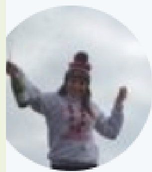
Update on SB 201

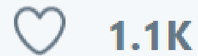
Reagan Tokes 1995-2017

Last tweet



Reagan @reagantokes · 5 Feb 2017

Today my dad emailed me diploma frames and told me to pick one out and I'd b
lying if I said I didn't tear up

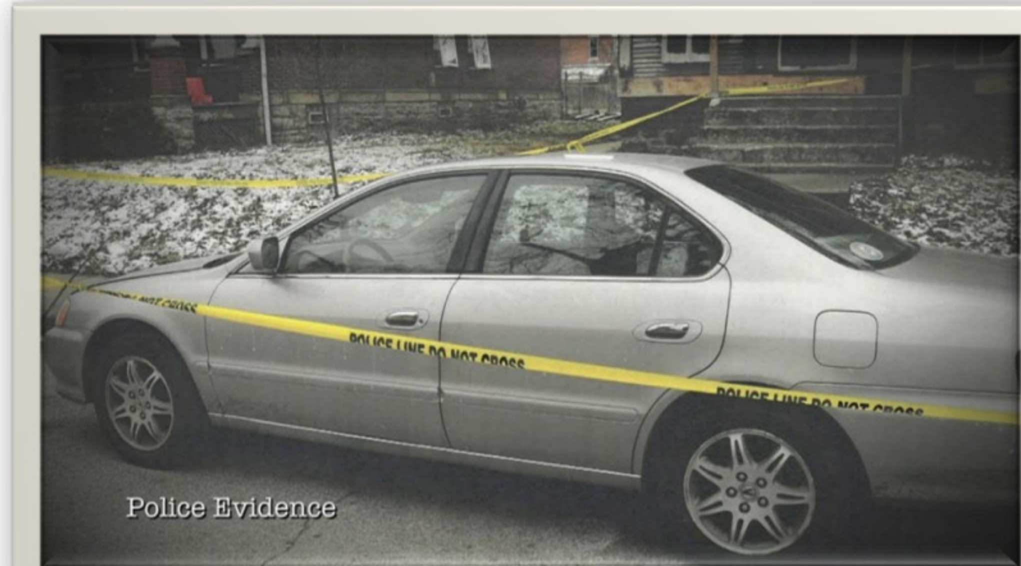


Bodega Cafe

9:43pm

Scioto Grove Metro Park

700-block of Oakwood Avenue



Ankle braclet

Her assailant

- 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.
- After raping her he forced Tokes out of her car naked and then shot her twice in the head at close range.

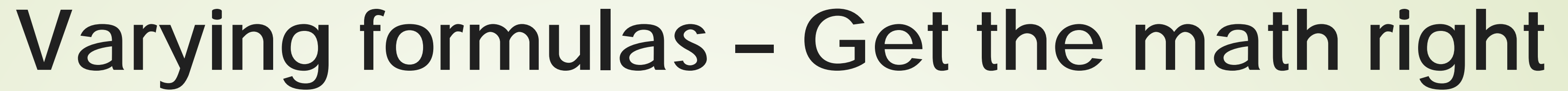
Tokes' parents

- 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.

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.

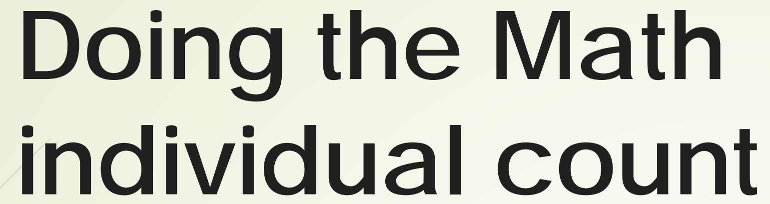
- Any F-1 or F-2 felony offense committed prior to March 22, 2019, or one that is punishable by a term of life imprisonment regardless of the date of the offense, is a non-qualifying felony.
- All F-3, F-4 and F-5 offenses, regardless if committed before or after the enactment date, are also non-qualifying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



- 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.

Individual term
R.C. 2929.144(B)(1)

- The minimum term for qualifying F-1 or F-2 offenses is selected by the trial judge from the existing sentencing ranges.
- The maximum term is the minimum term plus 50% or ½ of that minimum term imposed on that qualifying offense being sentenced.
- If the judge selects 10 years as the minimum term, the maximum term is 15 years. (50% or ½ of 10 years = 5 years) The indefinite range is 10-15 years.



