

Indefinite Sentencing *Reference Guide*

S.B. 201 – The Reagan Tokes Law

Senate Bill 201 went into effect March 22, 2019, and applies to all non-life felonies¹ of the first and second degree that occur on or after the effective date. The S.B. 201 provisions titled “The Reagan Tokes Law” significantly alter the sentencing structure for many of Ohio’s most serious felonies. For non-life felonies of the first and second degree, an indefinite sentencing system has been implemented. The sentencing judge will impose a “minimum term” from within the currently established sentencing range and a “maximum term” of an additional fifty percent of the “minimum term” imposed. Release is presumed to occur at the expiration of the “minimum term,” however the Department of Rehabilitation and Correction (DRC) may, under certain circumstances rebut that release presumption and extend the prison time up to the “maximum term.” For most offenses, DRC also has the authority, with approval of the sentencing judge, to reduce the “minimum term” by between 5-15% for exceptional conduct or adjustment to incarceration.

Indefinite Sentencing Process

1. Sentence offender² on each count.
2. Determine consecutive and allied offenses of similar import (merger) counts.
3. Calculate “aggregate minimum term.”
4. Calculate “maximum term” – specifications are *never* considered in the calculation.³
5. Impose specifications (if necessary).
6. Pronounce sentence, including “stated prison term.”

1 Only applies to non-life offenses. An offense that carries a life sentence is subject to parole, not indefinite sentencing.

2 Includes the adult portion of a Serious Youthful Offender sentence (R.C. 2152.13(D)).

3 R.C. 2929.144(B)(4).



Indefinite Sentencing Calculation

(Should be done at plea and during sentencing.)

1. Judge Imposes Prison Terms for All Offenses
 - a. Qualifying Offenses – The judge selects a “minimum term” from the F1 or F2 range as appropriate.⁴
 - b. Non-Qualifying Offenses - F3, F4, and F5 sentencing is unchanged. F1 and F2 offenses committed prior to March 22, 2019 are subject to definite terms.
 - c. Specifications – Sentencing for specifications or other mandatory time is unchanged. *Not part of the maximum indefinite term but are added to the maximum for plea advisements.*
2. Judge Calculates Maximum Term – R.C. 2929.144
 - a. Single Qualifying Offense – The maximum term is the minimum term plus 50% of that term. [R.C. 2929.144(B)(1)]
 - **Example:** Defendant is convicted of burglary, a felony of the second degree. The judge imposes a “minimum term” of four years in prison. The “maximum term” is the four-year minimum term plus two years (50% of that 4-year term) for a total of six years. The “stated prison term” would be four to six years.
 - b. Multiple Qualifying Offenses and Consecutive Sentences – The court adds up *all* indefinite minimum terms imposed *plus* any definite terms imposed *plus* any specifications *plus* an additional 50% of either the longest minimum term *or* definite term for the most serious felony sentenced. [R.C. 2929.144(B)(2)]
 - **Example:** Defendant is convicted of one count of aggravated burglary (1), a felony of the first degree, two counts of burglary (2) and (3), each a felony of the second degree, and one count of grand theft(4), a felony of the third degree. The judge imposes four years on (1), 3 years on (2) and (3) each, and one year on (4), and orders the sentences on each count to run consecutively. The aggregate “minimum term” would be 11 years (4+3+3+1), and the “maximum term” is: 4+3+3+1+2 (50% of 4 years – the longest minimum term or definite term for the most serious felony being sentenced) for a total of 13 years. The “stated prison term” would be 11 to 13 years.
 - c. Multiple Qualifying Offenses and Concurrent Sentences – The “maximum term” is equal to the longest minimum term imposed plus 50% of the longest term for the most serious qualifying felony** being sentenced. [R.C. 2929.144(B)(3)]
 - **Example:** Defendant is convicted of an aggravated burglary (1), a felony of the first degree and burglary (2), a felony of the second degree. The judge imposes “minimum terms” of four years on (1) and three years on (2) and orders the sentences to run concurrently. The “maximum term” is: four years (the longest minimum term for the most serious qualifying felony) plus two years (50% of four years) for a total of six years. The “stated prison term” would be four to six years.

