Alabama Sentencing Commission

Minutes of Legislative Committee
August 25, 2009

The Alabama Sentencing Commission met in the formal conference room of the Judicial Building in Montgomery on Monday, August 25, 2009. Present at the meeting were:

Dr. Lou Harris, Chairman
Vernon Barnett, Deputy Director, Department of Corrections
Sharon Bivens, Legislative Fiscal Office
Ellen Brooks, District Attorney, 15th Judicial Circuit
Judge John Bush, Circuit Judge, 19th Judicial Circuit
Eddie Cook, Alabama Board of Pardons and Paroles, Montgomery
Lynda Flynt, Director, Alabama Sentencing Commission
Mary Pons, Association of County Commissions
Jeff Williams, Director Community Corrections Div., Department of Corrections
Rosa Davis, Chief Assistant Attorney General (via conference call)

The meeting convened at 10:00 a.m. Chairman Harris called the meeting to order and made introductory remarks. Referring to the package of bills and information distributed, he requested that in reviewing the agenda items, the members go over the provisions of each bill that are noted. Ellen Brooks requested that the committee review all bills before a vote is taken. .

Dr. Harris requested that Lynda Flynt go over the items on the agenda and explain each suggested change. Lynda noted that the first agenda item was for informational purposes only, inasmuch it was the Truth-in-Sentencing Bill, the only Commission bill out of the four that were introduced, that passed during the 2009 Regular Session. She noted the following major provisions of the bill, enacted as Act 2009-742.

Act 2009-742 Truth-In-Sentencing Postponed

1. On page 2, lines 3-8 of the Act §12-25-32 (2)(a) the definition of "Active incarceration" was amended to specifically DOC Work Release and SIR.

2. On the same page, lines 9-14, §12-25-32(2)(b) was amended by deleting the provision referencing DOC work release, SIR and reentry programs from the definition of "Intermediate punishment":

"~~The term includes time served in a work release program operated as a custody option by the Alabama Department of Corrections or in the Supervised Reentry program~~

~~or the Supervised Intensive Restitution program of the Department of Corrections pursuant to Article 7 of Chapter 10 of Title 15, commencing with Section 15-10-110."~~

3. Page 4, lines 24-26 and page 5, lines 1-2 provisions of §12-25-32 (5) under "Initial Voluntary Standards" were amended as follows:

"The voluntary sentencing standards ~~that become~~ effective on October 1, ~~2004~~ 2006. These standards ~~shall be~~ were based on statewide historic sentences imposed with normative adjustments designed to reflect current sentencing policies."

4. Page 5, lines 12-16, §12-25-32 (10) and page 11, lines 5-7, §12-25-34 (a)(4) were amended under "Truth-In-Sentencing Standards" to provide that the TIS standards are scheduled to become effective October 1, 2011 rather than October 1, 2006.

5. Page 12, lines 16-18, §12-25-36 was amended to clearly state that "This section and Sections 12-25-37 and 12-25-38 shall apply only after development and legislative approval of the proposed truth-in-sentencing standards in 2011."

In response to questions from Dr. Harris regarding the need for postponing Truth-in-Sentencing (TIS), Lynda explained that the primary reasons for postponing TIS were 1) the need to first determine the effectiveness of the existing standards; 2) the need to ensure the judges, prosecutors, defense lawyers and court clerks are familiar with the existing standards and compliance with the recommendations 3) the need for alternative sentencing options for non-violent offenders, and 4) lack of sufficient funding.

Dr. Harris asked for the fiscal impact of implementing truth-in-sentencing. Lynda stated that she could not give him an estimate because we do not really know what these standards will look like, and they may be different from the blueprint that is outlined in the Sentencing Reform statutes; possibly only involving only the most serious offenses. In addition, there will be uncertainty always built in because these standards, like the initial standards will be voluntary. She concluded, stated that analysis was not possible until the standards are developed and a simulation projection run. Lynda did note that the Sentencing Commission was statutorily required to develop truth in sentencing standards and introduce them to the Legislature for approval. Ellen Brooks indicated that the implementation of truth in sentencing was not just about money, but was also driven on the idea of protecting the community.

