of actual incarceration which may be required by Chapter 2925 of the Revised Code, and place the offender on probation subject to Chapter 2951 of the Revised Code and under the control and supervision of the county probation department or the Adult Parole Authority." (Emphasis added.)

This section serves as definite confirmation that actual incarceration is the minimum term of an indefinite sentence. If the period of actual incarceration were a definite sentence after which the Department of Rehabilitation and Corrections is required to automatically release an offender, then R.C. 2925.04 (C) makes no sense.

In summary, what the legislature did in the new drug law was to define certain drug crimes and establish their penalties. In establishing these penalties, the legislature provided that for certain crimes, offenders must serve a period of actual incarceration as a minimum term of an indefinite sentence. The maximum sentence is established in R.C. 2929.11, according to the degree of felony involved. There would seem to be little ambiguity involved in these provisions.

Even assuming arguendo that the definition of actual incarceration were ambiguous and, therefore, required interpretation, it is still clear that the period of actual incarceration is the minimum term of an indefinite sentence. The Ohio Supreme Court recently summarized the applicable maxims of statutory construction in Crowl v. DeLuca, 29 Ohio St. 2d 53, 58 (1972), as follows:

> "In Prosen v. Duffy (1949), 152 Ohio St. 139, this court held, in the first paragraph of the syllabus:
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> 'A statute should be given that construction, unless such is prohibited by the letter of the statute, which will accord with common sense and reason and not result in absurdity or great inconvenience. (Paragraph one of the syllabus in Moore v. Given, 39 Ohio St., 661, approved and followed.)'
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> "The second paragraph of the syllabus in State, ex rel. Haines v. Rhodes (1958), 168 Ohio St. 165, reads:

'The General Assembly is presumed not to intend any ridiculous or absurd results from the operation of a statute which it enacts, and, if reasonably possible to do so, statutes must be construed so as to prevent such results.'

"By the enactment of R.C. 1.49, effective January 3, 1972, the General Assembly itself has acknowledged certain basic rules of statutory construction, the statute providing:

'If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.'"

As discussed above, concluding that actual incarceration provides a definite term constituting the entire term would impute to the legislature the absurd intention of requiring persons convicted of selling large amounts of heroin to be released from prison in 26 months while a person convicted of using heroin could be kept in prison for up to 5 years (less good time). The legislature clearly sought to differentiate between how society deals with those who unlawfully distribute and sell drugs and how it deals with those who are the drug abusers. For the distributors, the legislature mandated minimum prison terms while for the drug abuser the legislature preferred treatment to prison and created a new procedure for pre-trial diversion of drug abusers (R.C. 2951.041) and improved the procedures for probation to treatment (R.C. 2951.04).

The actual incarceration provisions must be interpreted in pari materia with other provisions of the new drug law and the criminal code, including classification of drug offenses by degree of felony, the eligibility requirements for probation to treatment (R.C. 2951.04(C)), and the provisions on indeterminate sentencing (R.C. Chapters 2929 and 2967). Accordingly, even if the definition of actual incarceration were ambiguous, it should be interpreted to give effect to the legislature's obvious intent, to avoid absurd results, and to be harmonious with other interrelated provisions of the criminal law.

The legislative history of H.B. 300 indicates that the objective of actual incarceration was to assure that persons convicted of three especially harmful and premeditated drug offenses spend at least a specified period in prison. The

penalties under the former drug law were lengthy (e.g., 20 to 40 years for sale of heroin). However, there was no assurance that an offender would spend even a day in prison because of many provisions permitting release before serving the minimum term. The legislature in H.B. 300 reduced the minimun penalties for serious drug crimes but required that these minimums were certain and would be served by precluding early release.

My office drafted H.B. 300 as introduced on February 6, 1975 wherein the concept of actual incarceration was developed. Representatives of this office spent hundreds of hours testifying before legislative committees concerning this Act and working closely with sponsors and legislators on this Act. The actual incarceration provisions of H.B. 300 are intended to inform every drug distributor that if apprehended and convicted of one of these three dangerous and premeditated offenses he will be assured of having to spend at least the specified period of actual incarceration in confinement. There is no possibility of early release through suspended sentence, probation, shock probation, or shock parole. Development and support of the concept of actual incarceration was appropriate because of beliefs that the certainty of a specified minimum term of punishment will deter persons from committing these especially harmful drug crimes. Furthermore, while an offender is in prison during the period of actual incarceration, society is protected from any other criminal acts he may commit. Actual incarceration was not intended to replace the system of indeterminate sentencing under the criminal code of 1974. Rather, it is intended to provide certainty of punishment. The period of actual incarceration is the minimum term of an indeterminate sentence which minimum cannot be reduced by probation, shock probation, shock parole or parole while the full length of incarceration (up to the maximum term) would be determined by the Adult Parole Authority.

