Back to the Future

Revised 3/10/2019

Reagan Tokes (1995-2017)

The Reagan Tokes Law (SB 201) and Ohio's return to indefinite sentencing

An introductory question and answer summary on the new law

NOTE: Revised through 3/10/2019. Please disregard earlier versions or undated versions. Please email scg@8thappeals.com to request updated versions as they become available.

Judge Sean C. Gallagher
Ohio Court of Appeals, 8th District

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I. Introduction:

On October 4, 1989, Ronnie Shelton, a rapist from Cleveland, was sentenced to 3,196 years in prison. It was one of the longest recorded prison terms in Ohio history. *(See Unfinished Murder: The Capture of a Serial Rapist, Gallery Books (2002) by James Neff.)* At the time of his appeal, Shelton didn't challenge his sentence. There were no statutory grounds to appeal an indefinite sentence that fell within the proper range at the time of Shelton's conviction. *State v. Shelton,* 8th Dist. Cuyahoga No. 58737, 1991 Ohio App. LEXIS 3144, June 27, 1991.

Today, nearly every felony sentence is appealable. Trial judges, prosecutors and defense counsel spend as much time strategizing over sentencing issues as their counterparts did with trial tactics a generation ago. Sentencing hearings, along with plea hearings, are the new trials.

The new "Reagan Tokes Law" (SB 201) returns indefinite sentencing to Ohio. The new law, effective for crimes committed on or after March 22, 2019, will increase the complexity of both plea and sentencing hearings.

The law covers 435 pages, amends 57 existing O.R.C. sections, and enacts 5 new O.R.C. sections. The Q and A format in this document is used to provide judges and criminal practitioners with a basic introductory review of these changes.

This summary doesn't cover every aspect of the new law nor does it examine every possible nuance that will result from its enactment. Some of the conclusions in this summary may be subject to debate and may well prove, over time, to be erroneous. The goal of this summary is to provide an introductory discussion for judges and practitioners exposed to the new law for the first time.

II. The modern historical landscape:

Q. What is the recent history of Ohio's approach to felony sentencing?

Looking back on Ohio's recent approaches to felony sentencing gives the Reagan Tokes Law context. The new law, effective for specified crimes committed on or after March 22, 2019, represents the fifth major sentencing reform enacted by the legislature since the adoption of the criminal code (Title 29) in 1974. Ohio's felony sentencing reforms can best be described as "phases." Each phase brought new requirements that increased the complexity of Ohio's sentencing procedures.

Q. What were these phases?

First phase: HB 511

-Passage of Am. 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.
-The new code established four felony levels (F-1 to F-4).
-The trial judge set the minimum term of imprisonment from an indeterminate range. -The parole board determined release date within the range of the sentence.
-The code allowed time off for good behavior.

Second phase: SB 199

-In 1983, the legislature enacted SB 199, creating aggravated felony ranges.
-The new ranges created mandatory minimum prison terms for many crimes. -The bill created two non-mandatory determinate prison ranges for low level nonviolent felons.
-The bill introduced the three-year mandatory sentence for having a gun while committing a felony.
-The bill added eight new prison ranges to the original four ranges.

Third phase: SB 2

-In August 1990, the legislature created the Ohio Sentencing Commission.
-The Commission's first report was released on July 1, 1993.
-The report recommended an overhaul of Ohio's sentencing laws.
-The legislature then passed SB 2, a major revamping of Ohio's sentencing laws, effective July 1, 1996.

SB 2 changed hundreds of provisions of the state's criminal code and reworked the way convicted felons were sentenced. It made these key changes:

1. Implemented so-called "truth in sentencing" standards by imposing definite prison terms for most felons sent to prison and eliminated "good time" and parole.
2. Created "presumptions" either for or against incarceration for various offense levels and enacted a process for appellate review.
3. Broadened the range of sanctions that a judge could impose, including community control sanctions, residential sanctions, and financial sanctions.

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; it therefore severed that requirement (and certain other fact-finding requirements, as well) from the statute.

In 2009, three years after *State v. Foster*, the Supreme Court of the United States decided *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L.Ed.2d 517 (2009). In that case, 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. The Supreme Court did note, however, that as a result of *Oregon v. Ice*, the Ohio General Assembly was free to enact new legislation requiring that findings be made.

Fourth phase: HB 86

HB 86 was enacted on September 30, 2011. The bill was the most comprehensive rewrite of Ohio's sentencing laws since the adoption of SB 2 in 1996. HB 86 and the "clean up" provisions in SB 160, enacted in 2012, were the legislature's response to the Ohio Supreme Court's decision in *Hodge*.

The prime goal behind HB 86 and SB 160 was to reduce Ohio's prison population. HB 86 increased the monetary thresholds for theft offenses, equalized the distinction between crack and powdered cocaine, placed limitations on trial judges sentencing F-4 and F-5 offenders to prison, and offered a so-called "*Foster* fix" for consecutive sentencing findings.

III. Ohio's return to indefinite sentencing -- The Reagan Tokes Law and SB 201:

Q. Who was Reagan Tokes and why do we have a return to indefinite sentencing?

On Feb. 8, 2017, Reagan Tokes was abducted, robbed, raped, and murdered. She was a 21-year-old senior at Ohio State. Her assailant had just been released from prison after serving 6 years on a rape conviction. He had over 50 institutional violations in five different prisons during the course of that incarceration. Because he served a definite sentence, he was released at the end of his term despite the risk he posed to the community. Upon release, he was on postrelease control, was registered as a sex offender, and was even wearing a GPS ankle monitoring bracelet.

The Tokes family and supporters were outraged that such a dangerous offender was released back into the community and demanded change. The legislature responded with SB 201 ("The Reagan Tokes Law") and ushered in Ohio's return to indefinite sentencing. (See generally R.C. 2901.011.)

IV. SB 201 -- The Reagan Tokes law:

A. Understanding qualified offenses, non-qualified offenses, minimum terms, maximum terms, and indefinite terms:

Q. What is the focus of the new law?

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.

Q. How does the new law categorize offenses?

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. (See R.C. 2929.144)

The offenses that are categorized as "non-qualifying" are subject to same definite terms as they presently are under current law.

Offenders who commit qualifying felony offenses on or after the effective date of the law are subject to an indefinite term of imprisonment. The language in the bill replaces the word "sentence" with the word "term" when describing the sanction of imprisonment.

Q. What is a "qualifying" felony?

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.

As long as the offense is an F-1 or F-2 committed on or after March 22, 2019, and is not subject to life imprisonment, it is a "qualifying" felony. Qualifying felonies are subject to the new indefinite prison terms.

