



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2020-11

The Honorable Scott Crow
Director, Oklahoma Department of Corrections
P.O. Box 11400
Oklahoma City, Oklahoma 73136-0400

July 16, 2020

Dear Director Crow:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

1. Does the Legislature's delegation of authority to the Oklahoma Department of Corrections ("DOC") to determine the conditions of post-imprisonment supervision ordered pursuant to 22 O.S.Supp.2019, §§ 991a(A)(1)(f) & 991a-21 violate the separation of powers clause of OKLA. CONST. art. IV, § 1?
2. For an offender sentenced to both (i) a term of confinement in DOC custody followed by post-imprisonment supervision pursuant to 22 O.S.Supp.2019, §§ 991a(A)(1)(f) or 991a-21, and (ii) a consecutive suspended sentence under DOC supervision, does the suspended sentence begin when the offender is released from confinement or when the offender has completed the term of post-imprisonment supervision?
3. Is an offender eligible for earned credits under 57 O.S.Supp.2019, § 138 for time served in DOC custody resulting from a sanction or revocation of post-imprisonment supervision?
 - a. If so, is the offender's eligibility subject to credit restrictions that applied to the underlying sentence (e.g., the requirement that persons convicted of crimes listed in 21 O.S.Supp.2019, § 13.1 serve at least 85% of the sentence)?
 - b. Additionally, how is DOC to determine whether an offender's term of confinement for sanction or revocation is subject to earned credit restrictions when the offender's underlying sentence was for multiple crimes, some of which were subject to earned credit restrictions and some of which were not?

4. **For an offender who is released from DOC custody following a sanction or revocation of post-imprisonment supervision, must such release be followed by a new term of post-imprisonment supervision? Alternatively, is the offender only subject to post-imprisonment supervision for the balance of the term that remained at the time of revocation or sanction?**

I. BACKGROUND

By statute, criminal courts in Oklahoma have broad discretion to craft an appropriate sentence. *See* 22 O.S.Supp.2019, § 991a. For instance, if a defendant is convicted of a crime and not subject to the death penalty, the court may impose a sentence but suspend its execution in whole or in part. *Id.* § 991a(A)(1). If the court imposes a suspended sentence with regard to certain sex crimes or crimes involving minor victims,¹ the court may also “order the convicted defendant at the time of sentencing or at any time during the suspended sentence . . . to confinement as provided by law together with a term of post-imprisonment community supervision for not less than three (3) years of the total term allowed by law for imprisonment[.]” *Id.* § 991a(A)(1)(f).

In 2007, the Legislature amended the statutes to which this provision applies, such that offenders convicted of crimes involving sexual abuse or exploitation and sentenced to imprisonment for two or more years—but excluding those sentenced to life or life without parole—*must* serve a term of post-imprisonment supervision as provided in Section 991a(A)(1)(f) under conditions determined by the Department of Corrections (“DOC”).² *See* 2007 Okla. Sess. Laws ch. 261. In 2012, the Legislature enacted another provision, now codified at Title 22, Section 991a-21, mandating post-imprisonment supervision. *See* 2012 Okla. Sess. Laws ch. 228, § 4. Section 991a-21 requires a court to include a term of post-imprisonment supervision in the sentence of anyone “convicted of a felony and sentenced to a term of confinement” with DOC. 22 O.S.Supp.2019, § 991a-21(A). The term of supervision “shall be for a period of not less than nine (9) months nor more than one (1) year following confinement” and is to be served under conditions prescribed by DOC. *Id.*

II. DISCUSSION

Your request first raises a constitutional question regarding DOC’s role in setting the conditions of an offender’s post-imprisonment supervision, and then turns to a series of practical questions regarding the proper implementation of post-imprisonment supervision in various scenarios. We address your questions in that order.

¹ These include violations of “Section 843.5 of Title 21 . . . when the offense involved sexual abuse or sexual exploitation; Sections 681, 741 and 843.1 of Title 21 . . . when the offense involved sexual abuse or sexual exploitation; and Sections 865 et seq., 885, 886, 888, 891, 1021, 1021.2, 1021.3, 1040.13a, 1087, 1088, 1111.1, 1115 and 1123 of Title 21[.]” 22 O.S.Supp.2019, § 991a(A)(1)(f).

² With respect to felony kidnapping that involves sexual abuse or exploitation, any non-life sentence of imprisonment—not just those of two years or more—must be followed by a term of post-imprisonment supervision pursuant to Section 991a(A)(1)(f). *See* 21 O.S.Supp.2019, § 741.