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.

- Different offenses (or terms) can form the basis of both the minimum term and then the maximum term.
- 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.

4 counts are run concurrent:

Count #	Degree of Offense	Min/Def Term	Actual Min. Term	Maximum Term
Count 1	F-1 qualifying	6 years	N/A	11 years (8 to 11)
Count 2	F-2 qualifying	8 years	8 years	N/A
Count 3	F-1 qualifying	5 years	N/A	N/A
Count 4	F-3 non-qualifying	3 years	N/A	N/A

- The minimum term is derived from count 2 because it is the ***longest minimum term*** imposed (8 years).
- The maximum term is derived from count 1 because it is the ***longest minimum term*** (6 years) for the ***most serious qualifying felony***. (F-1)Thus, 50% of 6 years = 3 years.

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.

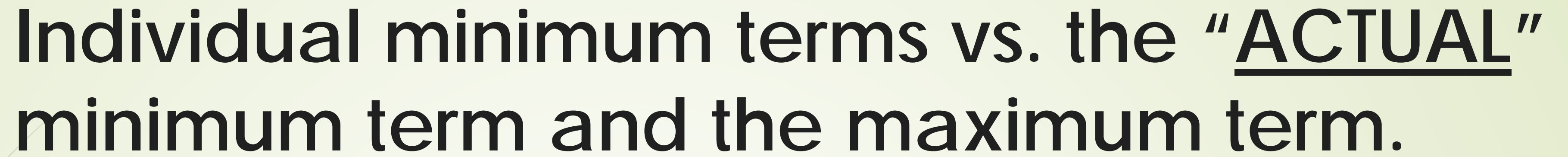
What if the F-3 is the longest term?

Count #	Degree of Offense	Min/Def Term	Actual Min. Term	Maximum Term
Count 1	F-1 qualifying	3 years	3 years (1.5)	4.5 years (1.5)
Count 2	F-2 qualifying	3 years	N/A	N/A
Count 3	F-1 qualifying	3 years	N/A	N/A
Count 4	F-3 non-qualifying	5 years	N/A	N/A

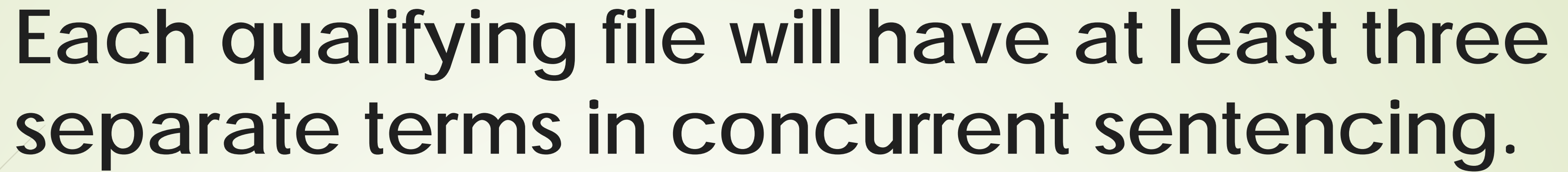
- With ***concurrent*** sentencing only the ***qualifying terms*** can determine the minimum and maximum terms.
- The ***definite*** term in count 4 (5 years) cannot be used as the minimum or to define the maximum as 7.5 years. See 2929.144(B)(3)
- In this scenario the indefinite range is defeated by the length of the definite term.
- There is a presumption the offender gets out of prison after completion of the minimum term (3 years), but even after the maximum term (4.5 years), the 5 year term will not be satisfied.

Do you have to Impose maximum terms on all concurrent qualifying offenses?

- No. 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.



- The language in R.C. 2929.144 implies the minimum and maximum terms are derived from a particular term, but live "independently" from that original term when determining the range for concurrent or consecutive sentencing.



- (1) The individual term on each individual count.
- (2) The minimum term derived from one of those individual counts that will form the basis of the indefinite range.
- (3) The maximum term derived from the ***<u>the most serious qualifying felony.</u>***

Consecutive terms R.C. 2929.144(B)(2)

- When sentencing to consecutive terms, the judge will still have to make the findings in R.C. 2929.14(C)(4).
- 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: 10 years + 5 years + 4 years + 1 year (all consecutive) = 20 years.
- 20 years is the aggregate minimum term.