Q. Why are F-1 and F-2 offenses with a "life tail" committed on or after March 22, 2019 not considered "qualifying" offenses?

F-1 and F-2 offenses committed on or after the effective date (*e.g.*, a capital offense, a felony requiring a term of life imprisonment, or a felony covered by the Sexually Violent Predator Sentencing law) already carry an indefinite term so they are not subject to the bill's indefinite sentencing process. For this reason, F-1 and F-2 offenses committed on or after the effective date that carry a term of life imprisonment are "non-qualifying" offenses. The new law defines the sentence imposed on qualifying offenses as a "non-life felony indefinite prison term." (See R.C. 2929.01(FFF)).

Q. What is a "non-qualifying" felony?

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. They remain subject to the same definite terms the trial judge currently selects from the sentencing ranges available for the degree of that particular offense. Non-qualifying felonies are not subject to indefinite sentencing, except in very limited circumstances discussed below.

Q. How is the new indefinite term quantified or determined?

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).

B. Imposing a single term on an individual offense:

Q. What is the minimum term and how is it determined?

The minimum term 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. (See R.C. 2929.14(A)(1)(a) or (A)(2)(a).)

It is important to understand that under the newly enacted R.C. 2929.144 the process of determining the minimum term for an offense can be different depending on whether the sentence is being imposed for an individual offense (R.C. 2929.144(B)(1); a series of offenses with consecutive terms (R.C. 2929.144(B)(2); or a series of offenses with concurrent terms (R.C. 2929.144(B)(3).

For an individual 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 is 10 years.

Likewise, for an individual qualifying F-2, the judge will select a term from the existing F-2 range of 2, 3, 4, 5, 6, 7, or 8 years, and that number selected will be the minimum term. If the judge selects 4 years from the range for a qualifying F-2, then the minimum term is 4 years.

Again, in either example, for an individual offense the specific number selected by the judge will be the "minimum" term, and the existing sentencing ranges under R.C. 2929.14(A)(1)(a) or (A)(2)(a) for all qualifying felonies remain the same. See R.C. 2929.144.

Q. Now that we know the minimum term for an individual offense, how is the maximum term established or determined?

When sentencing on an individual qualifying count, the maximum term is the minimum term plus 50% or ½ of that minimum term imposed on the most serious qualifying F-1 or F-2 offense being sentenced.

If a defendant is being sentenced on one or more counts and the most seriously qualifying offense is an F-1 and the trial judge selects 9 years as the minimum term (from the existing range of 3, 4, 5, 6, 7, 8, 9, 10, or 11 years for an F-1), the formula for determining the maximum term is as follows:

The minimum term that was selected by the trial judge (9 years in this example) plus 50%, or ½ of that 9-year minimum term (4.5 years), results in a maximum term of 13.5 years. The indefinite range in this example will therefore be 9 years to 13.5 years.

The good news is that the existing sentencing ranges remain the same for all felony levels. Judges and practitioners only have to learn how to do the math.

Q. What if the particular qualifying F-1 or F-2 offense is one where the offense itself specifies a minimum term or a specific penalty for the offense?

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.

C. Imposing concurrent terms on multiple offenses:

Q. What is the single biggest challenge in understanding how to impose concurrent terms on multiple offenses?

Setting the minimum and maximum terms is more complicated. After dealing with single offense files, most judges will presume the offense that set the minimum term will always be used to set the maximum term. As will be explained below, this is not always the case. Judges and practitioners need to understand that when dealing with multiple offense files the minimum and maximum terms will take on a form independent from the individual terms imposed on the underlying individual counts.

Q. When there are multiple qualifying felonies, which felony controls how the minimum term is determined?

When dealing with ***concurrent*** sentencing involving ***multiple offenses*** it is the ***longest*** of the minimum terms imposed on the ***qualifying*** offense(s) that will control the ***minimum term***.

R.C. 2929.144(B)(3):

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.

The language in the statute is confusing because it is a formula contained within a single paragraph (sentence) that is trying to set both the minimum and eventual maximum terms using separate determinations for each.

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.

Note: While ***individual*** minimum or definite terms are imposed for ***each*** qualifying or non-qualifying offense being sentenced, there is only ***one*** "actual" minimum term being imposed that will be used to determine the range. See R.C. 2929.14(A)(1)(a) & (A)(2)(a) and 2929.144(B)(3).

Q. Can you give an example of how the minimum term for a series of concurrent sentences will be selected under the language in R.C. 2929.144(B)(3)?

Example:

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 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 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.

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. If one of the F-2 offenses had an 8-year term, that term would have set the "actual" minimum term because it would have been longer than the 7 year term imposed on the F-1 in count 1.

Q. Is there an example where a lower degree qualifying offense could be used to set the minimum term for a concurrent sentence under R.C. 2929.144(B)(3)?

Example:

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 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 is the 7-year term imposed on the F-2 in count three, therefore, this is the term that will set the minimum term for the indefinite sentence in this example.

It is important to note that the 7-year term on the F-2 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.

Will the maximum term always be determined from that same "longest of the minimum terms" that was used to set the minimum term?

Not necessarily. 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. Where the minimum term was derived from the ***longest of the minimum terms*** imposed, the maximum term is derived from the longest minimum term for ***the most serious qualifying felony*** being sentenced.

Example:

If a judge imposes a 5-year minimum term on a qualifying F-1 offense and at the same time imposes a 6-year minimum term on the qualifying F-2 offense, it is the F-2 and the 6-year minimum term imposed on that offense that sets the ***minimum term*** because it is ***the longest term imposed***, but the ***maximum term*** is set from ***the most serious qualifying offense,*** and therefore, the F-1 will determine the indefinite range, not the F-2 offense with the greater term.

Thus, to get the maximum term, we take the 5 years from the most serious offense (F-1) plus 50%, or ½ of 5 years (2.5 years) and add it to our minimum term of 6 years from

the longest term imposed and this sets the maximum term at 8.5 years, and the indefinite range is 6 years to 8.5 years.

Q. What if a judge has two qualifying F-1 offenses and imposes different terms on each offense? Which qualifying F-1 offense will determine how the minimum term is determined?

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. Thus, under this scenario, 10 years plus 50%, or ½ of 10 years (5 years), results in a maximum term of 15 years and an indefinite range of 10 to 15 years.

Q. If only one maximum term is being imposed based on the most serious qualifying felony being sentenced, do maximum terms have to also be imposed on the lessor degree qualifying felonies or those with lessor minimum terms?