Eddie Cook asked if the Commission had studied how truth-in-sentencing practices had fared in other states. Lynda indicated that Chairman Colquitt had drafted an article on Truth-in-Sentencing, which she had provided to the Commission members and would send them to the Legislative Committee members as well. She did note that there were states that are moving away from truth-in-sentencing due to dire overcrowding and funding problems.

Community Corrections Amendments (HB397)

Indicating that it may be best for the Commission to consider only the most important amendments, Lynda stated that, in her opinion, the most important amendments proposed in this bill were those on page 5, lines 1-9, defining "Excluded Felony Offenders" to delete the absolute statutory prohibition of offenders convicted for selling controlled substances from participating in community corrections programs. Ellen Brooks noted that this amendment may be the most controversial. Lynda reminded the committee members that this change was proposed by the legislative committee last year and the Commission approved it. These changes have been approved before and the committee is being asked now if they think this bill should be reintroduced in the 2010 Regular Session. It was also noted that this amendment would only delete the absolute prohibition of offenders convicted of the sale of drugs from participating in community corrections, the ultimate determination would still have to be made by the court.

Lynda noted that the problem now being encountered may be due to the way Alabama's Drug Distribution statute is worded, to include sales as well as giving away drugs. This might be a statute the Commission would want to consider amending.

13A-12-211. Unlawful distribution of controlled substances.

(a) A person commits the crime of unlawful **distribution** of **controlled substances** if, except as otherwise authorized, he or she sells, furnishes, gives away, delivers, or distributes a controlled substance enumerated in Schedules I through V.

(b) Unlawful **distribution** of **controlled substances** is a Class B felony.

The other amendments proposed were:

1. Page 3, line 12, amendment of § 15-18-171 defining "board" to include the board of directors of a nonprofit entity as well as the board of an authority.

Ellen Brooks and Judge Bush stated that since these were the same amendments as considered by the committee last year, we need not go over all of the provisions that are proposed to be amended, only the most important.

2. It was proposed that the Community Corrections Act be amended throughout to consistently refer to participants as "offender" rather than "inmates.

3. Amends §15-18-175, p. 13, lines 17-18 to authorize community punishment and corrections programs, as well as counties (as now limited, to utilize offenders to perform community service in the county.

4. Amends §15-18-183, p. 18, line 20 and p. 19, line 2 regarding the limit on civil liability ($100,000 for BI or death of one person and one occurrence; $300,000 two or

more claims; $100,000 property loss, single occurrence) to include nonprofit entities, as well as authorities.

5. Amend §15-18-184 p. 19, lines 15-17 to include nonprofit entities (now limited to authorities) in requirement to maintain liability insurance (broadened from "general liability" to "appropriate liability" to include other types of insurance). Amend p. 19, lines 23-25 to specifically authorize county commissions to provide insurance coverage to nonprofits as well as authorities.

6. Amend §15-18-175(d)(1), p. 9, lines 15-16, to provide that a sentence to community corrections should be pursuant to a suspended sentence of confinement (to ensure that there is an underlying sentence to invoke upon revocation.)

Ellen Brooks indicated that the reason this bill did not pass last year had nothing to do with the merits of the bill. Lynda noted that neither the House nor Senate Bill passed their respective houses of origin. She noted that it may also have hurt that we did not limit our summaries to the major and most important provisions of the bill. Ellen asked if the impact statement had been revised to show 2008 data. Lynda stated that Melisa had those figures and she would ask if she could have a revised statement ready for distribution during the Commission meeting.

Modifications of Sentencing Standards

Lynda noted that the revisions to this bill were being considered by the Sentencing Standards Committee and that these would be submitted directly to the Sentencing Commission, without going through the Legislative Committee (as was done last year). She noted that the following provisions of last year's bill had been approved by that committee at their meeting on August 13, 2009:
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1. Amendment on page 3, lines 4-12 to include attempts, conspiracies, and solicitations to commit murder and attempts conspiracies and solicitations to commit the drug offenses of possession of marihuana, unlawful possession of a controlled substance, sale or distribution of marihuana (other than to a minor), and the sale or distribution of Schedule I-V drug offenses (other than to a minor).
2. Modifications to worksheets to include the above changes, p. 3, lines 13-14.
3. Modifications to worksheet instructions clarify provisions. P. 3, lines 15-18.
4. Effective date of October 1, 2009, line 12 changed to October 1, 2010.