Representatives of my office explained the concept of actual incarceration and its purpose to the legislature on many occasions, including written testimony to the House Judiciary Committee on February 27, 1975, and to the Senate Judiciary Committee on June 25, 1975. In both written presentations it was explained that the periods of actual incarceration were minimum sentences while maximum sentences were to be determined by the degree of the felony. Representatives of my office participated in each of the many legislative hearings on this law and no one testified that the provisions for actual incarceration had any other possible meaning.

This concept was later applied in development of the Ohio Drug Abuse Control Act Training Manual (Office of Attorney General, March, 1976), used to train the law enforcement community on the new drug bill, which describes the concept of actual incarceration as follows:

> "[T]he sentencing structure contained in the new criminal code (effective January 1, 1974) as set forth in R.C. §2929.11, continues to govern. There was no intention on the part of the drafters of the new drug law or of the legislature to deviate from the standard sentencing practice other than to require that a specified minimum sentence must actually be served. In certain cases, this

requires the establishment of a new higher minimum sentence than otherwise provided in R.C. 2929.11.

"As an example, if a person were convicted of corrupting another with drugs in violation of R.C. §2925.02(A)(3), the drug is a Scheule I or II drug, except marihuana, and the offense is a first offense, then the crime is a felony of the first degree requiring a seven year period of actual incarceration, less good time. The court must sentence the convict to a term of 7 to 25 years under the provisions of R.C. §2929.11 and prescribe that 7 years of this sentence less good time must be served under the provisions of R.C. §2925.02(C)(1). If the offender had previously been convicted of a felony drug abuse offense, then the sentence of 12 years actual incarceration would be mandated. The minimum sentence would therefore be raised to 12 years and the maximum sentence would remain at 25 years under R.C. §2929.11."

The legislators understood the provisions for "actual incarceration" in this way. The Legislative Service Commission, which provides staff services to the legislature, prepared a detailed 52 page summary of H.B. 300 after it had passed the House and had been recommended for passage by the Senate Judiciary Committee. The definition of actual incarceration in the law is identical to Sub. H.B. 300 at the time it was reported by the Senate Judiciary Committee. The Legislative Service Commission (LSC) report on Sub. H.B. 300 clearly described the bill as requiring "minimum mandatory imprisonment." (p. 1, emphasis added.) Summarizing the eligibility requirements for probation to a drug treatment program, this LSC report states that R.C. 2951.04 requires the offender first to have "served any minimum actual incarceration required under drug abuse offenses law." (p. 6, emphasis added.) In describing the penalties for those offenses which require a period of actual incarceration, the LSC report clearly indicated that the maximum sentence (years and fine) was determined by the degree of felony while the period of actual incarceration was the minimum prison term which must be served. For example, the penalty for corruption of another with a Schedule I or II drug (e.g., heroin) is summarized as "7-25 years and/or up to $10,000 (no probation or parole under 7 served)." Thus, the Legislative Service Commission report clearly summarized actual incarceration as retaining all aspects of indeterminate sentencing but establishing a minimum prison term which must be served.

Inasmuch as actual incarceration does, then, preclude an offender's eligibility for release which had earlier been allowed under provisions for suspended sentence, probation, shock probation, shock parole and parole, it does constitute a more severe penalty than penalties under the former drug law. That being the case, actual incarceration may not be imposed for offenses which occurred before July 1, 1976, the effective date of the new offenses. To retroactively apply the more severe penalty of actual incarceration would violate the constitutional prohibitions against ex post facto law.

Therefore, in specific response to your question it is my opinion, and you are so advised, that:

When a court imposes a sentence of actual incarceration under the provisions of the Drug Abuse Control Act of 1975 without specifying a maximum or minimum sentence in accordance with R.C. 2929.11, then the period of actual incarceration serves as the minimum term, and the maximum sentence is that which has been prescribed in R.C. 2929.11 for the degree of the offense for which the defendant stands convicted. Accordingly, the Department of Rehabilitation and Corrections is not required automatically to release an offender convicted of a drug offense when the period of actual incarceration has been served.