No. R.C. 2929.144 and R.C. 2929.14(A)(1(a) & (A)(2)(a) do not require a trial court to impose a maximum term on all the qualifying felonies being sentenced. The statutes only speak to one maximum term.

Nevertheless, it would be prudent for a trial judge to reference the potential maximum term for all qualifying offenses ***at the time of the plea colloquy and plea journal entry*** because at that time we don't know what sentence will be imposed on those counts and which one counts will form the basis of determining both the ***actual*** minimum term and maximum term.

Q. What is meant by the term "actual" minimum term?

The term or phrase "actual minimum term" doesn't appear in the language of SB 201. Nevertheless, it is important to distinguish the minimum term or definite term imposed in each individual qualifying and non-qualifying offense form the "actual" minimum term that will be used to establish the range.

State v Saxon and *State v Baker* require a complete sentence for each offense and those sentences have to be memorialized in the journal entry. Trial judges will have to memorialize the minimum or definite term for each individual offense and then memorialize the ***single "actual" minimum term*** and the single maximum term that are separate and apart from the individual terms they were derived from. In addition, any mandatory terms that must be served prior and consecutive to the actual minimum and maximum terms will also have to be recorded.

D. Understanding mandatory terms and sentencing enhancing specifications under SB 201

Q. What if the particular qualifying F-1 or F-2 offense is one where the offense is punishable by a mandatory term? Does the trial court select that mandatory term from the possible range?

Yes. 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. This scenario ***could*** occur when a court is imposing a term for the offenses of aggravated vehicular homicide, aggravated vehicular assault, vehicular assault, felonious assault, trafficking in persons, rape, sexual battery, gross sexual imposition, importuning, endangering children, or unlawful use of a weapon by a violent career criminal ***where certain factors are present*** in some of the offenses listed above. The judge selects one of the terms prescribed in R.C. 2929.14(A)(1)(a) or (A)(2)(a) for either a felony of the first degree or a felony of the second degree. Again, the term selected from the appropriate range then becomes the minimum term. These are the same sentencing ranges for F-1 and F-2 offenses that we currently have in effect. (See also R.C. 2929.14(C)(8).)

Q. What if the offense requires that the mandatory term be the longest term from the range for the available offense? How is the minimum term established for those offenses?

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. The judge will select the maximum prison term prescribed in either division (A)(1)(b) of section 2929.14 of the Revised Code for a felony of the first degree, or the maximum prison term prescribed in division (A)(2)(b) of section 2929.14 of the Revised Code for a felony of the second degree. Once imposed, that figure will become the minimum term. Again, R.C. 2929.14(A)(1)(a) or (A)(2)(a), containing the ranges for F-1 and F-2 offenses, remain the same under the new law.

Q. What about mandatory sentencing enhancements like gun specifications? How will gun specifications affect the determination of minimum and maximum terms?

Gun specifications or other mandatory terms cannot be added to increase the maximum term of the offense. Newly enacted R.C. 2929.144 is silent on whether they impact the minimum term, but gun specifications pursuant to R.C. 2929.14(C)(1)(a) are imposed separately and are served prior to and consecutive to the stated minimum term.

Thus, if a judge imposes a 10-year minimum term on a qualifying F-1 offense that also contains a 3-year gun specification, arguably the minimum term is 10 years, not 13 years. Nevertheless, even if we included the gun specification in the minimum term and set that term at 13 years, that number cannot be used to set the maximum term. (See

R.C. 2929.144(B)(4) The resulting maximum term is based off the 10-year minimum term. Thus, the maximum term is 15 years. It cannot be imposed as 18 years, even though the offender may well serve a term up to 18 years. The language in the statute is silent as to the minimum term, but it expressly precludes considering or including gun specifications or other mandatory terms in setting the maximum 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. Again, it is important to understand that under the new law, the mandatory terms imposed on specifications cannot be used to form or enhance the maximum term. Nevertheless, it is undeniable that the prison terms imposed for specifications will invariably increase the potential maximum amount of time an offender could spend in prison.

One approach to try to offer clarity is to view the overall sentence as four separate "terms":

(1) The first term is the 3-year gun specification to be served prior and consecutive to the minimum term.
(2) The second term(s) are the ***individual*** minimum or definite terms for any other qualifying or non-qualifying offense being sentenced. (none in this example)
(3) The third term is the 10-year ***actual*** minimum term.
(4) The fourth term is the additional 5-year term on top of the 10-year minimum term that forms the potential ***maximum term*** of 15 years for the indefinite sentence.

Even when breaking the terms down to their individual levels, this approach still doesn't communicate what the true potential maximum time will be in the above scenario (18 years). Trial court judges will have to develop a plea colloquy that explains not only the minimum and maximum terms for the indefinite sentence(s), but also account for how other terms imposed can push that maximum term out even further.

Q. Isn't it true that a maximum term can never be longer than 5.5 years regardless of whether the sentencing involves individual, concurrent or consecutive terms when imposed with at least one qualifying offense?

Yes. Since the maximum term for a F-1 is 11 years, 50% or ½ of that term is 5.5 years.

Q. How will major drug offender (MDO) specifications impact the calculation of the minimum and maximum terms? Are they part of the minimum term? Or are they served prior to and consecutive to the minimum term?

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.

Any other independent mandatory terms under the Ohio Revised Code would also be separate. The minimum and maximum terms are always going to be calculated from the individual base term on the most serious qualifying F-1 or F-2 offense. Mandatory terms not contained within the base minimum term are therefore always going to be additional terms.

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Q. What about repeat violent offender (RVO) specifications? Are the longest term and additional definite terms for an RVO combined to get the minimum? Or are these served separate and consecutive to each other?

They are separate. 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.

See 2929.14(B)(2)(b)(i)(ii)(iii). "The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:" (See: (i)(ii)(iii)).

Q. What about sexual violent predator (SVP) specifications? Are they exempt from SB 201?

Under R.C. 2971.03(B)(3)(a)(b)(c)(d), SVP penalties all have so-called "life tails." The new R.C. 2929.144 doesn't change SVP sentencing. 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.)

Q. Are there any sentences under the ORC that are mandatory definite 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.

E. Understanding consecutive sentencing under SB 201

Q. When a judge imposes a consecutive sentence with an indefinite term, does the judge still have to make the findings outlined in R.C. 2929.14(C)(4)?

Yes. 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).

Q. When a judge imposes consecutive terms on multiple offenses, how will the minimum term be defined?

First, it is important to understand that "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."

The aggregate minimum term is simply all the terms, on all the offenses being imposed consecutively, added together to achieve an aggregate minimum term.