The following summary of the Standards Committee meeting held August 13th, 2009 was provided by Chair Rosa Davis:
Suggestions for improving worksheet quality and process issues

a. Uniform Sentencing Order
b. Training – (use areas where it is working as part of training)
   (1). Regional or local seminars

(2). State Sentencing Seminar for Judges with part 2 for Das, judges, and defense bar. (Rains, i.e. BJA seminar, Ford, Public Welfare)

(3). Continuing education for prosecutors and defense bar

c. Training should now be more effective because of the experience in the field of using the worksheets and instructions
d. Appeal and/or Canon 2 – hold for another day (revisit in 6 to 12 months if results do not improve)
e. Statutory change to make worksheets a part of the record.
f. Discontinue e-worksheets as official transmission and require all worksheets to be submitted in paper form to the Sentencing Commission, along with a copy of the sentencing order.
g. Change statute on worksheet preparer to read: "In felony cases, a person appointed at the discretion of the trial court judge, which may include the district attorney, a probation officer or some other person."
h. Generate a supportive letter of encouragement to Court Clerks with copy to the DA and PJ - to send in worksheets and sentencing orders.
i. Require Judge to sign worksheet (statute or worksheet change)

Judge Bush requested that the recommendation be amended to state that the judge shall sign or initial the worksheet and Rosa agreed, stating that this was a good suggestion.

j. Rosa to work on sub-heading under "In" "Out" subtopics

Amendments to Split Sentencing and Probation Statutes

Lynda noted that the bill included in the package for the committee's review was the engrossed substitute to HB 394, which deleted reference to the provision included in the bill as introduced on page 7, lines 4-8, requiring a defendant to serve day for day any time that was imposed up to the minimum term, whether imposed initially or on revocation. Because this provision was opposed by the Department of Corrections and Board of Pardons and Paroles due to the fact that it could actually increase the prison population and because of administrative difficulty, the Commission requested Representative Black to offer a substitute deleting the proposed change in regard to good time calculation and parole eligibility after probation revocation and to continue to allow credit and eligibility as under existing law. The other provisions amended were:

1. Page 2, lines 1-9 amends §15-18-8 (a) to clarify the provision excepting Class A or B child felony sex offenders from split sentencing provisions, an amendment recommended last year by Judge Rains.

2. Page 2, lines 15-18, amends § 15-18-8(a)(1) to expressly provide that defendant sentenced to a 15 year split is not eligible for parole or good time during the minimum period of confinement. Omitted from this subsection when statute was amended to authorize a 20 year split, although covered under subsection (g) on page 6.

3. Page 2, lines 21-23 and page 3 lines 7-9 references limit of 5 years for probation portion of the split, the same as under straight probation..

4. Page 4, lines 20-23, subsection 4, prohibits ordering consecutive incarceration portions of split sentences for multiple convictions. Meant to prohibit stacking of minimum periods of mandatory incarceration, as requested by Chief Justice Cobb.

Upon reconsideration the committee voted to amend this subsection as follows:

"(4) Notwithstanding any law to the contrary, a defendant may not be sentenced to serve consecutive minimum incarceration portions of split sentences for multiple convictions at the same sentencing event. (shaded parts added).

This change was believed necessary to make sure that it does not prohibit a judge from another jurisdiction from imposing a split sentence for another offense.

5. Amends §15-18-8(b) on page 5, lines 3-9 to provide that the probation portion of a split sentence cannot exceed five years for a felony offense and 2 years for a misdemeanor offense and shall be in addition to the incarceration portion of the split sentence.

6. Page 5, lines 10-17 amends §15-18-8(c) to authorize court to suspend portion of the minimum sentence and place the defendant in a community corrections program, as well as place him or her on probation.

