THE REAGAN TOKES LAW

SB 201

Effective March 22, 2019

Powerpoint updated through 3/10/2019

REAGAN TOKES 1995-2017

MODERN SENTENCING REFORM

- HB 511 resulted in the adoption of the Model Penal Code and the creation of a Criminal Code in Title 29 of the O.R.C. effective January 1, 1974.
- In 1983, the legislature enacted SB 199, creating aggravated felony ranges.
- The legislature then passed SB 2, a major revamping of Ohio's sentencing laws, effective July 1, 1996.
- HB 86 was enacted on September 30, 2011. The prime goal behind HB 86 and SB 160 was to reduce Ohio's prison population.

IMPORTANT CASES

- In *State v. Foster*, decided on February 27, 2006, the Supreme Court of Ohio held that the statutory requirement (under SB 2) that a trial court must make certain findings before imposing consecutive sentences violated the United States Constitution.
- In *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L.Ed.2d 517 (2009) an Oregon statute that required judicial fact-finding as a prerequisite for the imposition of consecutive sentences was upheld as constitutional.
- In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, decided in 2010, the Supreme Court of Ohio held that *Oregon v. Ice* did not revive the Ohio statutory requirement of judicial fact-finding as a prerequisite for the imposition of consecutive sentences.

SB 201 'THE REAGAN TOKES LAW'

- Covers 435 pages
- Amends 57 R.C. statutes
- Enacts 5 new R.C. statutes
- Incorporates concepts from Marcy's Law regarding victim's rights.
- Is effective on F-1 and F-2 crimes committed on or after March 22, 2019.

SB 201
RETURNS US TO A FORMER APPROACH

- The new law subjects all F-1 and F-2 offenses, not subject to life imprisonment, committed on or after March 22, 2019, to indefinite sentencing.
- The new law categorizes offenses as either "qualifying" or "non-qualifying" and creates formulas for establishing minimum and maximum terms for indefinite sentences on those offenses that are deemed "qualifying" offenses.

QUALIFYING OFFENSE

- A "qualifying" felony is any felony of the first or second degree committed on or after March 22, 2019 that is not subject to life imprisonment.
- A qualifying F-1 or F-2 offense doesn't have to be an offense of violence, doesn't have to contain a particular specification, doesn't have to contain an enhancement clause, or even be labeled as a "qualifying" felony in an indictment.

NON-QUALIFYING OFFENSE

- Any F-1 or F-2 felony offense committed prior to March 22, 2019, or one that is punishable by a term of life imprisonment regardless of the date of the offense, is a non-qualifying felony.
- All F-3, F-4 and F-5 offenses, regardless if committed before or after the enactment date, are also non-qualifying felonies.
- Non-qualifying felonies, regardless of degree, are punishable in the same manner as they are under current law.

INDEFINITE TERM 2929.144

- In order to understand how the range for the indefinite term is quantified or determined, it is first necessary to understand how the minimum and maximum terms that make up the range for the indefinite term are established. (See newly enacted R.C. 2929.144).

VARYING FORMULAS

- Newly enacted R.C. 2929.144 creates formulas for determining the minimum and maximum terms.
- These formulas are variable depending on whether the sentence is:
- 1) For an individual qualifying offense 2929.144(B)(1)
- 2) For a series of non-qualifying or qualifying offenses being sentenced consecutively 2929.144(B)(3) or
- 3) for a series of qualifying offenses being sentence concurrently 2929.144(B)(2)
- In each instance the process for determining the minimum term and the maximum terms is slightly different.

MINIMUM TERM INDIVIDUAL OFFENSE

- The minimum term for an individual offense is selected by the trial judge from the existing sentencing ranges for qualifying F-1 or F-2 offenses in the same manner a judge selects a definite sentence for those offenses today.
- Thus, for a qualifying F-1, the judge will select a term from the existing range of 3, 4, 5, 6, 7, 8, 9, 10, or 11 years, and that number will be the minimum term. If the judge selects 10 years from the range for a qualifying F-1, then the minimum term for that individual offense is 10 years.

MAXIMUM TERM INDIVIDUAL OFFENSE

- The maximum term is the minimum term ***plus*** 50% or ½ of that minimum term imposed on the qualifying offense being sentenced.

DOING THE MATH
INDIVIDUAL COUNT

- 10 years + 50% or ½ of 10 years (5 years) = 15 years.
- The minimum term is 10 years.
- The maximum term is 15 years.
- The indefinite range is 10 years to 15 years.

OFFENSE SPECIFIES A PENALTY

- If the language in a specific statute states a minimum term or specific penalty that must be imposed for that offense, then that specific language controls when setting the minimum term. That figure becomes the minimum term.