A. Determining the conditions of post-imprisonment supervision is a judicial function and therefore cannot be delegated to DOC, an executive agency.

As explained in Section I, *supra*, offenders who serve terms of post-imprisonment supervision pursuant to Title 22, Sections 991a(A)(1)(f) and 991a-21 are supervised under conditions “determined by” or “prescribed by” DOC.³ You have asked whether the exercise of this authority by DOC infringes on the sentencing powers of the judiciary.

The separation of powers principle found in Article IV, Section 1, of the Oklahoma Constitution provides as follows:

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government *shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.*

OKLA. CONST. art. IV, § 1 (emphasis added). Powers properly belonging to a branch of government are those that are “essential to [its] existence, dignity and functions.” *Vandelay Entm’t, LLC v. Fallin*, 2014 OK 109, ¶ 14, 343 P.3d 1273, 1276 (quoting *Ford v. Bd. of Tax-Roll Corr.*, 1967 OK 90, ¶ 21, 431 P.2d 423, 428). This includes a branch’s “inherent powers”—those whose “subject matter is ‘so ultimately connected and bound up with a branch’s function that the right to define and regulate the subject matter naturally and logically belongs to the branch of government.’” *Id.* (quoting *Ford*, 1967 OK 90, ¶ 21, 431 P.2d at 428) (alterations omitted).

Oklahoma’s legislative power is vested in the Senate and House of Representatives. OKLA. CONST. art. V, § 1. The Legislature has the sole power to make law, and such power cannot be delegated. *Hill v. Am. Med. Response*, 2018 OK 57, ¶ 33, 423 P.3d 1119, 1131. *See also Tulsa Cty. Deputy Sheriff’s Fraternal Order of Police, Lodge No. 188 v. Bd. of Cty. Comm’rs of Tulsa Cty.*, 2000 OK 2, ¶ 8, 995 P.2d 1124, 1128 (“Oklahoma’s non-delegation doctrine is rooted in articles IV and V of the Oklahoma Constitution.”). In matters of criminal law, “the power to define crime and punishment in this State lies with the Legislature.” *State v. Young*, 1999 OK CR 14, ¶ 26, 989 P.2d 949, 955. *See also Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149 (“Legislatures, not courts, define punishment.”).

By contrast, the courts that adjudicate criminal matters are housed in the judicial department. *See* OKLA. CONST. art. VII, § 7; *see also Smith v. State*, 2007 OK CR 16, ¶ 42, 157 P.3d 1155, 1170 (“[A] district court as an entity has jurisdiction over criminal cases[.]”). A central function of the

³ Although Section 991a(A)(1)(f) itself does not require DOC to set conditions of post-imprisonment supervision, that mandate appears in the statutes setting forth the crimes to which Section 991a(A)(1)(f) applies. *See* 2007 Okla. Sess. Laws ch. 261. Specifically, persons imprisoned for such crimes “*shall be required to serve a term of post-imprisonment supervision pursuant to [Section 991a(A)(1)(f)] under conditions determined by the Department of Corrections.*” 21 O.S.2011, §§ 681(B), 843.1(D), 885-886, 891, 1021(D), 1021.2(A), 1021.3(A), 1040.13a(D), 1087(C), 1088(C), 1115 (emphasis added); 21 O.S.Supp.2019, §§ 741, 843.5(E),(H), 888(A), 1111.1(D), 1123(F) (emphasis added). In addition, while the phrasing of these statutes is slightly different than that of Section 991a-21—*i.e.*, “conditions determined by” DOC versus “conditions prescribed by” DOC—the difference is immaterial. In this context, the words “determined by” and “prescribed by” are synonymous.

state's criminal courts is determining whether "the defendant is guilty or innocent; the amount of time the defendant should be imprisoned within the statutory guidelines, or whether the court exercises discretion in granting probation; how much fine he is to pay; or any other issue central to the administration of criminal justice in this state." *State v. Ballard*, 1994 OK CR 6, ¶ 13, 868 P.2d 738, 742. "Imposing judgment and sentence in a criminal case is the business of the courts." *Fields v. Driesel*, 1997 OK CR 33, ¶ 7, 941 P.2d 1000, 1009 (Chapel, J., dissenting).