The following example illustrates the formula:

We have 4 offenses that are being sentenced.

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.)

NOTE: This is a mixture of both qualifying and non-qualifying offenses, but this doesn't matter to the calculation of the aggregate minimum term. All consecutive terms imposed, regardless of their degree or status as qualifying or nonqualifying offenses, are added together to set the minimum aggregate term.

Q. How will the maximum term be determined when consecutive sentences are in play?

Regardless of the aggregate minimum term (total) from the consecutively imposed individual terms, the maximum term will be determined from a ***single term*** plus 50%, or ½ of ***that*** term. Before we get to defining that single term, it is important to understand that the aggregate minimum term (total) from the consecutive grouping of individual minimum or definite terms ***is not*** what is used as the basis for determining the maximum term.

With multiple counts being run consecutively, the consecutive term with the ***longest minimum term or definite term from the most serious felony offense*** will control the determination of the maximum term. This is different from sentencing a series of offenses containing at least one qualifying offense that are run concurrently.

In concurrent sentencing, it is always the longest minimum term for ***the most serious qualifying felony*** being sentenced that controls the determination of the maximum term and the indefinite range, but 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). In other words, the longest term or most serious offense doesn't have to be a ***qualifying*** offense for consecutive sentencing.

Using our earlier example, 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 ***single term*** that has the ***longest minimum term or definite term for the most serious offense*** being sentenced.

In the above example, the offense with the longest minimum term or the definite term for the most serious offense is the F-1 with a 10-year term. Under this example, the maximum term would be 50%, or ½ of that individual 10-year 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.

While it is true the 10-year 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.

Once again, everyone must remember that newly enacted R.C. 2929.144 ***does not*** allow the ***aggregate*** consecutive minimum term to determine the maximum term. The maximum term for consecutive sentences is to be determined solely from the longest minimum term or definite term for the ***most serious felony*** being sentenced.

Q. Earlier, it was stated that non-qualifying offenses are not subject to the new indefinite sentencing range except in very limited circumstances. What are those circumstances?

First, because a non-qualifying term from either a pre or post SB 201 offense are used to calculate the aggregate minimum term for consecutive sentencing, technically all non-qualifying definite terms being sentenced consecutively with a qualifying term are part of an indefinite sentence.

But in a narrower context, when the prison term on a pre-SB 201 non-qualifying offense is being sentenced with at least one qualifying offense and that pre-SB 201 offense is ***the most serious offense being sentenced***, under R.C. 2929.144(B)(2), that pre-SB 201 definite term will be used to establish the maximum term. This is where that distinctive

language ***"…the longest minimum term OR definite term for the most serious felony being sentenced."*** found in R.C. 2929.144 (B)(2) really comes into play.

Q. How could this scenario happen?

Such a scenario could occur when offenses committed (in one crime spree) in close proximity both before and after the enactment date of SB 201 are charged in the same indictment as one case. In such circumstances, the offenses charged will contain at least one qualifying offense. That is, at least one F-1 or F-2 committed on or after March 22, 2019. In the event the term imposed for that qualifying offense is run consecutive with a non-qualifying offense committed prior to the enactment of SB 201, and that non-qualifying offense is a more serious non-qualifying offense than the qualifying offense, then the term imposed on the non-qualifying offense will control the determination of the maximum term and not the term imposed on the qualifying term.

A simple example is in order:

Imagine if a defendant is charged in the same case with one count of rape, an F-1 committed on March 20, 2019, a date before SB 201 goes into effect. That date makes the rape charge a non-qualifying F-1. In the second count of that same case, the defendant is charged with robbery, an F-2 committed on March 22, 2019, the day SB 201 goes into effect. That date makes the robbery charge a qualifying F-2.

When sentencing a single qualifying offense as well as when sentencing multiple offenses with a least one qualifying term, the most serious ***qualifying*** felony will control how the ***maximum*** term is determined. Thus, in individual or concurrent sentencing, the F-2 would control.

Nevertheless, consecutive sentencing is different. 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*** with a more serious non-qualifying felony, ***the most serious felony***, whether qualifying or not, will control the determination of the maximum term. Thus, because the non-qualifying F-1 is ***the most serious felony,*** that count will control the determination of the maximum term.

Again, 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 must be a "qualifying" felony.

Q. Is this a problem? Could the use of a pre-SB201 non-qualifying definite term to determine the maximum term for consecutive sentencing be problematic?

There is at least an argument that using the non-qualifying (definite term) pre-SB 201 "most serious offense" to set the maximum term increases the punishment for that term

by adding or associating it with a so called "tail" or indefinite term to that original definite term of imprisonment. This could violate the U.S. Constitution Article 1, Section 10 and the language in R.C. 2929.144(B)(2) could be considered an ex post facto law.

This would not be an issue if the legislature used the most serious ***qualifying*** offense to set the maximum in all instances, but they chose the "most serious offense" to determine the maximum for consecutive sentencing under R.C. 2929.144(B)(2). This language will not doubt be challenged going forward.

Q. Assuming the language in R.C. 2929.144(B)(2) is found to be constitutional, what is the order of how consecutive sentences will be served?

There is some uncertainty on this because R.C. 2929.144 doesn't address the order of how consecutive counts will be served. Further, that statute only speaks of "when sentencing" and also doesn't distinguish between sentencing on ***counts*** within a case, from ***cases*** being sentenced collectively.

Under pre-SB 201 law, when a term is imposed consecutively to another term, it is normally that other term that will control the manner of how the terms are served. But under newly enacted 2929.14(C)(8), the indefinite term ***will always 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).)

Note however that the language in R.C. 2929.14 (C)(8) talks about terms imposed ***previously*** or ***subsequently***, but not ***contemporaneously***. We will have to see how this language is interpreted going forward. It could be limited to circumstances where an offender is sentenced in one county to a sentence that is run consecutive to a sentence imposed in another county or a sentence imposed earlier by another judge in the same county on an unrelated case.

Q. Doesn't the DRC determine the order in which terms are served?

Yes, but there is invariably friction 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.

What if consecutive sentences are imposed contemporaneously between both pre and post SB 201 files?

Assuming consecutive sentencing can occur between terms imposed in separate files, the process could parallel the multiple terms imposed in a single qualifying file. Arguably, as long as there is a qualifying F-1 or F-2 to set the maximum term, the math would be the same as if these terms were all in the same file. This practice, however, will likely be subject to scrutiny on appeal.

Could there be a problem in the rare scenario discussed above where a non-qualifying F-1 definite term from a pre-SB 201 offense sets the maximum term?