CONCURRENT SENTENCING OF MULTIPLE COUNTS WITH AT LEAST ONE OR MORE QUALIFYING OFFENSES

- If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that all of the prison terms imposed are to run concurrently, the ***maximum term*** shall be equal to ***the longest of the minimum terms*** imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a ***qualifying*** felony of the first or second degree for which the sentence is being imposed plus fifty per cent of the longest minimum term for ***the most serious qualifying felony*** being sentenced. 2929.144(B)(3)

UNDERSTANDING THE CONCURRENT FORMULA

- Concurrent sentencing involving one or more qualified terms under R.C. 2929.144(B)(3) is confusing because the formula to define both the minimum and maximum terms depend on different variables.
- For concurrent sentencing, the minimum term is derived from the ***longest of the minimum terms*** imposed, while the maximum term is derived from the longest minimum term for ***the most serious qualifying felony*** being sentenced.

ESTABLISHING THE MINIMUM CONCURRENT TERM

- An offender is sentence on three qualifying counts to concurrent terms.
- In count one, a qualifying F-1 offense, the offender receives a 7-year sentence.
- In count two, a qualifying F-2 offense, the offender receives a 6-year sentence.
- In count three, a qualifying F-2 offense, the offender receives a 5-year sentence.
- The ***longest of the minimum terms*** imposed on the offender for a ***qualifying*** felony of the first or second degree is the 7-year term imposed on count one, therefore, this is the term that will set the minimum term for the indefinite sentence in this example.

LONGEST MINIMUM TERM CONTROLS MINIMUM FOR CONCURRENT SENTENCING

- It is important to note that the 7-year term in count one was selected not because it was the most serious offense, (F-1 vs F-2) but because it has the ***longest of the minimum terms*** imposed.

UNDERSTANDING LONGEST MINIMUM TERM FOR CONCURRENT SENTENCE

- An offender is sentence on three qualifying counts to concurrent terms.
- In count one, a qualifying F-1 offense, the offender receives a 5-year sentence.
- In count two, a qualifying F-2 offense, the offender receives a 6-year sentence.
- In count three, a qualifying F-2 offense, the offender receives a 7-year sentence.
- The ***longest of the minimum terms*** imposed on the offender for a ***qualifying*** felony of the first or second degree is the 7-year term imposed on count three, therefore, this is the term that will set the minimum term for the indefinite sentence in this example.

NOT THE F-1 OFFENSE

- It is important to note that the 7-year term in count three was selected despite it not being the most serious offense, (F-2 vs F-1) because it has the ***longest of the minimum terms*** imposed.

IMPOSING MAX TERMS ON ALL CONCURRENT QUALIFYING OFFENSES?

- R.C. 2929.144 doesn't require a trial court to impose a maximum term on all the qualifying felonies being sentenced. The statute only speaks to ***one*** maximum term.
- Nevertheless, a trial judge will have to reference the potential maximum terms ***for all qualifying offenses*** during the plea colloquy and plea JE because at that point we won't know what the terms are on those individual counts.
- Once we know the individual terms on each count, we can then determine the actual minimum term and maximum term that will form the range.

SAME DEGREE QUALIFYING OFFENSES WITH DIFFERENT PENALTIES IN CONCURRENT SENTENCING

- The bill specifies that it is "the longest of the minimum terms" imposed on the offender that controls how the maximum term will be determined.
- In other words, if a judge imposes a 10-year minimum term on a qualifying F-1 along with a 5-year minimum term on another qualifying F-1, it is the 10-year term that will control the determination of the maximum term and the indefinite range.

MANDATORY TERMS

- The mandatory term is selected and imposed from the current range of terms (R.C. 2929.14(A)(1)(a) or (A)(2)(a)) authorized for the offense, and that mandatory term then becomes the minimum term for that qualifying offense.

LONGEST MANDATORY TERM

- If the court is required to impose the longest term from the appropriate range for the offense, then that term becomes the minimum term.
- This will usually occur with specific qualifying F-1 or F-2 drug offenses.

GUN SPECIFICATIONS

- Gun specifications ***cannot*** be added to increase the maximum term. See 2929.144(B)(4) Gun specifications are imposed separately and ***are served prior to and consecutive to*** the stated minimum term. (See R.C. 2929.14(C)(1)(a).)
- If a judge imposes a 10-year minimum term on a qualifying F-1 offense that also contains a 3-year gun specification, the minimum term is 10 years, not 13 years, and the resulting maximum term is 15 years, not 18 years. (But note: 2929.144(B)(4) doesn't reference the effect of a spec on the minimum term.)
- This will likely cause challenges for trial judges in explaining the potential maximum amount of prison time the offender is facing for purposes of a plea.

MDO SPECIFICATIONS

- The MDO sentence is separate under R.C. 2929.144(B)(4). If any mandatory term on a specification is in addition to the term imposed for the underlying offense, it is not counted in determining the minimum or maximum terms.
- The term imposed on a MDO is not affected by the SB 201 changes, as the court will still sentence on the MDO specification as it has in the past.

RVO SPECIFICATIONS

- The underlying charge that forms the basis of the RVO specification would have to be the longest indefinite term.
- If the offense is an F1, it would be an 11year minimum term plus 5.5 years (50%, or ½) for the maximum term (16.5 years), and then the additional RVO specification (definite time) is separate as selected from the applicable range by the trial court.