4 For felonies of the first and second degree that specify a different minimum term or penalty (mandatory or otherwise), *that* term is considered the “minimum term” for calculation purposes.



Indefinite Sentencing Terminology

- **Qualifying Offense:** Felony of the first or second degree committed after March 22, 2019 and sentenced under R.C. 2929.14(A)(1)(a) or (2)(a). Offenses subject to a life sentence are *not* “qualifying offenses.”
- **Non-Qualifying Offense:** Felonies of the third, fourth, or fifth degree, felonies of the first or second degree committed before March 22, 2019, or felonies subject to a term of life imprisonment.
- **Non-Life Felony Indefinite Prison Term (R.C. 2929.01 (GGG)):** A prison term imposed under R.C. 2929.14(A)(1)(a) or (2)(a) for a qualifying felony of the first or second degree committed on or after March 22, 2019.
- **Definite Term:** A prison sentence imposed for “non-qualifying offenses” that are not punishable by life imprisonment.
- **Minimum Term:** The term of imprisonment imposed by the sentencing judge from the range of terms available for that offense for a particular qualifying offense. The defendant is presumed to be released at the expiration of the “minimum term,” subject to either “earned early release” or the “rebuttal of presumption of release.”
- **Maximum Term:** Calculated as per R.C. 2929.144. The maximum prison term that a defendant could be ordered to serve through “rebuttal of presumption of release” by the DRC.
- **Most Serious Felony:** determined by degree of felony. Felony of the first degree is the most serious.
- **Stated Prison Term:** The actual minimum sentence defendant will serve before consideration for release and the potential maximum amount of time the defendant could serve.
- **Presumptive Release Date:** The expiration of the defendant’s stated minimum term as calculated by DRC. Includes jail time credit. Defendant may be held beyond that date only through the “rebuttal of presumption of release.”
- **Earned Reduction of Minimum Prison Term (ERMT):** DRC recommended reduction of five to fifteen percent for “exceptional conduct while incarcerated or the defendant’s adjustment to incarceration.” R.C. 2967.271.
- **Presumptive Earned Early Release Date:** Date determined by the DRC recommended reduction, if any, of the minimum prison term. R.C. 2967.271(A)(2). A potential 5-15% reduction for “exceptional conduct or adjustment to incarceration,” subject to the review at a hearing in the sentencing court.
- **Rebuttal of Presumption of Release:** Procedures by which DRC may extend an offender’s incarceration up to the maximum term. R.C. 2967.271(C).



Advisements at Time of Plea

- The defendant must be informed of the longest potential maximum term during the Rule 11 plea colloquy.

Criminal Rule 11(C)(2)(a) requires the defendant to be notified of the maximum penalty involved. For SB201 qualifying sentences, the defendant should be informed of the potential maximum term they could face. This advisement should include the aggregate minimum term and maximum term if all counts were to be run consecutively.

Example 1: A defendant entering a guilty plea to one aggravated burglary, a felony of the first degree, should be informed of the potential 11 to 16.5 years in prison – 11 years being the max in the felony of the first-degree range for that offense, plus an additional 5.5 years for a 16.5-year maximum indefinite sentence.

Example 2: A defendant entering a guilty plea to two counts of aggravated burglary, each of which is a felony of the first degree, should be informed of the potential sentence of 11 to 16.5 years on each count for a total potential 22 to 27.5 years in prison.

- The court must notify the defendant of any mandatory terms.

Any qualifying offenses that carry mandatory terms are still subject to indefinite sentencing. The minimum term selected by the judge or mandated by statute is the mandatory portion of the sentence, and the defendant should be informed that the minimum term is mandatory.

- Non-mandatory offenses are still eligible for community control.

Defendants subject to indefinite sentencing for community control eligible offenses can still overcome the presumption in favor of a prison sentence. The court will then suspend minimum and maximum prison terms to be imposed for violation of the terms of community control.

- The court should notify the defendant of the mandatory sentence advisements in R.C. 2929.19(B)(2)(c).