Finally, DOC is an agency of the executive department, *see Higgins v. Branam*, 2006 OK CR 23, ¶ 2, 137 P.3d 1240, 1244 (Lumpkin, J., concurring in part/dissenting in part), with "exclusive power to operate the state prisons." *Fields*, 1997 OK CR 33, ¶ 21, 941 P.2d at 1005 (citing the Oklahoma Corrections Act of 1967, 57 O.S.2011, § 501 *et seq.*); *see also id.* ¶ 22, 941 P.2d at 1005 ("This Court has recognized for a long time that custody and place of confinement is an administrative matter and not a judicial act."). It is also "[g]enerally . . . the authority of the executive branch to administer sentences." *State ex rel. Mashburn v. Stice*, 2012 OK CR 14, ¶ 23, 288 P.3d 247, 253 (citing *Fields*, 1997 OK CR 33, ¶¶ 20-21, 941 P.2d at 1005).

Turning now to Sections 991a(A)(1)(f) and 991a-21, it is well-established that they are "presumed to be constitutional and will be upheld unless [they are] clearly, palpably and plainly inconsistent with the Constitution." *Lee v. Bueno*, 2016 OK 97, ¶ 7, 381 P.3d 736, 740. It is equally clear, however, that the Legislature may not enact a statute that transfers inherently judicial powers to another branch of government. *See, e.g., Hill*, 2018 OK 57, ¶ 21, 423 P.3d at 1128 ("The separation-of-powers doctrine serves to halt any legislative intrusion upon the role of the judiciary as set out by the constitution."). As noted above, the Legislature has sole authority to define criminal offenses and prescribe the permissible ranges of punishment, but the power to impose such punishment is inherently judicial and, as such, may not be exercised by another branch of government. And, under Oklahoma's sentencing scheme, the power to impose a judgment and sentence includes the authority to set terms and conditions of post-release supervision. So, for instance, "once the power to sentence to probation is granted by the legislature, '[i]t is the sole authority and responsibility of the court imposing a suspended sentence to set forth the terms and conditions governing such suspension [sic],' and, 'the Court cannot delegate its responsibility to state the terms and conditions of suspension.'" *Swart v. State*, 1986 OK CR 92, ¶ 20, 720 P.2d 1265, 1271-72 (alteration in original) (quoting *In re Collyar*, 1970 OK CR 48, ¶¶ 4, 10, 476 P.2d 354, 356-57). A "statutory scheme [that] improperly delegates to [DOC], the power to establish the rules and conditions of probation . . . violates the separation of powers doctrine[.]" *Id.* at ¶¶ 18, 20, 720 P.2d at 1271-72.

At the same time, it is important to distinguish between the authority to determine conditions of a sentence and simply administering the conditions properly imposed by the judiciary. In *Johnson v. State*, 1977 OK CR 255, 568 P.2d 355, the Court of Criminal Appeals explained that while a court "cannot delegate the authority of imposing conditions of [a] suspended sentence to [DOC]," the law "provides that, subject to conditions imposed by the court, [DOC] is given supervisory powers over the defendant while on probation." *Id.* at ¶ 3, 568 P.2d at 356. Supervisory powers include "the power to designate the frequency and times, etc., of reporting" because it is "merely a ministerial function necessary for proper supervision subject to the condition of reporting set out by the court." *Id.*

The Tenth Circuit has recognized this same distinction concerning the delegation of conditions for federal supervised release.⁴ In addressing whether a court violated the separation of powers by delegating to a probation officer the authority to make supervised release recommendations, the Tenth Circuit held a federal “court may delegate limited authority to a probation officer as long as the court retains and exercises ultimate authority over all of the supervised release conditions.” *United States v. Wayne*, 591 F.3d 1326, 1336 (10th Cir. 2010). Thus, when the court’s delegation of authority “merely task[s] the probation officer with performing ministerial acts or support services related to the punishment imposed,” the delegation is permissible. *United States v. Mike*, 632 F.3d 686, 695 (10th Cir. 2011). Conversely, when the court “allow[s] the officer to decide the nature or extent of the defendant’s punishment,” the delegation is impermissible. *Id.* In particular, when the conditions of supervised release implicate a significant liberty interest (e.g., mandated in-patient treatment), the court’s “granting the probation officer the discretion to decide whether such conditions will be imposed is tantamount to allowing him to decide the nature or extent of the defendant’s punishment.” *Id.* at 695-96. This type of delegation of a judicial function is impermissible, *id.* at 695, but it is precisely what Sections 991a(A)(1)(f) and 991a-21 require.