SVP SPECIFICATIONS

- Under R.C. 2971.03(B)(3)(a)(b)(c)(d), SVP penalties all have so-called "life tails." Because of the "life tail," the SVP statute controls offenses with SVP specifications.
- R.C. 2971.03 was amended by SB 201 to allow the reference to the minimum term for the SVP, but it doesn't change how the SVP statute is applied. (See R.C. 2971.03.)

OTHER MANDATORY SENTENCES

- The law provides that any third-degree felony offenses that require a mandatory term are sentenced from the current range and are imposed as definite mandatory terms.

CONSECUTIVE SENTENCING

- The new law doesn't change any of the existing provisions on how a trial judge will impose a consecutive sentence. The math will change, but not the principles or procedures.
- The judge will still have to make the findings in R.C. 2929.14(C)(4).

AGGREGATION OF TERMS

- "Qualifying" felonies and "nonqualifying" felonies ***can and will*** be sentenced together, and the new law contemplates consecutive sentencing involving both.
- When a judge decides to impose consecutive sentences, the new law requires a court to aggregate (add together) any consecutively imposed terms (regardless of whether they are qualifying or non-qualifying) and establish an "aggregate minimum term."

EXAMPLE OF AN AGGREGATE MINIMUM TERM INVOLVING 4 COUNTS

- The first is a ***qualifying*** F-1 where the court imposes a minimum term of 10 years.
- The second is a ***qualifying*** F-2 where the court imposes a minimum term of 5 years.
- The third is a ***non-qualifying*** F-3 where the court imposes a definite term of 4 years
- The fourth is a ***non-qualifying*** F-4 where the court imposes a definite term of 1 year.
- All the terms are imposed consecutively.
- The consecutive terms are added together and result in a 20-year aggregate minimum term. (10 years + 5 years + 4 years + 1 year (consecutive) = 20 years.)

DETERMINING THE MAXIMUM TERM FOR CONSECUTIVE SENTENCES

- The aggregate minimum term (total) from the consecutive grouping of individual minimum terms ***is not*** used as the basis for determining the maximum term.
- When ***consecutive*** sentences are in play it is either the longest ***minimum*** term or the ***definite*** term for the ***most serious offense*** that controls. See R.C. 2929.144(B)(2)

REMEMBER THE AGGREGATE MINIMUM TERM WILL NOT CONTROL THE MAXIMUM TERM

- If we have an aggregate minimum term from four separate offenses run consecutively that results in an aggregate minimum term of 20 years (10 + 5 + 4 +1 = 20 years), the maximum term is ***not*** determined from that 20-year aggregate minimum term.
- Rather, it is determined by the offense that has the longest minimum term or definite term for the ***most serious offense*** being sentenced.

JUDGE HAS TO SELECT THE RIGHT COUNT TO GET THE MATH RIGHT. SELECT THE MOST SERIOUS FELONY.

- Under previous example, the offense with the longest minimum term or the definite term for the most serious offense was the F-1 with a 10-year term. The maximum term would be 50%, or ½ of the individual 10year term (5 years), added to the aggregate minimum term (20 years) for a maximum term of 25 years and an indefinite range of 20 to 25 years.
- The 10year term in this example happens to be a qualifying offense, but that's not what's controlling.
- That offense controls because it is the longest minimum term for the ***most serious felony*** being sentenced.

QUALIFYING VS. NON-QUALIFYING DOESN'T MATTER FOR CONSECUTIVE SENTENCING

- Normally, the most serious ***qualifying*** felony will control how the maximum term is determined, but under newly enacted R.C. 2929.144(B)(2), where the terms of a series of offenses are imposed on a case involving a qualifying felony and the term imposed on that qualifying felony is run ***consecutive*** to a more serious non-qualifying felony, ***the most serious felony***, whether qualifying or not, will control the determination of the maximum term.
- The controlling language is "... the maximum term shall be equal to the total of those terms so added by the court plus fifty per cent of the longest minimum term or definite term for ***the most serious felony*** being sentenced." R.C. 2929.144(B)(2). Note: No requirement that the most serious felony be a "qualifying" felony.

EXAMPLE WHERE NON-QUALIFYING DEFINITE TERM CONTROLS MAXIMUM TERM FOR CONSECUTIVE SENTENCING

- Let's assume in one indictment we have one non-qualifying F-1 (pre- March 22, 2019) offense with a definite sentence of 10 years imposed.
- In the same indictment we have one qualifying F-2 (post – March 21, 2019) offense with a minimum term of 8 years.
- The counts are run consecutive.
- The non-qualifying pre-SB 201 10 year term will control determination of the maximum term over the qualifying SB 201 8 year term.
- "…the maximum term shall be equal to the total of those terms so added by the court plus fifty per cent of the longest minimum term or definite term for ***the most serious felony*** being sentenced." R.C. 2929.144(B)(2).

EX POST FACTO PROBLEM?

- Does use of a pre-SB201 non-qualifying definite term to determine the maximum term violate the U.S. Constitution under Article 1, Section 10?
- In other words, does it change the punishment proscribed for that crime by adding a so called "tail" to that term of imprisonment?