Best practice in order to establish a knowing, intelligent, and voluntary waiver is to advise the defendant of the indefinite sentencing procedures as outlined in R.C. 2929.19(B)(2)(c). This includes the potential “earned reduction of minimum term” for “exceptional conduct or adjustment to incarceration” as determined by DRC. Mandatory and sexually oriented offenses are not eligible for earned reduction of minimum term.



Advisements at Sentencing R.C. 2929.19(B)(2)(c)

Defendants being sentenced for qualifying offenses *must* be notified of the following:
These advisements must be read exactly or face reversal.

- i. That it is rebuttably presumed that the offender will be released from service of the sentence on the expiration of the minimum prison term imposed as part of the sentence or on the offender's presumptive earned early release date, as defined in R.C. 2967.271, whichever is earlier;
- ii. That the department of rehabilitation and correction may rebut the presumption described in division (B)(2)(c)(i) if, at a hearing held under R.C. 2967.271, the department makes specified determinations regarding the offender's conduct while confined, the offender's rehabilitation, the offender's threat to society, the offenders restrictive housing, if any, while confined, and the offender's security classification;
- iii. That if, as described in division (B)(2)(c)(ii), the department at the hearing makes the specified determinations and rebuts the presumption, the department may maintain the offender's incarceration after the expiration of that minimum term or after that presumptive earned early release date for the length of time the department determines to be reasonable, subject to the limitation specified in R.C. 2967.271;
- iv. That the department may make the specified determinations and maintain the offender's incarceration under the provisions described in divisions (B)(2)(c)(i) and (ii) of this section more than one time, subject to the limitation specified in R.C. 2967.271;
- v. That if the offender has not been released prior to the expiration of the offender's maximum prison term imposed as part of the sentence, the offender must be released upon the expiration of that term.

The court must impose the maximum sentence both on the record and in the sentencing entry.

The judge must inform the defendant on the record of the minimum terms and the maximum term imposed. Those terms must also be journalized in the sentencing entry per R.C. 2929.144(C).

The Court Should Inform the Defendant of the Stated Prison Term.

Where the sentence contains specifications, it is important to note those specifications are served prior to any indefinite prison term and are not included in the maximum term per R.C. 2929.144(B)(4). In this case it is prudent to inform the defendant of the actual minimum sentence (the stated minimum prison term) that will be served before presumption of release and the potential maximum amount of time that could be served (the stated maximum prison term).

Indefinite Sentences are Subject to Post-Release Control (PRC).

Defendants must be notified that they will be subject to a term of post-release control. As with current law, violators may be sent back to the institution in up to 9-month increments, and the time served for PRC revocation cannot exceed one-half of the defendant's stated minimum term.



R.C. 2967.271 – Earned Reduction Of Minimum Term⁵ “Presumed Early Release Date”

DRC may recommend reduction of an offender's minimum sentence by 5-15% for “exceptional conduct or adjustment to incarceration” as described in R.C. 2967.271(F)(7). If DRC recommends this reduction, it is presumed the offender will be released at what is then called the “presumed early release date.”

That presumption may be rebutted by the sentencing court. DRC must provide notice of the recommendation to the sentencing court at least 90 days before the early release date. This request must include an ISR as well as program documentation and disciplinary records.

The court then has 60 days to make a decision. It must schedule a hearing on the request and notify the prosecutor.

At the hearing, it is presumed the court will grant the reduction. The court may overcome that presumption if any of the following apply:

1. Regardless of the offender's security level, the offender violated institutional rules that compromised prison security, or the safety of staff or inmates, or that involved physical harm or threat of physical harm to staff or inmates, or committed a violation of law that was not prosecuted and that those infractions or violations demonstrate a lack of rehabilitation.
2. The offender's behavior while incarcerated demonstrates a continued threat to society.
3. The offender is classified at security level 3 or higher.
4. The defendant did not productively participate in a majority of the rehabilitative programs and activities recommended by DRC for the offender or did not successfully complete a reasonable number of programs they participated in.
5. Upon release, the offender will not be residing in a halfway house, reentry center, or licensed community residential center and does not have any other fixed residence address to reside in.