Just as criminal trial courts cannot delegate to DOC the power to impose conditions of post-imprisonment supervision, the Legislature cannot delegate the judiciary’s authority by requiring DOC, an executive agency, to prescribe conditions of post-imprisonment supervision. *See Hill*, 2018 OK 57, ¶ 21, 423 P.3d at 1128. This is not to say the Legislature cannot define the judiciary’s sentencing powers, prescribe permissible punishments, or empower DOC to administer judicially imposed conditions of punishment. *See Rea*, 2001 OK CR 28, ¶ 5, 34 P.3d at 149; *Young*, 1999 OK CR 14, ¶ 26, 989 P.2d at 955; *Johnson*, 1977 OK CR 255, ¶ 3, 568 P.2d at 356. But once the Legislature provided the courts with the power to impose a term of post-imprisonment supervision, the courts have sole authority to determine the terms and conditions of that supervision. *See Swart*, 1986 OK CR 92, ¶ 20, 720 P.2d at 1271-72. Requiring DOC to impose such conditions goes beyond its permissible “ministerial function necessary for proper supervision subject to the condition of [post-imprisonment supervision] set out by the court.” *Johnson*, 1977 OK CR 255, ¶ 3, 568 P.2d at 356.

Accordingly, pursuant to the holdings in *Swart*, *Johnson*, and *In re Collyar*—and consistent with the decisions of the Tenth Circuit based on the same principles—it is the responsibility of the sentencing court to determine and impose the conditions of an offender’s term of post-imprisonment supervision. Because Sections 991a(A)(1)(f) and 991a-21 of Title 22 require DOC to perform that function, the statutes violate the separation of powers principle of Article IV, Section 1 of the Oklahoma Constitution. *See Hill*, 2018 OK 57, ¶ 21, 423 P.3d at 1128; *Swart*, 1986 OK CR 92, ¶ 20, 720 P.2d at 1271–72; *Johnson*, 1977 OK CR 255, ¶ 3, 568 P.2d at 356; *In re Collyar*, 1970 OK CR 48, ¶¶ 4, 10, 476 P.2d at 356-57.

⁴ Federal supervised release is comparable to Oklahoma’s post-imprisonment supervision in that “‘supervised release is not a punishment in lieu of incarceration’; rather, ‘it is a unique method of post-confinement supervision that fulfills rehabilitative ends, distinct from those served by incarceration.’” *United States v. Aplicano-Oyuela*, 792 F.3d 416, 423 (4th Cir. 2015) (quoting *United States v. Buchanan*, 638 F.3d 448, 451 (4th Cir. 2011)).

- B. An offender sentenced to both (i) a term of confinement in DOC custody followed by post-imprisonment supervision pursuant to 22 O.S.Supp.2019, § 991a(A)(1)(f) or § 991a-21, and (ii) a consecutive suspended sentence under DOC supervision must complete the term of confinement and post-imprisonment supervision associated with the first sentence before serving the consecutive suspended sentence.**

You next present a scenario wherein an offender receives two sentences: (1) a term of confinement and post-imprisonment supervision under Section 991a(A)(1)(f) or 991a-21, and (2) a consecutive suspended sentence. You ask whether the offender begins serving the second sentence upon release from confinement or upon completing the term of post-imprisonment supervision.

When an offender receives more than one sentence, the sentencing court may order the sentences to run consecutively or concurrently. 22 O.S.2011, § 976. The term “consecutive” is not defined by the statute and therefore is “to be understood in [its] ordinary sense.” 25 O.S.2011, § 1. When used as an adjective, the term consecutive means “one right after the other.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 482 (3d ed. 2002).

Under Sections 991a(A)(1)(f) and 991a-21, the term of post-imprisonment supervision is part of the offender’s sentence. *See* 22 O.S.Supp.2019, § 991a(A)(1)(f) (“The court . . . may order the convicted defendant at the time of sentencing or at any time during the suspended sentence . . . to confinement as provided by law together with a term of post-imprisonment community supervision”); *id.* § 991a-21 (“[T]he court shall include in the sentence of any person convicted of a felony and sentenced to a term of confinement with [DOC] . . . a term of post-imprisonment supervision.”); *see also Tryon v. State*, 2018 OK CR 20, ¶ 120, 423 P.3d 617, 650 (explaining probation “relates to judicial action taken before the prison door is closed, and is part of the sentence imposed” (quoting *Swart*, 1986 OK CR 92, ¶ 16 n.9, 720 P.2d at 1270 n.9)). *Cf. United States v. Haymond*, ___ U.S. ___, 139 S. Ct. 2369, 2379-80 (2019) (explaining in the context of federal supervised release, “[t]he defendant receives a term of supervised release thanks to his initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime”). As such, the first sentence is not complete until the offender has been released from confinement *and* completed the term of post-imprisonment supervision. Upon completion of the first sentence, the term of the consecutive sentence begins.