IN CONSECUTIVE SENTENCING THE MAXIMUM TERM CAN BE VIEWED AS AN "INDEPENDENT" TERM

- While the maximum term in consecutive sentencing is derived from the longest term from the most serious felony, it is actually applied to the aggregate minimum term total to achieve the maximum term.
- Thus, it is not simply added to the individual term of the most serious felony it was derived from.
- The language in R.C. 2929.144 implies the maximum term is derived from a particular term, but lives "independently" from that original term when attached to the aggregate minimum term.
- This issue will be the subject of considerable debate going forward.

CONSECUTIVE SENTENCING BETWEEN PRE AND POST SB 201 FILES

- Let's assume we have four separate case files set for sentencing.
- The first two files each contain individual F-1 counts for rape (non-qualifying), all committed prior to the enactment of SB 201.
- The last two files each contain one individual F-2 count of robbery (qualifying) committed after the enactment of SB 201.
- Assume the judge imposes 10 years each on the first two F-1 files (non-qualifying) files and then imposes 8 years each on the remaining two (qualifying) F-2 files.
- The judge then orders both 8-year (qualifying) terms and the two 10-year (non-qualifying) terms to all run consecutive.
- 10 + 10 + 8 + 8 = 36 years.

CAN TERMS ON COUNTS BETWEEN FILES CONTROL THE INDEFINITE TERM FOR CONSECUTIVE SENTENCING?

- The new R.C. 2929.144 only speaks of "when sentencing" and doesn't distinguish between sentencing on counts within a case, from cases being sentenced collectively.
- R.C. 2929.144(B)(2) doesn't specify that the order of how terms are imposed between qualifying and non-qualifying offenses impacts the determination of the maximum term.
- Under pre-SB 201 law, when a term is imposed consecutively to another term, it is normally that other term that is controlling. This would suggest one of the pre-SB 201 cases in the above example would determine the minimum and maximum term.

APPLES ARE APPLES AND ORANGES ARE ORANGES

- But other language in the new law seems to be telling us to keep the non - SB 201 files separate from the SB 201 files.
- "When a court sentences an offender to a non-life felony indefinite prison term, any ***definite*** prison term or mandatory ***definite*** prison term previously or subsequently imposed on the offender in addition to that indefinite sentence that is required to be served consecutively to that indefinite sentence ***shall be served prior to*** the indefinite sentence." (See newly enacted R.C. 2929.14(C)(8).)
- This statute doesn't address ***contemporaneously*** imposed sentences.

THE INDEFINITE TERM WILL BE SERVED LAST

- "When a court sentences an offender to a non-life felony indefinite prison term, any ***definite*** prison term or mandatory ***definite*** prison term previously or subsequently imposed on the offender in addition to that indefinite sentence that is required to be served consecutively to that indefinite sentence ***shall be served prior to*** the indefinite sentence." (See newly enacted R.C. 2929.14(C)(8).)
- This provision doesn't clarify how the terms "previously" or "subsequently" imposed are to be reconciled with contemporaneous sentencing of multiple files, but it makes clear the indefinite term is served last.

DRC DETERMINES ORDER THAT TERMS ARE SERVED.

- Invariably friction occurs between how a trial judges imposes terms and how the DRC determines they be served.
- The DRC uses a complicated formula under the Ohio Administrative Code at OAC 5120-2-03.2 to determine the order of how a sentence is served.
- Interestingly, this code section has not been updated to date with the passage of SB 201.

IMPACT OF CONCURRENT SENTENCES ON CONSECUTIVE SENTENCES

- Concurrent terms imposed on either qualifying or non-qualifying offenses don't figure into the aggregate minimum term when consecutive sentencing is in play.
- Only the terms imposed consecutively are added together to determine the aggregate minimum term.

STATE V SAXON

- In *State v. Saxon*, the Supreme Court of Ohio in citing *Foster* said: "a judge sentencing a defendant pursuant to Ohio law must consider ***each offense individually*** and impose a ***separate*** sentence for each offense. Only after the judge has imposed a ***separate*** prison term for ***each offense*** may the judge then consider . . . whether the offender should serve those terms concurrently or consecutively."

DEFINES 'PRISON TERM' AND 'STATED PRISON TERM'

- SB 201 moves away from the word "sentencing" and replaces it with the word "term."
- "Sentencing" is still what a judge does when imposing a prison sanction, but that actual sanction itself is not called a sentence, it is now called a "term."
- The law defines a "prison term" as the term imposed on an individual count and the "stated prison term" as the combination of all definite, indefinite, and mandatory terms imposed.

CHANGES TO CERTAIN SEX OFFENSES UNDER SB 201

- SB 201 expands certain sex offenses where the victim is a minor to include situations where the victim is an impaired person.
- The offenses are pandering obscenity involving a minor, pandering sexually oriented matter involving a minor, and the illegal use of a minor in a nudity-oriented material or performance.
- The net effect is that those offenses will now apply not only when the victim is a minor, but also when the victim is deemed to be an impaired person.
- Where the offense is charged as an F-3, the higher sentencing range for a third-degree felony will apply.