Perhaps. Because 2929.14(C)(8) requires all definite and mandatory terms to be served prior to the indefinite sentence. The pre-SB 201 definite term that set the basis for the maximum term, and hence the indefinite term, has to be served first. That seems to defy logic as ***that*** definite term is clearly related to the maximum term and the very indefinite term it is supposed to precede.

Q. Can you give an example?

Let's assume we have four separate case files set for sentencing. Files #1 and #2 each contain individual F-1 counts for rape (non-qualifying), all committed prior to the enactment of SB 201. Files #3 and #4 each contain one individual F-2 count of robbery (qualifying) committed after the enactment of SB 201. Thus, we have two non-qualifying files (#1 and #2) and two qualifying files (#3 and #4.)

The judge imposes 11 years on file #1; 10 years on file #2; 8 years on file #3; and 7 years on file #4. The judge then orders all four terms to run consecutive to file #1. (11 + 10 + 8 + 7 = 36 years.)

Since consecutive sentencing is in play (again, we are assuming it is allowed between both pre and post SB 201 files) the first file (#1) controls determination of the maximum term because it is "the longest minimum term or ***definite*** term (11 years) for ***the most serious felony*** being sentenced." See R.C. 2929.144(B)(2).

Therefore, the maximum term following the aggregate minimum term is 5.5 years (1/2 or 50% of 11 years) and the indefinite range is 36 years to 41.5 years.

Depending on how you view the definite 11-year term imposed in count 1 that formed the basis for the maximum term and indefinite sentence can cause confusion. R.C. 2929.14(C)(8) requires definite terms to be served first, but if you view the actual minimum and maximum terms as independent from the underlying term or terms they are derived from, this debate is avoided.

Q. Is there an inconsistency between the language in R.C. 2929.144 and R.C. 2929.14(C)(8)?

The wording in both statutes is clumsy. One way to explain the anomaly would be to say that because R.C. 2929.144 creates a new aggregate minimum term, there are no longer any individual consecutive minimum terms to be run in any formal order. Thus, the maximum term, as explained below, could be considered an "independent" term separate and apart from either the minimum or definite term that formed it, or the aggregate minimum term it follows. The lack of clarity on how terms are served contributes to this confusion.

Q. The aggregate minimum term for consecutive sentencing seems to fly in the face of State v. Saxon. Is State v. Saxon no longer good law? Is the "sentencing package doctrine" back because we are aggregating terms?

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."

Judges will still sentence individually on each count under SB 201. We currently aggregate consecutive definite sentences, so that portion won't be a significant change. What is different is those individual consecutive terms are now combined into a singular "aggregate minimum term" where previously they stood independently.

In the short term, we cannot say *Saxon* is dead. We still have to sentence individually on all counts. Nevertheless, because aggregation of terms is now in play for consecutive sentences there is at least an argument that the so called "sentencing package doctrine" is back. It is important to recognize that the legislature can overturn prior Supreme Court precedent in this area. Whether or not that has happened will depend on how *Saxon* is viewed during future appellate reviews.

Judges and practitioners are encouraged to go back and read *State v Saxon,* 2006 Ohio 1245, Supreme Court of Ohio, March 20, 2006 to gain more insight on the potential problems.

Q. Can the new "aggregate minimum term" for consecutive sentencing be considered a separate and identifiable "independent" term on its own for Saxon compliance?

This is an interesting issue. *Saxon* tells us to stay in our lane and sentence individual terms on individual counts. Under SB 201 we will continue to do that up to the aggregation of minimum terms for consecutive sentencing. The question now is once that aggregate minimum term is set does that new term become a "package" of individual terms or does it take the form of a new separate "individual" term that could be considered *Saxon* compliant?

Q. Is the maximum term attached only to the underlying minimum term that formed the basis of the maximum term, or is it somehow imposed "independently" of that term?

The statutory language doesn't expressly attach the maximum term imposed (whether it be on an individual count, a series of concurrent counts, or consecutive counts) to the particular minimum term or aggregate minimum term. The minimum term establishes what the maximum term will be, but doesn't get physically attached or associated to that underlying minimum term. In other words, the minimum term determines the maximum term, but the relationship seems to end at that point especially if it's a consecutive sentence.

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 for consecutive sentencing.

The new law does provide some clarity on terminology. 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.

Q. What happens with other qualifying or non-qualifying offenses that are run concurrently with those imposed consecutively? How do the concurrent terms figure into the minimum term?

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.

F. Changes to certain sex offenses under SB 201

Q. Does SB 201 make changes to certain sex offenses?

Yes. SB 201 expands certain sex offenses where the victim is a minor to include situations where the victim is an impaired person. The existing 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. In addition, where the offense is charged as an F-3, the higher sentencing range for a third-degree felony will apply.

Q. How is an impaired person defined under SB 201?

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)).

G. Post Release Control (PRC) and SB 201

Q. What's the biggest change involving 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. The advisement will no longer have to be given for offenses with life terms.

Q. What about the traditional PRC advisement given by a trial judge? Will that change?

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.

Q. Are there some advisements regarding PRC that might be prudent to give at the time of a plea under SB 201?

While it would appear that the traditional advisements should be sufficient, trial judges should at least be aware that SB 201 creates three modifications regarding PRC for offenders serving indefinite terms:

(1) If an offender is released before the end of the minimum term because of a reduction of the minimum term (ERMPT - explained below) and received more than 60 days of credit, a GPS device must be used for the first 14 days.

(2) If the Parole Board wants to reduce the period of PRC, it can do so, but that ability is subject to the following limitations:

- (a) The reduction cannot be less than the period of the original minimum term.
- (b) The offender must be on PRC for at least one year if original release was rebutted (explained below) and incarceration was continued.
- (c) The offender cannot leave the state without permission of trial court and parole officer.

(3) If PRC is violated and prison is imposed, the prison term cannot exceed nine months for each violation and the maximum cumulative prison term for all violations cannot exceed one-half of the ***minimum term*** imposed as part of the indefinite prison term originally imposed under the bill on the offender.

NOTE: While not related to SB 201, trial judges should also be aware of the recent change regarding the PRC advisement when a new offense is charged. See *State v. Bishop*, 2018-Ohio-5132, decided December 21, 2018, where 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.

Q. In the event of a new charge while on PRC, does the indefinite term from the original case have any relevance to calculating how much time an offender can do for a PRC violation?

No. The ***minimum term*** from the original sentence is all that will be relevant in the event of a violation of PRC based on a new charge. The minimum term controls all PRC considerations. The indefinite portion of the sentence will have no impact on PRC violations.