- C. Eligibility for earned credits while in DOC custody resulting from (i) a post-imprisonment supervision sanction pursuant to Section 991a-21(C), or (ii) a post-imprisonment supervision revocation pursuant to Section 991a-21(D).**

Your next set of questions concern two actions the State may take against defendants who violate the terms of post-imprisonment supervision: (1) the imposition of a sanction for failing to comply with conditions of supervision, and (2) the revocation of post-imprisonment supervision.⁵ You first ask whether an offender is eligible for earned credits provided for in Title 57, Section 138 when

⁵ Specifically, an offender who “fail[s] to comply with the terms of post-imprisonment supervision” imposed pursuant to Section 991a-21 “may be sanctioned to serve a term of confinement of six (6) months in an intermediate revocation facility.” 22 O.S.Supp.2019, § 991a-21(C). However, nothing in Section 991a-21 “shall prevent the state from revoking, in whole or in part, the post-imprisonment supervision, probation or parole of a person for committing any misdemeanor or felony while under such supervision, probation or parole.” *Id.* § 991a-21(D).

the offender serves a term of sanction or revocation in DOC custody. If so, you ask whether the term of sanction or revocation is subject to any credit restrictions associated with the original sentence. Finally, you ask how DOC is to determine whether a revoked term of post-imprisonment supervision is subject to credit restrictions when an offender's sentence is for multiple crimes, some of which are subject to credit restrictions and some of which are not.

Earned credits reduce an inmate's "term of imprisonment" based on the inmate's assigned class level and achievements. 57 O.S.Supp.2019, §138(A). However, no statute speaks directly to the applicability of earned credits and credit restrictions to confinement resulting from a sanction or revocation of post-imprisonment supervision. Therefore, "[t]o determine legislative intent we may look to each part of the statute, similar statutes, the evils to be remedied, and the consequences of any particular interpretation." *King v. State*, 2008 OK CR 13, ¶ 7, 182 P.3d 842, 844. *See also City of Okla. City v. Int'l Ass'n of Fire Fighters, Local 157, AFL-CIO/CLC*, 2011 OK 29, ¶ 17, 254 P.3d 678, 683 ("Any doubt as to the purpose or intent of a statute may be resolved by resort to other statutes relating to the same subject matter."). In interpreting statutory provisions, if "possible, different provisions must be construed together to effect a harmonious whole." *In re BTW*, 2010 OK 69, ¶ 12, 241 P.3d 199, 205. "Statutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits." *McIntosh v. Watkins*, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096. Accordingly, to ascertain the Legislature's intent regarding the imposition of a sanction or revocation of post-imprisonment supervision, we look to the statutes governing the imposition of a sanction or revocation of probation outlined in Section 991b of Title 22.⁶

Probation is similar to post-imprisonment supervision, as both are terms of conditional supervised release.⁷ *See Wells v. State*, 2016 OK CR 28, ¶ 5 n.2, 387 P.3d 966, 968 n.2 ("Historically, a term of 'probation' as set out in Section 991a(E) acted as a form of post-imprisonment supervision."). A probationer who commits a "technical violation" of the court-imposed rules and conditions of probation may be sanctioned to a term of confinement of up to six months at an intermediate revocation facility. *See* 22 O.S.Supp.2019, § 991b(C), (D)(1). An offender who violates a term or condition of post-imprisonment supervision imposed under Section 991a-21 faces an identical sanction. *See id.* § 991a-21(C).