DEFINES 'IMPAIRED PERSON'

- An "impaired person" is a person whose ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age. (See R.C. 2907.321(D)).

POST RELEASE CONTROL (PRC) AND SB 201

- SB 201 eliminates the requirement to impose PRC with respect to any term of life imprisonment. This is a legislative fix from the Supreme Court decision in *State ex rel. Carnail v. McCormick,* 126 Ohio St.3d 124 (2010), which required the advisement even where the offender wasn't eligible to get out of prison.
- No. SB 201 maintains the existing PRC provisions to the same extent for the new indefinite sentences as are currently in place for F-1 and F-2 offenses. (5 years for sex and F-1 offenses and 3 years for F-2 offenses). (See R.C. 2967.28(D) and (F).)
- Each violation is punishable by up to 9 months and the total prison time served for a PRC revocation cannot exceed 50% or ½ of the ***minimum*** term imposed.

PRC ADVISEMENTS AT PLEA AND SENTENCING

- In *State v. Bishop*, 2018-Ohio-5132, decided December 21, 2018, the Supreme Court held that when a defendant currently on postrelease control is entering a guilty plea on a new felony, the trial court ***must inform*** that defendant ***during the Criminal Rule 11 colloquy*** that it is permitted by statute to terminate their existing postrelease control and to sentence the defendant to a consecutive term of imprisonment for violating postrelease control by committing a new felony.
- The traditional advisements should be sufficient, nevertheless trial judges should at least be aware that SB 201 creates three modifications regarding PRC for offenders serving indefinite terms.

RELEASE UNDER INDEFINITE SENTENCING

- SB 201 creates a "presumptive release date" at the end of the minimum term for F-1 and F-2 offenders that is "rebuttable." (See R.C. 2967.271(C).)
- The presumptive release date is the end of the offender's minimum term less any jail time credit awarded. See R.C. 2967.271(A)(2).
- The DRC (Department of Rehabilitation and Corrections) will hold an administrative hearing if the intention is to rebut the presumption of release and keep the offender in prison beyond the minimum term. This will essentially be an internal parole hearing at the institution in an administrative setting.

REBUTTING THE PRESUMPTION OF RELEASE BY THE DRC

- The DRC must find ***one or more*** of the following three conditions present to rebut presumption of release:
- 1) Improper conduct in the institution and a continued threat to society.
- 2) DRC placed the offender in extended restrictive housing at any time within the year preceding the date of the hearing.
- 3) At the time of the hearing, the offender is classified by DRC as a security level three, four, or five, or at a higher security level.
- Trial judge has no input of involvement in this process.
- SB 201 offers no process of appellate review of denial by DRC.

DRC DENIAL OF RELEASE

- If release is denied, DRC may maintain incarceration for a "reasonable time" as specified by the DRC up to the maximum term of imprisonment. The DRC may hold more than one review of release once the presumption is initially denied. This presumes an inmate can petition the DRC for additional reviews. The process will likely have to be established through the DRC administrative rules.

EARNED REDUCTION OF MINIMUM PRISON TERM (ERMPT) OR "GOOD TIME"

- SB 201 adds a provision for "earned reduction of minimum prison term" (ERMPT) of between 5% and 15% off the minimum term. (See R.C. 2967.271(F)(1).)
- The new law identifies "exceptional conduct or adjustment to incarceration" as the basis for awarding the reduction. See R.C. 2967.271.
- Offenders serving terms for any "sexually oriented offense" (under R.C. 2950) are not eligible for ERMPT.

TRIAL JUDGES AND "GOOD TIME"

- SB 201 requires the trial judge to review ***all*** 5% to 15% "good time" ERMPT credit requests the DRC seeks to apply to reduce the offender's minimum term. See R.C. 2967.271.
- The DRC must notify the trial judge in writing 90 days prior of its intent to award the ERMPT credit. The judge will then be required to schedule a hearing on ***all*** ERMPT requests. The prosecutor will have to be notified, and in turn, the prosecutor will have to notify the victim (if applicable), and the victim has right to participate.
- There is a ***rebuttable presumption*** that the offender gets the ERMPT credit once the DRC requests the credit.
- SB 201 doesn't define a standard for rebutting that presumption.

THE "GOOD TIME" HEARING

- The hearing is in open court and it appears the defendant has a right to be present. (Video review may be possible).
- The prosecutor and victim will have an opportunity to present evidence presumably to rebut the presumption.
- There is a debate over what will, or should, be reviewed at the hearing.
- Some believe the hearing should be focused solely on the offender's conduct in prison and not on the prior conduct related to the offense.
- Others believe that because the victim has a right to be present and participate and the court must review the seriousness and recidivism factors under 2929.12, the offender's conduct related to the offense is still relevant.

REBUTTING THE GOOD TIME PRESUMPTION

- The trial court must find ***at least one*** of ***five*** factors to rebut the presumption for ERMPT. (See page 20-21 of main outline.)
- The trial court must notify the DRC in writing of its decision within 60 days after receipt of the notice of the request for ERMPT.
- The statute is silent on appealability of the trial court's determination to rebut or grant the ERMPT requested.