H. Release under indefinite sentencing and SB 201

Q. Now that we have indefinite sentencing, when does an offender actually get out of prison?

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).)

Q. What is the presumptive release date?

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).

Q. How exactly is the presumptive release rebutted?

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.

Q. What factors must be present for the DRC to rebut the presumption of release at the end of the minimum term?

The DRC will be required to make findings if the DRC intends to keep the offender beyond the presumptive release date. The DRC must find ***one or more*** of the following three conditions present to rebut presumption of release:

(1) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising a prison's security, compromising the safety of a prison's staff or inmates, or physical harm or the threat of physical harm to a prison's staff or inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated, and the offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in clause (1) of this paragraph, demonstrate that the offender continues to pose a threat to society.

(2) The second condition that, if found, may rebut the presumption is that, regardless of the security level in which the offender is classified at the time of the hearing, DRC placed the offender in extended restrictive housing at any time within the year preceding the date of the hearing.

(3) The third condition that, if found, may rebut the presumption is that, 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.

Q. If release is denied by the DRC, can the offender have another hearing before the expiration of the maximum term?

Yes. 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.

I. Earned reduction of minimum prison term (ERMPT) or "good time"

Q. Does SB 201 have a provision for inmates to reduce their minimum term?

Yes. 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).)

Q. What qualifies an offender for ERMPT?

The new law identifies "exceptional conduct or adjustment to incarceration" as the basis for awarding the reduction. See R.C. 2967.271.

Q. How will the ERMPT be determined?

The DRC must draft administrative rules that specify the type of exceptional conduct while incarcerated and the adjustment to incarceration that will qualify an offender for ERMPT.

Q. Are some offenders ineligible for the ERMPT?

Yes. Offenders serving terms for any "sexually oriented offense" (under R.C. 2950) are not eligible for ERMPT.

J. Judicial review of ERMPT (good time)

Q. What role will the trial judge play in granting or denying ERMPT?

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.

Q. How will this occur?

The DRC must notify the trial judge in writing 90 days prior of its intent to award the ERMPT credit. Although SB 201 is silent on the form of a "hearing" it appears the trial judge will 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.

Q. What is the standard for the trial court's review of the request?

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.

Q. How will the trial court conduct the hearing?

Again, SB 201 is silent as to the form of a "hearing," but we can presume the hearing will be in open court and it appears the defendant has a right to be present. The prosecutor and victim will have an opportunity to present evidence, presumably to rebut the presumption. There is certainly the possibility that these "hearings" can be done by video, but we will have to see what accommodations DRC comes up with in the future.

There is a lively discussion emerging in criminal law circles regarding the focus of the hearing. 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. There are reasonable arguments for both perspectives, but this issue will not be resolved anytime soon.

Q. What must the trial court find to rebut the presumption for ERMPT?

The trial court must find ***at least one*** of the following to rebut the presumption for ERMPT:

(1) Regardless of the security level in which the offender is classified at the time of the hearing, during the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a prison, compromising the safety of a prison's staff or its inmates, or physical harm or the threat of physical harm to a prison's staff or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.
(2) The offender's behavior while incarcerated, including, but not limited to, the infractions and violations specified in paragraph (1), above, demonstrates that the offender continues to pose a threat to society.
(3) At the time of the hearing, the offender is classified by DRC as a security level 3, 4, or 5, or at a higher security level.
(4) During the offender's incarceration, the offender did not productively participate in a majority of the "rehabilitative programs and activities" recommended by DRC for the offender, or the offender participated in a majority of such recommended programs or activities but did not successfully complete a reasonable number of the ones in which the offender participated. As used in this provision, "rehabilitative programs and activities" means education programs, vocational training, employment in prison industries, treatment for substance abuse, or other constructive programs developed by DRC with specific standards for performance by prisoners.
(5) After release, the offender will not be residing in a halfway house, reentry center, or licensed community residential center and, after release, does not have any other place to reside at a fixed residence address.

Q. When does the trial court have to notify the DRC of its decision to grant or deny the ERMPT?

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.

Q. Is the trial court's decision appealable by either side?

The statute is silent on appealability of the trial court's determination to rebut or grant the ERMPT requested.

Q. Does a trial court have to specify exactly how a reduction credit applies to either an individual term or to the aggregate term? Does it matter? Or is that predetermined by the DRC?

The DRC will likely issue standards or requirements when they release the basis for granting the ERMPT.

Q. How is eligibility for transitional control impacted by SB 201?

Under the new law, offenders serving an indefinite term can only be transferred to transitional control by the DRC if they are serving a minimum term of two years or less on an indefinite term.

K. Judicial release and SB 201

Q. Does the eligibility for judicial release change under SB 201?

No. 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.

Q. What about the 80% release request by DRC? Is that still in play for indefinite terms under SB 201?

Yes. 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.

"(A)(6) 'Stated prison term of one year or more' means a definite prison term of one year or more imposed as a stated prison term, or a minimum prison term of one year or more imposed as part of a stated prison term that is a ***non-life felony indefinite prison term***."

L. Plea Advisements and SB 201

Q. Do we need to revamp Crim. R. 11 in light of SB 201?

Yes. It seems the Supreme Court is already moving us in that direction with their recent decision regarding postrelease control notifications in *State v. Bishop, Slip Opinion No. 2018-Ohio-5132*.

SB 201 will require a much longer and more detailed Crim. R. 11 advisement with offenders pleading on cases containing qualified offenses subject to indefinite sentencing. Common Pleas Court judges should work with the Ohio Judicial Conference (OJC) to develop a SB 201 compliant plea advisement form.

Q. What is the maximum sentence advisement language that will comply with Crim. R. 11 at a plea for an indefinite sentence?

There is a lot of discussion over whether just stating the maximum term for each individual indefinite term will be enough.

Many believe that *State v. Saxon* will still control, meaning we will continue to focus on individual terms imposed for individual offenses, but it would seem in the short term that the best practice would be to follow the language in R.C 2929.14 and R.C. 2929.144.

At a minimum, judges will have to give a minimum or definite term for each offense, an ***actual*** minimum term for concurrent or consecutive sentences containing at least one qualifying offense and a maximum term for all sentences containing at least one qualifying offense. In addition, any mandatory terms that must be served prior and consecutive to the minimum and maximum terms will have to be explained. Lastly, it would be prudent to give the aggregate maximum sentence for everything imposed, not only as to the individual offenses, but as to the aggregate for everything imposed (such as gun specifications her 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.

Q. What are the probable additions to existing Crim. R. 11 that will have to be covered?

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. 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.