Maximum not based on aggregate total.

- 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.
- The consecutive term with the ***longest minimum term (qualifying) or definite term (non-qualifying) from the most serious felony (degree) offense*** will control the determination of the maximum term.
- This is different from sentences that are run concurrently.

Why doesn't 8 year term in count 2 control maximum term?

Count #	Degree of Offense	Min/Def Term	Actual Min Term	Maximum Term
Count 1	F-1 qualifying	6 years	N/A	25 years (22 + 3)
Count 2	F-2 qualifying	8 years	N/A	N/A
Count 3	F-1 qualifying	5 years	N/A	N/A
Count 4	F-3 non-qualifying	3 years	N/A	N/A
Aggregate of consecutive terms:		N/A	22 years	N/A

The most serious offense controls the maximum term for consecutive sent.

- The maximum term is derived from count 1 and the 6-year term (50% or ½ of 6 years = 3 years) because it is the longest minimum term from the ***most serious felony*** offense.
- Individually, count 1 is not the longest minimum term, but it is the longest minimum term for ***the most serious offense*** so it trumps the longer minimum term of 8 years from count 2 because count 2 is only a F-2 offense.

Non-qualifying in control for maximum term.

Count #	Degree of Offense	Min/Def Term	Actual Min Term	Maximum term
Count 1	F-1 non-qualifying	11 years	N/A	**32.5 years (27+5.5)**
Count 2	F-2 qualifying	8 years	N/A	N/A
Count 3	F-1 qualifying	5 years	N/A	N/A
Count 4	F-3 non-qualifying	3 years	N/A	N/A
Aggregate of consecutive terms:		N/A	**27 years**	N/A

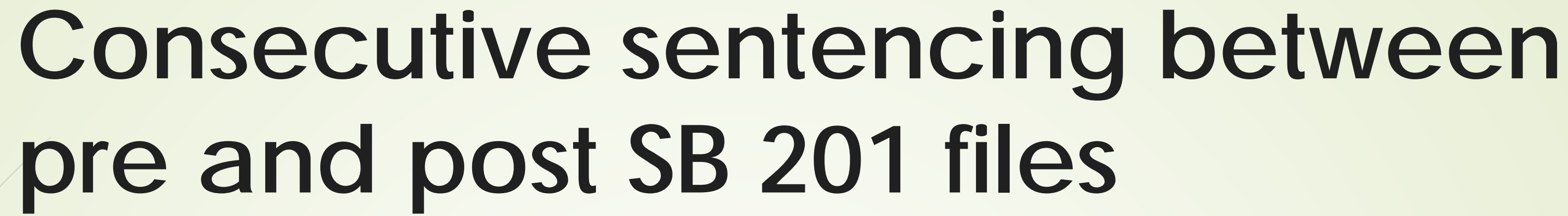
This can only occur with consecutive sentencing.

- The maximum term is derived from the non-qualifying count 1 and the 11-year term because it is the longest ***definite*** term and that term is longer than the longest ***minimum*** term (5 years) from the other F-1 offense for the qualified offense in count 3.
- Count 1 is not a qualified offense, but its ***definite*** 11-year term is the longest term (minimum or definite) of ***the most serious offense*** so it trumps the longest minimum term of 5 years from the qualified offense in count 3 that is also a F-1.

- 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?

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.

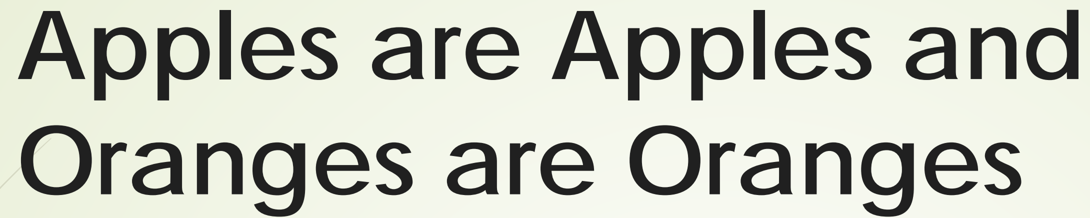


Consecutive sentencing between pre and post SB 201 files

- 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.