7. Page 5, lines 21-26, specifically provides that a court may incarcerate the defendant for any portion or the entire suspended sentence upon revocation of probation. Lynda explained to the committee that it was her understanding that this provision, authorizing a court to revoke the probation period of a split sentence, in whole or part, was opposed by the Board of Pardons and Paroles and the Department of Corrections. Because these offenders could be getting good time credit and would be eligible for parole while serving the suspended portion of their split, to allow revocation for part of the suspended sentence would cause both Pardon and Paroles and DOC administrative problems. It was noted that even if authorized, revocation in part may not be utilized by the trial judges. It was the committee's recommendation that the provisions authorizing revocation in part, that were amendments to last year's bill, be deleted.

8. Page 6, lines 11-14 of last year's bill specifically provides that a defendant may be ordered to participate in and complete a substance abuse or community corrections program (which can include residential facilities operated by the Board of Pardons and Paroles – LIFE Tech.). The committee requested that this portion of the bill be amended to read as follows (following Eddie Cook's subsequent e-mail)[1]:

[1] After talking to Cynthia and Steve. the conclusion of our discussion in short is that we do not want section (4) page six, lines 13 and 14 or section (c) page nine, lines 23 and 24 included. This will change our operating procedures in that it will be statutory that a Judge can send any inmate to either one of our Life-Tech Centers and we will have no choice but to accept them. As you

The vote is to change page 6 to read: **During the incarceration or probation portion of a split sentence, the defendant may be required to do all of the following: . . .**
. . .
(4) Participate in and complete a substance abuse or community corrections program ~~which may include residential facilities operated by the Board of Pardons and Paroles~~.

And p. 9 subsection (2)(c) to read

(2) If the court revokes probation, it may, after a hearing, depending on the seriousness of the violation, do any of the following:

. . .

c. Order the defendant to participate in and complete a substance abuse or community corrections program~~, which may include residential facilities operated by the Board of Pardons and Paroles~~.

9. Page 7, lines 1-8, leaves current law in place in allowing good time and parole after defendant serves minimum period of confinement. P. 7. lines 1-8.

10. Amends §15-22-54 to authorize a court to amend and modify the period of probation or suspension of execution of the sentence, specifically referencing split sentences. P. 7, lines 10-16. The committee voted to delete the words "amended, modified" that were added in last year's bill since it was unclear why these words were included and that to include them may lead to problems. The provisions for amended should read:

"(a) The period of probation or suspension of execution of sentence shall be determined by the court, and, notwithstanding any law to the contrary, the period of probation or suspension may be ~~amended, modified~~, continued, extended, or terminated while the defendant is serving any portion of his or her sentence and prior to his or her discharge. It was noted that reference to "discharge" is consistent with case law holding that a defendant's probation may be continued until its conditions are fulfilled and the court issues a formal discharge.

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know, Life-Tech Thomasville was created to relieve DOC and we keep it full with parolees. If this section is added, we are afraid that there may be net widening with the center being used for probationers and the Board will not have room for the ones needed to be released from prison. There are several other problems but the other major one is if this section is added, our Life-Tech centers could be used to house inmates per order of a sentencing Judge, regardless of capacity or capability.

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11. Applies the limitations of probation to the probation portion of split sentences. P. 7, lines 16-20.

12. Page 9, lines 21-24, rewords provision regarding court's authority upon revocation and adds authority for the court to "order the defendant to participate in and complete a substance abuse or community corrections program, which may include residential facilities operated by the Board of Pardons and Paroles. The Committee voted to delete all reference to residential facilities operated by the Board of Pardons and Paroles. See discussion under #8 above.

13. Page 10, lines 2-5 amended to provides full credit toward incarceration for time served in a state certified residential treatment program to which the defendant has been ordered.

Alabama Drug Offender Accountability Act (Drug Court Bill)

Lynda advised that this bill was not a Sentencing Commission bill, but rather was a bill that was part of the UJS Legislative package last year and was to be reintroduced this year. She had been advised by Judge Pete Johnson that there would be no changes in the bill introduced in 2010 from HB718 introduced in the 2009 Regular Session. The Commission will be asked to support the bill, as it did last year

1. Defines 'drug offender' as any person charged with or convicted of a drug related offense or an offense which substance abuse is determined from the evidence to have been a significant factor in the commission of the offense and has applied for or been accepted to participate in a drug court program. Section 1 (10), page 5, lines 11 – 16.