⁶ Probation "is a procedure by which a defendant found guilty of a crime . . . is released by the court subject to conditions imposed by the court and subject to supervision by [DOC], a private supervision provider or other person designated by the court." 22 O.S.Supp.2019, § 991a(E). Probation is initiated by court order and, subject to certain exceptions, may extend for a term of up to two years. *Id.*

⁷ While probation and post-imprisonment supervision are similar, there are notable differences. Probation may be imposed as part of a suspended sentence whether or not the offender serves a term of confinement whereas post-imprisonment supervision is mandated only when an offender is sentenced to a term of confinement. 22 O.S.Supp.2019, §§ 991a(A)(1), 991a(A)(1)(f), 991a-21. Moreover, the court has discretion whether to impose probation as part of a suspended sentence whereas the imposition of post-imprisonment supervision is mandatory in the circumstances described in Section I, *supra*. While a term of post-imprisonment supervision cannot be less than three years under Section 991a(A)(1)(f) for certain offenses, a term of probation for sex offenses cannot exceed "the expiration of the maximum term or terms of the sentence[.]" *Id.* § 991a(E). For all other felony offenses, a term of probation cannot exceed two years, absent a violation, petition for revocation, or otherwise, whereas a term of post-imprisonment supervision cannot exceed one year. *Id.* §§ 991a(E), 991a-21(A).

Similarly, both probation and post-imprisonment supervision can be revoked. *See* 22 O.S.Supp.2019, §§ 991a-21(D), 991b(E). A term of probation can be revoked in whole or in part after the appropriate due process procedures have been followed and the violation has been proven by a preponderance of the evidence. *Id.* § 991b. The revocation imposes the penalty that was originally suspended. *See Tilden v. State*, 2013 OK CR 10, ¶ 3, 306 P.3d 554, 555 (“The consequence of judicial revocation is execution of a penalty previously imposed in a judgment and sentence.”); *Degraffenreid v. State*, 1979 OK CR 88, ¶ 13, 599 P.2d 1107, 1110 (explaining at revocation hearing, “[T]here is one judgment of guilt and one sentence, and they have already been imposed. The question at the revocation hearing is whether that sentence should be executed.”).

A term of post-imprisonment supervision can be revoked if the offender commits a new misdemeanor or felony offense. 22 O.S.Supp.2019, § 991a-21(D). Upon revocation, the term of confinement for which the offender was originally sentenced has already been satisfied, so the revocation serves as the penalty for the offender’s failure to comply with the conditions of post-release supervision. *Cf.* 18 U.S.C. § 3583(e)(3) (explaining in the context of federal supervised release, when an offender violates “a condition of supervised release,” the court may “revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision”).

Using this framework as a guide, we now turn to your specific questions on this topic.

- 1. An offender who is confined pursuant to a Section 991a-21(C) sanction is *not* eligible for earned credits, while an offender who is confined pursuant to a Section 991a-21(D) revocation *may* be eligible for earned credits.**

As noted above, Section 991a-21 does not address whether an offender serving a term of post-imprisonment supervision sanction or revocation is eligible for earned credits while in DOC custody. Accordingly, we look to Title 57, Section 138 to determine the limitations on accrual of earned credits for offenders confined pursuant to sanction or revocation.

Section 138 provides that “every inmate of a state correctional institution shall have their term of imprisonment reduced monthly, based on the class level they are assigned” and outlines four class levels. 57 O.S.Supp.2019, § 138(A), (D). Relevant to your question, an offender “who is referred to an intermediate revocation facility for violating any of the terms and conditions of probation” is ineligible for earned credits. *Id.* § 138(A). Given the similarities between probation and post-imprisonment supervision described above, it follows that an offender in custody at an intermediate revocation facility pursuant to Section 991a-21(C) is likewise not eligible for earned credits under Section 138(A). There is no reason to assume the Legislature intended such offenders to be treated differently than those subject to the exact same probation sanction under Section 991b(D)(1). *See Int’l Ass’n of Fire Fighters*, 2011 OK 29, ¶ 17, 254 P.3d at 683 (“Any doubt as to the purpose or intent of a statute may be resolved by resort to other statutes relating to the same subject matter.”); *King*, 2008 OK CR 13, ¶ 7, 182 P.3d at 844 (explaining, “[t]o determine legislative intent we may look to each part of the statute, similar statutes, the evils to be remedied, and the consequences of any particular interpretation”). Both forms of conditional supervised release serve to remedy non-compliant behavior of the offender while under supervision.

However, unlike a *sanction* under Section 991a-21(C), a *revocation* of post-imprisonment supervision allowed under Section 991a-21(D) is *not* served at an intermediate revocation facility. Thus, whether an offender in DOC custody as a result of revocation is eligible for earned credits depends on whether the offender's underlying conviction is a crime or sentence enumerated in Title 57, Section 138(A) or (E). The calculation of earned credits "is based on an inmate's classification level under [DOC] policy, which is impossible to predict for a given inmate at a particular time." *Verduzco v. State*, 2009 OK CR 24, ¶ 6, 217 P.3d 625, 627.