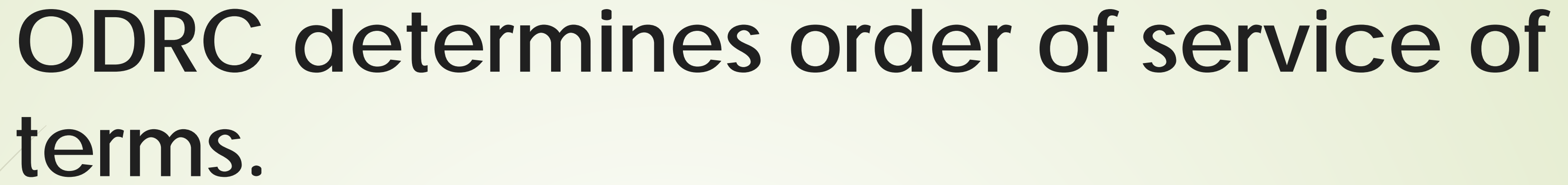
Can terms between files control the indefinite term for consecutive sentencing?

- 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)(9).)
- This statute doesn't address ***contemporaneously*** imposed sentences.



ODRC determines order of service of terms.

- 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.

Other considerations

Gun specifications

- Gun specifications ***<u>cannot</u>*** be added to increase the maximum term. See 2929.144(B)(4) Gun specifications are imposed separately and ***<u>are served prior to and consecutive to</u>*** 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.

- 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

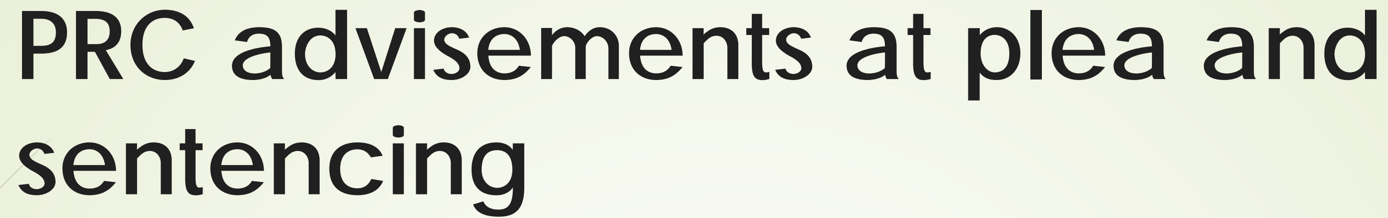
- Under R.C. 2971.03(B)(3)(a)(b)(c)(d), SVP penalties all have so-called "life tails." Because of the "life tail," the SVP statute controls offenses with SVP specifications.
- R.C. 2971.03 was amended by SB 201 to allow the reference to the minimum term for the SVP, but it doesn't change how the SVP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

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.

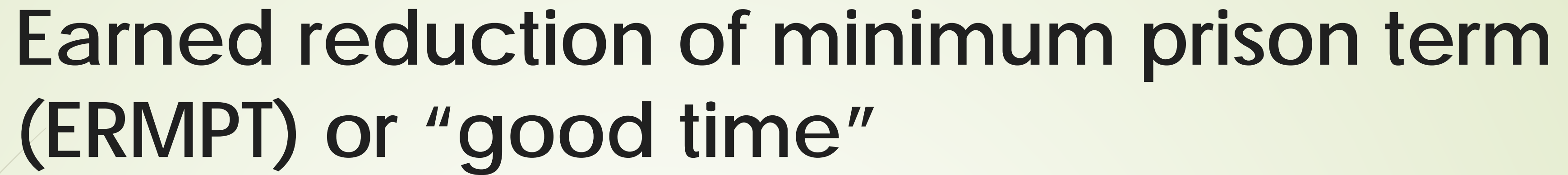
Post Release Control (PRC) and SB 201

- 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.



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 trial court must find ***at least one*** of ***five*** factors to rebut the presumption for ERMPT. (See pages 20-21 of the main "Back to the Future" 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.

- 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.

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).)

Plea advisements

- Constitutional and non-constitutional advisements under Crim. R. 11.
- Existing Crim. R. 11(C)(2)(a)&(b) only requires substantial compliance for most non-constitutional advisements.

Plea Considerations

- (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.

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).