2. Details the goals of the act as follows:
   - Enhance community safety and quality of life for citizens.
   - Reduce recidivism.
   - Reduce substance abuse.
   - Increase the personal, familial and societal accountability of drug offenders.
   - Restore drug offenders to productive, law-abiding, and taxpaying citizens.
   - Promote effective interaction and use of resources among criminal justice and community agencies.
   - Reduce the costs of incarceration.
   - Improve the efficiency of the criminal justice system by enacting an effective methodology. Section 3, page 7, lines 12–24.

3. Authorizes the presiding judge of each judicial circuit to establish a drug court or courts to address the drug offender's identified substance abuse problem as a condition of pretrial release, pretrial diversion, probation, jail, prison, parole, community corrections, or other release from a correctional facility. (Section 4, page

8 lines 4-16

- o Does not affect the authority of the district attorney to establish a deferred prosecution program or a pretrial diversion program or to nolle prosse a particular case. Section 4 (a) but does require all drug courts to comply with the Act and any rules promulgated by the Supreme Court for Drug Courts. (page 8, lines 17-23.)

4. Allows the drug court to grant reasonable incentives or sanctions in accordance with a written agreement. Section 4 (c) & (d), page 9, lines 3-22.

5. Requires disposition of the offender upon successful completion to be as per the written agreement and in accordance with the drug court polices and procedures, which may include, withholding criminal charges, nolle prosse of charges recommended by the district attorney, probation, deferred sentencing, suspended sentencing, spilt sentencing or reduced incarceration. Also specifies that records of dispositions are to be maintained and made available to judges and prosecutors statewide, notwithstanding agreements to expunge, seal or destroy, but noting that juvenile or youthful offender records shall not be released to the general public. Section 4(e), page 9, lines 23- 27 and p. 10 lines 1-8.

6. Requires drug courts to include the ten key components defined by the U.S. Department of Justice. Section 4 (f), page 10, lines9-27, page 11, lines 1-10.

7. Provides that the act does not create a right or expectation of a right to participate in drug court, nor does it obligate the drug court to accept every drug offender. Each drug court judge may establish rules and make special orders provided they do not conflict with the act or the Rules promulgated by the Alabama Supreme Court. Section 4 (j), page 11, lines 26-27 and p. 12, lines 1-8.

8. Requires a court to order the drug offender to participate when the offender is screened as a substance abuser, there is reason to believe that participation will be beneficial and the prosecution consents. Section 5(h), page 14, lines 3-14.

9. Provides for screening of drug offenders, treatment, support services, and drug testing and referrals to programs certified by the Department of Mental Health and Mental Retardation for indicated treatment. Section 5 and 6, page 12, lines 16-27, pages 13 and 14, 15, and 16, p. 17 lines 1-2.

10. Stipulates a drug offender shall not be eligible for admission if the drug offender:

- o has a pending violent criminal charge or any felony charge involving a firearm or deadly weapon or dangerous instrument,
- o has been convicted of a violent felony offense or any felony charge involving a firearm or deadly weapon or dangerous instrument or adjudicated a juvenile delinquent or youthful offender based on a violent

felony offense or any felony in which a firearm or deadly weapon or dangerous instrument was used.

- is required to register as a sex offender or currently charged with a sex offense,
- is charged with manufacturing, or trafficking of a controlled substance. Section 5 (i), page 14, lines 15-26. p. 15, lines 1-4

11. Allows the local drug court program to further restrict eligibility. Section (j), page 15, lines 5-6.

12. Requires, the Commissioner of the Department of Corrections to develop criteria for eligibility and evaluation for early release into reentry drug court programs. Section 5(k), page 16, lines 7-11.

13. Requires the drug court to ensure fair, accurate and reliable drug testing procedures. Section 7, page 17, lines 3-14.

14. Allows the transfer of drug offenders between drug courts within the state and any drug court in any state which is part of the Interstate Compact for Adult Offender Supervision. Section 8, page 17, lines 15-27.

15. Requires the Administrative Office of Courts to assist in the planning, implementing, and developing drug courts. Including recommendations concerning the legal, policy, and procedural issues confronting drug courts. Section 9, page 18, lines 3-27.

- Under existing law, the Administrative Office of Courts administers programs for drug courts in this state.