JUDICIAL RELEASE AND SB 201

- Eligibility for judicial release is still tied to the length of time the offender has served in prison.
- The only distinction is that now it will be the non-mandatory ***minimum*** prison term(s) imposed that will determine eligibility.
- Judges and practitioners should focus on the ***minimum*** non-mandatory term or terms for determining eligibility. There are no other changes to R.C. 2929.20.

80% RELEASE REQUEST BY DRC

- The 80% judicial release provision will still be an option for those serving non-life felony indefinite prison terms.
- R.C. 2967.19 incorporates the indefinite terms under SB 201.

THE MAXIMUM SENTENCE ADVISEMENT FOR CRIM. R. 11 AT A PLEA FOR AN INDEFINITE SENTENCE

- Many believe that *State v. Saxon* will still control, meaning we will continue to focus on individual terms imposed for individual offenses.
- Nevertheless, it would seem in the short term that the best practice would be to give the aggregate maximum terms for everything imposed, not only as to the individual offenses, but as to the aggregate for everything imposed (such as gun specifications and other mandatory terms) so there isn't a subsequent claim on appeal that the offender wasn't really advised of the true ***total prison time*** he or she faced.

NEW CRIM. R. 11 PLEA ADVISEMENTS

- SB 201 doesn't address plea advisements or Crim. R. 11.
- SB 201 only addresses advisements that must be given at sentencing.
- Existing Crim. R. 11(C)(2)(a)&(b) requires substantial compliance for most non-constitutional advisements.
- Nevertheless, it would seem overcompliance with details about SB 201 is probably better than undercompliance in the short term.
- Until we get a case from the Supreme Court of Ohio clearly detailing what satisfies Crim. R. 11, there will be ongoing debates over what is required.

SOME POSSIBLE RULE 11 CONSIDERATIONS

- That there is a presumption of release at the end of the minimum term.
- That the presumption is rebuttable by the DRC.
- That the DRC has the authority to maintain incarceration through the end of the maximum term, if the presumption of release is rebutted.

SOME POSSIBLE RULE 11 CONSIDERATIONS

- The general grounds or criteria for the DRC to rebut the presumption. (The specific guidelines will have to be drafted by the DRC.)
- That no matter what, the offender will have to be released at the expiration of the maximum term.
- That the offender may receive between 5% and 15% of earned reduction of minimum prison term credit (ERMPT) for "exceptional conduct or adjustment to incarceration."
- That there is no guarantee that the DRC will request ERMPT for the offender.
- That if ERMPT is requested by DRC, there is a presumption the ERMPT will be granted.

SOME POSSIBLE RULE 11 CONSIDERATIONS

- That even if the DRC request carries a presumption, the trial court still has the ability to rebut the presumption of ERMPT.
- The PRC provision that will apply to offenders regarding imposition of a new indefinite term for violation of PRC (See also *State v. Bishop*, 2018-Ohio-5132, decided December 21, 2018).
- That the maximum cumulative prison term for all PRC violations will not exceed ½ the minimum term as originally imposed as part of the indefinite term.
- Any mandatory terms and any specification terms, if applicable, and the fact they must be served prior to and consecutive to the minimum term and potential maximum term on the indefinite sentence. Or that the minimum term will not be realized until all mandatory and consecutive terms required to be served are first served.
- The potential aggregate maximum sentence (total combined possible time in prison) from all sources.

SB 201 MANDATORY SENTENCING HEARING ADVISEMENTS

- (1) The rebuttable presumption of release;
- (2) The authority for DRC to rebut the presumption and maintain the offender's incarceration in certain circumstances;
- (3) The procedures and criteria for DRC to rebut the presumption and maintain the offender's incarceration and the fact that it may do so more than one time; and
- (4) The required release of the offender on the expiration of the maximum term if the offender has not been released prior to the expiration of that term.
- (5) The PRC provisions that will, or might, apply to the offender, including the provisions regarding imposition of a new prison term for a violation of PRC, and the provisions regarding reduction of the minimum term for related days of confinement. (See 2929.19(B)(2)(c)(i-v).)

SB 201 JOURNAL ENTRY REQUIREMENTS

- In addition to informing an offender of the minimum and maximum term for each qualifying offense on the record, the new law requires these also be recorded in the JE. Journal entries (JE's) will have to be worded to comply with the new law's requirements and also remain compliant with *State v. Baker*. See RC 2929.144(C).

PREPARING FOR SB 201 APPEALS

- Unfortunately, the legislature merely grafted the indefinite sentencing language from SB 201 into existing R.C. 2953.08 and made no effort to provide clarity on the review process. It looks like appellate review will remain mired in an endless review of the undefinable.
- Until the legislature puts as much focus on the review of a sentencing process as it does on the process itself, these problems will continue.