If the court finds the presumption has *not* been rebutted, it must grant the requested reduction of the minimum term.

If the court finds the presumption has been rebutted, it *must* notify DRC of its reasons in writing.

The prosecutor will inform the victim of the hearing, and both the prosecutor and victim may present information at the hearing as well. Judges are also instructed to consider the 2929.12(B) factors, but only as they relate to the five findings above.

⁵ Individuals convicted of a sexually oriented offense are *not* eligible for a reduction of the minimum term under R.C. 2967.271.



R.C. 2967.271 – Continued Incarceration Beyond Minimum Term “Rebuttal of Presumption Of Release”

DRC may maintain an offender's incarceration beyond the minimum term if it makes specified findings rebutting the presumption of release.

DRC must hold a hearing pursuant to R.C. 2967.271 and find that one or more of the following three conditions apply:

1. Regardless of the offender's security level, the offender violated institutional rules that compromised prison security, or the safety of staff or inmates, or that involved physical harm or threat of physical harm to staff or inmates and that those infractions demonstrate a lack of rehabilitation *and* the offender's behavior demonstrates they continue to pose a threat to society.
2. The offender was placed in extended restrictive housing at any time during the year preceding the hearing.
3. The offender is classified at security level 3 or higher.

If the release presumption is rebutted, DRC may maintain the offender's incarceration for a reasonable period as specified by DRC, but it may not exceed the maximum term.

The presumption of release applies to the additional period imposed by DRC, and another hearing must be held to further extend the incarceration.

The offender must be released at the expiration of the maximum term. They will then be subject to PRC.

When an offender is subject to multiple consecutive indefinite sentences in different case files, the incarceration may be extended for one sentence before beginning the minimum term on another sentence.

Example: Defendant is sentenced to an indefinite term of 2-3 years for Burglary in Franklin county. The defendant is later sentenced to a 4–6-year sentence in Delaware county, and that sentence is ordered to run consecutively. The defendant could have the Franklin County prison term extended to the full 3-year maximum term before starting the 4-year minimum term on the Delaware county case.

Unlike the reduction of the minimum term, there is no hearing at the sentencing court when DRC maintains incarceration beyond the minimum term. That hearing will occur administratively through DRC.



Notable Ohio Supreme Court Case Law

State v. Maddox, 2022-Ohio-764, Decided March 16, 2022. The Court resolved the certified conflict regarding whether the non-life felony indefinite sentencing scheme of S.B. 201 is ripe for constitutional review. In a 4-3 opinion, the majority held that the defendant could challenge the constitutionality of the sentencing scheme on direct appeal. The Court found that the requiring the defendant to wait until the incarceration is extended beyond the maximum term would cause hardship, and that as the maximum term is imposed at the initial sentencing hearing, no further factual development is necessary to make the constitutional determination. The Court further found sufficient harm by the potential additional loss of liberty to allow for challenge of the sentencing scheme.

State v. Hacker, Slip Opinion No. 2023-Ohio-2535, decided July 26, 2023. The Court held that the “Reagan Tokes Law” is not void for vagueness and is not facially unconstitutional. The Court held that the “Reagan Tokes Law” does not give the Ohio DRC the authority to extend a prison term beyond the maximum range imposed by the trial court and, thus, does not exceed the power given to the executive branch. Likewise, this extension beyond the minimum as a form of prison discipline does not interfere with the judiciary’s authority because the trial court imposed the maximum range at the time of sentencing. The Court also declined to adopt the defendant’s facial due process challenges, holding that the law is not void-for-vagueness and that because the law required the DRC to hold a hearing before extending the prison term beyond the minimum but within the maximum range there is not a facial procedural due process violation. Finally, the Court determined that the defendant’s right to a jury trial was not violated because the imposed “Reagan Tokes Law” sentence range is not changed by DRC at the hearing, the maximum amount of the defendant’s sentence is always capped at the maximum amount of time the trial court imposed.

Questions? Concerns?

Contact the Ohio Criminal Sentencing Commission at ocsc@sc.ohio.gov.