In addition to the existing constitutional and non-constitutional advisements under Crim. R. 11, the following plea advisements should at least be considered:

(1) That there is a presumption of release at the end of the minimum term.
(2) That the presumption is rebuttable by the DRC.
(3) That the DRC has the authority to maintain incarceration through the end of the maximum term, if the presumption of release is rebutted.
(4) The general grounds or criteria for the DRC to rebut the presumption. (The specific guidelines will have to be drafted by the DRC.)
(5) That the offender will have to be released at the expiration of the maximum term.
(6) 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."
(7) That there is no guarantee that the DRC will request ERMPT for the offender.
(8) That if ERMPT is requested by DRC, there is a presumption the ERMPT will be granted by the trial judge.
(9) That even if the DRC request carries a presumption, the trial court still has the ability to rebut the presumption of ERMPT.

(10) 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).
(11) 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.
(12) 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.
(13) The potential aggregate maximum sentence (total combined possible time in prison) from all sources.

M. Sentencing hearing advisements

Q. In addition to the plea hearing does the new law require advisements at sentencing?

Yes. The advisements at sentencing are as long and as complicated as those for a plea. See R.C. 2929.19(B)(2)(c),(d),(f), and (h).

These include the following:

(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.

N. Journal Entries

What does SB 201 require in a sentencing entry?

The new law requires each term to 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).

It would seem that training for bailiffs and clerks will be as important as that for judges, prosecutors, and defense counsel. The best approach might be for the Ohio Judicial Conference (OJC) or each court at a local level to agree on a standardized JE for SB 201 cases.

O. GPS global positioning system monitoring under SB 201

Q. How will GPS devices be used under SB 201?

The law requires the DRC to complete a feasibility study by June 30, 2019, of a "crime scene correlation program" for GPS-monitored offenders. Also, certain offenders who are released early under the ERMPT reduction will have to wear a GPS device for the first 14 days after release.

P. Community Program Fund

Q. What role does this fund have under SB 201?

It authorizes the DRC to use the fund for residential service contracts for homeless offenders being released from prison.

Q. Other Considerations under SB 201

Q. What other considerations does SB 201 raise?

The DRC will be required to post on an internet database information regarding offenders serving indefinite terms.

Q. What is the one area of SB 201 that no one is thinking about or considering?

It would be unfair to say no one is thinking about it, but juvenile court judges will also have to learn the SB 201 advisements since serious youth offenders (SYO) will be subject to the new law.

V. Appellate review of felony sentencing and SB 201:

Q. How will appellate review of felony sentencing change under SB 201?

Despite this new enactment, the confusing and undefined language in R.C. 2953.08 remains. The ongoing lack of clarity in sentencing terminology will only be complicated with the new SB 201 requirements.

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.

It is unclear if *State v. Gwynne,* 2017-1506*, State v. Jones,* 2018-0444*, or State v. Hitchcock*, 2018-0012 (all currently pending before the Supreme Court of Ohio) can provide clarity on sentencing review prior to the effective date of SB 201.

The central problem with reviewing SB 201 (like every other sentencing reform preceding it) is that little or no consideration was given as to how it would be reviewed on appeal. 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. The Reagan Tokes Law (SB 201) is no exception.

Q. State v Saxon was discussed earlier. Does SB 201 raise questions regarding the continued viability of State v. Saxon for appellate practitioners?

First it is important ot recognize that the legislature has the authority to overrule *Saxon*.

Appellate panels will have to be concerned about the effect (if any) of aggregating minimum terms to establish an aggregate minimum term for a consecutive sentence. SB 201 raises questions about *Saxon* at least in form if not in substance. *Saxon* taught us to "stay in our lane" with each individual count, but now we are aggregating.

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.

Q. Is it enough for the maximum term for each individual consecutive sentence to be stated on the record to satisfy Crim. R. 11? What about specifications or other separate mandatory terms?

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 there will likely be problems over how to state other mandatory terms and how they affect the total potential prison time for an offender. Not stating the total prison time in some aggregate form could be a matter of semantics to some, but it may impact the viability of the plea.

The question of what is required may be viewed differently by different appellate panels. Trial judges should give the individual minimum/definite terms, he actual minimum term and maximum term, but further should give all the additional mandatory terms to be served prior and consecutive to the indefinite sentence, and also state the full

maximum time an offender could serve under all the terms imposed until there is clarity on the issue.

Q. If the aggregate term is on the record, but not in the JE, can we assume this will result in a limited remand for a nunc pro tunc entry? Will the oral pronouncements or the JE language control?

Problems with the JE could be handled the same as we do now for the consecutive sentence findings. Presuming the trial court did the right thing at the sentencing hearing, the JE should conform (or be made to conform) to what was said. If not, it should be reversed for the correct notification that is required under the statute. There is an argument that if we can "discern" from the record what the minimum and maximum terms are, we could remand for a nunc pro tunc entry since there is nothing explicit in the statute requiring a formulaic recitation at the sentencing hearing.

Q. If a defendant doesn't appeal every aspect of his sentence at the initial appeal (including the possibility that a trial judge may not award the ERMPT credit requested by the DRC) does res judicata apply? Or does that issue only become ripe when denied?

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, but it may be wise to do so at the outset. While there doesn't seem to be anything to appeal when there is only a possibility that the presumptive release will be denied, failing to do so could be fatal. Nevertheless, there is no trial court order to appeal in the case involving the reduction credit at the time of the initial appeal. The existing R.C. 2953.08 is silent on this issue.

Q. Assuming the defendant wants to appeal a trial court's denial of the ERMPT credit, would a defendant have to seek leave to appeal the denial? What is the mechanism for reviewing the trial court decision? If the defendant can appeal, can the state also appeal when it is granted? Are there grounds for such an appeal given the lack of any language in the statute?

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. Nor does it contemplate the state appealing the granting of ERMPT credit. In addition, it's not clear what the standard of review would be in the trial court for overruling the presumption or even what the appellate review standard would be if that order was appealable.

Q. If the DRC refuses to petition the court to award the ERMPT credit or the DRC refuses to release the defendant at the end of the stated minimum term does the defendant have a remedy?

Without a judicial order, it doesn't appear that there are grounds for a traditional appeal at the appellate level of what is essentially an administrative determination.

Q. In such situations, is an administrative appeal possible? To the DRC? Is there any path for an administrative appeal? Are administrative decisions in such circumstances reviewable? Under what mechanism would they be reviewed?