For these reasons, an offender in DOC custody resulting from a sanction under Title 22, Section 991a-21(C) is ineligible for earned credits. However, the eligibility of an offender after revocation under Section 991a-21(D) will depend on the eligibility factors outlined in Title 57, Section 138.

2. An offender's term of confinement for revocation of post-imprisonment supervision is not subject to earned credit restrictions.

You next ask whether an offender entitled to earned credits while in DOC custody pursuant to a term of sanction or revocation is subject to any credit restrictions that existed during the underlying offense or sentence. Because an offender who *is sanctioned* to confinement "in an intermediate revocation facility" for violating terms of post-imprisonment supervision is not entitled to earned credits at all, *see* 57 O.S.Supp.2019, § 138(A), this question applies only to offenders in DOC custody after *revocation* of post-imprisonment supervision.

For offenders convicted of certain offenses, Oklahoma law requires that a minimum portion of the sentence imposed must be served before the offender becomes eligible for earned credits. For instance, a person convicted of a felony listed in Title 21, Section 13.1 must serve at least 85% of "any sentence of imprisonment" and is not eligible for earned credits that would reduce the term of imprisonment to less than 85% of the sentence imposed. 21 O.S.Supp.2019, § 13.1; *see also* 21 O.S.2011, § 801 (prohibiting offenders convicted of certain robbery offenses from receiving "any deduction from his sentence for good conduct until he shall have served ten (10) calendar years of such sentence"), 63 O.S.Supp.2019, § 2-401(G)(3)–(4) (requiring an offender to serve 85% percent of the sentence), *id* § 2-415(D)(3) (requiring a three-time convicted trafficker to serve not less than 20 years imprisonment and 50% of the sentence imposed).

These statutory restrictions on an offender's eligibility for earned credits apply during the offender's initial term of confinement. Once an offender serves the minimum term of confinement, the earned credit restriction is lifted. If an offender is then released from confinement and begins a term of post-imprisonment supervision, and subsequently has such supervision revoked, the term of confinement for the revocation would not be subject to the credit restriction. The restriction would have been satisfied prior to the offender's release from confinement. Consequently, an offender's term of confinement for revocation of post-imprisonment supervision is not subject to earned credit restrictions.⁸

⁸ You also ask how DOC is to determine whether a revoked term of post-imprisonment supervision is subject to credit restrictions when an offender is serving concurrent sentences for multiple crimes, some of which are subject to credit restrictions and some of which are not. Because we conclude such restrictions are inapplicable to confinement based on revocation, this question is moot.

D. When an offender is released from confinement that resulted from a sanction or revocation of post-imprisonment supervision, DOC is responsible for supervising the offender for the remaining balance of post-imprisonment supervision, if any.

Finally, you ask whether DOC is responsible for continuing supervision of an offender who is released from custody following sanction or revocation of post-imprisonment supervision, whether under (1) a *new* term of post-imprisonment supervision, or (2) simply the balance of the *existing* term of supervision, if any.

This question is answered, in part, by the Double Jeopardy Clause of the federal and state constitutions, which prohibits an offender from receiving “multiple punishments for the same offense imposed in the same prosecution.” *Pavatt v. State*, 2007 OK CR 19, ¶ 20, 159 P.3d 272, 280; OKLA. CONST. art. II, § 21 (“Nor shall any person be twice put in jeopardy of life or liberty for the same offense.”). Similarly, Oklahoma’s “sentencing statutes contemplate that when a defendant is sentenced he receives only one sentence, not multiple ones.” *Hemphill v. State*, 1998 OK CR 7, ¶ 6, 954 P.2d 148, 150.

Under Section 991a(A)(1)(f), a court may sentence an offender to a term of post-imprisonment supervision at the time of sentencing or any time during the suspended sentence. *See Wells*, 2016 OK CR 28, ¶ 13, 387 P.3d at 970. However, under Section 991a-21, a court can impose a term of post-imprisonment supervision *only* at sentencing, and not upon revocation of a suspended sentence. *See Friday v. State*, 2016 OK CR 16, ¶¶ 4-6, 387 P.3d 928, 930.⁹