STATE V SAXON

- SB 201 also asks a judge to make the concurrent or consecutive determination ***before*** imposing the maximum term. This appears to be at odds with the logic in *Saxon*. It could undermine the central point of *Saxon* that "there is no potential for error in the sentence for one offense to permeate the entire multi-count group of sentences."
- Appellate panels will enter new territory if they have to reverse an individual term that forms the basis of an aggregate minimum term. It may be that the net effect is no different than what we do today, but it is too early to predict how this will play out. In any event, *Saxon* will likely still be viable after the enactment of SB 201.

CRIM. R. 11 PROBLEMS

- The new RC 2929.144(C) says that the court shall impose the minimum and maximum terms at sentencing, and then state those in the JE.
- On appeal we will no doubt see circumstances where even where the trial court states the minimum and maximum terms for each offense there will likely be problems over how to state other mandatory terms and how they affect the total potential prison time for an offender.

APPEALING "POSSIBILITIES"

- It doesn't appear the defendant can appeal the "possibility" in the direct appeal of something that may or may not happen in the future.
- While there is only a possibility that the presumptive release will be denied or "good time" will not be requested by DRC, failing to do so could be fatal.
- The existing R.C. 2953.08 is silent on this issue.

APPEALING JUDICIAL DENIAL OF GOOD TIME

- There is no provision in SB 201 for appellate review of a trial court's ruling on the ERMPT credit.
- If the trial court denies the ERMPT credit after the DRC recommends it, one could certainly make an argument that it could be appealed.
- After all, it is a judicial order.
- Nevertheless, the statute doesn't contemplate these appeals.

ORIGINAL ACTION WRIT FOR RELEASE

- In the absence of the right to appeal the administrative denial of release at the end of the minimum term or the refusal by DRV to request a "good time" reduction, appellate courts could see original actions filed by inmates.
- However it would seem there would be a jurisdictional issue. It would seem they would have to be filed in Columbus where the DRC is located.

"REBUTTABLE PRESUMPTION"

- While we are all familiar with the term, the new statutes don't define the standard of review for evaluating a decision based on a rebuttable presumption.
- This will only be an issue if it is determined that aspects of SB 201 related to release or good time are reviewable by appellate panels.

(1) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is sentenced on a single qualifying F-1 count to 10 years.
  - Current scheme: 10 years.
  - SB 201: The minimum term is 10 years; the maximum term is 15 years.

(2)SENTENCING HYPOTHETICALS FOR SB 201

- An offender is sentenced to two 3-year terms of imprisonment on two third-degree felony offenses, to be served consecutively.
  - Current scheme: 6-year aggregate term of imprisonment.
  - SB 201: No change; the legislature altered sentencing only on first- and second-degree felonies.

(3) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is sentenced on one count to 10 years of imprisonment for involuntary manslaughter, a first-degree felony, and also is consecutively sentenced on a second count to 10 years of imprisonment for rape, also a first-degree felony, both of which arose from separate events.
- Current scheme: The aggregate term of imprisonment is 20 years (10+10).
  - SB 201: The minimum term is 20 years; the maximum term is 25 years (20 + 1/2 of 10) (under R.C. 2929.144(B)(2)).

(4) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is sentenced to 10 years in count 1 for an F-1; 8 years in count 2 for an F-1; 2 years on count 3 for an F-3 and 2 years on count 4 for an F-3.
- The sentences in counts 1 and 3 were run, but the remaining sentences were imposed concurrently.
  - Current sentencing: The aggregate term of imprisonment is 12 years (10 +2)
  - SB 201: The aggregate minimum term is 12 years; the maximum term is 17 years. See R.C. 2929.144(B)(2).

(5) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is sentenced to 10 years on count 1 a F-1; to 10 years on count 2 a F-1; to 2 years on count 3 an F-3 and 2 years on count 4 an F-3. All four counts were imposed to run consecutively.
  - Current scheme: The aggregate term of imprisonment is 24 years (10+10+2+2).
  - SB 201: The minimum term is 24 years (all the minimum terms for qualifying felonies plus the definite terms on all non-qualifying felonies under the proposed R.C. 2929.144(B)(2)), and the maximum term is 29 years (the maximum term is equal to the minimum term plus 50% of the longest minimum OR definite term for the most serious felony being sentenced).

(6) SENTENCING HYPOTHETICAL FOR SB 201

- An offender in sentenced in Count 1 to 6 years for a F-1 and to 6 years in count 2 an F-1, both with 3 year firearm specs and one year each on counts 3, 4 and 5 all F-s offenses. Counts 1 and 2 merged and counts 3,4 and 5 were run consecutive to count 1.
- Current scheme: 12 years in prison (3+6+1+1+1).
  - SB 201: 3 years on the firearm specification to be served prior and consecutive to a minimum term of 9 years and a maximum term of 12 years (6+1+1+1+1/2 of 6). (The practical result is the offender will serve 12 years at the minimum, up to 15 years.)

(7) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is sentenced to 4 years on count 1 an F-1 and 4 years in count 2 an F-1. In count 3 the offender is sentenced to 5 years for an F-3. All terms imposed are to be consecutively served.
  - Current scheme: The aggregate term of imprisonment is 13 years (4+4+5).
  - SB 201: The aggregate definite and minimum term is 13 years, and the maximum term is 15 years (note that the proposed R.C. 2929.144(B)(2) defines the maximum term as 50% of the longest minimum or definite term *for the most serious felony* being sentenced; the F1's control despite the fact that the F3 carries a longer minimum sentence. The only time a definite sentence would be used for the maximum term calculation is if the offender committed an F1 or F2 before the effective date of SB 201.) (4+4+5+1/2 of 4).