16. Requires the presiding judge of each circuit court to report to AOC each year, from which AOC is to compile a statewide report each year for the Alabama Supreme Court, Legislature and Governor regarding the need for and the implementation of the act. Section (f)&(g), page 19, lines 9-26.

17. Provides for the collection and maintenance of information for each drug offender, including instances recidivism, the number of drug offenders screened, and the cost of the operation. Records are to be kept in accordance with federal and state confidentiality laws. Section 10, page 20, lines 3-26, p 21 lines 1-4.

18. Requires the drug offender to pay all fees associated with the drug court, unless the offender is determined to be indigent. Section 10 (f), page 21, lines 20–24

19. Provides for civil immunity for any individual who, in good faith, provides a service or for any qualified person who obtains a specimen pursuant to the act. Section 11 (a), page 22, lines 20-26 and p. 23, lines
1-2.

20. Provides that any violation of the act is to be referred to the circuit court in the county where the violation occurred. Section 12, p. 23, lines 3-5.

Mary Pons indicated that there were some amendments proposed by the Association of Community Corrections and agreed to by Judge Johnson after the bill was introduced, that needed to be considered. She stated that she would provide the amended bill to the Committee.

Sharon Bivens provided a copy of the fiscal note for House Bill 718 of the 2009 Regular Session, noting that there were problems with the provisions on page 10 requiring that records of drug court dispositions must be maintained and available to judges statewide, notwithstanding agreements to expunge, seal or destroy the records. She stated that the U.S. Department of Transportation has stated that because the bill mentions expungement, sealing, or destroying of records (which is now allowed by certain drug courts through local laws under the District Attorney's Pre-trial Diversion Program), the state may: (1) lose federal funds in relations to commercial drivers license (CDL) laws for failure to meet record retention requirements; (2) subject to the withholding of federal funds for failure to comply with the state's Motor Carrier Safety Assistance Program; and (3) subject the state to the transfer of federal highway funds to alcohol-impaired driving counter measures, enforcement of D.U.I. laws, or Hazard Elimination Programs for failure to meet the record retention requirements related to repeat offenders of driving while intoxicated . Lynda noted that most drug courts do not even authorize defendants charged with DUI to participate in Drug Courts.

It was suggested that the phrase referencing expungement, sealing, or destroying of records not be applied to the CDL program and DUI offenses. Lynda stated that she would bring this issue to the attention of Judge Johnson and send him a copy of the Fiscal Note and laws provided by Sharon Bivens. Ms. Bivens recommended that Judge Johnson talk with Mike Robinson, legal counsel for the Department of Public Safety regarding the implications that the provision relative to expungement, sealing or destroying of the records of program participants.

Ellen Brooks moved to approve the bills as the committee amended today and that we continue to support the Drug Court Bill but that we bring to the attention of Judge Johnson the issue raised in regard to expungement and the loss of federal funds.

Rosa Davis suggested that the motion be amended to state that these amendments should be subject to discussions we would have with our legislative representatives. Lynda noted that they were members of this committee and Ellen reminded her that the committee was not the final authority and that their recommendations would need to go to the Commission for approval. Rosa stated that she was trying to make the legislative package stronger and that there was a concern by the Legislature with the Commission's legislative package from year to year and the Commission members need to be aware of this. Lynda noted that she had already mentioned that we may need to prioritize our bills; however, this would be more appropriate at the Commission meeting when a vote

on the Commission's Legislative package was taken. Ellen noted that we only had three bills, one of which was the Standards bill. Lynda questioned whether the Standards Committee would have a bill ready for the Commission to review at its September meeting and Rosa indicated that they would not, but would have it before the end of the year.

Judge Bush seconded the motion and it was unanimously approved.

Dr. Harris asked if the Legislative Committee should meet again. Lynda stated that we would need to wait and see if the Commission gave them an assignment or if other bills were recommended for inclusion in the 2010 Legislative package.

New Business

Rosa noted that there was going to be a Legislative Trends paper put out by Vera in the next couple of months that the Legislative Committee might want to take a look at. There may be something in that paper that we would want to consider for new legislation.

Adjourn

There being no further business the meeting was adjourned.