To comport with the prohibition against double jeopardy and multiple punishments, an offender must not be assessed a *new* term of post-imprisonment supervision upon release from confinement for sanction or revocation of such supervision. When an offender receives only one term of post-imprisonment supervision—whether at the time of sentencing under Section 991a-21 or at any time during a suspended sentence under 991a(A)(1)(f)—the offender “is not being punished twice for the same offense.” *Wells*, 2016 OK CR 28, ¶ 14, 387 P.3d at 970. Therefore, when an offender is sentenced to confinement and a term of post-imprisonment supervision, the Constitution prohibits the imposition of an additional term of post-imprisonment supervision. *Friday*, 2016 OK CR 16, ¶¶ 1-2, 6, 387 P.3d at 929-30. *See also Wells*, 2016 OK CR 28, ¶ 14 & n.4, 387 P.3d at 970 & n.4 (“Underlying this Court’s opinion in *Friday* is the double jeopardy prohibition against multiple punishments for the same offense”).

Based on the foregoing, an offender released from DOC custody after sanction or revocation of post-imprisonment supervision cannot be ordered to serve a *new term* of post-imprisonment supervision. But if any portion of the *original term* of post-imprisonment supervision remains unexecuted upon release, the offender *is* subject to continued DOC supervision for the remaining term.

⁹ In either case, the term of revocation or sanction should not exceed the maximum statutory term of post-imprisonment supervision (*i.e.*, a maximum term of three-years for offenses outlined in Section 991a(A)(1)(f) and one-year for offenses subject to 991a-21).

It is, therefore, the official Opinion of the Attorney General that:

1. The requirement that post-imprisonment supervision imposed pursuant to 22 O.S.Supp.2019, §§ 991a(A)(1)(f) or 991a-21 is subject to conditions determined by the Oklahoma Department of Corrections violates the separation of powers provision of OKLA. CONST. art. IV, § 1. Determining conditions of post-imprisonment supervision is a judicial function, not an executive one. *See Hill v. Am. Med. Response*, 2018 OK 57, ¶ 21, 423 P.3d 1119, 1128; *Swart v. State*, 1986 OK CR 92, ¶ 20, 720 P.2d 1265, 1271-72; *Johnson v. State*, 1977 OK CR 255, ¶ 3, 568 P.2d 355, 356; *In re Collyar*, 1970 OK CR 48, ¶¶ 4, 10, 476 P.2d 354, 356-57.¹⁰
2. An offender sentenced to both (i) a term of imprisonment followed by post-imprisonment supervision pursuant to 22 O.S.Supp.2019, §§ 991a(A)(1)(f) or 991a-21, and (ii) a consecutive suspended sentence must complete the term of confinement and post-imprisonment supervision associated with the first sentence before serving the consecutive suspended sentence.
3. An offender sanctioned to confinement in an intermediate revocation facility for failing to comply with terms of post-imprisonment supervision pursuant 22 O.S.Supp.2019, § 991a-21(C) is ineligible for earned credits during the term of confinement. 57 O.S.Supp.2019, § 138(A). An offender confined due to revocation of post-imprisonment supervision pursuant to 22 O.S.Supp.2019, § 991a-21(D) may be eligible for earned credits during the term of confinement, depending on the offender's classification level under 57 O.S.Supp.2019, § 138.
 - (a) An offender's term of confinement for revocation of post-imprisonment supervision pursuant to 22 O.S.Supp.2019, § 991a-21(D) is not subject to earned credit restrictions.
 - (b) Because earned credit restrictions are inapplicable to confinement based on revocation pursuant to 22 O.S.Supp.2019, § 991a-21(D), it is unnecessary for DOC to determine how such restrictions would apply to an offender serving concurrent sentences for multiple crimes, some of which are subject to credit restrictions and some of which are not. *See* footnote 8, *supra*.
4. When an offender is released from confinement following sanction or revocation of post-imprisonment supervision pursuant to 22 O.S.Supp.2019, § 991a-21(C)–(D), the Department of Corrections must supervise the offender for the remaining balance of post-imprisonment supervision, if any. *See Wells v. State*, 2016 OK CR 28, ¶ 14, 387 P.3d 966, 970; *Friday v. State*, 2016 OK CR 16, ¶¶ 1-2, 387 P.3d 928, 929-30.

¹⁰ An attorney general opinion that concludes an "act of the legislature is unconstitutional should be considered advisory only, and thus not binding until finally so determined by an action in the District Court of this state." *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 12, 681 P.2d 763, 767. Thus, Sections 991a(A)(1)(f) and 991a-21 remain valid until they are amended by the Legislature or overturned by a court. The remaining conclusions of this opinion are provided with that understanding in mind.



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