(8) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is sentenced on count one to 6 years on a qualifying first-degree aggravated burglary offense and in count two to 8 years on a qualifying second-degree felonious assault offense. In the third count the offender is sentenced to 7 years on a qualifying second-degree felony drug trafficking offense. All the terms are run concurrent.
  - Current scheme: 8 years in prison. (6+8+7 concurrent).
  - Under SB 201: The minimum term is 8 years taken from ***the longest of the minimum terms imposed*** on the offender for a qualifying felony of the first or second degree for which the sentence is being imposed and the maximum term is 50% or ½ of the 6 year term imposed on count one for the F-1 because it is the longest minimum term for ***the most serious qualifying felony*** being sentenced. Thus the minimum term is 8 years and the maximum term is 11 years. (8 plus 3 years (50% or ½ of 6 years) = 11 years)

(9) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is sentenced in one count to 3 years of imprisonment for first-degree drug trafficking, and also is sentenced in a second count to 3 years for a first-degree drug trafficking offense. In addition, the offender is sentenced on a third count to 60 months for robbery under R.C. 2929.14(A)(3)(a). All sentences imposed are to be concurrently served.
  - Current scheme: 5 years in prison (3+3+5 concurrent).
  - SB 201: Unclear. Under R.C. 2929.144(B)(3), the minimum term is 3 years and the maximum term is 4.5 years; however, the definite 60-month term on the F3 under R.C. 2929.14(C)(3)(a) must be served, which would render the minimum and maximum terms irrelevant. Subdivision (B)(3) does not answer this problem.

(10) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is sentenced to 6 years of imprisonment on one count for felonious assault, a second-degree felony, and also consecutively sentenced in a second count to 10 years of imprisonment for rape, a first-degree felony, both of which arose from separate events and both of which included a three-year firearm specification attendant to the base offenses.
  - Current scheme: The aggregate term of imprisonment is 22 years (3+6+3+10); the firearm specs are mandatory and must be served prior and consecutive to the sentences imposed on the base offenses under R.C. 2929.14(C)(1)(a), and both sentences on the firearm specs are mandated under R.C. 2929.14(B)(1)(g).
  - SB 201: 6 years of mandatory time on the firearm specs, same as above. The minimum term on the base offenses is 16 years and the maximum term is 21 years. (Under R.C. 2929.144(B)(4), the sentences imposed on the specifications are separate and not to be considered in calculating the maximum term; and under the proposed R.C. 2929.14(A)(1)(a), the minimum term is defined as the term selected by the court of three, four, five, six, seven, eight, nine, ten, or eleven years) (10+6+1/2 of 10). (NOTE: The aggregate term of imprisonment, practically speaking, is 22-27 years, but in actuality, the term should be stated as 6 years on the firearm specs to be served prior and consecutive to the minimum term of 16 years with a maximum term of 21 years on the base offense in light of the statutory language that precludes the court from considering the sentences on the specs in computing the maximum term.)

(11) SENTENCING HYPOTHETICAL FOR SB 201

- An offender is consecutively sentenced to life without the possibility of parole on a rape offense, and five years to life on each of two counts for gross sexual imposition, all with associated attendant sexually violent offender specifications.
  - Current scheme: The offender must serve a life sentence with the possibility of parole after 10 years (R.C. 2971.03(E)) followed by a life sentence without the possibility of parole.
  - SB 201: No practical change. R.C. 2971.03(A) is expressly applicable to sentencing for sexually violent predator specifications notwithstanding R.C. 2929.14, which sets forth the new indefinite sentencing. Since R.C. 2929.14 does not apply to sentencing under R.C. 2971.03, by implication, the proposed R.C. 2929.144 is also not applicable. (NOTE: R.C. 2971.03 was amended to reflect that the minimum terms applicable to the SVP sentencing are the minimum terms under the proposed R.C. 2929.14(A), but the life tail remains the same.)

(12) SENTENCING HYPOTHETICAL FOR SB 201

- The offender is sentenced on one count to 11 years on an F1 offense of violence with an associated repeat violent offender specification under R.C. 2941.149, for which the court imposes an additional definite term of 10 years under R.C. 2929.14(B)(2)(a).
  - Current scheme: 21 years. Under R.C. 2929.14(B)(2)(d), the additional definite time is to be served prior and consecutive to the sentence imposed on the underlying offense (10+11).
  - SB 201: 10 years of definite prison time to be served prior and consecutive to the minimum of an 11-year term up to the maximum 16.5 (the practical result is the offender will serve 21 years at a minimum, up to 26.5 years).

PENDING CASES

- *State v. Gwynne,* 2017-1506,
- *State v. Jones,* 2018-0444,
- *State v. Hitchcock*, 2018-0012