Beyond asking the DRC to reconsider under some internal protocol, I'm not aware of any administrative appeals on the determination of what is essentially a parole ruling in a criminal case. It seems highly unlikely that an administrative determination involving release would be able to follow the traditional path of an administrative appeal to the trial court (such as a tax or zoning appeal), but I've been around long enough to know someone will try it, even if the statutes preclude it.

Q. What if an appeal is filed in the appellate court following a DRC decision to hold an inmate beyond the minimum term? What jurisdiction does an appellate court have to even hear such appeals?

None. Because there is no trial court order, we don't have jurisdiction for such an appeal filed in an appellate court. I don't see anything in the new statutes that permits appellate review of any of the executive decisions on release under the indefinite terms.

Q. Could an inmate file an original action writ for release?

Yes, but there would be a jurisdictional issue. It would seem it would have to be filed in Columbus where the DRC is located.

Q. What exactly is the burden of proof for a "rebuttable presumption" on the ERMPT credit? Assuming an ERMPT determination is appealable is the standard of review abuse of discretion or the clear and convincing standard from R.C. 2953.08?

There is no clarity on these issues in either the bill or the existing R.C. 2953.08.

Q. What if a trial court grants only a partial reduction in the sentence reduction credit? Can it do that? How is that decision reviewed? Can either side appeal that? How? Under what mechanism?

It's not clear what restrictions, if any, are on the trial court judge when considering the request for credit. It could be all or nothing or something else.

Sample Sentencing Hypotheticals for SB 201

Prepared by Judge Sean C. Gallagher and David Winkelhake, Judicial Attorney

In an effort to provide some context on the changes, here are some examples of how the new law will impact existing sentences:

(NOTE: Under the new statutory parlance, it is minimum and maximum "terms" not "sentences.")

1. An offender is sentenced on a single count to 10 years of imprisonment for involuntary manslaughter, a qualifying first-degree felony.

    a. Current scheme: 10 years.

    b. SB 201: The minimum term is 10 years; the maximum term is 15 years.

2. An offender is sentenced to two 3-year terms of imprisonment on two non-qualifying third-degree felony offenses, to be served consecutively.

    a. Current scheme: 6-year (3 + 3) aggregate term of imprisonment.

    b. SB 201: No change; the legislature altered sentencing only on first- and second-degree felonies.

3. An offender is sentenced on one count to 10 years of imprisonment for involuntary manslaughter, a qualifying first-degree felony, and also is consecutively sentenced on a second count to 10 years of imprisonment for rape, also a qualifying first-degree felony, both of which arose from separate events.

    a. Current scheme: The aggregate term of imprisonment is 20 years (10+10).

    b. 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. An offender is sentenced in one count to 10 years of imprisonment for involuntary manslaughter, a qualifying first-degree felony, and also is sentenced in a second count to 8 years of imprisonment for rape, also a qualifying first-degree felony, both of which arose from separate events. In addition, the trial court imposed 2-year terms on each of the third and fourth counts involving two counts of aggravated assault on a peace officer. Each are non-qualifying felonies of the third degree. The sentences for involuntary manslaughter (the first count) and one of the aggravated assault offenses (the third count) were imposed to be served

consecutively to all other sentences, but the remaining sentences were imposed concurrently.

a. Current sentencing: The aggregate term of imprisonment is 12 years (10+2).

b. SB 201: The aggregate minimum term is 12 years; the maximum term is 17 years under R.C. 2929.144(B)(2). (The statute requires the court to add all minimum terms with the definite sentences, and the maximum term is that computation plus 50% of the longest of the minimum or definite term for the most serious offense regardless of whether or not it is a qualifying offense.) Under R.C. 2929.144(B)(3), the concurrent terms are not considered; the minimum and maximum terms are based on the longest term imposed on a qualified F1 or F2.

5. An offender is sentenced to 10 years of imprisonment on one count for involuntary manslaughter, a qualifying first-degree felony, and also is consecutively sentenced on a second count to 10 years of imprisonment for rape, also a qualifying first-degree felony, both of which arose from separate events. In addition, the trial court consecutively imposed 2-year sentences on each of the third and fourth counts, both involving aggravated assault on a peace officer with both being non-qualifying felonies of the third degree. All four counts were imposed to run consecutively.

a. Current scheme: The aggregate term of imprisonment is 24 years (10+10+2+2).

b. 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. An offender pleads guilty in Count 1 to kidnapping and in Count 2 to rape, both qualifying first-degree felonies with attendant 3-year firearm specifications. In addition, the offender pleads guilty in Counts 3, 4, and 5 to three separate counts of trafficking marijuana in excess of 1000 grams. All are non-qualifying third-degree felonies. The rape charge merged into the kidnapping, and a 6-year sentence was imposed on the kidnapping in addition to the 3-year term on the firearm specification. Three one-year terms of prison were imposed on the trafficking counts to be served consecutively to the aggregate term on the kidnapping count.

a. Current scheme: 12 years in prison (3+6+1+1+1).

b. 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. An offender is sentenced on count one to 4 years of imprisonment for a qualifying first-degree drug trafficking, and also is consecutively sentenced in a second count to 4 years for a qualifying first-degree drug trafficking offense. In addition, the offender is sentenced in a third count to 5 years for robbery under R.C. 2929.14(A)(3)(a). All terms imposed are to be consecutively served.

   a. Current scheme: The aggregate term of imprisonment is 13 years (4+4+5).

   b. SB 201: The aggregate 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 and that F-1 or F-2 was the most serious offense.) (4+4+5+1/2 of 4 = 15).

8. 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.

   a. Current scheme: 8 years in prison. (6+8+7 concurrent).

   b. 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. An offender is sentenced in one count to 3 years of imprisonment for a qualifying first-degree drug trafficking, and also is sentenced in a second count to 3 years for a qualifying first-degree drug trafficking offense. In addition, the offender is sentenced on a third count to 5 years for robbery under R.C. 2929.14(A)(3)(a). All sentences imposed are to be concurrently served.

   a. Current scheme: 5 years in prison (3+3+5 concurrent).

b. 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 5 year 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. An offender is sentenced to 6 years of imprisonment on one count for felonious assault, a qualifying second-degree felony, and also consecutively sentenced in a second count to 10 years of imprisonment for rape, a qualifying 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.

a. 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).

b. 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. 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.

a. 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.

b. 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. 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).

    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).

    b. 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).

For questions, comments, or corrections, please contact Judge Sean C. Gallagher at the Ohio Court of Appeals, 8th District, at 216-348-4838 or scg@8thappeals.com.

NOTE: Revised through 3/10/2019. Please disregard earlier versions or undated versions. Please email scg@8thappeals.com to request updated versions as they become available.